

UE on Appeal

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



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U.S. Supreme Court

Title IX – Certiorari Denied in *Kollaritsch*

On Oct. 13, 2020, the U.S. Supreme Court denied certiorari in the student plaintiffs’ appeal of the Sixth Circuit’s Title IX decision *Kollaritsch v. Michigan State Univ. United Educators (UE)* reported on the *Kollaritsch* decision in its *Spring 2020*, *Fall 2020*, and *Winter 2020* issues.

SIXTH CIRCUIT REQUIRES FURTHER ACTIONABLE SEXUAL HARASSMENT

The Sixth Circuit held in a December 2019 decision 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 the university’s deliberate indifference resulted in further actionable sexual harassment causing the victim to suffer Title IX injuries. The Sixth Circuit rejected the student plaintiffs’ argument that they need only show that a school’s “clearly unreasonable” response made them more “vulnerable to harassment.”

EXTENT OF CIRCUIT SPLIT DISPUTED

In their petition for certiorari, the student plaintiffs argued that the Sixth Circuit’s decision squarely implicates a conflict among the courts of appeals, with three circuits (First, Tenth, and Eleventh) holding that a school is liable under *Davis v. Monroe County Board of Education* if its deliberate indifference causes either further sexual harassment or vulnerability to further harassment and two circuits (Sixth and Eighth) holding that a school is liable under *Davis* only if its deliberate indifference causes further sexual harassment. The plaintiffs also made some policy-related points why such a reading of the *Davis* decision was warranted.

Michigan State University (MSU) filed a response to the petition for certiorari, arguing in part that the circuit split on which the student plaintiffs relied is “exceedingly shallow” and further development in the courts of

appeals is warranted. MSU argued that the Sixth Circuit's decision is consistent with results in abbreviated decisions from the Eighth and Ninth Circuits. It also argued the only decision that squarely adopted the student plaintiffs' view – *Farmer v. Kansas City Univ.* – created a split within the Tenth Circuit, was based on especially egregious allegations, and predated the *Kollaritsch* decision.

MSU cited two cases decided before *Farmer* in which the Tenth Circuit rejected Title IX claims where plaintiffs failed to show post-notice actionable harassment. MSU disputed that the First or Eleventh Circuits had squarely resolved the same question.

MSU also argued that the student plaintiffs' theory would put schools in a Catch-22 and expose them to lawsuits from both sides of a sexual harassment complaint. A school would have little choice but to immediately expel a student accused of harassment to avoid the accuser's vulnerability to

further harassment that could occur from emotional distress caused by the possibility of an interaction with the respondent. But such a move would subject the school to a suit for violating the respondent's procedural rights.

THE BOTTOM LINE

Time will tell whether the Supreme Court has an opportunity to review a subsequent case involving interpretation of the sentence in *Davis* referencing a student's vulnerability to harassment. In the meantime, the Sixth Circuit's decision in *Kollaritsch* stands as precedent within the Sixth Circuit (Michigan, Ohio, Kentucky, and Tennessee).

Kollaritsch v. Michigan State Univ. Board of Trustees, 944 F.3d 613 (6th Cir. Dec. 19, 2019), cert. denied (Oct. 13, 2020).

RELATED UE RESOURCES

- [Podcast: Recent Developments in Title IX Caselaw](#)
- [ED Releases Final Title IX Regulations Governing Campus Sexual Misconduct: Guidance for Higher Education](#)

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U.S. Court of Appeals for the Eighth Circuit

Title IX: Student Fails to Establish Gender as Motivating Factor for Expulsion

The Eighth Circuit Court of Appeals recently joined other circuits in rejecting different categories of Title IX claims and adopting the more straightforward standard of asking instead whether the alleged facts, if true, raise a plausible inference that the university discriminated against the plaintiff on the basis of sex. Applying that inquiry, the court affirmed that the plaintiff could not set forth sufficient evidence to allow a reasonable jury to find that being male was a motivating factor for his expulsion.

STUDENT EXPELLED FOR TITLE IX POLICY VIOLATION

After considering the Title IX retaliation lawsuit in 2020 brought by Tom Rossley Sr., as discussed in the [Spring 2020 UE on Appeal](#), the Eighth Circuit recently decided the

appeal of his son, Thomas Rossley Jr. (“Rossley”), who sued Drake University after being expelled when university officials found he had sexually assaulted a female student. One day in 2015, Jane Doe reported to Drake Public Safety that Rossley had sexually assaulted her that morning when she was “blacked out” after drinking a large amount of alcohol. During Drake’s Title IX investigation, Rossley met with the Title IX Coordinator and advised her that he did not remember the event because he was also drunk. He stated he may have been a victim of sexual assault but declined when asked if he wanted to file a complaint against Doe.

The Title IX investigator concluded that “based on a preponderance of the evidence” Rossley had violated the university’s Title IX policy. She found Rossley seemed less incapacitated than Doe and, when weighing credibility, that

Doe was more credible. The Dean of Students Office recommended expulsion as the appropriate sanction. Rossley's father, then a Drake trustee, demanded the university accommodate Rossley's disabilities during the formal hearing. Rossley himself did not make any such request.

After the hearing, the hearing officer determined Doe did not consent to the sexual contact due to incapacitation and recommended Rossley's expulsion. Rossley appealed, and an appeals panel held another hearing. The panel affirmed the hearing officer's findings and recommended expulsion.

COURT REJECTS ATTEMPT TO LINK UNIVERSITY'S ACTIONS WITH GENDER BIAS

Rossley filed suit against Drake and certain university officials, asserting claims for violations of Title IX and the Americans with Disabilities Act (ADA), as well as claims related to breach of contract. On appeal, Rossley challenged the district court's grant of summary judgment on his Title IX claim based on an erroneous outcome theory, his ADA claim, and his breach of implied duty of good faith and promissory estoppel claims.

With respect to erroneous outcome, Rossley argued there was a genuine dispute of material fact regarding whether gender bias had resulted in an erroneous outcome in his disciplinary proceedings. Applying the Second Circuit's framework in *Yusuf v. Vasser College*, the district court dismissed this claim to the extent it was based on the erroneous outcome theory. Subsequent to the submission of Rossley's appeal, the Eighth Circuit announced a pleading standard for Title IX claims whereby a plaintiff must adequately allege that the university disciplined the plaintiff "on the basis of sex," rejecting the categories of Title IX claims described in *Yusuf*.

Applying its decision in *Doe v. Univ. of Ark.-Fayetteville*, the court concluded there was no dispute of material fact as to whether being male was a motivating factor in Rossley's expulsion. In support of his argument to the contrary, Rossley contended there were procedural flaws in the investigation and hearing, the university's "victim-centered" approach punishes male respondents, and the "Dear Colleague" letter pressured Drake to protect female victims at the cost of erring against accused male students.

The court rejected each argument. As to the university's Title IX process, the court concluded that whatever the deficiencies in the investigation, such as the investigator's decision

not to interview additional witnesses that might be duplicative, they did not result in findings so devoid of substantive content as to be unworthy of credence. Additionally, Drake's sexual assault prevention policy is gender-neutral and cannot be fairly read as being inherently gender-biased.

The court also rejected Rossley's argument regarding the influence of the "Dear Colleague" letter on Drake. Whatever the validity of his allegation that the letter's cited statistics regarding the gender of campus sexual assault victims were inaccurate, Rossley ignored the letter's data that men and women have been victims of campus sexual assault, as well as the letter's use of gender-neutral language.

In affirming the dismissal of Rossley's Title IX claim, the court narrowed its holding by noting that the pressure that was being put on Drake to investigate and adjudicate Title IX complaints by females against males did not appear to approach the facts described in other cases, nor was it combined with clearly irregular investigative and adjudicative process that have been found to support a *prima facie* case of sex discrimination.

Rossley also claimed Drake failed to accommodate his ADHD, dyslexia, and word-retrieval issues during the investigation and hearings. To establish a claim under Title III of the ADA, a plaintiff must, among other things, demonstrate he requested reasonable accommodations and how each requested accommodation was necessary to let him participate due to his disabilities.

Drake previously had provided Rossley accommodations in an academic context. But Rossley conceded that neither he nor his representative explicitly requested that he be provided accommodations during the disciplinary process. Rossley claimed, however, that sufficient requests were made given Drake's awareness of his academic accommodations and his father's request to a university official to accommodate those disabilities during the hearing. In addition to finding that Rossley made no specific request, formal or informal, for an accommodation, the court also held that he failed to connect his demands to his disability. Even if third-party requests were sufficient, which the court did not address, Rossley's father did not request any specific accommodation nor explain now it would enable Rossley to better participate in hearings.

Without discussion, the court further affirmed the district court's dismissal of Rossley's breach of implied duty of good faith and promissory estoppel claims.

THE BOTTOM LINE



Regardless of whether a court divides Title IX claims into categories, a plaintiff ultimately must prove that the university acted “on the basis of sex” to establish a case for

discrimination in violation of Title IX. An institution should ensure its Title IX-related policies are drafted and applied in a gender-neutral fashion.

Rossley v. Drake Univ., et al., No. 18-3258 (8th Cir. Nov. 5, 2020).

RELATED UE RESOURCES

- [A Review of Student-Perpetrator Sexual Assault Claims with Losses](#)
- [Confronting Campus Sexual Assault](#)
- [Checklist: Title IX Compliant Policies Against Sexual Harassment in Higher Education](#)

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U.S. Court of Appeals for the Eighth Circuit

Private Universities Must Not Act Arbitrarily in the Disciplinary Process

Does a private university owe a duty of care to conduct its disciplinary process in a non-negligent manner and with due care? No, according to the Eighth Circuit.

STUDENT DISCIPLINED UNDER SEXUAL MISCONDUCT POLICY

John Doe was accused of sexual misconduct by a fellow student at University of St. Thomas, a private university in Minnesota. After he was suspended and found responsible, he sued, alleging Title IX violations and various state law claims, including negligence.

The district court granted the university’s motion to dismiss on all claims except the negligence claim. On summary judgment, the district court held that the university owed to Doe and others a duty of care to conduct a disciplinary process in a non-negligent manner, but found that Doe had not shown a genuine issue of fact that the disciplinary proceedings were biased against him or that the alleged procedural flaws in the disciplinary process breached the duty of reasonable care. Doe appealed.

WHAT DUTY IS OWED?

Before analyzing whether the university breached its duty, the Eighth Circuit examined what the duty of care requires of private universities investigating non-academic violations under

the common law. The Minnesota Supreme Court had not ruled on that point, leaving the Eighth Circuit to predict how that court would decide the issue. Doe argued the university must act reasonably and in a manner comporting with constitutional due process, while the university argued the district court had erred in adopting that standard and that Minnesota law merely requires a private university to refrain from acting arbitrarily in the disciplinary process.

Looking to prior Minnesota decisions, the Eighth Circuit found the district court erred in formulating a reasonable care standard for a private university’s misconduct proceedings and applied a more permissive standard that no Minnesota court had adopted. The Minnesota Supreme Court previously held that an academic expulsion from a public university violates due process if it results from arbitrary, capricious, or bad faith actions of university officials and stated *in dicta* that a private university may not arbitrarily expel a student under similar circumstances.

Thereafter, the Minnesota Court of Appeals extended the duty not to expel students in an arbitrary manner to non-academic misconduct discipline and further held that public universities only must give such students notice and some opportunity to be heard. Based on those precedents, the Eighth Circuit concluded the district court should not have held that the university “had an obligation to create and administer a process that was fair and impartial to both [the

accuser and the accused] ... and [to] provide some measure of due process in the proceeding to ensure that an accurate outcome was achieved.”

Applying the correct standard, the Eighth Circuit also held that the university had not acted arbitrarily in its disciplinary process. While the court was troubled by university training that implicated stereotypes rather than individualized assessments, it found no evidence that these materials caused university staff to be individually biased against Doe.

Likewise, Doe did not raise procedural irregularities in the process, and the court stated that even minor, harmless violations of the university’s sexual misconduct policy would not show the proceedings were arbitrary in any event. Because none of Doe’s evidence showed the university was

“out to get [him]” or that its proceedings were the product of ill will, instead of judgment, the Eighth Circuit affirmed the dismissal of his negligence claim.

THE BOTTOM LINE

While this decision only applies to institutions in Minnesota, it is a useful reminder that the standards of care for permissible proceedings in any state may differ depending on whether a public or private institution is involved and whether the proceedings arise from violations of academic standards or non-academic student misconduct.

John Doe v. Univ. of St. Thomas, 972 F.3d 1014 (8th Cir. Aug. 28, 2020).

RELATED UE RESOURCES

- [A Review of Student-Perpetrator Sexual Assault Claims with Losses](#)
- [Confronting Campus Sexual Assault](#)

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U.S. Court of Appeals for the Third Circuit

No Evidence of Sex Bias Where University Has Distinguishable Comparators and Gender-Neutral Polices

In a non-binding opinion, the Third Circuit affirms the district court’s granting of summary judgment to the university, rejecting claims under both erroneous outcome and selective enforcement theories of liability and ultimately concluding that the plaintiff did not present evidence of bias “on the basis of sex.”

TITLE IX RESPONDENT FAILS TO ESTABLISH VALID COMPARATORS

John Doe, a St. Joseph’s University student, had a sexual encounter with Jane Roe in his dorm room in 2018. A few days later, Roe told the university’s Title IX Coordinator that Doe squeezed her neck forcefully without her consent. After an investigation, the investigator concluded Doe was responsible for sexual assault for engaging in this conduct without Roe’s consent. The university placed Doe on disciplinary probation.

Asserting that the proceedings against him were infected with sex bias in violation of Title IX, Doe sued the university, advancing claims under Title IX pursuant to selective enforcement and erroneous outcome theories.

To prevail under a selective enforcement claim, Doe needed to identify a similarly situated female student who the university treated less harshly. He pointed to two investigations where women were found not responsible for violating school policy.

In the first instance, a female student was investigated after requiring other female students to touch her bare buttocks. Based on the facts that the touching occurred in the context of a “team bonding” incident and was not touching in a sexual manner, the investigator in that case determined it was not in violation of school policy.

In the second instance, the university received an anonymous report that a female staffer kissed a male student on the lips at a lunch. During the investigation, the male student said it was not unwelcome and was non-sexual. Based on these and other facts, the investigator found the staff member did not violate school policy.

The court thus found both instances Doe cited to be distinguishable – neither involved a private romantic encounter

leading to allegations of nonconsensual physical contact, neither involved a victim alleging to have been physically harmed, and neither was initiated by a complaint from the alleged victim. Accordingly, those students did not constitute adequate comparators.

BIAS IN DISCIPLINARY PROCEEDING MUST BE GENDER-MOTIVATED

To prevail on an erroneous outcome claim, Doe must cast some “articulable doubt” on the accuracy of the outcome of the disciplinary proceeding and then show circumstances suggesting gender bias was a motivating factor behind the erroneous finding.

Doe pointed to alleged bias in the investigation based on certain choices the investigator made, such as the decision to interview only Doe and Roe. However, the court concluded that even if those investigatory choices showed bias, a jury would have no basis to conclude this bias was gender-motivated.

Doe also pointed to statements a university official made on a grant application as evidence of gender bias but failed to show that he played any influential role in the investigation or adjudication.

Lastly, the court rejected Doe’s contention that the university’s emphasis on combatting sexual assault reflected the school’s gender bias. Instead, all the facts Doe argued in support of his claim were gender-neutral: a university presentation on supporting those who claimed to be victims of sexual violence, a financial incentive in the form of a federal grant to encourage

students to report sexual misconduct, and the university’s sexual misconduct policy itself. While other courts have pointed to internal or external pressure when evaluating gender bias, those cases all contained indicators of specific intent to punish male students.

Accordingly, the Third Circuit held that the district court did not err in dismissing Doe’s Title IX claims.

THE BOTTOM LINE

While the Third Circuit separately considered plaintiff’s selective enforcement and erroneous outcome Title IX claims in this decision, the fundamental element of either theory of liability is whether the university’s alleged bias against a respondent is on the basis of sex. Even if a plaintiff in a respondent Title IX case can identify irregularities in the Title IX process, such claims will not be successful unless the allegations also include evidence of gender bias.

Doe v. St. Joseph’s Univ., No. 19-2158 (3d Cir. Oct. 27, 2020), pet. for en banc and panel rehearing denied (Nov. 24, 2020).

RELATED UE RESOURCES

- [Checklist: Sexual Harassment Investigations](#)
- [Checklist: Title IX Compliant Policies Against Sexual Harassment in Higher Education](#)



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