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## **Sexual Harassment: Who Will Pay the Price of Scandal?**

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Mulry: Sexual Harassment  
**SEXUAL HARASSMENT: WHO WILL PAY  
THE PRICE OF SCANDAL?**

## I. INTRODUCTION

Sexual harassment seems to be the buzzword of the moment, invading the everyday milieu of the workplace, classroom and nightly news commentary.<sup>1</sup> Despite our collective rage, it occurs with such frequency that it is almost commonplace and commonly accepted.<sup>2</sup> The Civil Rights Movement of the 1960s provided the impetus to correct the disparate treatment endured by certain classes of people.<sup>3</sup> "While it began as a backlash against racial hatred and discrimination, the movement expanded to include discrimination on the basis of religion, national origin and sex."<sup>4</sup> Obviously, much has yet to be learned in dealing with insidious discrimination, including that based on sex. In our country's attempts at righting these civil wrongs, the law has created certain duties for employers and federally funded schools, imposing upon them the dual task of watchdog and enforcer.<sup>5</sup> The United States

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<sup>1</sup> See generally Susan Estrich, *Sex At Work*, 43 STAN. L. REV. 813 (1991). "'Sexual harassment' [is] a term which was not even coined until the 1970s -- was not recognized in trial courts until the late 1970s, and was only affirmed by the United States Supreme Court in the 1980s." *Id.* at 816.

<sup>2</sup> See James T. Madore, *When Work Turns Ugly*, NEWSDAY, April 5, 1998, at 4. In response to a poll, some twenty-five percent of women indicated that they were the victims of harassment in the workplace, with half that number reporting emotional harassment or inappropriate touching. *Id.* Indeed, males comprised eleven percent of the cases reported to the U. S. Equal Employment Opportunity Commission ("EEOC"). *Id.*

<sup>3</sup> Michael P. Meliti, *Civil Rights - Title IX of the Education Amendments of 1972 - Implied Private Right of Action Under Title IX Will Not Lie by Reason of Teacher's Sexual Harassment of Student When District Official With Authority Did Not Have Actual Notice and Was Not Deliberately Indifferent to Such Conduct - Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998), 9 SETON HALL CONST. L. J. 213, (1998).

<sup>4</sup> *Id.*

<sup>5</sup> See generally Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employers' Paradox in Responding to Hostile Environment Sexual Harassment -- A Proposed Way Out*, 67 FORDHAM L. REV. 1517 (1999). "[An] employer's duty to correct a hostile environment arises when it knows of the existence of that environment . . ." *Id.* at 1552. See also Philip T.K. Daniel, *Violence and the Public Schools: Student Rights Have Been Weighed in the Balance and Found Wanting*, 27 J.L. & EDUC. 573 (1998). "[S]chool officials face liability

Congress has sought to ensure equal opportunity via such legislation as Title VII of the Civil Rights Act of 1964 [hereinafter "Title VII"],<sup>6</sup> and Title IX of the Education Amendments of 1972 [hereinafter "Title IX"],<sup>7</sup> empowering courts with the necessary legal predicates to eradicate pernicious harassment motivated by animus and to put an end to the resultant biased victimization.<sup>8</sup>

Indeed, 1998 was the year of sexual harassment as evident in the country's highest court and in the court of public opinion.<sup>9</sup> While the United States Supreme Court made great strides in the area of sexual harassment, deciding a quartet of cases involving employer and public school liability,<sup>10</sup> the country's Executive-in-Chief fought his own legal battles involving allegations of sexual misconduct. Thus, even the actions of a sitting President taken

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when they know of sexual harassment against students by employees and take no immediate action to address the deleterious conduct." *Id.* at 605.

<sup>6</sup> Title VII of the Civil Rights Act of 1964, §§ 701, 703 (a)(1), as amended, 42 U.S.C. § 2000e (1998).

<sup>7</sup> Title IX of the Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C. § 1681(a) (1990).

<sup>8</sup> See generally *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). "The language of Title VII makes clear the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *Id.* at 800. See also Glenn M. Wong & Carol Barr, *Title IX Wields a Mightier Sword*, ATHLETIC BUSINESS, May 1992, at 16-17 (noting that after a recent United States Supreme Court decision allowing compensatory damages, Title IX has evolved "from a purely protective statute into an offensive weapon").

<sup>9</sup> See generally Marley S. Weiss, *The Supreme Court 1997-1998 Labor and Employment Law Term (Part I): The Sexual Harassment Decisions*, 14 LAB. LAW 261 (1998). This article notes that:

Specialists in the field of labor and employment law will remember this Supreme Court term as the year of the sexual harassment trilogy, or perhaps, counting the Title IX case decided this year, quartet. The Paula Jones litigation has further contributed to the public impression that this has been the year of sexual harassment litigation.

*Id.*

<sup>10</sup> See 129 WEST'S EDUC. LAW REP. 887 (1998). "The Supreme Court decided four sexual harassment cases in the 1997-98 Term, returning to this controversial area for the first time since 1992." *Id.* at 892. See also *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998); *Gebser v. Lago Vista Indep. School Dist.*, 118 S. Ct. 1989 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

prior to and outside the scope of the office could not escape Title VII scrutiny.<sup>11</sup> This Comment will survey the evolution of the law of sexual harassment, including the recent decisions of the United States Supreme Court, which have further defined the contours of liability for employers and schools that receive federal funds. Part I sets forth the definition of sexual harassment, both in the workplace and educational contexts.<sup>12</sup> Part II discusses Title VII and the concomitant case law that have set forth the standards upon which an employer may be held liable for the sexually harassing conduct of a supervisor, co-worker, or third party.<sup>13</sup> Part III similarly describes the statutory background of Title IX and its varying judicial interpretations in the area of teacher-student sexual harassment.<sup>14</sup> This section deals extensively with the judicially implied right of action for student victims,<sup>15</sup> the decision that allowed money damages for student victims,<sup>16</sup> and the Supreme Court's imposition of a heightened standard in situations of teacher-student harassment.<sup>17</sup> Finally, Part IV will review the Supreme Court's recent decision in another landmark case,<sup>18</sup> which makes federally funded schools accountable for peer (or student-to-student) sexual harassment.<sup>19</sup>

## II. SEXUAL HARASSMENT DEFINED

What type of conduct constitutes sexual harassment? Courts have grappled with this question in trying to delineate between behavior that is questionable and that which is actionable.<sup>20</sup> The term 'Sexual harassment' has been defined generally as the

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<sup>11</sup> See *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998) (granting President Clinton's motion for summary judgment after finding that Paula Jones failed to establish a basis for a claim of either quid pro quo sexual harassment or hostile environment sexual harassment).

<sup>12</sup> See *infra* notes 20-41 and accompanying text.

<sup>13</sup> See *infra* notes 42-104 and accompanying text.

<sup>14</sup> See *infra* notes 105-223 and accompanying text.

<sup>15</sup> See *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

<sup>16</sup> See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).

<sup>17</sup> See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S.274 (1998).

<sup>18</sup> See *infra* notes 224-280 and accompanying text.

<sup>19</sup> See *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661 (1999).

<sup>20</sup> Monica E. McFadden, *But Is It Harassment?*, 34 TRIAL 48 (Dec. 1998).

unwanted imposition of sexual requirements in the context of a relationship of unequal power.<sup>21</sup> The concept that a worker may be subjected to unwelcome sexual conduct because of a supervisor's ability to exact far-reaching career consequences, or that a teacher may impose his/her sexual will on a vulnerable student with that student's grade hanging in the balance, forms the very basis for liability of those in a better position to halt such behavior – i.e., employers and school districts.

The United States Supreme Court has adopted the definition of sexual harassment posited by the Equal Employment Opportunity Commission [hereinafter "EEOC"] in its Guidelines on Discrimination Because of Sex.<sup>22</sup> The EEOC Guidelines set forth the following:

Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.<sup>23</sup>

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<sup>21</sup> Katherine S. Anderson, *Employer Liability Under Title VII for Sexual Harassment after Meritor Savings Bank v. Vinson*, 87 COLUM. L. REV. 1258, 1258 n.1 (1987) (citing C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN I* (1979)).

<sup>22</sup> *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). The Court stated that "[i]n 1980 the EEOC issued Guidelines specifying that 'sexual harassment,' as there defined, is a form of sex discrimination prohibited by Title VII . . . . In defining 'sexual harassment,' the Guidelines first describe the kinds of workplace conduct that may be actionable under Title VII . . . . Relevant to the charges at issue in this case, the Guidelines provide that such sexual misconduct constitutes prohibited 'sexual harassment' . . . ." *Id.*

<sup>23</sup> 29 C.F.R. § 1604.11(a).

In the educational context, sexual harassment has been defined by the National Advisory Council on Women's Educational Programs to mean "the use of authority to emphasize the sexuality or sexual identity of the student in a manner which prevents or impairs the student's full enjoyment of education[al] benefits, climate, or opportunities."<sup>24</sup>

Sexual harassment has been generally grouped into two categories: "quid pro quo harassment" and "hostile environment harassment."<sup>25</sup> *Quid pro quo* harassment in the workplace occurs when the receipt of tangible job benefits is conditioned upon submission to unwelcome sexual conduct, or when rejection of such conduct results in negative employment consequences.<sup>26</sup> The classic case of *quid pro quo* is when a superior threatens dismissal of an employee for not engaging in certain sexual acts, or when a job benefit is conferred in exchange for sexual favors. The hallmark of a *quid pro quo* case is an exchange premised on disproportionate status or authority.<sup>27</sup>

The more difficult type of sexual harassment claim to bring is that based on the active creation of a hostile work environment.<sup>28</sup> This type of harassment occurs when unwelcome sexual conduct unreasonably interferes with the performance of one's job or creates an intimidating and offensive work atmosphere.<sup>29</sup> Such claims are more common and usually involve conduct or comments which are offensive, or involve sexual innuendo that creates an intolerable work environment.<sup>30</sup> One might think that

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<sup>24</sup> Jill Suzanne Miller, *Title VI and Title VII: Happy Together as a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 U. ILL. L. REV. 699, 707 (1995) (quoting the Advisory Council on Women's Educational Program's definition of sexual harassment in education) (further citations omitted).

<sup>25</sup> See *Meritor*, 477 U.S. at 62. "[A] violation of Title VII may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment." *Id.*

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

<sup>28</sup> McFadden, *supra* note 20, at 48.

<sup>29</sup> McFadden, *supra* note 20, at 48.

<sup>30</sup> SUSAN L. SEGAL, *WOMEN'S LEGAL GUIDE* 226 (Barbara R. Hauser, ed., Fulcrum Publishing 1996). "A hostile work environment exists when: (1) The employee is subjected to unwelcome harassment by a fellow employee or

conduct that includes sex-specific and derogatory language, suggestions of sexual acts, and unwanted sexual advances or touching would certainly constitute actionable sexual harassment. However, "not all boorish and scandalous behavior is legally considered to be sexual harassment."<sup>31</sup> Indeed, courts and commentators have opined that "merely offensive" conduct should be prevented from being actionable as sexual harassment.<sup>32</sup> Furthermore, the conduct does not have to be purely sexual in nature so long as it is directed at a person based on that person's gender.

Both types of harassment claims may be brought in the educational arena as well. In 1977, a federal district court in Connecticut was the first to recognize a claim of *quid pro quo* sexual harassment in the case of *Alexander v. Yale University*.<sup>33</sup> In that case, former students claimed that they were denied educational benefits by the university's lack of a grievance policy designed to deal with incidents of sexual harassment.<sup>34</sup> One female student claimed that she was offered a high grade by a professor in exchange for sexual favors, and upon her refusal to submit to his sexual advances, she received a low grade.<sup>35</sup> The court found that academic achievement conditioned on sexual favors did indeed amount to sex discrimination in education.<sup>36</sup>

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supervisor; (2) the harassment interfered with her employment by creating an offensive work environment; (3) if the harassment is by a fellow employee, the employer knew or should have known of the harassment." *Id.*

<sup>31</sup> *Id.* "Much unpleasant behavior is not legally sexual harassment. Under the 'at will' doctrine, employers have no legal obligation to create fair and pleasant workplaces. The theory is the worker who doesn't like the work environment or the attitude and behavior of his or her supervisors can leave." *Id.* See also *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998). Justice Scalia cautioned against "courts and juries . . . mistak[ing] ordinary socializing in the workplace -- such as male-on-male horseplay or intersexual flirtation -- for discriminatory conditions of employment." *Id.* at 1003.

<sup>32</sup> See Cecilee Price-Huish, "Because the Constitution Requires It and Because Justice Demands It": *Specific Speech Injunctive Relief for Title VII Hostile Work Environment Claims*, 7 WM. & MARY BILL RTS. J. 193, 203 (1998).

<sup>33</sup> 459 F. Supp. 1 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980).

<sup>34</sup> *Id.* at 2.

<sup>35</sup> *Id.* at 3-4.

<sup>36</sup> *Id.* at 4. Even though the court recognized a claim based on *quid pro quo* sexual harassment in education, the action was dismissed for failure on the part

Nonetheless, it was not until 1985 that a federal court first allowed a claim of hostile environment in an educational setting. In *Moire v. Temple University School of Medicine*,<sup>37</sup> a medical student brought a claim of hostile environment harassment on the basis of conduct by her supervisor that subjected her to an environment of sexual harassment and discrimination.<sup>38</sup> She essentially claimed that as a result of this hostile treatment, she failed her third year of medical school.<sup>39</sup> The *Moire* court recognized a hostile environment claim brought against a teacher by a student, and looked to the Title VII hostile work environment cases for guidance.<sup>40</sup> While the district court recognized this right of action and the Third Circuit affirmed that such a right existed, the plaintiff failed to establish that the alleged conduct of her supervisor created a hostile environment.<sup>41</sup>

### III. TITLE VII AND THE STANDARD OF LIABILITY FOR EMPLOYERS

Title VII provides in pertinent part that “[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his race, color, religion, sex, or national origin.”<sup>42</sup> But when is an employer held liable for sexual harassment?

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of the plaintiff to prove her harassment claim. *Id.* The Second Circuit affirmed the decision, also recognizing the right of a student to claim *quid pro quo* sexual harassment in the educational setting. *Alexander*, 631 F.2d at 185.

<sup>37</sup> 613 F. Supp. 1360 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1136 (3d Cir. 1986).

<sup>38</sup> *Id.* at 1365-66.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1366-70.

<sup>41</sup> *Id.*

<sup>42</sup> Title VII of the Civil Rights Act of 1964, §§ 701, 703 (a)(1), as amended, 42 U.S.C. § 2000e (a)(1) (1998). *See also* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Court in *Griggs* made clear the purpose of Title VII by stating that:

Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What Congress requires is the removal of artificial, arbitrary, and unnecessary barriers to employment when



The United States Supreme Court first permitted sexual harassment as a cause of action under Title VII in the landmark case of *Meritor Savings Bank, FSB v. Vinson*.<sup>43</sup> The *Meritor* Court “recognized the illegality of hostile environment sexual harassment.”<sup>44</sup> However, the Court specifically refrained from creating a definitive standard for employer liability, opting instead to provide the lower courts with the suggestion that they use common law agency principles. The Court further reiterated Congress’ intent that employers should be held liable under Title VII for certain acts of their employees, not automatically liable nor insulated for mere lack of notice.<sup>45</sup> This instruction yielded many varying decisions in the lower courts based on scope of employment analyses.

In *Meritor*, the plaintiff Mechelle Vinson alleged that during the course of her four years of employment at defendant bank, she had “constantly been subjected to sexual harassment” by her boss, Sidney Taylor, a vice president and manager at the bank and Vinson’s immediate supervisor.<sup>46</sup> Among other acts of sexual degradation in the office place, Vinson testified that Taylor repeatedly demanded sex with her and that she eventually agreed because she was afraid of losing her job.<sup>47</sup> Taylor denied the

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the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

*Id.* at 430-31.

<sup>43</sup> 477 U.S. 57 (1986). “[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.” *Id.* at 66. Indeed the Court looked to the words of the Eleventh Circuit in *Henson v. Dundee*, justifying an action for sexual harassment by pointing to precedent in racial harassment cases, as follows:

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

*Id.* (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (1982)).

<sup>44</sup> See Franklin, *supra* note 5, at 1526.

<sup>45</sup> *Meritor*, 477 U.S. at 72. The Court “agree[d] with the EEOC that Congress wanted courts to look to agency principles for guidance in this area.” *Id.*

<sup>46</sup> *Id.* at 60.

<sup>47</sup> *Id.*

allegations and claimed that Vinson was motivated to fabricate the story of sexual misconduct because of a business-related dispute.<sup>48</sup>

*Meritor* clarified the level of evidence necessary to show a hostile environment violation. First, the Court made clear that such a claim is not limited to economic or tangible discrimination.<sup>49</sup> The Court stated that the harassing conduct “must be sufficiently severe or pervasive ‘to alter the conditions of employment and create an abusive working environment.’”<sup>50</sup> Second, the Court corrected the lower court’s ruling that there was no sexual harassment if the sexual relationship was voluntary.<sup>51</sup> The Court reasoned that “the gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”<sup>52</sup> Thus, the question in a sexual harassment case is not whether a plaintiff voluntarily participated in sexual intercourse; rather, it is whether the plaintiff indicated by conduct that the sexual advances were not, in fact, welcomed.<sup>53</sup> The Court noted that in determining whether the victim “by her conduct indicated” unwelcomeness, factors such as the victim’s “sexually provocative speech or dress” may be taken into consideration.<sup>54</sup>

In *Henson v. City of Dundee*,<sup>55</sup> the Eleventh Circuit listed the necessary elements of a hostile environment claim as follows:

- (1) the employee belongs to a protected class;
- (2) the employee was subject to harassment, that is, unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature;
- (3) the harassment was based on sex;

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<sup>48</sup> *Id.* at 61.

<sup>49</sup> *Id.* at 64.

<sup>50</sup> *Id.* at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

<sup>51</sup> *Id.* at 68 (stating that “the fact that sex-related conduct was ‘voluntary,’ in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII”).

<sup>52</sup> *Id.* (citing 29 C.F.R. § 1604.11(a) (1985)).

<sup>53</sup> *Id.* (stating that “[t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary”).

<sup>54</sup> *Id.* at 69. Justice Rehnquist noted that “such evidence is obviously relevant.” *Id.*

<sup>55</sup> 682 F.2d 897 (11th Cir. 1982).

(4) the harassment affected a term, condition, or privilege of employment, that is, the conduct was sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) a basis for employer liability.<sup>56</sup>

The most difficult element to establish in this list is perhaps the requirement that the harassment be sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. Seven years after the Court's decision in *Meritor*, the Court in *Harris v. Forklift Systems, Inc.*,<sup>57</sup> gave further substance to this element by setting forth that the spectrum of disparate treatment included "intimidation, ridicule and insult."<sup>58</sup> As such, when that conduct is imposed on an employee causing an "abusive working environment," Title VII is violated.<sup>59</sup> The Court in *Harris* required a "middle path" standard, making actionable conduct that is more than "merely offensive," but less than "concrete psychological harm."<sup>60</sup> Thus, only conduct that is severe enough to create an objectively hostile environment is within Title VII's purview.<sup>61</sup> Additionally, the Court found that for conduct to

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<sup>56</sup> Franklin, *supra* note 5, at 1527 (citing *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982)).

<sup>57</sup> 510 U.S. 17 (1993).

<sup>58</sup> *Id.* at 21 (citing *Meritor*, 477 U.S. at 65).

<sup>59</sup> *Id.* (citing *Meritor*, 477 U.S. at 65, 67, in which the Supreme Court stated that when the workplace is permeated with "discriminatory intimidation, ridicule, and insult," that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment," Title VII is violated).

<sup>60</sup> *Id.* at 21-22. "Title VII comes into play before the harassing conduct leads to a nervous breakdown." *Id.* at 22.

<sup>61</sup> *Id.* at 21. That is, "an environment that a reasonable person would find hostile or abusive." *Id.* *But see* *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419 (E.D. Mich. 1984). The court commented:

[I]t cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to -- or can-- change this . . . Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite

have altered the terms and conditions of one's employment, the victim must have subjectively perceived an abusive environment.<sup>62</sup> Therefore, the need to demonstrate psychological harm is obviated if an objective person would view the conduct as creating a hostile environment and the person that is the subject of the conduct perceives the hostile environment.<sup>63</sup> Finally, determining whether a work environment is sufficiently hostile to be actionable requires consideration of all the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."<sup>64</sup>

Post-*Meritor*, the lower courts utilized the Restatement (Second) of Agency, and specifically section 219, to decide the scope of an employer's liability in sexual harassment cases.<sup>65</sup> Applying these principles, courts established employer liability for *quid pro quo* sexual harassment by a supervisor, despite the employer's lack of knowledge of the harassing conduct.<sup>66</sup> As such, an employer was usually held vicariously liable for *quid pro quo* harassment where

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different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.

*Id.* at 430.

<sup>62</sup> *Id.* at 21-22.

<sup>63</sup> *Id.* at 22 (reasoning that "[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious"). *Id.*

<sup>64</sup> *Id.* at 23.

<sup>65</sup> RESTATEMENT (SECOND) OF AGENCY § 219 (1957). Section 219 provides in pertinent part:

- (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
- (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
  - (a) the master intended the conduct or the consequences, or
  - (b) the master was negligent or reckless, or
  - (c) the conduct violated a non-delegable duty of the master, or
  - (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

*Id.*

<sup>66</sup> Anderson, *supra* note 21, at 1261.

the employer's "liability derive[d] from the fault of the employee, regardless of whether the employer was aware of the harassment."<sup>67</sup> Therefore, post-*Meritor* courts applied principles of respondeat superior in cases of actionable conduct, but only for acts of a supervisor or a worker with agency capacity.<sup>68</sup> Liability based on respondeat superior, which literally means "look to the man higher up," is usually associated with acts that further the master's business, and are thus within the scope of the servant's employment.<sup>69</sup>

In addition, courts following the directives of the Supreme Court in *Meritor* found liability for employers based on hostile environment harassment claims. In the situation where a co-worker creates an offensive environment, "courts always employ[ed] a knowledge standard to assess employer liability," where the employer was liable if he or she knew or should have known of the misconduct but failed to take remedial action.<sup>70</sup> Therefore, an employer was liable for the harassing conduct of a co-worker under a negligence or recklessness standard because of its own misconduct in failing to perceive and take corrective action, and not under a theory of vicarious liability.<sup>71</sup>

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<sup>67</sup> See Anderson, *supra* note 21, at 1261. See also *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979). The Ninth Circuit stated that "respondeat superior does apply here [where] the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions, although what the supervisor is said to have done violated company policy." *Id.* at 213.

<sup>68</sup> See, e.g., *Miller, supra* note 67. See also 29 C.F.R. § 1604.11(c) (1986). "The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity." *Id.*

<sup>69</sup> See W. PAGE KEETON, ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 69, at 500 (5th ed. 1984). See also *BLACK'S LAW DICTIONARY* 1311-12 (6th ed. 1990), which defines "respondeat superior" to mean "let the master answer." *Id.* at 1311. It further defines the doctrine as follows: "a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent." *Id.* at 1311-12.

<sup>70</sup> Anderson, *supra* note 21, at 1262. See also *Franklin, supra* note 5, at 1553. "Constructive knowledge is judged by the pervasiveness, severity, and openness of the harassment." *Id.*

<sup>71</sup> Anderson, *supra* note 21, at 1276.

However, courts had much more difficulty in applying uniform standards when it came to the situation of a hostile work environment created by a supervisor. Indeed, the United States Supreme Court recognized that ever since they held in *Meritor* that the Restatement (Second) of Agency should be utilized in this area, the circuits have struggled to identify with a uniform standard to evaluate an employer's responsibility for the abusive conduct of its supervisor.<sup>72</sup>

It was not until twelve years after the *Meritor* decision that the United States Supreme Court provided further assistance in determining employer liability for hostile work environments created by supervisors. In two landmark cases, both decided on the last day of the 1997-98 term, the Court all but abandoned the distinction between *quid pro quo* and hostile environment sexual harassment.<sup>73</sup> In *Burlington Industries, Inc. v. Ellerth*,<sup>74</sup> and *Faragher v. City of Boca Raton*,<sup>75</sup> the Court instead chose to base employer liability on whether the harasser is a supervisory employee or a non-supervisory employee. Again, the Court relied on agency law principles holding an employer responsible at law for its agent's torts if the agent was aided by the existence of the agency relationship.<sup>76</sup> The *Burlington* Court followed the lead of *Meritor* in using the Restatement (Second) of Agency as the starting point for its analysis of the principles of agency.<sup>77</sup>

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<sup>72</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 785 (1998) (stating that "Courts of Appeals have struggled to derive manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees").

<sup>73</sup> *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (stating that the labels *quid pro quo* and hostile work environment are not controlling for purposes of establishing employer liability); *see also Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

<sup>74</sup> 524 U.S. 742 (1998).

<sup>75</sup> 524 U.S. 775 (1998).

<sup>76</sup> *See Burlington*, 524 U.S. at 754. Justice Kennedy made clear that the Court, in deciding whether an employer is vicariously liable when a supervisor creates a hostile work environment, "turn[ed] to principles of agency law, for the term 'employer' is defined under Title VII to include 'agents.'" *Id.* Justice Kennedy further pointed out that "Congress has directed federal courts to interpret Title VII based on agency principles." *Id.*

<sup>77</sup> *Id.* at 755 (stating that "the Restatement (Second) of Agency . . . is a useful beginning point for a discussion of general agency principles").

The Court set forth identical holdings in *Burlington* and *Faragher*, assessing employer liability for a supervisor's sexual harassment of a subordinate even if the employer knew nothing about the harassment at the time it occurred.<sup>78</sup> Both decisions rested on in-depth analyses of principles of agency law that later formed the basis for employer liability.<sup>79</sup> First, the Supreme Court definitively ruled that "sexual harassment by a supervisor is not conduct within the scope of employment;" therefore, liability based on section 219(1) of the Restatement (Second) of Agency was put aside.<sup>80</sup> The Court then considered liability based on the employer's negligence in failing to perceive a supervisor's sexual harassment occurring outside the scope of employment.<sup>81</sup> In such cases, even though the supervisor acted purely with personal motives, the employer's negligence is the cause of the harassment.<sup>82</sup> Therefore, "[n]egligence sets a minimum standard for employer liability under Title VII."<sup>83</sup>

Then the Court turned to an assessment of potential vicarious liability for the acts of a supervisor.<sup>84</sup> Subsection 219(2)(d) of the Restatement (Second) of Agency provides that:

A master is not subject to liability for the torts of his servants acting outside the scope of their employment, *unless* . . . the servant purported to act

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<sup>78</sup> See *id.* at 765 (holding that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee"); see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998)

<sup>79</sup> See *id.* at 758; see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 801 (1998).

<sup>80</sup> *Id.* at 757.

<sup>81</sup> *Id.* at 759 (stating that "[a]n employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it"). *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* Under Section 219(2)(b), "an employer is liable when the tort is attributable to the employer's own negligence." *Id.*

<sup>84</sup> *Id.* "Subsection 219(2)(d) concerns vicarious liability for intentional torts committed by an employee when the employee uses apparent authority (the apparent authority standard), or when the employee 'was aided in accomplishing the tort by the existence of the agency relation' (the aided in the agency relation standard).") *Id.*

or to speak on behalf of the principal and there was reliance upon *apparent authority*, or he was *aided in accomplishing* the tort by the existence of the *agency relation*.<sup>85</sup>

In accordance with this principle, the Court noted that usually a supervisor's harassing conduct involves "misuse of actual power, not the false impression of its existence,"<sup>86</sup> and that therefore a basis of liability cannot be grounded in the reliance upon apparent authority. The Court instead looked to the "aided in the agency relation" rule, where "[p]roximity and regular contact [in the workplace] may afford a captive pool of potential victims."<sup>87</sup> Here, it found the implications to be too far-reaching in that the mere existence of the employment relation would subject employers to vicarious liability for acts of co-workers as well. The Court explicitly required something more than the agency relation itself to establish liability, and it found that requirement satisfied in the class of cases in which a supervisor's actions against a subordinate could be characterized as a tangible employment action.<sup>88</sup> This presupposes that the actor had supervisory or agency authority to carry out the change in employment status.<sup>89</sup> Therefore, any action taken by a supervisor that is classified as a tangible employment action is deemed to be the act of the employer under Title VII, imposing liability.<sup>90</sup>

The Court found it more difficult, however, to exact the agency relation standard in situations where there is no tangible employment action, but harassing conduct occurs nonetheless.<sup>91</sup>

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<sup>85</sup> RESTATEMENT (SECOND) OF AGENCY § 219 (2)(d) (1958) (emphasis added).

<sup>86</sup> *Burlington*, 524 U.S. at 759.

<sup>87</sup> *Id.* at 760.

<sup>88</sup> *Id.* at 761-62 (reasoning that "[w]hen a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation.").

<sup>89</sup> *Id.* at 762. "Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control." *Id.*

<sup>90</sup> *Id.* (holding that "tangible employment action taken by a supervisor becomes for Title VII purposes the act of the employer.").

<sup>91</sup> *Id.* at 763.



The Court did note that this type of harassment, which indeed creates a hostile work environment, is particularly insidious in that the “supervisor’s power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation.”<sup>92</sup> The Court in *Faragher* clarified this point by suggesting that an employee who may not hesitate to deal with the harassing conduct of a fellow worker, may be reluctant to call into question the acts of a supervisor who has the power to demote or dismiss at will.<sup>93</sup>

The Court was careful to point out that even though vicarious liability for employers may result, *Meritor*’s mandate that employer liability not be automatic would still be honored.<sup>94</sup> Borrowing the avoidable consequences doctrine from tort law, the Court laid down a rule of vicarious liability limited by the availability of an affirmative defense. The holdings of *Burlington* and *Faragher* explicitly state:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.<sup>95</sup>

The affirmative defense created by the Supreme Court to preclude liability is only available for employers when no tangible employment action was taken.<sup>96</sup> The Court once again looked to the objectives and purposes of Title VII in creating this defense and noted that its requirements will better serve the remedial

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<sup>92</sup> *Id.* “[I]t is precisely because the supervisor is understood to be clothed with the employer’s authority that he is able to impose unwelcome sexual conduct on subordinates.” *Id.* (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 77 (Marshall, J., concurring)).

<sup>93</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 803 (1998).

<sup>94</sup> *Id.* at 804.

<sup>95</sup> *Id.* at 807; *see also Burlington*, 524 U.S. at 765.

<sup>96</sup> *Id.*

aspects of the statute in preventing sexual harassment from occurring in the first place.<sup>97</sup> By making employers more aware of the extent of the problem and the possible solutions, statutory policy will in fact be implemented.<sup>98</sup> The composite defense is made up of two elements. First, an employer must show that it took reasonable care to prevent and correct promptly any sexually harassing conduct.<sup>99</sup> While the absence of a company's anti-harassment policy and procedures is not totally fatal in arguing reasonable care, it will be taken into account in establishing whether the employer's duty was breached.<sup>100</sup> Second, the defendant must show that the plaintiff/victim unreasonably failed to take advantage of any opportunities presented by the employer that might have avoided harm.<sup>101</sup> Usually, this may be satisfied if the employer can show that the victim never resorted to complaint procedures instituted in the workplace.

In sum, under the new standards set forth in *Burlington* and *Faragher*, an employer can be held vicariously liable for a hostile work environment created by a supervisor. This liability is subject to an affirmative defense if the employer had no knowledge of the conduct and if no tangible employment action was taken. As a defense, the employer must prove by a preponderance of the evidence that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the employee unreasonably failed to take advantage of any preventive or corrective measures available that could have avoided harm.<sup>102</sup> To

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<sup>97</sup> *Id.* at 805-06.

<sup>98</sup> *Id.* at 806.

<sup>99</sup> *Burlington*, 524 U.S. at 765; *see also Faragher*, 524 U.S. at 807; *see also* Franklin, *supra* note 5, at 1554. In addressing the issue of promptness:

[A]n employer can be assured that it will escape liability only if it takes appropriate corrective action within hours of discovering severely harassing conduct or within days of discovering subtly harassing or questionable conduct. It can be assured of having corrective action deemed prompt absent a complaint only if it acts with similar haste after observing severe, overtly sexual conduct and if it affirmatively investigates after observing more innocuous conduct to ensure that it is not creating a hostile environment.

*Id.*

<sup>100</sup> *Burlington*, 524 U.S. at 765.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

limit liability, employers should implement an anti-harassment policy with adequate procedures to attempt to prevent and correct promptly any harassing conduct. In situations where a tangible employment action was taken, it is irrelevant whether the employer maintained a policy or whether the victim complained.<sup>103</sup> In situations where a co-worker/non-supervisory employee creates a hostile environment, employer liability is predicated upon whether the employer knew or should have known of the conduct and failed to correct it.<sup>104</sup> Under this traditional knowledge/correction standard, the burden is on the plaintiff to show a lack of reasonable care in perceiving the harassment and adequately addressing it.

#### IV. TITLE IX AND SCHOOL LIABILITY FOR SEXUAL HARASSMENT

The essential language of Title IX mandates: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>105</sup> The United States Supreme Court has noted that it is the express purpose of Title IX to prevent discrimination by entities using federal funding as well as to protect citizens of the United States from discrimination.<sup>106</sup> Title IX has been touted by legal scholars as the “most significant law nationally advancing equality of opportunity and the prohibition of sex discrimination in educational institutions, including athletic

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<sup>103</sup> *Id.* Actions such as an undesirable reassignment, demotion, or discharge will not afford the employer with an affirmative defense. *Id.*

<sup>104</sup> See Franklin, *supra* note 5, at 1540-41. The employer must promptly correct the hostile situation in order to avoid liability. *Id.*

<sup>105</sup> Title IX of the Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C. § 1681(a) (1999). See also Meliti, *supra* note 3, at 222-23. “Congress enacted Title IX of the Education Amendments of 1972 as an extension of the Civil Rights Acts of 1964. In essence, the statute captures the strong attitudes of Congress and the Supreme Court toward discrimination based on sex and applies it to public schools.” *Id.* at 222.

<sup>106</sup> Cannon v. University of Chicago, 441 U.S. 677, 704 (1979) (reasoning that “Congress wanted to avoid the use of federal resources to support discriminatory practices . . . [and] to provide individual citizens effective protection against those practices”).

programs and activities, that are recipients of federal funds.”<sup>107</sup> It was specifically designed to secure for every individual an equal educational opportunity by eliminating discrimination on the basis of sex.<sup>108</sup> Therefore, Title IX imposes a duty on federally funded schools to ensure that discriminatory conduct such as harassment does not prevent a student from attaining the benefits of education.<sup>109</sup>

Sexual harassment in the field of education is indeed a problem.<sup>110</sup> Studies reveal that harassing conduct is an everyday occurrence at our nation’s schools and universities.<sup>111</sup> The opportunity for such harassment abounds due to the vulnerability of young students and the disproportionate power structure that

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<sup>107</sup> Diane Heckman, *Lowrey v. Texas A & M University Systems: Title IX Vis-a-vis Title VII Sex Discrimination and Retaliation in Educational Employment*, 124 Ed. Law Rep. 753, 753 (1998).

<sup>108</sup> 34 C.F.R. § 106.1 (1999).

<sup>109</sup> Title IX of the Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C. § 1681(a) (1999).

<sup>110</sup> See Hauser, ed., *supra* note 30, at 230-31. “While sexual harassment in the workplace has recently come under greater scrutiny, the problem of sexual harassment in the schools has been largely ignored.” *Id.* at 230. See also John T. Wolohan, *Sexual Harassment of Student Athletes and the Law: A Review of the Rights Afforded Students*, 5 SETON HALL J. SPORT L. 339, 353 (1995). “Sexual harassment of students is a serious problem that cannot be ignored by school administrators.” *Id.*

<sup>111</sup> See Hauser, ed., *supra* note 30, at 230-31. “Every day in schools across the country, harassment interferes with girls’ educational opportunities.” *Id.* at 230. In a 1992 study by NOW Legal Defense and Education Fund and the Wellesley College Center for Research on Women, surveying over forty-two hundred girls, ranging in age from nine to nineteen years old, it was revealed that:

[T]he majority of girls experience both verbal and physical sexual harassment: 89 percent reported receiving sexual comments, looks, or gestures, and 83 percent were touched, pinched, or grabbed. When harassment occurs, it is not a one-time-only event: 39 percent reported that they were sexually harassed at school on a daily basis in the last year. Also, harassment is a public event: other people were present at over two-thirds of the reported incidents. Girls are most often harassed by fellow students, but 4 percent of the girls reported harassment by teachers, administrators, and other school staff.

*Id.* at 231.

necessarily exists between teachers and their students.<sup>112</sup> Furthermore, there is an increasing propensity for sexual harassment to occur between coaches and student athletes.<sup>113</sup> And, of particular and timely significance is the question of school liability for peer (student-to-student) sexual harassment. One must note that the United States Supreme Court only began to recognize that an implied right of action exists for students under Title IX over the past two decades.<sup>114</sup> More significantly, the Supreme Court has only very recently held that an implied right of action under Title IX can support a claim for money damages.<sup>115</sup> Ironically, the United States Supreme Court has imposed a much more stringent standard for school liability than was set forth in the Title VII workplace sexual harassment cases.<sup>116</sup> Indeed, after the Supreme Court's decision in *Gebser v. Lago Vista Independent School District*,<sup>117</sup> students found it difficult to prove supervisory liability for sexual harassment under Title IX.<sup>118</sup>

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<sup>112</sup> See *Gebser*, 524 U.S. at 297-98 (Stevens, J., dissenting) (noting that a teacher exerts even greater authority over young students than an employer/supervisor does over an employee).

<sup>113</sup> See Robin Finn, *Growth in Women's Sports Stirs Harassment Issue*, N.Y. TIMES, Mar. 7, 1999, § 1, at 1. "The coach-athlete relationship is based on trust." *Id.* "It's all about emotions, about trust and about the body, [and] when scholarships come into play, it's about money, too." *Id.* "When you put a male in a position of power where he can manipulate something of real meaning to an athlete, such as playing time or a scholarship, then add in the possibility of a young girl who may have a crush, you've got an extremely dangerous mix." *Id.*

<sup>114</sup> See *Cannon v. University of Chicago*, 441 U.S. 677, 689 (1979) (stating that "the Court of Appeals reached the wrong conclusion and that [Cannon] does have a statutory right to pursue her claim that respondents rejected her application on the basis of her sex"); see also *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 65 (1992) (recognizing that in *Cannon*, "the Court held that Title IX is enforceable through an implied right of action").

<sup>115</sup> *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 76 (holding that "a damages remedy is available for an action brought to enforce Title IX").

<sup>116</sup> See *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997), *rev. 'd*, 526 U.S. 629 (1999).

<sup>117</sup> 118 S. Ct. 1989 (1998).

<sup>118</sup> See Michael A. Zwibelman, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. CHI. L. REV. 1465, 1484 (1998); see also Diane Heckman, *On the Eve of Title IX's 25th Anniversary: Sex Discrimination in the Gym and Classroom*, 21 NOVA L. REV. 545, 551-52 (1997) [hereinafter Heckman, *25th Anniversary*].

As in a Title VII analysis, sexual harassment can form the basis of liability under Title IX for either *quid pro quo* or hostile environment sexual harassment.<sup>119</sup> *Quid pro quo* harassment occurs in the educational context when, for example, a teacher expressly conditions grades on the receipt of sexual favors or a coach grants or withholds benefits, such as scholarships, contingent on an athlete's willingness to submit to such demands.<sup>120</sup> Similarly, one student may extort sexual demands by threatening sabotage of another student's project, or divulging of unsavory information. Moreover, Title IX hostile learning environment sexual harassment, which is created by a teacher's harassment, is clearly actionable.<sup>121</sup> Additionally, claims of hostile learning environments caused by peer sexual harassment are of alarming frequency.

The country just recently celebrated the twenty-fifth anniversary of Title IX and while much ground has been gained in litigating these issues under the statute's mandates, it still remains an enigma in many ways.<sup>122</sup> President Clinton ushered in federal government activities commemorating the anniversary with a caveat to schools:

Every school and every educational program that receives federal assistance in the entire country must understand that complying with Title IX is not optional. It is the law and must be enforced . . . [W]e're here to celebrate the God-given talent of every woman and girl who has been benefited by it . . . . [T]itle IX has had a beneficial impact on every American citizen. If we've learned anything in the last twenty-five years since Title IX, it is that

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<sup>119</sup> See *Davis v. Monroe County Bd. Of Educ.*, 120 F.3d 1390, 1415 (11th Cir. 1997), *cert. granted*, 524 U.S. 980 (1998).

<sup>120</sup> See John T. Wolohan, *Sexual Harassment of Student Athletes and the Law: A Review of the Rights Afforded Students*, 5 SETON HALL J. SPORT L. 339, 342 (1995).

<sup>121</sup> See *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1293 (N.D. Cal. 1993) (holding that a hostile environment claim under Title IX is permitted).

<sup>122</sup> See generally Heckman, *25th Anniversary*, *supra* note 118, at 546.

expanding benefits and opportunities for any American helps the rest of us.<sup>123</sup>

However, to what extent can Title IX be enforced? The Office for Civil Rights [hereinafter "OCR"] in the U.S. Department of Education is the governmental entity responsible for enforcement and compliance with the mandates of Title IX.<sup>124</sup> A student may file a complaint of harassment with the OCR, which then results in an investigation of the school district or university.<sup>125</sup> If the OCR does find that discrimination exists, it will attempt to negotiate voluntary compliance with the educational entity, at the risk of that entity's loss of federal financial assistance for non-compliance.<sup>126</sup> The filing of a complaint via the OCR does not preclude the availability of a civil lawsuit and money damages under Title IX.<sup>127</sup> However, courts are still trying to define the contours of liability for an educational institution under Title IX, and to determine whether that standard should differ if the perpetrator of harassing conduct is an educational employee or another student.<sup>128</sup>

In *Cannon v. University of Chicago*,<sup>129</sup> the United States Supreme Court rendered its first decision addressing Title IX. *Cannon* involved a female plaintiff who claimed that she was denied admission to two medical schools because of her sex.<sup>130</sup>

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<sup>123</sup> Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 SETON HALL J. SPORT L. 391 (1997) [hereinafter Heckman, *Scoreboard*] (quoting William J. Clinton, White House Press Release, June 17, 1997).

<sup>124</sup> 34 C.F.R. §100 App. B (1999).

<sup>125</sup> 34 C.F.R. §106.8 (1999).

<sup>126</sup> Diane Heckman, *The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992-93: Defining the 'Equal Opportunity' Standard*, 1994 DET. C.L. REV. 953, 955 (1994) [hereinafter Heckman, *Explosion*]. "The OCR is responsible for providing technical assistance, investigating administrative complaints, initiating compliance reviews and referring cases to the Department of Justice." *Id.*

<sup>127</sup> *Franklin*, 503 U.S. at 75.

<sup>128</sup> *Davis v. Monroe County Bd. Of Educ.*, 119 S. Ct. 1661, 1670 (1999) (recognizing that "the scope of liability in private damages actions under Title IX is circumscribed by Pennhurst's requirement that funding recipients have notice of their potential liability").

<sup>129</sup> 441 U.S. 677 (1979).

<sup>130</sup> *Id.* at 680.

The Court engaged in a detailed analysis of the legislative history of the statute to conclude that Congress surely intended it to confer a private right of action for discrimination on the basis of sex.<sup>131</sup> The Court also looked at the objectives of Title IX and emphasized its goal of protecting citizens from discriminatory practices by avoiding support of such practices with federal funds.<sup>132</sup> The Court held that although Title IX is silent as to whether there exists a private right of action, nevertheless, there is an implied right of action to seek redress for a violation of Title IX.<sup>133</sup> Thus, the *Cannon* Court “opened a new door for the enforcement of Title IX.”<sup>134</sup>

It was not until the Court’s decision in *Franklin v. Gwinnett County Public Schools*<sup>135</sup> that Title IX began to bare its teeth. In that seminal Title IX case, which was a unanimous Supreme Court decision, money damages were made available to redress a teacher’s sexual harassment of a student and the school’s intentional failure to take remedial action.<sup>136</sup> In *Franklin*, a female high school student alleged that a teacher subjected her to continuous sexual harassment, including explicit sexual conversations, forcible kissing in the school parking lot, and even coercive intercourse in a school office.<sup>137</sup> Although school officials became aware of and investigated the misconduct, “teachers and administrators took no action to halt it and discouraged [the student] from pressing charges against [the teacher].”<sup>138</sup> The school dropped its investigation of the incidents

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<sup>131</sup> *Id.* at 699.

<sup>132</sup> *Id.* at 708-09 (citing *Cort v. Ash*, 422 U.S. 66 (1975)).

<sup>133</sup> *Id.* at 736.

<sup>134</sup> Meliti, *supra* note 3, at 224.

<sup>135</sup> 503 U.S. 60 (1992). *See also* Heckman, *Explosion*, *supra* note 126, at 954 (noting that *Franklin* was decided in 1992, the twentieth anniversary of the enactment of Title IX). Ms. Heckman further noted that the twentieth anniversary of Title IX was voted the third most important sports story of 1992 by a poll of New York Times sportswriters. *Id.*

<sup>136</sup> *Id.* at 75.

<sup>137</sup> *Id.* at 63. “Respondent Gwinnett County School District operates the high school and receives federal funds.” *Id.*

<sup>138</sup> *Id.* at 63-64.



of harassment when the teacher subsequently resigned.<sup>139</sup> Thereafter, the student filed charges with the OCR but was disappointed when, after finding that the Gwinnett school district had violated Title IX, the OCR dropped further inquiry upon the school district's promise to implement a grievance procedure.<sup>140</sup>

Upon bringing a civil action in federal district court under Title IX, the student/plaintiff in *Franklin* was once again discouraged when the action was dismissed on the ground that Title IX did not authorize an award of money damages.<sup>141</sup> The dismissal was later affirmed by the Eleventh Circuit, holding that while a private right of action exists under Title IX, an award of money damages could not be sustained.<sup>142</sup> The Eleventh Circuit justified its holding by noting that Title IX was patterned after Title VI to give sex the same protection as race, color or national origin,<sup>143</sup> and that past court decisions had denied an award of money damages to Title VI claims.<sup>144</sup> In addition, the Eleventh Circuit noted that, like Title VI, Title IX is Spending Clause legislation and, therefore, it could not allow a right of recovery of money damages where Congress had not explicitly provided for such relief.<sup>145</sup>

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<sup>139</sup> *Id.* at 64. Indeed, the resignation of defendant, Hill, was premised on the condition that the school district would drop all matters pending against him. *Id.*

<sup>140</sup> *Id.* at 65.

<sup>141</sup> *Id.* at 64.

<sup>142</sup> *Id.* at 65 (reasoning that without an express provision by Congress or direction from the Supreme Court, an action for monetary damages could not be sustained for an alleged intentional violation of Title IX).

<sup>143</sup> See *Cannon v. University of Chicago*, 441 U.S. 677 (1979). "Title IX was patterned after Title VI of the Civil Rights Act of 1964" and "the two statutes use identical language to describe the benefited class." *Id.* at 688 n.7 (stating that both statutes form a significant "part of the civil rights enforcement scheme" that Congress has enacted pursuant to its "obligation to enforce the Fourteenth Amendment by eliminating entirely . . . discrimination") (quoting 122 Cong. Rec. 31, 372 (1976) (remarks of Sen. Kennedy)).

<sup>144</sup> *Franklin*, 503 U.S. at 64. "Citing as binding precedent *Drayden v. Needville Independent School Dist.*, 642 F.2d 129 (CA5 1981), . . . the court concluded that Title VI did not support a claim for monetary damages." *Id.*

<sup>145</sup> *Id.* at 64-65. "Under such statutes, relief may frequently be limited to that which is equitable in nature, with the recipient of federal funds thus retaining the option of terminating such receipt in order to rid itself of an injunction." *Id.* at 65.

The United States Supreme Court reversed the lower courts' rulings, finding instead that there is a presumption of the availability of all remedies.<sup>146</sup> Furthermore, the Court stated that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."<sup>147</sup> The Court applied this principle to Title IX and concluded that money damages could be fully recovered.<sup>148</sup>

The Court explicitly disagreed with the Eleventh Circuit's denial of a compensatory award based on the limitations of Spending Clause legislation.<sup>149</sup> It pointed out that the whole idea of not allowing money damages, in cases of unintentional violations, is that the entity receiving federal funds lacks notice that it will be liable for a monetary award.<sup>150</sup> In *Franklin*, an intentional discrimination was alleged; therefore, there was no problem with notice.<sup>151</sup> Moreover, the Court applied the principles set forth in *Meritor* to determine that sexual harassment of a student falls within the purview of sexual discrimination under Title IX.<sup>152</sup> The Court stated without question that:

Title VII placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." We believe the same rule should apply when a teacher sexually harasses and abuses a student.

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<sup>146</sup> *Id.* at 66 (citing *Davis v. Passman*, 442 U.S. 228, 246-47 (1979), which held that the Court "presume[s] the availability of all appropriate remedies unless Congress has expressly indicated otherwise").

<sup>147</sup> *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). "From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court, although it did not always distinguish clearly between a right to bring suit and a remedy available under such a right." *Id.*

<sup>148</sup> *Id.* at 76.

<sup>149</sup> *Franklin*, 503 U.S. at 74-75.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 75.

Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.<sup>153</sup>

This was indeed a landmark decision for victims of sexual harassment, one that would make school administrators sit up and take notice. “No longer does a plaintiff have to tolerate sexual harassment by a teacher or coach. If the school fails to act, the plaintiff can now sue to collect compensatory damages for any deliberate violations of Title IX.”<sup>154</sup> The decision in *Franklin* brought about a noticeable increase in the number of Title IX lawsuits brought by students claiming sexual harassment by school employees and as witnessed in recent years, it served as a “catalyst for the enormous explosion of Title IX litigation.”<sup>155</sup> It has also paved the way for assessing school district liability for sexual harassment claims involving coaches and peers.<sup>156</sup>

However, in the years following *Franklin*, courts have applied conflicting standards in assessing a school’s liability for its employees’ actionable conduct.<sup>157</sup> Indeed, some courts have adopted standards that limit the amount of compensatory damages awarded under Title IX.<sup>158</sup> These cases are significant because they formed the basis upon which the United States Supreme Court justified a more stringent standard for school liability in *Gebser v.*

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<sup>153</sup> *Id.* at 75. (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

<sup>154</sup> Wolohan, *supra* note 120, at 353. “A plaintiff can win a sexual harassment suit if they can demonstrate that they were subjected to a hostile or abusive environment.” *Id.*

<sup>155</sup> Heckman, *Explosion*, *supra* note 126, at 1022.

<sup>156</sup> See *Doe v. Claiborne County, Tenn.*, 103 F.3d 495 (6th Cir. 1996); see also *Smith v. Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014 (7th Cir. 1997); *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996); *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997).

<sup>157</sup> Compare *Doe v. Claiborne County, Tenn.*, 103 F.3d 495, 514 (6th Cir. 1996) (determining Title IX sexual harassment liability by applying agency principles), with *Smith v. Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014, 1034 (7th Cir. 1997) (applying an actual notice standard for determining school liability in sexual harassment cases).

<sup>158</sup> See, e.g., *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996); *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997).

*Lago Vista Independent School District*.<sup>159</sup> For example, in *Canutillo Independent School District v. Leija*,<sup>160</sup> a second-grade student brought a Title IX action against the school district based on allegations of egregious sexual harassment by her physical education/health teacher.<sup>161</sup> A jury awarded the plaintiff compensatory damages in excess of a million dollars.<sup>162</sup> The Fifth Circuit reversed the jury's award of damages, claiming that recovery under Title IX requires actual notice of the harassment by a school district official.<sup>163</sup>

The Fifth Circuit narrowed its application of Title IX even further in the case of *Rosa H. v. San Elizario Independent School District*.<sup>164</sup> In *Rosa H.*, the mother of a fifteen year old female high school student brought a Title IX case of sexual harassment against the school district, claiming that her daughter and the school's karate teacher had an ongoing sexual relationship in violation of Title IX.<sup>165</sup> The Fifth Circuit once again reversed the plaintiff's damage award, holding that the school district liability could only be based on actual notice of threat of harm.<sup>166</sup> The court reasoned that the actual notice standard would better serve the settled principle that "Title IX generates liability only for intentional wrongs."<sup>167</sup>

The United States Supreme Court seemed to adopt this very restrictive interpretation of Title IX when it decided *Gebser v. Lago Vista Independent School District*.<sup>168</sup> The *Gebser* decision

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<sup>159</sup> 118 S. Ct. 1989 (1998) (concerning liability of educational institutions for sexual harassment of students by employees); see also *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223, 1224 (5th Cir. 1997).

<sup>160</sup> 101 F.3d 393 (5th Cir. 1996).

<sup>161</sup> *Id.* at 395.

<sup>162</sup> *Id.* at 396. To be exact, the jury awarded plaintiff \$1.4 million in compensatory damages. *Id.*

<sup>163</sup> *Id.* at 400.

<sup>164</sup> 106 F.3d 648 (5th Cir. 1997).

<sup>165</sup> *Id.* at 651. The Court found that the karate teacher "had sex with [the student] at his house on a regular basis in December, January, and February, often during the school day. When [the student] insisted that she would get in trouble for missing school, [the karate teacher] assured her that the school did not require her to attend so long as she was with him." *Id.* at 650.

<sup>166</sup> *Id.* at 648.

<sup>167</sup> *Id.* at 659-60.

<sup>168</sup> 118 S. Ct. 1989 (1998).

has met with much criticism since its resolution last term.<sup>169</sup> Some have argued that the Court's ruling in *Gebser* is inconsistent with the Supreme Court's previous interpretations of Title VII, Title IX, and Agency Law, reasoning that it is directly contrary to the public policy Congress intended, to wit, prohibiting sexual discrimination in federally funded educational programs.<sup>170</sup>

In *Gebser*, the plaintiff, Alida Starr Gebser, was the subject of improper sexual conduct by a Lago Vista School District teacher, Frank Waldrop.<sup>171</sup> Ms. Gebser first met Waldrop at a book discussion group when she was a thirteen-year-old, eighth-grade student.<sup>172</sup> During these sessions, "Waldrop often made sexually suggestive comments to the students."<sup>173</sup> Entering high school the following year, Ms. Gebser was assigned to one of Waldrop's classes.<sup>174</sup> Throughout that year and the next, Waldrop initiated sexual contact with Ms. Gebser, maintaining their liaison at all times off school property.<sup>175</sup> According to Ms. Gebser's testimony, she never complained to school officials, even though she knew that Waldrop was doing something wrong, because she did not want to lose him as her teacher.<sup>176</sup> During that time, the

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<sup>169</sup> See generally *Federal Statutes and Regulations - Civil Rights Acts*, 112 HARV. L. REV. 335 (1998) [hereinafter *Federal Statutes*]; Marley S. Weiss, *The Supreme Court 1997-1998 Labor and Employment Law Term (Part I): The Sexual Harassment Decisions*, 14 LAB. LAW 261 (1998); Michael A. Zwibelman, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. CHI. L. REV. 1465 (1998); Linda Greenhouse, *School Districts Given A Shield in Sex Harassment*, N.Y. TIMES, June 23, 1998, at A1.

<sup>170</sup> See *Federal Statutes*, *supra* note 169, at 335, 340. "By failing to apply agency principles in the Title IX context, the Court departed from its previous interpretations of Title IX, Title VII, and agency law and reached a result that will ill-serve Title IX's goal of protecting school children from discrimination." *Id.*

<sup>171</sup> *Gebser*, 118 S. Ct. at 1993. The Court noted that "Lago Vista received federal funds at all pertinent times." *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* "Their relationship continued through the summer and into the following school year and they often had intercourse during class time, although never on school property." *Id.*

<sup>176</sup> *Id.* (noting that Alida Gebser testified "that while she realized that Waldrop's conduct was improper, she was uncertain how to react and she wanted to continue having him as a teacher").

high school principal received unrelated complaints from parents of other students who alleged that he made offensive remarks in the classroom.<sup>177</sup> Without admitting guilt, Waldrop nevertheless apologized for any offense taken and promised it would never happen again.<sup>178</sup> The principal did nothing more than warn Waldrop at that time, and never reported the confrontation to the district's Title IX coordinator.<sup>179</sup> A couple of months later, a police officer found Waldrop and Gebser having sexual intercourse and subsequently arrested Waldrop.<sup>180</sup> Thereafter, the school district fired Waldrop and the Texas Education Agency revoked his teaching license.<sup>181</sup> It is noteworthy to point out that at all relevant times, the Lago Vista School District did not have an anti-harassment policy, nor did it have an effective grievance procedure in place to address situations such as this.

In a suit brought by Gebser and her mother for compensatory and punitive damages under Title IX, 42 U.S.C. Section 1983, and various state law claims, the district court granted summary judgment in favor of Lago Vista, reasoning that the school could not be held to a violation of a policy of discrimination, if indeed, it had no notice of the discriminatory conduct.<sup>182</sup> The Fifth Circuit, relying on *Canutillo* and *Rosa H.*, affirmed and the United States Supreme Court granted certiorari.<sup>183</sup>

In a 5-4 decision, with Justice O'Connor writing the majority opinion, the Supreme Court rejected the application of vicarious liability principles which would have rendered the Lago Vista

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<sup>177</sup> *Gebser*, 118 S. Ct. at 1993.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* "The principal . . . advised Waldrop to be careful about his classroom comments and told the school guidance counselor about the meeting, but he did not report the parents' complaint to Lago Vista's superintendent, who was the district's Title IX coordinator." *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 1993-94. The court reasoned that "the statute 'was enacted to counter policies of discrimination . . . in federally funded education programs,' and that 'only if school administrators have some type of notice of the gender discrimination and fail to respond in good faith can the discrimination be interpreted as a policy of the school district.'" *Id.* at 1994 (citing App. to Pet. for Cert. 6a-7a).

<sup>183</sup> See *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223, 1226 (5th Cir. 1997).

school system liable under Title IX.<sup>184</sup> Indeed, the Court refused to apply the “knew or should have known” standard that had gained acceptance under Title VII employer liability cases.<sup>185</sup> Instead, the Court viewed Title IX as a contract between the school district and the federal government whereby the school district promises compliance with the mandates of the statute as a condition on receipt of federal funds.<sup>186</sup> The Court expressly held that:

[a] damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf has actual knowledge of discrimination in the recipient’s programs and fails adequately to respond . . . . [For school districts to be liable], the response must be deliberate indifference to discrimination.<sup>187</sup>

Petitioner Gebser argued that because the Court in *Franklin* had compared teacher-student harassment with that prohibited by Title VII in the supervisor-employee context, agency principles should similarly be applied in Title IX cases.<sup>188</sup> Gebser suggested

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<sup>184</sup> *Gebser*, 118 S. Ct. at 2000.

<sup>185</sup> *See id.* at 1995-96.

<sup>186</sup> *See id.* at 1997. In this regard, Justice O’Connor likened Title IX to Title VI as follows:

The statute was modeled after Title VI . . . which is parallel to Title IX except that it prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs. . . . The two statutes operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.

*Id.*

<sup>187</sup> *Id.* at 1999. “The premise, in other words, is an official decision by the recipient not to remedy the violation.” *Id.*

<sup>188</sup> *Id.* at 1995. Petitioners relied on the following passage in *Franklin* to support their argument:

Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and “when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that

alternatively that the principles of respondeat superior or, at a minimum, constructive notice were standards that would allow a money damages recovery.<sup>189</sup> The Court rejected this argument finding that the intent of Congress would be obviated if they allowed a money damages recovery against a school district using principles of respondeat superior or constructive notice of a teacher's sexual harassment.<sup>190</sup> Justice O'Connor pointed out that the Court's willingness to apply agency principles in the Title VII context was premised on the language of Title VII itself, which expressly prohibits discrimination in the workplace as against an "employer."<sup>191</sup> Title VII further defines "employer" to include "any agent," a reference found lacking in Title IX. Indeed, because Title IX does not define an educational institution as an "agent," it "does not expressly call for application of agency principles."<sup>192</sup>

To further distinguish Title VII and Title IX, the Court made clear that Title VII expressly provides for a private right of action for individuals whose rights have been violated, while under Title IX, a private right of action is purely a construction of the courts.<sup>193</sup> Moreover, Title VII explicitly awards relief in the form of monetary damages while Title IX has no such legislative expression. Justice O'Connor reasoned that because Congress did not specifically define the scope of available remedies under Title IX, and because an implied private right of action exists, the Court has the power to determine what remedy is appropriate under Title

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supervisor discriminate[s] on the basis of sex." We believe the same rule should apply when a teacher sexually harasses and abuses a student.

*Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 (1992) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

<sup>189</sup> *Id.* at 1995.

<sup>190</sup> *Id.* at 1997 (stating that "it would frustrate the purposes of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of respondeat superior or constructive notice, i.e., without actual notice to a school district official").

<sup>191</sup> *Gebser*, 118 S. Ct. at 1996.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* "With respect to Title IX, however, the private right of action is judicially implied." *Id.* See also *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).



IX.<sup>194</sup> To find a remedial scheme that fits within the parameters of the statute, the Court examined the statute, taking care not to frustrate its congressional purposes.<sup>195</sup> In so doing, Justice O'Connor remarked: "[I]t does not appear that Congress contemplated unlimited recovery in damages against a funding recipient where the recipient is unaware of discrimination in its programs."<sup>196</sup>

The majority indicated other differences between Title VII and Title IX, explicit in the statutory language. Title VII asserts an "outright prohibition" against discrimination, whereas Title IX promises to protect individuals against such practices as a condition on receipt of federal moneys.<sup>197</sup> In addition, Title IX expressly confers upon administrative agencies that are responsible for disbursing funds to educational institutions the authority to strictly enforce its mandates.<sup>198</sup> Thus, agencies have the power to terminate such funding; however, they can only do so after they have advised the recipient of its non-compliance, and allowed ample opportunity for the recipient to remedy the discrimination.<sup>199</sup> Therefore, the entire enforcement scheme is premised on "actual notice to officials of the funding recipient."<sup>200</sup> Such notice assures that educational funding will not be diverted from beneficial uses, especially when the recipient is unaware of discrimination inherent in its programs.<sup>201</sup>

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<sup>194</sup> *Id.* (stating that "[b]ecause the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute").

<sup>195</sup> *Id.* at 1997.

<sup>196</sup> *Id.* at 1997. "Applying those principles here, we conclude that it would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of respondeat superior or constructive notice, i.e. without actual notice to a school district official." *Id.* See also *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (C.A.5 1997). "When the school board accepted federal funds, it agreed not to discriminate on the basis of sex. We think it unlikely that it further agreed to suffer liability whenever its employees discriminate on the basis of sex." *Id.* at 654.

<sup>197</sup> *Id.*

<sup>198</sup> *Gebser*, 118 S. Ct. at 1998.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 1999.

In applying the majority's new standard to the facts in *Gebser*, the Court noted that while the Lago Vista School District may have had notice of Waldrop's inappropriate language in class, such knowledge was insufficient to put an appropriate school official on notice of the more egregious conduct complained of therein.<sup>202</sup> The majority made clear that an "appropriate person" under the statute's remedial scheme is an official who, at the very least, has the authority to take corrective action to end the discrimination."<sup>203</sup> Therefore, Waldrop was not the appropriate person to effect remediation and his knowledge of his own wrongdoing was irrelevant to the analysis.<sup>204</sup> Accordingly, the Court affirmed summary judgment for the school district, noting that the school district did not have actual notice of Waldrop's conduct.<sup>205</sup> Indeed, when school officials finally became aware of Waldrop's malfeasance, the school district immediately terminated his employment, thus ending the discrimination.<sup>205</sup> Furthermore, the Court did not equate the school district's absence of grievance procedures with a finding of deliberate indifference.<sup>207</sup>

Justice Stevens' dissent is particularly noteworthy because of its strong language and vehement disagreement with the majority.<sup>209</sup> Justice Stevens concluded that the majority's newly devised standard is antithetical to established precedent and ill-serving of congressional intent under Title IX.<sup>209</sup> He argued that Congress' acquiescence in the Court's previous interpretations of Title IX in *Cannon* and *Franklin* is indicative of its approval of monetary damages for victims of a teacher's sexual harassment.<sup>210</sup> Justice Stevens further contended that the Court had previously construed

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<sup>202</sup> *Id.* at 2000. "Where a school district's liability rests on actual notice principles, however, the knowledge of the wrongdoer himself is not pertinent to the analysis." *Id.*

<sup>203</sup> *Gebser*, 118 S. Ct. at 1999.

<sup>204</sup> *Id.* at 2000.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* (stating "the failure to promulgate a grievance procedure does not itself constitute 'discrimination' under Title IX.").

<sup>208</sup> *Id.* at 2001 (Stevens, J., dissenting) (stating that the majority is not being faithful to precedents or to their duty to interpret congressional commands).

<sup>209</sup> *Gebser*, 118 S. Ct. at 2004.

<sup>210</sup> *Id.*

Title IX expansively, so as to give it “a sweep as broad as its language.”<sup>211</sup> Moreover, he argued that the use of passive verbs in Title IX is indicative of Congress’ intent to give it an even broader reading than Title VII because it focuses on the victim rather than on the wrongdoer.<sup>212</sup>

In his dissent, Justice Stevens postulated that Waldrop’s position as a secondary school teacher allowed him to use, and indeed misuse, authority and control over young students.<sup>213</sup> He asserted that such a situation is the typical example of abuse that could only occur as a result of the agency relationship and authority that a school district vests in its teachers.<sup>214</sup> Thus, in contradistinction to the majority’s view, Justice Stevens concluded that the Lago Vista School District would be liable under principles of agency law for harassment perpetrated by Waldrop specifically because “he was aided in accomplishing the tort by the existence of the agency relation.”<sup>215</sup>

Justice Stevens also convincingly argued public policy in his dissent, noting that the majority’s heightened standard under Title IX would create a disincentive for school districts to deal with abusive behavior, enabling schools to “insulate themselves from knowledge about this sort of conduct . . . [and] claim immunity from damages liability.”<sup>216</sup> His obvious disagreement and dissatisfaction with the majority’s opinion is indeed evident in his concluding remarks which state:

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<sup>211</sup> *Id.* at 2002 (Stevens, J., dissenting) (quoting *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982)) (further citations omitted).

<sup>212</sup> *Id.* (Stevens, J., dissenting) (citing *Smith v. Metro. Sch. Dist. Perry Township*, 128 F.3d 1014, 1047 (7th Cir. 1997)).

<sup>213</sup> *Id.* at 2004 (Stevens, J., dissenting). “His gross misuse of that authority allowed him to abuse his young student’s trust.” *Id.*

<sup>214</sup> *Id.* at 2003-04 (stating that “[t]his case presents a paradigmatic example of a tort that was made possible, that was effected, and that was repeated over a prolonged period because of the powerful influence that Waldrop had over Gebser by reason of the authority that his employer, the school district, had delegated to him”) (Stevens, J., dissenting).

<sup>215</sup> *Id.* at 2003 (Stevens, J., dissenting).

<sup>216</sup> *Id.* at 2004 (Stevens, J., dissenting). *See also* Meliti, *supra* note 3, at 239. “The articulation of an ‘actual notice’ creates a comfort zone where principals, and other school officials, need not thoroughly investigate the conduct of teachers when informed of inappropriate conduct.” *Id.*

As a matter of policy, the Court ranks protection of the school district's purse above the protection of immature high school students that [Title IX] would provide. Because those students are members of the class for whose special benefit Congress enacted Title IX, that policy choice is not faithful to the intent of the policy making branch of our Government.<sup>217</sup>

Interestingly, economics may have played a role in the majority's opinion. In a brief filed on behalf of the Lago Vista School District, the National School Boards Association warned the Court that any standard other than an actual notice standard would have a "devastating financial impact on the nation's public schools."<sup>218</sup> It emphasized that jury awards in harassment cases could easily exceed one million dollars, whereas many schools receive considerably less amounts of federal money.<sup>219</sup>

The *Gebser* opinion has been the subject of quite a bit of criticism, both in the public realm and in academia. A spokesperson for the National Women's Law Center commented that the *Gebser* decision would "make the job of eliminating sexual harassment in schools more difficult."<sup>220</sup> The group had pointed out in its brief in *Gebser* that the logical result of a standard requiring that the school district have actual notice is that the school district would most often avoid liability due to the fact that most victimized students are reluctant to report teacher harassment.<sup>221</sup> Legal commentators have noted stark inconsistencies in that the Court "appears willing to hold a company liable for the welfare of its adult employees whereas the

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<sup>217</sup> *Id.* at 2007 (Stevens, J., dissenting).

<sup>218</sup> See Greenhouse, *supra* note 169, at A14.

<sup>219</sup> See *id.* In this case, the Lago Vista School District received \$126,000 a year in federal funding. *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* (noting that "because many victims of sexual harassment by teachers felt isolated and afraid to report it, a liability standard that depended on official knowledge would effectively immunize school districts much of the time").

Court will not hold a school liable for the welfare of its minor students.”<sup>222</sup> Another scholarly writing astutely points out that:

The Supreme Court’s actual knowledge plus deliberate indifference test for institutional liability under Title IX will make it extremely difficult for plaintiffs to meet their burden because sexual offenders often ‘rely on the silence of their victims.’ In other words, the secret and embarrassing nature of sexual harassment and abuse might make it unlikely that anyone other than the offender and the victim will have actual knowledge of the occurrences in question.<sup>223</sup>

#### V. PEER SEXUAL HARASSMENT: CAN SCHOOLS BE HELD LIABLE FOR THE HARASSMENT OF ONE STUDENT BY ANOTHER?

Today, education is perhaps the most important function of state and local governments . . . [i]t is required in the performance of our most basic public responsibilities . . . [i]t is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values . . . [i]t is doubtful that any child may reasonably be expected to succeed in life if . . . denied the opportunity of an education. Such an opportunity . . . is a right, which must be made available to all on equal terms.<sup>224</sup>

These memorable words from the landmark decision of *Brown v. Board of Education*<sup>225</sup> clearly indicate and proclaim to the country the inexorable right of our children to equal opportunities in education. Title IX has had significant impact in advancing equality of opportunity by prohibiting discrimination on the basis

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<sup>222</sup> Meliti, *supra* note 3, at 238.

<sup>223</sup> Zwibelman, *supra* note 169, at 1485.

<sup>224</sup> *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

<sup>225</sup> 347 U.S. 483 (1954).

of sex in educational institutions that receive federal funds. But, what happens when a student is impeded in gaining the benefits of that education by the acts of another student? To what extent will a school district be held liable for conduct that is clearly sexual harassment when the actor is not one hired by the school district, but one to whom the school district owes a similar duty to benefit by education?<sup>226</sup>

The United States Supreme Court, in *Davis v. Monroe County Board of Education*, recently addressed these difficult issues.<sup>227</sup> Indeed, such questions become more vexatious because “[a]s everyone who has gone to junior high knows, adolescent boys sometimes harass girls.”<sup>228</sup> But, what everyone might not know is that sometimes persistent taunts and lewd behavior by students do rise to the level of sexual harassment that is legally proscribed. In such instances of contumacious student-to-student harassment, as in the *Davis* case, the nation’s Court has now decided that schools will bear the burden of liability in certain circumstances. Such is the “new frontier of sexual harassment law.”<sup>229</sup>

In *Davis*, a mother sued under Title IX on behalf of her daughter, LaShonda Davis, alleging sexual harassment by another student.<sup>230</sup> Davis claimed that over the course of five months, LaShonda was harassed by a fellow fifth-grader, a boy, who made lewd comments and actions that caused the young girl much distraction and distress in class.<sup>231</sup> LaShonda complained, both to her mother and to school officials, but the teacher and the principal made light of the boy’s conduct, and made no attempts to remedy the situation.<sup>232</sup>

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<sup>226</sup> See also Kay P. Kindred, *When Equal Opportunity Meets Freedom of Expression: Student-on-Student Sexual Harassment and the First Amendment in School*, 75 N. DAK. L. REV. 205 (1999). “[S]chool administrators must seek to strike a balance between the need to maintain order and the obligation to respect the right of students to freedom of expression.” *Id.* at 240.

<sup>227</sup> 119 S. Ct. 1661 (1999).

<sup>228</sup> David G. Savage, *Will Court Teach Schools A Lesson?*, 85-JAN A.B.A. J. 38, 38 (Jan. 1999).

<sup>229</sup> *Id.*

<sup>230</sup> *Davis v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 364 (M.D.Ga. 1994).

<sup>231</sup> Petitioner’s Brief at 3, *Davis v. Monroe County Bd. of Educ.*, 1998 WL 792418 (U.S. 1998) (No. 97-843).

<sup>232</sup> *Id.*

After enduring months of repeated sexual harassment, during which time the school never disciplined the harasser, LaShonda's grades, once A's and B's, fell to below average, and she claimed that her emotional well-being was also being compromised.<sup>233</sup> When LaShonda approached the principal for help, she was asked "why she was the only one complaining," and when Mrs. Davis contacted the principal, she was told that "he guess[ed he would] have to threaten [the boy] a little bit harder."<sup>234</sup> With no other avenue of help available and no school policy or procedures on sexual harassment to assist her, Davis brought suit under Title IX against the school board.<sup>235</sup>

The district court dismissed the complaint deciding that "[t]he sexually harassing behavior of a fellow fifth grader is not part of a school program or activity,"<sup>236</sup> and thus, the school district could not be held liable under Title IX. Then a divided panel of the Eleventh Circuit reversed the district court's decision, holding that Title IX "encompasses a cause of action when a school district fails to address and remedy a hostile environment created by a student's sexual harassment of which it knew or should have known."<sup>237</sup> The Eleventh Circuit, sitting en banc, then vacated the panel's decision and held that the Davis complaint "fail[ed] to state a claim under Title IX because Congress gave no clear notice to schools and teachers that they . . . would accept responsibility for remedying student-student sexual harassment when they chose to accept federal financial assistance under Title IX."<sup>238</sup>

In justifying the court's decision, Judge Tjoflat began by noting that Title IX is simply not applicable to this case.<sup>239</sup> He argued that a school district is faced with a predicament of choosing between

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<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Davis v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 367 (M.D.Ga. 1994).

<sup>237</sup> Petitioner's Brief at 4, *Davis* (No. 97-843).

<sup>238</sup> *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1406 (11th Cir. 1997) (reasoning that "[i]mposing liability of the sort envisioned by [Davis] could induce school boards to simply reject federal funding—in contravention of the will of Congress").

<sup>239</sup> *Id.* at 1401 (noting that "nothing in the language or history of Title IX suggests that Title IX imposes liability for student-student sexual harassment").

lawsuits, one from the victim and one from the alleged harasser. Because a school district's only means of sufficiently disciplining a student harasser may be to suspend or expel, it may also face liability under Fourteenth Amendment principles because that student may claim a property interest in his or her education that cannot be deprived without due process of law.<sup>240</sup> Furthermore, Judge Tjoflat recognized that expansion of Title IX liability in this context would equate to staggering litigation costs.<sup>241</sup> He based this contention on a study that showed that sixty-five percent of school students in secondary education were victims of student-to-student harassment. Judge Tjoflat further argued that school districts, faced with these escalating costs of litigation, may choose not to receive federal funds specifically to escape the risk of Title IX liability.<sup>242</sup> Based on the aforementioned reasons, the Eleventh Circuit denied *Davis* an action against the school board.<sup>243</sup>

In a recent opinion by Justice O'Connor that may have far-reaching consequences, the United States Supreme Court disagreed with the Eleventh Circuit in *Davis*.<sup>244</sup> The Court directly addressed the issue of "whether and under what circumstances, a recipient of federal educational funds can be liable in a private damages action arising from student-on-student sexual harassment."<sup>245</sup> In a five to four decision, the Court reversed the Eleventh Circuit's ruling, finding instead that a private damages action is available in cases of student-on-student sexual harassment where a funding recipient is deliberately indifferent to known claims of sexual harassment, and where the harassing conduct is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."<sup>246</sup> Justice O'Connor followed the Court's previous actual notice plus deliberate indifference standard articulated in *Gebser* to

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<sup>240</sup> *Id.* at 1402.

<sup>241</sup> *Id.* at 1404. See also Savage, *supra* note 228, at 38. "Holding schools liable for such harassment could generate 7.8 million lawsuits." *Id.*

<sup>242</sup> See *id.* at 1405.

<sup>243</sup> *Id.* at 1406.

<sup>244</sup> 119 S. Ct. 1661 (1999).

<sup>245</sup> *Id.* at 1668.

<sup>246</sup> *Id.* at 1675.



find that Davis had an actionable claim.<sup>247</sup> The dissent, on the other hand, criticized the majority for its “inability to provide any workable definition of actionable peer harassment”<sup>248</sup> and focused instead on the “potentially crushing financial liability for student conduct that is not prohibited in clear terms by Title IX.”<sup>249</sup>

After *Gebser* it seemed incontrovertible that the Court would allow liability for a school district for the misconduct of third parties. However, Justice O’Connor made clear in *Davis* that it is the school district’s failure to act against known incidents of student-on-student harassment that effectively deprives the student victim of the educational benefits protected by Title IX.<sup>250</sup> She further reasoned that since Title IX was enacted by Congress pursuant to its spending clause power, a funding recipient accepts the risk of liability for its failure to comply with the mandates of federal legislation, much like in a contract.<sup>251</sup> Moreover, “subject[ing] students to discrimination” via deliberate indifference to misconduct constitutes a violation of Title IX.<sup>252</sup> Thus, such liability does not arise from agency or negligence principles, but rather from “the district itself intentionally act[ing] in clear violation of Title IX by remaining deliberately indifferent to acts of . . . harassment of which it had actual knowledge.”<sup>253</sup>

Can direct liability be imposed on school districts when the harassing conduct is carried out by a student rather than by a teacher over whom the district has control in hiring and firing? Indeed, as the dissent pointed out, “a public school does not control its students in the way it controls its teachers or those with

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<sup>247</sup> *Id.* at 1674-75.

<sup>248</sup> *Id.* at 1687 (Kennedy, J., dissenting).

<sup>249</sup> *Id.* at 1685 (Kennedy, J., dissenting).

<sup>250</sup> *Davis*, 119 S. Ct. at 1670. “Here, petitioner attempts to hold the Board liable for its own decision to remain idle in the face of known student-on-student harassment in its schools.” *Id.*

<sup>251</sup> *Id.* “When Congress acts pursuant to its spending power, it generates legislation much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.” *Id.*

<sup>252</sup> *Id.* at 1671.

<sup>253</sup> *Id.*

whom it contracts.”<sup>254</sup> Justice O’Connor limited a school’s damages liability to “circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs.”<sup>255</sup> This control test when applied to the facts in *Davis* revealed that the school board had significant control over the student harasser, control that has been described as “custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.”<sup>256</sup> Furthermore, the context wherein the acts of harassment took place was “under” an “operation” of the school district: the classroom. The student harasser in this case, G.F., exacted his sexual remarks and lewd behavior “during school hours and on school grounds.”<sup>257</sup> Thus, the school board’s control in this case, exhibited in its potential for disciplinary authority over the harasser and the situation in which the harassment took place, subjected LaShonda Davis to discrimination for which it may be held directly liable.

The majority was careful to make clear that Title IX does not require certain prescribed remedial action for peer sexual harassment. Indeed, the Court was quick to point out that schools would retain flexibility in dealing with student harassers, as long as the response is not “clearly unreasonable.”<sup>258</sup> Thus, administrators are not forced to take particular remedial action like expulsion. Rather, they must take disciplinary action that will effectively ensure equal access to an institution’s resources and opportunities, a fine line when the harasser and the victim are both students. The dissent focused on the problems that school administrators will

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<sup>254</sup> *Id.* at 1681. “Most public schools do not screen or select students, and their power to discipline students is far from unfettered.” *Id.* (Kennedy, J., dissenting).

<sup>255</sup> *Davis*, 119 S. Ct. at 1672.

<sup>256</sup> *Id.* at 1673 (quoting *Vernonia School Dist. 471 v. Acton*, 515 U.S. 646, 655 (1995)).

<sup>257</sup> *Id.* at 1672.

<sup>258</sup> *Id.* at 1674. “Title IX imposes no such requirements. On the contrary, the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable.” *Id.*

face in balancing one's fundamental right to education with another's right not to be subjected to harassment.<sup>259</sup>

Yet when does harassment rise to the level of conduct "so severe, pervasive, and objectively offensive . . . that [it] so undermines and detracts from the victims' educational experience"?<sup>260</sup> Justice O'Connor attempted to answer this question by looking at a "constellation of surrounding circumstances, expectations, and relationships,"<sup>261</sup> and warned courts to be aware of the differences between the workplace and the classroom. Indeed, school children are still learning how to socialize and often do not display appropriate behavior in certain circumstances. Schoolyard taunting and teasing is commonplace in every community and social status across the county and it is not unusual for a student's testing of profanity and insults to include gender-specific comments. Thus, the majority made clear that "[d]amages are not available for simple acts of teasing and name-calling among school children . . . even where these comments target differences in gender."<sup>262</sup> The dissent, however, forecasts a myriad of problems for schools who must now ensure that "thousands of immature students conform their conduct to acceptable norms" of behavior.<sup>263</sup> Indeed, in a day and age where our nation's schools are already overwhelmed by guns in the schools and school violence,<sup>264</sup> how can schools be expected to also police the "normal teasing and jostling of adolescence?"<sup>265</sup>

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<sup>259</sup> *Id.* at 1682 (Kennedy, J., dissenting). "In at least some States, moreover, there is a continuing duty on schools to educate even students who are suspended or expelled." *Id.*

<sup>260</sup> *Davis*, 119 S. Ct. at 1675.

<sup>261</sup> *Id.* Such circumstances include but are not limited to "the ages of the harasser and the victim and the number of individuals involved." *Id.*

<sup>262</sup> *Id.* at 1675.

<sup>263</sup> *Id.* at 1682. "School districts cannot exercise the same measure of control over thousands of students that they do over a few hundred employees." *Id.* (Kennedy, J., dissenting).

<sup>264</sup> Chris Riemenschneider, *Is it Only Rock n' Roll? Debate Continues Over Role of Music in Columbine Shootings*, *Tulsa World*, June 4, 1999, at 3 (discussing whether music motivated Eric Harris and Dylan Klebold to shoot "to death 12 classmates and a teacher at Columbine High School in Littleton, Colo., and then [kill] themselves"); see also *DA Dave Thomas on the Littleton Tragedy*, PROSECUTOR, July-Aug. 1999, at 25.

<sup>265</sup> *Davis*, 119 S. Ct. at 1682 (Kennedy, J., dissenting).

Furthermore, the dissent points out that schools lack the resources to deal with such problems and that what resources are available should be used for educational programs.<sup>266</sup>

However, the majority in *Davis* suggests that harassment so severe that it denies its victim access to educational benefits is worthy of a private damages action. Indeed, Justice O'Connor applied the standard to the facts in *Davis* to conclude that the school board may be held liable for its knowledge and deliberate indifference to the harassment. Here, the misconduct persisted for months and included not only sexual taunts but also suggestive behavior and inappropriate touching. The conduct took place on school grounds while school was in session and was made known to the school board on numerous occasions. Furthermore, LaShonda's grades declined over the course of the harassment, and while not direct evidence of denial of educational benefits it does provide "necessary evidence of a potential link between her education and G.F.'s misconduct."<sup>267</sup> According to the majority, the Monroe County school district's failure to respond to this instance of student-on-student harassment can support a private suit by petitioner for money damages. Thus, the United States Supreme Court has concluded that schools can be made to pay for the consequences of peer sexual harassment.

Notwithstanding the United States Supreme Court's decision in *Davis*, the Sixth Circuit Court of Appeals in a subsequent decision, *Soper v. Hoben*,<sup>268</sup> refused to hold a school district and school board liable for money damages.<sup>269</sup> Although the Sixth Circuit purported to analyze the case in light of the decision in *Davis*, it nonetheless affirmed the lower court's dismissal of the action.<sup>270</sup> Interestingly, the Court was indifferent to the fact that oral arguments of the parties were made prior to the decision in

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<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 1676.

<sup>268</sup> No. 98-1550, 1999 U.S. App. LEXIS 28396 (6th Cir. Nov. 2, 1999).

<sup>269</sup> *Soper v. Hoben*, No. 98-1550, 1999 U.S. App. LEXIS 28396, at \*26 (6th Cir. Nov. 2, 1999).

<sup>270</sup> *Id.* at \*24. The Court recognized the recent Supreme Court decision establishing that Title IX may support a claim for student-on-student sexual harassment when the plaintiff can make the appropriate showing. *Id.*

*Davis*.<sup>271</sup> In what seems to be a total disregard of the *Davis* Court's reasoning in formulating the test, the Sixth Circuit affirmed the dismissal of this action despite the teacher's actual knowledge of the harassment and the apparent deliberate indifference to the student harassment by the school.<sup>272</sup>

In *Soper*, an action was commenced by the mother of a female special education student based on alleged harassment, sexual molestation and rape by three classmates.<sup>273</sup> The court found that since there was sufficient evidence to support the assertion that the child was raped, harassed and sexually abused, the first prong of the *Davis* test had been satisfied.<sup>274</sup> However, the court took issue with the second and third portions of the *Davis* test.<sup>275</sup> The court found that the defendants in *Soper* did not have actual knowledge of the harassment until after it had allegedly occurred and that they took immediate action to correct the situation upon notice.<sup>276</sup>

Although the majority in *Soper* held the *Davis* standard had not been met, Judge Moore dissenting in part, found that there was a

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<sup>271</sup> *Id.* at \*24. The court noted that oral argument was completed prior to the *Davis* decision, however there was no re-argument. *Id.*

<sup>272</sup> *Id.* at \*32 (Moore, J., dissenting).

<sup>273</sup> *Id.* at \*2. The alleged harassment, sexual molestation and rape occurred both inside of the school and on a school bus. The sexual molestation by two male students allegedly took place in the back of the classroom while the teacher was in the hallway as well as on the school bus. *Id.* at \*6. It is alleged that the third male student forced the plaintiff to hide in the back room of the classroom while the teacher locked the room for lunchtime and thereafter raped her. *Id.* at \*7.

<sup>274</sup> *Id.* at \*24. The court found that the harassment endured by the female student was "severe, pervasive, and objectively offensive sexual harassment that could deprive Renee of access to the educational opportunities provided by her school." *Id.* at 25.

<sup>275</sup> *Id.* at \*24. The second portion of the *Davis* test requires the funding recipient to have had actual knowledge of the sexual harassment. The third prong of the *Davis* test requires the funding recipient to have been deliberately indifferent to the harassment.

<sup>276</sup> *Id.* at \*25. After receiving notice of the incidents, the defendants contacted the proper authorities, initiated internal investigations, placed windows on the classroom doors and placed an aide in the classroom where the incidents took place. Further, the defendants offered to increase the supervision of the plaintiff while providing her with an escort while in school. Lastly, upon notice of the criminal charges, the defendants expelled the student allegedly responsible. *Id.* at \*26.

question as to whether the defendants had actual knowledge of the harassment and therefore the action should not have been dismissed on summary judgment.<sup>277</sup> Judge Moore noted that the majority had analyzed the claim based on the final instance of harassment, the alleged rape, and point out that Soper had made previous complaints to the defendants' regarding the student ultimately responsible for the rape.<sup>278</sup> He argued that despite the plaintiff's concerns, and the defendants assurances of safety, no affirmative action was taken by the defendants to stop the previous acts of harassment nor was any action taken to prevent future acts of harassment.<sup>279</sup> Accordingly, in light of the recent *Davis* decision, Judge Moore would not have dismissed the action on summary judgment, but rather would have allowed the plaintiffs the opportunity to make their case before a jury.<sup>280</sup>

## VI. CONCLUSION

The legal concept of sexual harassment has evolved in our nation's courts in recent years to deal with both pervasive and insidious forms of discrimination based on sex. Suits against employers and federally funded educational institutions have increased as society struggles to define what is acceptable versus actionable conduct, and to determine who will be accountable for such behavior. The contours of employer and institutional liability were mapped out by the United States Supreme Court last term as the Court allowed a private right of action under Title VII and Title IX, respectively. Furthermore, the Court has recently recognized

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<sup>277</sup> *Id.* at \*32 (Moore, J., dissenting).

<sup>278</sup> *Id.* (Moore, J., dissenting). Although the final act of harassment considered by the majority was discovered in October, 1994, Mrs. Soper had first expressed concerns about this particular student to the defendants in 1993. *Id.* at \*3. Mrs. Soper expressed similar concerns in August, 1994, when she became aware of the student's abusive family background and requested that her daughter not be left alone with this student based on this information in addition to the known incident in October, 1993. *Id.* at \*5.

<sup>279</sup> *Id.* at \*33. (Moore, J., dissenting) (stating that the previous incidents had been known to some of the defendants and therefore the defendant did have actual notice; however, there was no special attention given to the situation). *Id.* at \*33.

<sup>280</sup> *Id.* at \*33 (Moore, J., dissenting).

the potential for school board liability for student-on-student sexual harassment, despite a heightened standard of liability that includes deliberate indifference to known peer sexual harassment by school officials and conduct that is so severe and pervasive as to deprive the student victim of the benefits of education.<sup>281</sup>

The nation's highest court has seemingly recognized that sexual harassment affects society as a whole. Society pays for the loss of productivity in the workplace and for the academic downfall of our nation's youth who are prevented from receiving the education that is guaranteed them due to the misconduct of a teacher, coach or fellow student. The Supreme Court has addressed the problem and placed the burden of policing the unwelcome conduct on the employers who are in the best position to deal with the harasser in the workplace and school officials who can properly discipline conduct that passes the line from schoolyard taunts to harassment.<sup>282</sup>

*Laurette D. Mulry\**

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<sup>281</sup> See *Davis v. Monroe County Bd. Of Educ.*, 119 S. Ct. 1161 (1999).

<sup>282</sup> See generally Kay P. Kindred, *When Equal Opportunity Meets Freedom of Expression: Student-on-Student Sexual Harassment and the First Amendment in School*, 75 N. DAK. L. REV. 205 (1999). Harassment becomes actionable when it "has the purpose or effect of unreasonably interfering with a person's work or academic performance or creating an intimidating, hostile, or offensive working, learning, or social environment." *Id.* at 209 (citing Equal Employment Opportunity Commission (EEOC) Guidelines. 29 C.F.R. 1604.11(a) (1998)).

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