

Case Review: K.T. v. Culver-Stockton College

Michael Henry, J.D., Lead Investigator, The NCHERM Group, LLC

K.T. v. Culver-Stockton College, No. 16-3617 (8th Cir. 8/1/17)

Background

Culver-Stockton College (CSC) is a small, private, liberal arts college in Missouri with approximately 1,000 students. The plaintiff, identified as “K.T.,” was a 16-year-old junior in high school who had been invited to campus by CSC as a potential recruit for the women’s soccer team. “While there, K.T. went to an on-campus fraternity party, where she says she was served alcohol before being physically and sexually assaulted by a fraternity member. The alleged assailant was a student at [CSC].” K.T. reported the incident to CSC officials “the same weekend of the party,” but aside from canceling a scheduled conference with K.T. and her parents, CSC did not investigate the incident and took no further disciplinary or responsive action. K.T. sued CSC under Title IX.

Applying the standard established by the U.S. Supreme Court in the *Davis*^[1] case, K.T. contended that CSC acted with “deliberate indifference” by failing to (1) take reasonable preventative measures such as supervising K.T. during the visit and (2) investigate and provide treatment for K.T. once the College learned of the incident. CSC moved to dismiss K.T.’s lawsuit, “arguing that K.T. failed to state a claim because she was not a Culver-Stockton student when the alleged assault occurred.” CSC quoted language from the *Davis* decision, specifically that a school is not liable under Title IX “unless its deliberate indifference subject[s] *its students* to harassment” (emphasis added), arguing that no federal court had extended the *Davis* holding to include claims made by non-students, which is true.

The district court agreed with CSC and, in granting its [motion to dismiss](#) (Aug. 11, 2016), asserted that K.T. could not bring a Title IX claim against CSC because she was not a student at the College (i.e., she did not have the requisite “standing” to bring a claim under Title IX). In considering whether non-student plaintiffs had standing under Title IX to sue schools that they did not actually attend, a question the courts had not previously addressed head-on, the district court looked to both Congress’s legislative intent in enacting the law and to the Supreme Court’s decision acknowledging Title IX’s implied private right of action for money damages. The district court ultimately concluded that such an interpretation could not have been the intention, noting that such an interpretation would open the door for any person invited to visit a college campus to sue that institution under Title IX for student-on-student harassment.

The district court went on to say, however, that even if she could bring such a claim, she nevertheless failed to plausibly allege facts satisfying the requirements set out in *Gebser*^[2] and *Davis*, namely that (1) an appropriate person at the College had actual knowledge of previous incidents of similar harassment so as to alert it to a substantial risk of further abuse, or (2) that the College’s response to K.T.’s allegations was deliberately indifferent and caused her to undergo harassment, made her vulnerable to it, or subjected her

to further discrimination. K.T. appealed the district court's decision to the 8th Circuit Court of Appeals.

Decision by the 8th Circuit Court of Appeals (8/1/17)

Notably, the Court of Appeals specifically chose not to address the question of whether a non-student has standing to bring a Title IX lawsuit against an institution in which they are not enrolled. Instead, the court assumed, for the sake of argument, that K.T. did have standing and based their decision on the sufficiency of her pleadings. In other words, the court analyzed whether K.T. had alleged facts sufficient to meet the elements for liability under *Gebser* and *Davis*: (1) actual notice to a school official with the "authority to institute corrective measures," (2) that the alleged discrimination was sufficiently "severe, pervasive, and objectively offensive," such that the behavior has "the systemic effect of denying the victim equal access to an educational program or activity," and (3) that the school responded with "deliberate indifference." Surprisingly, the court's reasoning, detailed below, represents a notable departure from previous interpretations of the *Gebser* and *Davis* analysis for liability under Title IX.

Actual Notice

K.T. argued that she had satisfied the actual notice requirement because she reported the incident to CSC "the same weekend of the party," within 1-2 days of its occurrence. Citing *Williams*^[3], K.T. argued that a plaintiff satisfies the actual knowledge element simply by notifying the school that she was subjected to a sexual assault. The court said, "Even in *Williams*—which K.T. misreads as favoring her case—the Eleventh Circuit [...] found that school officials had actual knowledge of discrimination in part because they recruited the student assailant despite having 'preexisting knowledge' of the student's previous sexual misconduct," adding that "K.T.'s complaint lacks any assertion that Culver-Stockton knew—prior to the alleged assault on K.T.—that individuals in the College's soccer recruiting program faced a risk of sexual harassment." The court concluded that "the actual notice element requires schools to have more than after-the-fact notice of a single instance in which the plaintiff experienced sexual assault."

Severe, Pervasive, and Objectively Offensive Discrimination

Interestingly (or perhaps alarmingly), the court read the *Davis* test literally, rather than inserting the almost universally understood "or" between "severe" and "pervasive" (i.e., "severe, [or] pervasive, and objectively offensive"). Quoting the *Davis* decision, the court notes that, "Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment." Consequently, the court determined that

because “K.T.’s complaint is limited to an allegation of a single sexual assault,” it ultimately fails because it “does not plausibly allege pervasive discrimination as required to state a peer harassment claim.”

Deliberate Indifference

Referencing *Davis*, the court asserted that a school “may not be liable for damages unless its deliberate indifference subject[s] its students to harassment.” The court explained that, in other words, the deliberate indifference must, at a minimum, “cause [students] to undergo harassment or make them liable or vulnerable to it.” K.T. alleged that CSC was deliberately indifferent because they “failed to adopt practices to prevent sexual assault,” “fail[ed] to investigate” the incident, and failed to “offer medical services to K.T. after it received reports of the alleged incident.” K.T. argued that “as a direct and proximate result” of these failures, she “sustained substantial mental and emotional distress.” In response, the court said, “At most, these allegations link the College’s inaction with emotional trauma K.T. claims she experienced following the assault,” but fail to demonstrate a “causal nexus” between CSC’s inaction and the fact that K.T. experienced sexual harassment. The court ultimately concluded that, “while K.T. was dissatisfied with Culver-Stockton’s response, based on the allegations in the complaint the response cannot be characterized as deliberate indifference *that caused the assault.*” (emphasis original)

Ruling

The court affirmed the district court’s decision, stating, “K.T.’s complaint lacks factual content allowing us to conclude that either the alleged misconduct or Culver-Stockton’s response to K.T.’s allegations had the required ‘systemic effect’ such that K.T. was denied equal access to educational opportunities provided by Culver-Stockton. [...] The complaint therefore failed to state a claim of peer harassment under Title IX.”

Significance of the Case

It is interesting that, in finding for the college, the court here chose to reinterpret the *Davis* decision rather than to pursue what is perhaps lower-hanging fruit in the form of a non-student alleging a deprivation or impairment of educational opportunities at an institution she does not attend.

As noted above, this case is noteworthy (or perhaps concerning) because it demonstrates a court’s notable departure from a seemingly well-established understanding of the *Davis* decision’s “severe, pervasive, and objectively offensive” standard, particularly as it pertains to a singular instance of sexual assault. This also creates friction with current guidance from the Department of Education’s Office for Civil Rights (OCR), which uses the “severe, persistent, or pervasive” standard for allegations of hostile environment sexual harassment and retains broad oversight and enforcement authority subject to that interpretation. OCR even goes a step further in clearing up any ambiguity, explaining, “The more severe the conduct, the

less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe. For instance, a single instance of rape is sufficiently severe to create a hostile environment.” The language addressing this from the *Davis* decision, however, is distinctly more ambiguous: “A single instance of severe one-on-one peer harassment could, in theory, be said to have such a systemic effect, but it is unlikely that Congress would have thought so.”

This case also highlights the distinction between pre-incident indifference and post-incident indifference. Referencing *Williams*, the court differentiates K.T.’s situation from those where an institution was aware of prior incidents or circumstances that would make a current reporting party’s situation somewhat foreseeable, in that a school’s inaction given its knowledge of those prior circumstances could constitute deliberate indifference. Thus, if K.T. had alleged (and could demonstrate) that CSC was aware of prior incidents involving the same fraternity, the same respondent, or similar incidents involving prospective student-athletes visiting for recruitment purposes, the court’s analysis would likely have looked very different. In the terms used by the court, the school’s pre-incident indifference could arguably “cause [students] to undergo harassment or make them liable or vulnerable to it.” Here, the court analyzed the school’s purported post-incident indifference in how it responded to K.T.’s report of a singular instance of sexual assault, ultimately finding that a single instance of sexual assault was not sufficiently “severe *and* pervasive” such that it had “the systemic effect of denying [K.T.] equal access to an educational program or activity.” It would be interesting to see how the court would have analyzed the systemic effect one instance would have created at CSC had K.T. been a student. Would the court have seen it the same way if CSC had refused to investigate the allegation of its own student? It is also worth noting that while a sexual assault is a severe harm, it is unlikely to have a pervasive effect within an educational program in which the student is not enrolled. It should also be noted that whether Title IX applies or not, many colleges would investigate such an allegation about one of their own students, to be sure that student does not represent an ongoing risk of harm to others.

^[1] *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999)

² *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998)

³ *Williams v. Board of Regents of the University System of Georgia*, 441 F.3d 1287, 1298 (11th Cir. 2006), vacated, 477 F.3d 1282 (11th Cir. 2007)