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# An Examination of the Legal Framework between Title VII and Title IX Sexual Harassment Claims in Athletics and Sport Settings: Emerging Challenges for Athletics Personnel and Sport Managers

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## INTRODUCTION

Sexual harassment is a continuing concern for employers and administrators in the workplace and in educational institutions. When Congress enacted Title VII of the Civil Rights Act in 1964, one goal of this legislation was to eradicate sex discrimination in the workplace (42 U.S.C. § 2000e-2(a)(1)). Later, in 1972, Congress further acted to prevent sex discrimination in educational settings when it passed Title IX of the Education Amendments (20 U.S.C. § 1681 *et seq.*, 2006). The concept of sexual harassment was adopted under Title VII from theories put forth by scholars in the late 1970s based upon documentation by journalists from that period (Farley, 1978; MacKinnon, 1979). By the end of the 1970s, courts had incorporated the concept of sexual harassment into Title VII in *quid pro quo* situations, which occurs when a subordinate's employment opportunities are conditioned on a sexual relationship with a superior (*Barnes v. Costle*, 1977; *Miller v. Bank of America*, 1979). In their reluctance to get involved in

settling disputes between men and women, these early cases only recognized sexual harassment in the narrowly defined *quid pro quo* area.

By the early 1980s, courts began accepting the hostile environment theory (*Henson v. City of Dundee,* 1982). By the mid 1980s the U.S. Supreme Court expanded Title VII liability to encompass two forms of workplace sexual harassment: *quid pro quo* and hostile environment and adopted agency principles to determine employer liability (*Meritor Savings Bank, FSB v. Vinson*, 1986). This categorization of sexual harassment is of particular importance since an employer is strictly liable for *quid pro quo* sexual harassment. Whereas for hostile environment liability an employer may be vicariously liable for sexual harassment by a supervisor, but it has affirmative defenses available to it (*Faragher v. City of Boca Raton*, 1998).

For an athletic department operating in an educational environment, athletic administrators must be cognizant of the legal mandates under both Title VII and Title IX. The parallel between Title VII sexual harassment liability and Title IX is an important one. While both *quid pro quo* and hostile environment sexual harassment claims are permitted under Title IX (*Franklin v. Gwinnett County Public Schools,* 1992), the standard for imposing liability on the educational institution is different than that used to impose liability on an employer under Title VII. In analyzing whether a person was subjected to actionable sexual harassment under Title IX, courts have looked to precedent under Title VII. Federal courts have followed this precedent because the Supreme Court in two Title IX cases, *Franklin v. Gwinnett County Public Schools* (1992) and *Davis v. Monroe County Board of Education* (1999) cited to its Title VII jurisprudence.

This paper will explore the differences between Title VII and Title IX sexual harassment claims and discuss several recent cases under Title IX that illuminate the limitations of Title IX as an effective and adequate agent for addressing sexual harassment in an academic environment involving athletes. The first section will briefly summarize current literature addressing the prevalence of sexual harassment in the United States. The next section will provide an overview of sexual harassment claims under both Title VII and Title IX with a particular emphasis on the differences between the claims and the rationale behind those differences. The final section will examine recent cases involving student athletes raising Title IX claims and discuss the conflicting outcomes in those cases and the limitations of the remedies available under Title IX to combat sexual harassment in athletic settings.

## SEXUAL HARASSMENT IN AMERICA

Sexual harassment continues to be a persistent problem in the workplace, in educational settings, and in athletic settings. Large scale surveys of working women suggest that one of every two women will be sexually harassed at some point in their academic or working life experiences (Fitzgerald, 1993). Others agree that many females have or will experience some form of sexual harassment during their academic or working life (Volkwein, Schnell, Sherwood, and Livezey, 1997). Further, available research may under-estimate the extent of the problem (Volkwein et al.), and a lack of research exists on training interventions and organizational response patterns to dealing with sexual harassment situations (Fitzgerald & Schullman, 1993).

The number of sexual harassment complaints filed with the EEOC rose from 10,532 complaints in 1992 to its highest level of 15,889 complaints in 1997. Beginning in 2002, the number of complaints declined slightly from 14,396 in 2002 to 12,025 reported complaints in 2006. The 12,025 complaints resulted in the resolution of 11,936 cases providing monetary benefits for the charging parties of $48.8 million (U.S. Equal Employment Opportunity Commission, n.d.). This figure does not include monetary benefits recovered through private litigation. The $11.6 million dollar judgment awarded to Browne Sanders against the CEO of Cablevision and Madison Square Gardens for sexual harassment committed by the President of the New York Knicks, Isiah Thomas, is just one recent example of potential money judgments obtained through private litigation (Dorf, 2007). Thus, the impact of sexual harassment in the workplace is still pronounced both in terms of the number and frequency of sexual harassment complaints, and the financial burden it places on entities that fail to prevent such activities.

Sexual harassment in educational environments continues to be a significant issue facing educators and administrators. It is generally hypothesized that incidents of sexual harassment on college campuses are under-reported (Shepela & Levesque, 1998). Riggs, Murrell, and Cutting reported in 1993 that the frequency with which sexual harassment complaints occur was on the rise in higher education. Another study in 1993, by the American Association of University Women Education Foundation (AAUW), concluded that 85% of girls and 76% of boys were harassed in their schools, of which the majority was peer harassment. However, 25% of girls and 10% of boys said the harasser was a teacher, coach, or other school employee. Troubling, too, was the fact that more than half of the students surveyed did not know whether their school had a sexual harassment policy (AAUW

Educational Foundation, 1993). The AAUW repeated this study in 2001 and discovered that once again, eight in ten students experience sexual harassment in schools. Yet, on the positive side, 70% of students knew their schools had a sexual harassment policy and 33% noted that the policies were distributed (AAUW Educational Foundation, 2001). Another study of 525 undergraduates found that 40% of women and 28.7% of men had been sexually harassed by a college professor or instructor (Kalof, Eby, Matheson, Kroska, 2001).

A recent study by the AAUW on sexual harassment found that it is prevalent on college campuses. The AAUW's Educational Foundation (2006) and Harris Interactive conducted a nationally representative survey of undergraduate college students in spring 2005. The report is part of AAUW's continuing work to address the problem of sexual harassment in education. The survey found that nearly two-thirds (62 percent) of college students experience some form of sexual harassment and two-thirds have a friend who has been sexually harassed. Despite those percentages, less than ten percent tell a college employee about the experience and far fewer file a formal complaint with a Title IX officer. Further, in federally funded schools and universities the AAUW (2000) found there is a consistent failure to address student complaints and concerns about sex discrimination and, by doing so, widely ignore federal requirements according to a study released by the AAUW Legal Advocacy Fund. The research entitled, *A License for Bias,* identifies important trends and issues in Title IX non-sports-related complaints including the finding in 1993-97 sexual harassment was the most common complaint accounting for 63% of the 425 cases analyzed (AAUW Educational Foundation, 2000). The findings ultimately reveal that the federal mandate under Title IX that requires every federally funded educational institution to establish grievance procedures for addressing sex discrimination is widely ignored.

In 1979, legal feminist scholar Catherine MacKinnon's (1979) study of sexual harassment of women in the workplace made a profound impact on the manner in which Title VII could be used to address this form of sex discrimination in the work place. The following passage, in particular, sets forth the conditions faced by working women at the time (when the phrases sexual compliance or demands are used, consider it in the context of *quid quo pro* or hostile environment harassment).

> Far from being simply individual and personal, sexual harassment is integral and crucial to the social context in which women, as a group are allocated a disproportionately small share of wealth, power, and advantages compared with men as a group. . . .In this context, the

> problem of sexual harassment is revealed as both a manifestation and perpetuation of the socially disadvantaged status of women. A man in a position of authority, . . . uses his hierarchically superordinate role to place conditions of sexual compliance on his female subordinate's access to the benefits of her job or educational program. The necessity of dealing with the sexual pressures that are, by virtue of the man's position and actions, bound up with the woman's desired goal burdens and restricts her access to the means of survival, security, and achievement. In a society in which women are at a comparative disadvantage to men, the negative impact that sexual harassment has on the maintenance or improvement of women's position contributes to their socially inferior condition. . . . Indeed, in a dominantly heterosexual society, in which it is men who overwhelmingly decide both men's and women's employment and educational destinies, male subordinates are generally treated very differently. Men tend to go about their business . . .without having sexual demands routinely being made on them and without having to invest care and energy continually to attempt to avoid or manage such demands (MacKinnon, 1979, p. 235-36).

While much of this article focuses on cases and discussion of sexual harassment as male on female form of harassment, sexual harassment of males by females does occur as does same-sex sexual harassment. One research study found that working men experience potentially sexually harassing behaviors at least as often as they do from women, however men in the study reported far fewer negative reactions to these situations (Waldo, et. al, 1998). However, most of the legal cases focus on the male harasser to the female victim, which is the focus of this paper.

## SEXUAL HARASSMENT IN ATHLETIC AND SPORT SETTINGS

The problem as described based upon national statistics is most certainly more pronounced in athletics due to a number of factors related to the male dominated nature of the athletic environment as a whole and the close bonds that form between coaches and female athletes.

The environment of athletics continues to be male dominated. Gutek and Morash (1982) concluded the prevalence of sexual harassment is greatest in workplaces where women are under represented. MacKinnon's (1979) description of the work environment may be analogous to the environment of the college athletic department in which women, as a group, are routinely

allocated a disproportionately smaller share of wealth, power, and advantages compared with men in that group. The majority of athletes, coaches and administrators currently and historically are male. Since athletic departments generally have more male employees than female, men are more likely to have access to organizational and social power that may be used for purposes of sexual harassment. Further, for males in the locker room or male dominated athletic department, a culture may exist that rejects homosexual or feminine stereotypes and forces on males "hypermasculinity" in which women are often seen as objects of sexual conquest to gain status in the male peer group (Messner, 1992, pp. 97-102). Collegiate athletes may have an elevated social status on campus that carries with it power that could be abused and used to sexually harass peers. Further, the role of sport in the socialization process for boys and men may contribute to creating a team environment that by its nature may encourage peer to peer sexual harassment. Further, in the college environment, an AAUW sexual harassment study entitled *Drawing the Line*, found that a good majority of the college campus harassers saw hostile environment sexual harassment as joking, not discrimination (Hill & Silva, 2005). The feeling of the victims, however, was that this behavior was real, hurtful, discriminatory, and not a joke.

It is from this pool of male athletes that we often find our pool of coaches. These coaches may then perpetuate the above attitudes among young male athletes. Individuals from this pool of male athletes may also go on to coach female athletes. Current statistics show that in 1970, two years prior to the enactment of Title IX, 90% of women's sport teams were coached by female coaches, and today 57.2% of female collegiate athletes are coached by male coaches (Acosta & Carpenter, 2008). Meanwhile, the percentage of women coaching men's teams is somewhere between 2-3% (Yiamouyiannis, 2007; Acosta & Carpenter, 2008). Might male coaches rely on their own locker room experience when coaching women? Thus, young women may be exposed to situations where their coaches are accustomed to a sexually charged environment that exhibits negative sexual stereotypes for women. It is not unrealistic to ask how coaches who have already created or experienced an environment where women are sexual objects can then turn around and mentor female athletes as coaches. In sum, the male collegiate team environment may be an environment that reinforces sexually harassing behavior while simultaneously rejecting any behavior that goes against acceptable male social norms—anything that might be viewed as feminine or homosexual.

Also, the environment may be one in which sexual banter and other discussions may flow more freely in same-sex situations than in mixed sex

situations. That may explain some of the conflict that female athletes feel when a teammate accuses a coach of sexual harassment. For example, consider the reporting of the *Jennings v. UNC* case involving soccer coach Anson Dorrance. Much of the reporting touched upon the environment that Dorrance created so that he could be very close to his athletes (Hays, 2007). According to his letter of apology, because of the close relationship he created, his sexual banter and other comments were meant in jest or in a teasing nature, not as sexually harassing (*Jennings v. University of North Carolina,* 2007). However, what may be taken in jest by one female athlete, may be seen as hostile by another when we are dealing with a male coach-female athlete situation.

Female athletes may be reluctant to report sexual harassment by a coach because of the close bonds between coaches and athletes (Volkwein et al., 1997). Often, when a coach is winning or an athlete is performing better despite behaviors that may cross a line, athletes may be reluctant to challenge the coach due to the coach's success. Additionally, the importance of a positive relationship between the coach and the athlete is emphasized by the university and often associated with the success of the team. For example, female athletes will ignore or tolerate harassing behaviors or environments for the good of the team, permitting their individual interests to become of secondary concern (Lenskyj, 1992). Also, since the coach is an authority figure whose authority extends to many areas of an athlete's private life, athletes are particularly vulnerable targets. For example, athletes frequently surrender control and decision making authority to their coaches over medical treatment, nutrition, social activities, sexual behavior, alcohol use, and academic decisions (Lenskyj). Sexual harassment is more prevalent in organizations with hierarchical structures, which is commonly the case in athletic departments and on sports teams. Since sexual harassment is a form of discrimination based upon power and the abuse of that power, hierarchical structures with the coach as an authority figure make harassment more likely to occur (Masteralexis, 1995). Lastly, in most sports there will be significant hands-on instruction, close physical contact, and more intimate physical and psychological interactions between coaches and athletes than would be experienced in a traditional work or educational setting. All of the above attributes intensify the potential for harassment, inappropriate touching, and abuse in athletics, and between coaches and student athletes.

## OVERVIEW OF TITLE VII AND TITLE IX

As discussed above, sexual harassment of one student by another student and by a teacher/coach of a student is still a pervasive problem in the United States. Thus, in the sport industry, those sport managers working in any school or collegiate setting must be familiar with the legal mandate under both Title VII relative to employees and Title IX regarding student to student sexual harassment and teacher/coach to student sexual harassment. The claims under Title VII and Title IX have significant differences relating to (1) the elements of the underlying cause of action; (2) the rationale for imposing liability; and (3) notice and intentionality requirements. These differences in many instances limit Title IX's remedies for sexual harassment, particularly in an athletic setting.

### Title VII – Liability for Sex Discrimination in the Workplace

"Title VII of the Civil Rights Act of 1964 makes it 'an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin' . . . "(*Meritor Savings Bank, FSB v. Vinson*, 1986, p. 63). Case decisions have carefully identified the necessary elements of a sexual harassment claim under Title VII and the standards for imposing liability on the employer for the sexual harassment conduct of an employee. The elements of the claim and the standard for imposing liability upon the employer are closely paralleled in Title IX judicial decisions, but with important distinctions. Thus, this paper will first review the elements and standards for imposing liability under Title VII in order to draw a better comparison in the discussion section to follow.

*Elements of the claim.*

Title VII does not proscribe all conduct of a sexual nature in the workplace and is not to be construed as a civility code. To meet the statutory definition of sexual harassment, the conduct must be unwelcome sexual conduct that is explicitly or implicitly a term or condition of employment, or when submission or rejection of such conduct is used for employment decisions, or when such conduct unreasonably interferes with work performance or environment ("Guidelines on Discrimination," 2008). In *Meritor Savings Bank, FSB v. Vinson* (1986), the Supreme Court recognized

sexual harassment as a form of sex discrimination prohibited under Title VII and acknowledged both *quid pro quo* and hostile environment sexual harassment as violations of Title VII. *Quid pro quo* sexual harassment occurs when an individual's employment (hiring, firing, demotion, promotion, etc.) is conditioned on submission to or denial of some sexual demand or solicitation from their superior (29 C.F.R. 1604.11(a), 2008).. "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex" under Title VII (*Meritor*, 1986, p. 64). Thus, *quid pro quo* sexual harassment can only occur between a supervisor (or a person in a position of authority) and a subordinate employee. In other words the person must be in a position to take adverse employment action (i.e., discriminate) against the employee.

Hostile environment sexual harassment can be committed by either a supervisor or a co-worker and consists of "severe or pervasive" verbal or physical conduct which "alter[s] the conditions of [the victim's] employment and create[s] an abusive working environment'". (Meritor, p. 67 (*quoting Henson v. Dundee*, 1982, pg. 904). In *Meritor* (1986) the Court distinguished between the two concepts, stating that while both are bases for claims, a hostile environment claim requires that the plaintiff show the harassment to be severe and pervasive. The severe or pervasive question requires both an objective and subjective analysis (*Harris v. Forklift Systems, Inc.*,1993). The standard adopted in *Harris* requires that the employee must actually perceive the conduct as abusive and hostile (subjective); and the conduct must be sufficiently severe and pervasive that a reasonable employee in similar circumstances would view the conduct as abusive and creating a hostile work environment (objective). In *Burlington Industries, Inc. v. Ellerth* (1998) and *Faragher v. City of Boca Raton* (1998), the Court further acknowledged hostile environment sexual harassment as a violation of Title VII. Even though, the Supreme Court has only mildly endorsed the *quid pro quo* and hostile environment labels (*Burlington Industries v. Ellerth*, 1998, p. 751 & 766), a typical sexual harassment analysis will first determine which type of sexual harassment is alleged to have occurred, and second, the extent of liability of the employer for the alleged harassment.

*Standards for imposing liability.*

Without providing much explanation, the *Meritor* (1986) Court held that agency principles controlled employer liability. As Title VII sexual harassment law has evolved, employers are held strictly liable for instances of

quid pro quo sexual harassment. The Court in *Burlington Industries v. Ellerth* (1998) and *Faragher v. City of Boca Raton* (1998) held that employers can and should be liable for the employee-supervisors unlawful actions.

> At the outset, we can identify a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of the harassment: when a supervisor takes a tangible employment action against the subordinate. Every Federal Court of Appeals to have considered the question has found vicarious liability when a discriminatory act results in a tangible employment action (*Ellerth*, p. 760; *See also*, *Meritor*, 1986, pp. 70-71).

The Court extended vicarious liability to the employer for the unlawful action of the employee using the "aided by the agency relationship" standard. Under agency law principles, an employer is liable for an employee's unlawful acts when the court finds that the employee used his position as an agent of his employer to effect a "tangible employment action" on a subordinate employee. When a supervisor makes a tangible employment decision, there is no doubt that the agency relationship enabled the infliction of the injury (*Ellerth*, p. 761-762). Without this tangible act, the employer can raise an affirmative defense to liability.

Thus, in the case of hostile environment sexual harassment (absent a tangible employment action), agency law will not impose strict liability on the employer. An employer may affirmatively defend allegations of hostile environment sexual harassment if the employer can show "two necessary elements: (a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise" (*Ellerth*, 1998, p. 765).

In summary, pursuant to Title VII, employers are vicariously liable for acts of their employees which result in sexual harassment. The scope of that liability varies depending upon whether the harassment involves a tangible employment action by a supervisor in which case liability is absolute, or whether the harassment results from a hostile environment created by a supervisor, co-worker, or both in which case liability is imposed unless the employer can prove an affirmative defense. Title VII is applicable to athletic departments in educational institutions and protects athletic department employees from unlawful sexual harassment.

Sexual harassment is further prohibited in educational institutions, including athletic departments, based upon the mandate of Title IX. The Title IX sexual harassment claim is both similar and distinctly different from a Title VII sexual harassment claim. The Title IX sexual harassment claim will be explored more fully in the following section.

Title IX: Liability for Sex Discrimination in Education

Congress enacted Title IX of the Education Amendments of 1972 to prohibit sex discrimination in educational programs and activities. Unlike Title VII, Title IX did not include a private cause of action for a victim of sex discrimination nor did it identify the scope of available remedies for violations of the act. Instead, Title IX assigned enforcement responsibility to the Department of Education (formerly Health, Education and Welfare (HEW)). Within the Department of Education, the Office for Civil Rights (OCR) is responsible for enforcing the statutory mandate of Title IX. Both the Supreme Court and OCR acknowledge Title IX's administrative enforcement scheme is incremental in nature and requires OCR to notify schools of potential Title IX violations and seek voluntary compliance before pursuing termination of federal funding or other enforcement tools (Revised Sexual Harassment Guidance, 2001, p. iii). The emphasis of administrative enforcement is to obtain compliance, not to remedy past discrimination. Absent a private cause of action for a victim of discrimination under Title IX, the victim is not entitled to any damages or other remedy for the discrimination, nor can the victim demand compliance directly from the educational institution. The sole remedy for the victim is to file a complaint with the OCR in hopes of eliminating the discrimination. However, not long after Title IX's enactment, victims of discrimination began to pursue private suits against educational institutions for violations of Title IX. Thus it was left for the courts to determine the scope of Title IX's remedial scheme and in 1979 the Supreme Court held that an implied private right of action existed under Title IX (*Cannon v. Univ. of Chicago*, 1979).

The Supreme Court also found sexual harassment to be a form of discrimination on the basis of sex under Title IX. In *Franklin v. Gwinnett County Public Schools* (1992) the Court quoted from its opinion in *Meritor* (1986) that "when a supervisor sexually harasses a subordinate because of that subordinate's sex, that supervisor discriminates on the basis of sex" and held that "we believe the same rule should apply when a teacher sexually harasses and abuses a student" (p. 75). In *Franklin,* a high school student was allegedly

sexually abused by a teacher. Teachers and administrators at the high school knew of the harassment and took no action. The Court viewed that inaction as deliberate and, thus, held that money damages were available as a remedy for intentional discrimination in private actions brought pursuant to Title IX (*Franklin,* p. 75-76). However, *Franklin* did not define the contours of a school district's liability. Even more recently, in 2005, the Court held claims for retaliation against those who report or complain about Title IX violations are also available under the implied private right of action created in *Cannon* (*Jackson v. Birmingham Board of Education*, 2005).

*Elements of the claim.*

To establish a Title IX claim on the basis of teacher/coach on student sexual harassment, a plaintiff must demonstrate the following: (1) she was a student at an educational institution receiving federal funds; (2) she was subjected to harassment based on her sex; (3) the harassment was sufficiently severe or pervasive to create a hostile or abusive environment in an educational program or activity; and (4) there is a basis for imputing liability to the institution (*Gebser v. Lago Vista Independent School District*, 1998). The Supreme Court identified one additional element required in peer sexual harassment in order to impose liability on an educational institution. The institution must have had substantial control over the student and the environment in which the harassment occurred (*Davis v. Monroe County Board of Education*, 1999).

While Title VII and Title IX contain many similarities, some critical differences exist as well. It is these differences that hinder Title IX's effectiveness to eliminate discrimination in the form of sexual harassment in educational institutions. For example, despite the similarities between Title VII and Title IX as to the types and availability of claims, the standard for imposing liability on an educational institution for Title IX violations is quite different and the rationale for imposing liability under Title IX does not follow the same pattern as exists for Title VII.

*Scope of liability for educational institutions.*

Neither Title IX nor Title VII impose individual liability on the person who actually commits the sexual harassment. Title VII imposes liability on employers and Title IX imposes liability upon educational institutions. Both statutes are directed at the institutions, not the individual. There are only three Supreme Court decisions involving Title IX sexual harassment and those

decisions leave many unanswered questions regarding the scope of liability for educational institutions and the appropriate standards to use to impose liability (*Franklin v. Gwinnett County Public Schools,* 1992; *Gebser v. Lago Vista Independent School District*, 1998; and *Davis v. Monroe County Board of Education*, 1999). For example, it is not clear whether the standards for imposing liability upon an educational institution vary depending upon whether the sexual harassment is committed by a teacher or another student. The 2001 Revised Sexual Harassment Guidance published by the OCR replaces the 1997 policy guidance and attempts to explain the parameters of institutional liability for harassment by school employees, other students, or third parties. The Preamble to the policy guidance reminds that the standards imposed by Title IX and the Title IX regulations are distinguished from the standards created in *Gebser* and *Davis* which are applicable to private litigation for money damages (Revised Sexual Harassment Guidance, 2001, p. i).

Even if we were to analogize to Title VII, the dichotomy between *quid pro quo* sexual harassment involving supervisors (which would seem analogous to the teacher/student or coach/student relationships) and hostile environment sexual harassment (which would seem more analogous to a peer sexual harassment situation) has not been extended to Title IX situations. Instead, the four basic elements outlined previously are applied equally to both coach/student sexual harassment and to peer sexual harassment.

The "sufficiently severe and pervasive" component of the Title IX sexual harassment claim is articulated similarly to a hostile environment claim under Title VII. However, it is generally acknowledged that both types of sexual harassment, *quid pro quo* and hostile environment, are actionable under Title IX, but yet the Title IX cause of action does not fully integrate concepts associated with *quid pro quo* sexual harassment from Title VII. It leaves open the question about whether a single isolated incident of *quid pro quo* sexual harassment by a coach and his student athlete would be sufficiently severe and pervasive to create a hostile environment. A single incident of *quid pro quo* sexual harassment in the workplace is recoverable under Title VII and the employer's liability for such conduct is absolute (*Burlington Industries v. Ellerth*, 1998; *Faragher v. City of Boca Raton*, 1998).

That same standard for imposing liability does not appear to hold in Title IX cases. Instead, under Title IX, the Court has held that to meet the sufficiently severe and pervasive standard under Title IX, the sexual harassment must deprive the student of access to educational opportunities or benefits. The Court in *Davis v. Monroe County Bd. of Educ.* (1999) held that a

victim of peer sexual harassment has been deprived of an educational opportunity if the sexual harassment (1) results in the physical exclusion of the victim from an educational program or activity; (2) so undermines and detracts from the victim's educational experience as to effectively deny her equal access to institutions resources and opportunities; or (3) has a concrete negative effect on the victim's ability to participate in the educational program or activity. Thus, it seems clear that even an outright exclusion (i.e. dismissal from a team for refusing to submit to sexual advances of a coach) which would be comparable to a tangible employment action under Title VII carrying with it strict liability, is merely evidence of one element of a hostile environment claim under Title IX and would not be sufficient to impose liability unless the school failed to remove the discrimination once a school district official had actual notice of the harassment (*Gebser v. Lago Vista Independent School Dist.*, 1998).

*Rationale for imputing liability – Gebser and vicarious liability.*

Another significant difference between Title VII claims and those pursuant to Title IX relates to the basis for imposing liability, the "actual notice and deliberate indifference" component of a Title IX claim. As discussed previously, the Supreme Court and every Court of Appeals that has considered the question, held employers vicariously liable under Title VII using the theory of *respondeat superior* and agency law principles. The liability is absolute for *quid pro quo* sexual harassment by a supervisor, but is subject to certain affirmative defenses for hostile environment sexual harassment by co-workers and supervisors alike.

The Court in *Gebser v. Lago Vista Independent School Dist.*, (1998), declined to hold educational institutions vicariously liable for a teacher's sexual harassment of a student. Instead the *Gebser* Court held that an educational institution can only be held liable for sexual harassment under Title IX if "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the [educational institution'] behalf has *actual knowledge* of the discrimination and fails adequately to respond" or displays *deliberate indifference* to the discrimination (*Gebser*, 1998, p. 290). Such failure to act must rise to the level of deliberate indifference to expose the educational institution to liability for violations of Title IX for sexual harassment. Thus, educational institutions are only liable for their own acts and not those of their employees or agents. This leaves one class of persons with less protection from sexual harassment under

Title IX than is available to employees under Title VII – students, and of particular relevance to this article, student-athletes.

The Court's rationale for limiting educational institutions' liability is particularly useful to examine in order to fully understand the impact limited liability has in the coach/student athlete relationship. In *Gebser* (1998), the Court was asked to invoke standards used in Title VII cases involving a supervisor's sexual harassment of an employee in the workplace for resolution of the Title IX teacher to student sexual harassment claims before it. The Court acknowledged its reliance on Title VII jurisprudence from *Franklin* (1992) when it concluded that school districts could be liable for sexual harassment as a form of intentional sex discrimination, but also stated that the *Franklin* decision did not "purport to define the contours of that liability" (*Gebser,* p. 281). The *Gebser* petitioners and the United States as *amicus curiae* advanced two theories as to the proper contours of liability under Title IX. First, *respondeat superior* liability would permit damages where a teacher is aided by his position of authority within the institution in carrying out sexual harassment of a student (p. 281-283). The agency theory was consistent with Title VII cases such as *Meritor* (1986). Further, the Court's reliance upon *Meritor's* reasoning in its later *Franklin* decision in 1992 also supported the Gebser's agency theory. The agency theory was also consistent with the Department of Education's 1997 Policy Guidance notifying school district's they could be liable for sexual harassment even without actual knowledge of the harassment (p. 282).. The second theory argued that a school district may be liable under constructive notice standards, where the school district either knew or "should have known" about harassment but failed to discover and eliminate the harassment (p. 282).. The Court rejected both theories.

In refusing to apply principles of *respondeat superior* to school districts for sexual harassment liability, the Court reasoned that *Franklin* (1992) did not turn on principles of imputed liability since school officials in *Franklin* had actual knowledge of the harassment and took no action to stop it; thus, references in *Franklin* to *Meritor* (1986) could not be taken as a wholesale adoption of *Meritor's* rationale (*Gebser*, 1998, p. 283).. Rather references to *Meritor* in *Franklin* were only with regard to the general proposition that sexual harassment is a form of sex discrimination under Title IX (*Gebser*, p. 283). The *Gebser* (1998) Court further distinguished *Meritor's* rationale by contrasting the statutory language from Title VII and Title IX. Title VII explicitly defines employer to include agents whereas "Title IX contains no comparable reference to an educational institution's "agents," and so does not expressly call for application of agency principles" (p. 283). In addition, the

Court concluded that Title IX's implied private action was distinguishable from Title VII's express private cause of action particularly with regard to the appropriate award of money damages (p. 284). The Court was clearly cautious not to define the scope of liability under Title IX's implied private right of action as broadly as liability was expressly defined under Title VII. The Court acknowledged a "measure of latitude" available to shape the remedial scheme for an implied right of action, but cautioned that the scope of the remedies, had to be consistent with the scope of the right and the statutory structure and purpose (p. 284). The Court concluded it would frustrate the purpose of Title IX to permit damages against a school district for a teacher's sexual harassment based on *respondeat superior* or constructive notice.

In so concluding, the Court made several important observations. The Court identified two principle objectives of Title IX: (1) to avoid the use of federal resources to support discriminatory practices; and (2) to provide individual citizens effective protection against those practices. Title IX was modeled after Title VI, which prohibits race discrimination by public and private entities receiving federal funds. Thus, the Court observed the two statutes operate similarly. Both statutes condition the receipt of federal funds on a promise by the recipient not to discriminate. Thus the majority opinion in *Gebser* (1998) analyzed the scope of liability analysis as a contractual analysis. Using a contractual analysis further distinguished Title IX from Title VII for purposes of liability because Title VII "is framed in terms not of a condition but of an outright prohibition" (*Gebser*, p. 286). Title VII is designed to compensate victims of discrimination, while Title IX is focused on protecting individuals from discrimination carried out by recipients of federal funds. Using a contractual analysis, the Court next determined that when Congress attaches conditions to the award of federal funds, it is using its spending powers which must ensure the receiving entity has notice that it will be liable for a monetary award (p. 287). If a school district's liability was based on *respondeat superior* or constructive notice, it would effectively impose liability on a recipient of funds who was unaware of the discrimination. This concept was reinforced in *Davis*, where it stated private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue due to the fact that Title IX has repeatedly been treated by the Court as legislation enacted by Congress pursuant to the Spending Clause (*Davis*, 1999, p. 640). Thus, "a recipient of federal funds may be liable in damages under Title IX only for its own misconduct" (*Davis*, 1999, p. 640).

Justice Stevens, with whom Justices Souter, Ginsburg, and Breyer joined, in his *Gebser* (1998) dissent disagreed that a contractual analysis was the correct approach. Justice Stevens disputed the importance placed by the majority on the absence of any references to "agents" in Title IX (*Gebser*, p. 299-300). Instead, the dissent observed that Title IX, as most remedial legislation, is written in passive voice focusing on the victim, i.e. no person shall be subjected to discrimination, as opposed to the language in Title VII focusing on the wrongdoer, i.e. making it unlawful for an employer to discriminate (p. 296-297). According to Justice Stevens, such language gives the statute broader coverage than Title VII (p. 296, *citing Smith v. Metropolitan School Dist. Perry Twp*, 1997, p. 1047). Moreover, the dissent concludes that Title IX created a duty on funding recipients not to discriminate on the basis of sex, and *Franklin* "stands for the proposition that sexual harassment of a student by a teacher violates the duty assumed by the school district in exchange for the federal funds" (p. 296). Thus, the dissent argued that the majority's analysis was a departure from settled agency law principles under which the school district is responsible for its employee's misconduct because the employee was aided in accomplishing the tort due to the agency relationship that existed. (p. 299, citing Restatement (Second) of Agency, §219(2)(d), 1957).

Justice Steven's dissent challenges the majority's concern about notice to the funding recipient and reminded the majority that the "respondent was . . . on notice that sexual harassment of a student by a teacher constitutes an 'intentional' violation of Title IX for which damages are available" based upon this Court's "unanimous" holding in *Franklin* (p. 299).

Justice Ginsberg joined Justice Steven's dissent, but also wrote a separate dissent wherein she agreed with the standard of liability laid out in the dissenting opinion, but also would recognize affirmative defenses to a Title IX charge of sexual harassment if the school district could show its remedies and policies were adequately publicized and provided adequate redress without exposing the complainant to undue risk, effort, or expense. Justice Ginsberg's basis for imputing liability would closely mirror the hostile environment framework under Title VII (*Gebser*, 1998, dissenting opinion, p. 307).

Thus, the four dissenting Justices in *Gebser* would have recognized a standard of liability under Title IX very similar to if not identical to Title VII. But instead, a very different standard of liability has emerged which leaves a gap in the protections available to students and in particular, student-athletes. Student-athletes are in a position very similar to that occupied by a subordinate employee in that they are subject to the authority and control of a

superior, such as a coach or athletic administrator. Consequently, the coach or athletic administrator is in a position to take actions against the student-athlete resulting in tangible losses such as lost scholarships and lost participation opportunities.These losses closely mirror a "tangible employment action" under Title VII for which an employer is strictly liable. Under Title IX, not only is the school district or university not strictly liable, they can avoid liability altogether if they have not received actual notice of the sexual harassment or, if once being notified of the offending conduct do not act with deliberate indifference to correct it.

Davies (2002) recognized that it would be up to the lower courts to interpret *Gebser* (1998) and *Davis* (1999) and she urged them to "use underlying policy as their compass" (p. 396). She further observed that many lower courts construed the *Gebser* and *Davis* decisions favorably to plaintiffs while also respecting the Supreme Court's concerns about entity liability under Title IX. However, Davies still noted marked inconsistency among the lower courts. At the time of her study in 2002, 52 cases had been decided by the lower courts, 24 of which were at the court of appeals level. Davies argued that this number of cases should allay concerns of a flood of litigation flowing from *Gebser* and *Davis*. Davies further remarked that despite the confusion in the lower courts and inconsistent outcomes, attorneys should not be discouraged from representing sexual harassment plaintiffs since some cases are winnable and eventually won or settled.

Very few of those 52 cases involved the coach and student-athlete relationship, thus, it was not clear whether the special context of athletics would or could produce additional challenges for courts. The past few years have produced several significant cases which deal with the special context of athletics and the continuing problem of sexual harassment in high school and college athletics. These cases will be explored in greater detail in the following section.

## Recent Title IX Sexual Harassment Cases

Since the Supreme Court outlined the elements of a sexual harassment claim under Title IX and recognized sexual harassment as a form of sex discrimination, only a few cases involving coaches and/or athletes have been decided. Moreover, as predicted by Davies (2002) a great deal of inconsistency exists between the lower courts resulting in some favorable decisions for plaintiffs, as well as some disappointing decisions. This section will examine several decisions to highlight the difficulties and inconsistencies

in applying the *Gebser* and *Davis* framework in athletics settings. First, some cases decided soon after the *Gebser* and *Davis* standards were announced will be discussed, followed by a review of recent cases in multiple circuits.

*Early Cases Applying Gebser and Davis in Athletic Settings*

In *Ericson v. Syracuse University* (1999), the district court denied Syracuse's motion to dismiss the Title IX sexual harassment claim. Ericson and another tennis player at Syracuse alleged that the coach, Jesse Dwire, had sexually harassed them over a three-year period including fondling, massaging, and sexually propositioning them. Once the students reported him, he allegedly retaliated by throwing tennis balls at them during practice. The district court stated that the university's response must be tantamount to an official decision not to remedy the discrimination (*Ericson*, 1999, 328-29) Syracuse's failure to have a grievance procedure in place was not sufficient to imply knowledge. But since the Vice President for Human Resources rejected a university panel's recommendation of a two-year suspension for Dwire and instead gave Dwire an unpaid 14-week suspension during the summer, this act could be construed as bad faith and deliberate indifference. After Syracuse received the denial of its motion to dismiss, the University settled for an undisclosed amount with the players ("Tennis Players Settle Lawsuit," 1999). Shortly thereafter, Dwire resigned ("College Tennis," 1999).

In *Klemencic v. Ohio State University* (1998), the district court granted summary judgment for Ohio State University against a student athlete's Title IX claim that her college coach created a hostile educational environment. Klemencic was a cross-country runner whose eligibility to compete had expired but she still wished to train with the team. She alleged that the school's male cross-country coach created a hostile environment over a two-year period by asking her out on two dates, sending her a sexually suggestive photograph and magazine article, offering her rides home from practice, extending the use of his apartment when her lease expired, and asking about her relationship with her boyfriend. Assuming these alleged facts as true for purposes of summary judgment, the district court held that these actions did not satisfy the burden of proof required of Klemencic to prove that she was subjected to a hostile environment (*Klemencic*, p. 917) The court found when viewing conduct objectively, it appeared that Klemencic was merely offended, but not harassed (p. 917). Further, even considering Klemencic's subjective viewpoint, the court found that Klemencic admitted the only conduct she deemed harassing were two requests for a dating relationship and then, the

coach's reneging on his offer to permit her to train with the team (p. 917). The court also denied her *quid pro quo* claim and granted Ohio State's motion for summary judgment in accordance with *Gebser* (1998) finding that no one at Ohio State in a position of authority to institute corrective measures had actual notice of the coach's behavior at a time to intervene (p. 920). On appeal, the Sixth Circuit affirmed (*Klemencic v. Ohio State University,* 2001).

In *Zimmer v. Ashland University* (2001), Zimmer was a swimmer on the Ashland swim team and reported numerous instances of her coach touching her inappropriately such as insisting on giving Zimmer massages and making inappropriate comments regarding her butt and breasts. Zimmer and other athletes complained to school officials, yet school officials' reprimand letter only vaguely referred to inappropriate personal conduct instead of specifically addressing the sexual harassment allegations. Moreover, the harassment continued even after the reprimand, which suggested that the sexual harassment allegations were not discussed sufficiently or taken seriously enough to warrant a change in the coach's behavior. The district court concluded that material issues of fact remained and declined to grant summary judgment on the Title IX claim of hostile environment sexual harassment (*Zimmer*, p. 32).

These early cases, resulted in some decisions favorable to plaintiffs such as *Zimmer* (2001) and *Ericson* (1999) and others less hospitable toward the student athletes sexual harassment claims such as *Klemencic* (1998, 2001) (*See also*, Davies, 2002). As commentators have observed, very few legal complaints of sexual harassment involving coaches and athletes are reported due to early settlements and other pressures upon student athletes (Volkwein, et al. 1997; Pinarski, 2000; Mendelson, 2003; and DeFrancesco, 2007). Thus, most cases must rely on precedent involving a teacher/student relationship from which to analyze the coach/athlete relationship. The perspective of the teacher/student relationship is not always analogous and often times will not afford a reasonable means to consider an important ingredient of a sexual harassment claim – the context in which the harassment occurs and the "constellation of surrounding circumstances, expectations, and relationships" (*Oncale v. Sundowner Offshore Services, Inc*, 1998; *Davis v. Monroe County Board of Education*, 1999). More recent cases further demonstrate the growing inconsistency among the circuits in resolving sexual harassment claims involving coaches and athletes.

*Favorable Results in the Fourth, Tenth, and Eleventh Circuits*

The following section discusses several recent district court and court of appeals decisions from the Fourth, Tenth, and Eleventh Circuits that apply *Gebser* (1998) and *Davis* (1999) resulting in favorable outcomes for victims of sexual harassment in athletics settings

*Jennings v. University of North Carolina* – Fourth Circuit Court of Appeals.

Melissa Jennings was a student and soccer player at the University of North Carolina from August 1996 until May 1998 (*Jennings v. UNC*, 2007). Jennings was recruited as a walk-on athlete, and was not on scholarship. Anson Dorrance has been the head women's soccer coach at UNC since 1979 and is regarded as one of the most successful women's soccer coaches in the country (Hays, 2007). Jennings alleged that Dorrance would frequently participate in and direct conversations about players' personal lives, including their dating habits and sexual activities. Dorrance allegedly asked players with whom they were sleeping. His language was frequently crude referring to one player's sexual partner as the "f*** of the week" and asking another player if she knew her sexual partner's names or just took tickets. He also frequently commented on players' physical attributes such as their weight, legs, breasts, and butts, and even questioned one player abut the size of her partner's genitalia. Dorrance denied initiating such conversations and that he only infrequently overhead the student's comments about their partners and private lives.

Jennings admits that most of Dorance's comments were directed at other players on the team, but alleges that she was constantly worried about being the focus of his comments and questions. On at least one occasion, Dorrance directed his inquiry toward Jennings, which she tried to ignore as she walked away.

Jennings met with the Assistant to the Chancellor and Senior University Counsel at UNC, Ehringhaus, during the Fall of 1996 and told Ehringhaus a number of things regarding Dorrance's conduct including his making sexual comments at practice. Ehringhaus encouraged Jennings to talk with Dorrance about these issues indicating that he was a "great guy" (*Jennings*, 2007, p. 700). Ehringhaus took no further action in response to Jennings' concerns about Dorrance'S sexual comments.

Toward the end of 1996, Dorrance made a direct inquiry about Jennings private sexual activities during a road trip with the team where Dorrance met

privately with each athlete in his hotel room for a routine end-of-year meeting. Jennings understood the purpose of this meeting was to provide each player with a performance evaluation. During this meeting with Jennings, Dorrance asked "who are you f***ing." Jennings responded that her personal life was none of his g** d*** business. This meeting occurred when Jennings was only 17 years old and alone with her 45 year old coach in his motel room (*Jennings*, 2004, p. 670).

Jennings returned to the team in the Fall of 1997, and during a meeting with Dorrance was told that while her grades were improving, she was not meeting team standards for fitness and she was in danger of being cut from the team. Her grades continued to improve her sophomore year from a 1.5 to a 1.964 at the end of the Fall term in 1997. On May 5, 1998 Dorrance met with Jennings and told her that her fitness and conditioning were not at an adequate level and cut her from the team. Jennings was shocked and upset that she was cut because she believed she had been improving. Jennings' father wrote a letter complaining about Dorrance's questions and comments made about the players' personal lives. After receiving this letter, Ehringhaus forwarded the letter to administrators in the Athletic Department and the Senior Associate A.D., Miller, began an investigation. Miller scheduled a meeting between the athletic director, Ehringhaus, Dorrance, and Jennings, and her father. During this meeting Dorrance admitted participating in group discussions at practice, but only in a teasing nature. Dorrance denied discussing sexual activity in the one-on-one meeting in December 1996. Following this meeting the athletic director wrote a letter of apology to Jennings which was endorsed by Dorrance. The athletic director also wrote Dorrance a letter advising him that it was inappropriate to have conversations with members of his team regarding their sexual activity.

In August, 1998 Jennings and another teammate, Keller, sued UNC, Anson Dorrance, the assistant women's soccer coaches, the athletic trainer, the chancellor, the assistant to the chancellor, the athletic director, and the senior associate athletic director, and the former athletic director (hereinafter "UNC" or "UNC and the defendants") alleging claims under Title IX, Section 1983, and common law invasion of privacy (*Jenningsv. University of North Carolina*, 2004).

The District Court for Middle District of North Carolina awarded summary judgment to UNC and the defendants in 2004 (*Jennings*, 2004). Jennings appealed to the Fourth Circuit Court of Appeals, which affirmed the award of summary judgment on April 11, 2006 (*Jennings v. University of North Crolina*, 2006). Thereafter, on June 8, 2006, the Fourth Circuit granted

Jennings' petition for rehearing and rehearing *en banc* and vacated the April 11, 2006 decision (*Jennings v. University of North Carolina*, 2006). On April 9, 2007, the Fourth Circuit, sitting *en banc*, reversed the District Court's grant of summary judgment on Jennings' Title IX claim against UNC and her §1983 claims against Dorrance and Ehringhaus (*Jennings v. University of North Carolina*, 2007). The Supreme Court denied UNC's petition for writ of certiorari on October 1, 2007 (*University of North Carolina v. Jennings*, 2007). Jennings case was remanded to the district court which scheduled the trial for April 2008. On January 15, 2008, UNC announced it had settled the case for $385,000 ("UNC settles lawsuit with former player," 2008; Wolverton, 2008).

The district court had concluded that the pervasive sexual banter participated in and sometimes encouraged by Coach Dorrance was insufficient as a matter of law to satisfy the third element of a Title IX sexual harassment claim (i.e. that it was not sufficiently severe or pervasive so as to create a hostile or abusive environment in the woman's soccer program and thereby deprive Jennings of an educational opportunity) (*Jennings*, 2004, p. 675). The court of appeals disagreed. In reviewing the district court's conclusion, the court of appeals cited to its Title VII precedent in *Harris v. Forklift Systems, Inc.*, (1993), and reaffirmed that harassment under Title IX reaches the sufficiently severe or pervasive level when it creates an environment a reasonable person would find hostile or abusive and an environment that the victim herself subjectively perceived to be abusive or hostile (*Jennings*, 2007, p. 696). This standard is necessarily rigorous to avoid Title VII or Title IX from creating a civility code. Instead, determining whether an environment is sufficiently severe or pervasive depends on a "constellation of surrounding circumstances, expectations, and relationship" (p. 696).

Under Title IX, courts will evaluate a number of circumstances including (a) the frequency of the harassment; (b) the position or power of authority of the harasser; (c) the age of the harasser and victim; (d) and the general environment of hostility (*Jennings*, 2007, p. 696). In applying this standard to the circumstances faced by Jennings, the court of appeals concluded that Jennings had presented sufficient facts for a jury to conclude that Dorrance's degrading and humiliating conduct was sufficiently severe and pervasive to create a hostile environment (*Jennings*, 2007, p. 697-98). Thus, summary judgment was inappropriate.

Specifically, the court of appeals observed that Dorrance was not just any coach, he *was* and *is* the *most* successful women's soccer coach in U.S. college history and, therefore, had tremendous power and influence. The disparity in

power between Dorrance and his players trapped players in a sexually charged environment. Dorrance was a 45 year old man probing into and commenting about the sexual habits and activities of young female athletes, some as young as 17. These inquires were frequent and persistent, giving Jennings good reason to fear that she would be targeted. The sex-based verbal abuse permeated the team environment. The court of appeals further advised that its conclusion took into account the informal, and sometimes jocular, college sports team atmosphere that can lead to familiar and close relationships between players and coaches (*Jennings*, 2007, p. 698). While a coach may use sexual banter and foul language around his athletes, when that conduct results in a degrading, intimidating, or humiliating environment based on sex it creates an impermissible hostile environment for purposes of Title IX (*Jennings*, p. 698).

Lastly, the Court of Appeals concluded that the sexual harassment could be said to have deprived Jennings of access to educational opportunities or benefits since facts were presented showing that Jennings suffered humiliation and fear that had a negative impact on her participation and performance in soccer and in her academics (*Jennings*, 2007, p. 699-700). Interestingly, the dissenting judges in the Court of Appeals suggested that, since Jennings grades improved slightly and she was disappointed when she was cut from the team there was not sufficient evidence of a negative effect on her or a deprivation of an educational opportunity (*Jennings*, p. 717-718). The concurring opinion found the dissent's logic to be particularly troubling since it would seem to penalize a student simply because she was resilient and made the most of a bad situation. The dissenting judges would argue that if a situation is truly intolerable, the victim should not, in fact, tolerate it. The concurring opinion cited to decisions from other circuits holding that "what students put up with, without objection or protest, does not mark the bounds of permissible classroom conduct" (*Henson v. Dundee*, 1982) and a . . . woman should not be forced to run a gauntlet of sexual abuse in return for the privilege of being allowed to work or make a living (*Jennings,* 2007, p. 707). The dissent's logic however, has been applied in another recent case involving student on student sexual harassment which is discussed below (*Drews v. Joint Sch. Dist. No. 393,* 2006b).

Additionally, the court of appeals in *Jennings* held that Jennings complaints to University Counsel, Ehringhaus, were sufficient to provide UNC with actual notice of the hostile environment. Since Ehringhaus took no action on the complaint and Dorarnce's harassment continued, a rational jury could

find UNC's failure to remedy the situation constituted deliberate indifference to ongoing discrimination (*Jennings*, 2007, p. 701).

*Simpson v. University of Colorado, Boulder* – Tenth Circuit Court of Appeals.

The Tenth Circuit has previously acknowledged that lower courts differ on whether notice sufficient to trigger liability may consist of prior complaints or if only knowledge of the current harassment will suffice (*Escue v. NOC*, 2006, p. 1153; See, Perkins, 2007; and Richardson, 2007). Recently, the Tenth Circuit issued another installment addressing the notice requirements of *Gebser* (1998) and *Davis* (1999). In *Simpson v. University of Colorado, Boulder* (2007), a series of sexual assaults were committed by prospective recruits for the University of Colorado football team who were being hosted on campus by student/hosts of the University as part of the football program's recruiting practices. In this decision, the Tenth Circuit carefully analyzes the *Gebser* notice requirements in the context of policies and practices of the Athletic Department at the University of Colorado. *Simpson* notes two passages from *Gebser* which may limit the holding in *Gebser* and makes it inapplicable to some sexual harassment claims such as those presented in the *Simpson* case. First, *Gebser* expressly restricted the notice requirements it set forth to "cases like this one that do not involve official policy of the school district" (*Simpson*, 2007, p. 1176). Second, *Gebser* suggested that courts seek guidance from civil-rights cases alleging municipal liability under §1983 and holding municipalities responsible for their own acts and official decisions that fail to prevent a deprivation of federal rights (Id.). Such official acts can include inadequate training of employees where a need for additional training is obvious.

The Tenth Circuit concluded that *Gebser* (1998) and *Davis* (1999) do not apply to the context of the instant case as there was no element of encouragement of the misconduct by the school districts in *Gebser* and *Davis (Simpson, 2007, p. 1177)*. However, the University of Colorado had sanctioned, supported, and funded a recruiting program that, without proper controls, would encourage young men to engage in opprobrious conduct. In as much as this case involved an official policy and program of the university, it does not fall under the notice framework established in *Gebser* and *Davis*. When a claim of sex discrimination involves an official policy, a different standard must apply. The court of appeals concluded that a funding recipient can be said to have intentionally acted in clear violation of Title IX when the violation is caused by official policy, which may be a policy of deliberate

indifference to providing adequate training or guidance that is obviously necessary for the implementation of the program or policy (*Simpson*, p. 1178).

Thus, the central question was whether the prior history and knowledge of sexual assaults and sexual misconduct associated with the recruiting program established that the risk of an assault during a recruiting visit was obvious, and additional training or supervision was necessary to implement the program in a non-discriminatory manner. The court of appeals observed that implementation of a specific program can be a circumstance in which the funding recipient exercises significant control of both the harasser and the environment in which the harassment occurs (*Simpson*, 2007, p. 1178). Finally, the court of appeals held that there was sufficient evidence before the district court to support a finding that by the time the assaults on Simpson and the other plaintiff's occurred (1) the coach had general knowledge of the serious risk of sexual harassment and assault during recruiting efforts; (2) the coach knew such assaults had occurred during previous visits; (3) the coach continued to maintain an unsupervised player/host program within the recruiting program to show high school recruits a "good time"; and (4) the coach's own unsupportive attitude resulted in no change in the atmosphere surrounding the recruiting program that would have made the misconduct less likely (*Simpson*, p. 1184-85).

*Williams v. Board of Regents of the University of Georgia* – Eleventh Circuit Court of Appeals.

In *Williams v. Board of Regents of the University of Georgia* (2007), Tiffany Williams was gang raped by three male student athletes in a dorm room. The court of appeals reversed the district court's dismissal of the Title IX claims (*Williams*, 2007, p. 1294). The court of appeals held that the plaintiff had adequately pleaded claims under Title IX (*Williams*, p. 1296). The court of appeals concluded the men's basketball coaches and other school officials had sufficient knowledge upon which to base a claim for deliberate indifference and failure to supervise (p. 1296-97). The men's basketball coaches and other school officials knew they were recruiting a player who had been expelled from other colleges for sexual misconduct against female students and who had a violent history. As the *Simpson* (2007) court, the Eleventh Circuit Court of Appeals also relied on municipal liability standards from which to analyze the university's alleged deliberate indifference (p. 1295).

The court noted the deliberate indifference standard is used in cases arising from independent actions of employees not cases involving official policy decisions (*Williams*, 2007, p. 1295). The court of appeals held that Williams met the Title IX standard due to the university's failure to inform its student athletes about applicable sexual harassment policies after having been requested to by student athletes. The university also failed to supervise an athlete for which they had knowledge of prior misconduct, which substantially increased the risk faced by female students on campus. Finally, the court of appeals held that the university acted with deliberate indifference by failing to provide an adequate response and waiting more than 11 months to take corrective action. Even though university officials had a preliminary report from the police within 48 hours of the rape, the university waited another eight months to conduct a disciplinary hearing after two of the athletes had already left the university.

Each of the cases discussed above reflect the challenges faced by the courts in applying the notice and deliberate indifference standard from *Gebser* (1998). Moreover, the notice and deliberate indifference standard created in *Gebser* continues to produce mixed results in sexual harassment cases.

*Harsh Results in the Third, Fifth, and Ninth Circuits*

In the past two years, several district court and court of appeals decisions from the Third, Fifth, and Ninth Circuits have narrowly construed *Gebser* (1998) and *Davis* (1999) resulting in harsh outcomes for victims of sexual harassment in athletics settings.

*Drews v. Joint Sch. Dist. No. 393* – Idaho District Court.

In *Drews v. Joint School District No. 393* (2006a) a student, Casey Drews, alleged harassment based on perceived sexual orientation. The Idaho District Court found that it was undisputed that some level of student to student harassment occurred and that Casey Drews has a right to be free of discrimination (*Drews*, 2006a, p. 22). However, the court held that even assuming the harassment was sufficiently severe and pervasive, Casey was not deprived of educational opportunities because (1) she took an independent study course and enjoyed it; and (2) she voluntarily quit cheerleading because she opposed some moves (*Drews*, p. 27). The court though held that Drews may have been deprived of an educational opportunity because she was forced to quit the basketball team and denied the school districts motion for summary judgment (p. 27). In a rather stunning reversal, the district court reversed itself

when the school district's motion to reconsider pointed out that Drews had not quit the basketball team, but had in fact stayed and played on the team (*Drews v. Joint School Dist. No. 393*, 2006b). The district court found as a matter of law that since Casey voluntarily chose to continue to play basketball, she was not denied educational opportunities (*Drews*, 2006b, p. 10).

This conclusion is the exact conclusion urged by the *Jennings* (2007) dissenting opinion and feared by the *Jennings* (2007) concurring opinion, that a student who manages to overcome an abusive environment is punished for her perseverance.

*King v. Conroe Independent School District* – Fifth Circuit Court of Appeals.

In *King v. Conroe Independent School District* (2007a) a female volleyball coach had a sexual relationship with an eighth grade female athlete. A parent of another student reported rumors of the relationship to the principal, but the record is unclear whether the coach was mentioned by name or how the principal came to know the identity of the coach about whom the allegations were made. The principal and vice-principal did meet with the female coach, Shupp, during which she denied any inappropriate relationship and was warned to keep her relationships with students professional at all times. No further action or investigation was taken by the principal or other school officials. There is no evidence that the athletic director or other school officials were notified of the allegations. The abuse continued for another three and a half years until the student finally reported Shupp to the police. Shupp pled guilty to sexual assault of a child.

The Court of Appeals for the Fifth Circuit, in an unpublished opinion, affirmed the district court's grant of summary judgment for the school district (*King*, 2007a, p. 4). The court of appeals held that, assuming *arguendo,* the principal had notice of the sexual abuse, King cannot establish that the principal acted with deliberate indifference (p. 4). The court of appeals relied upon the deliberate indifference standard applied in municipal settings where good faith but ineffectual responses do not rise to the level of deliberate indifference (*King*, p. 3-4, citing, *Doe v. Taylor Indep. Sch. Dist.*, 1994). The court of appeals concluded that the principal's meeting with Shupp, questioning her and upon receiving a denial, warning her to keep her relationship professional met the municipal liability standard. The court held the principal did not act with deliberate indifference based on the limited information he received (*King,* p. 4). Strangely, the Fifth Circuit Court of Appeals never applies the reasoning of the *Gebser* (1998) or *Davis* (1999)

court and only cites to *Gebser* in a footnote. The U.S Supreme Court denied certiorari in the case in November 2007 (*King v. Conroe Independent School District*, 2007b).

Two other observations of the court are also interesting. First, the court rejected the argument that the principal's failure to follow school district policies to investigate the abuse amounted to deliberate indifference (*King*, 2007a, p. 4). Instead, the court held the plaintiff must prove that all of the procedures were obviously necessary to give rise to liability (*King*, p. 4). This is a very different application of the municipal liability deliberate indifference standard than the Tenth Circuit used in *Simpson*. The court of appeals also noted the athletic directors were not "persons with supervisory authority" over Coach Shupp even assuming they had had notice of the inappropriate relationship (p. 4, fn. 4). This is a very narrow interpretation of the appropriate authorized person standard from *Gebser* (1998) and *Davis* (1999) and seems to ignore the modern realities of the organizational structures in high school and college athletic departments.

*Bostic v. Smyrna School District* – Third Circuit Court of Appeals.

In *Bostic v. Smyrna School Dist*rict (2005), the court of appeals upheld the district court's denial of a motion for new trial by the plaintiffs. The plaintiffs challenged the jury instructions given by the trial court as being too narrow and imposing a higher standard than required by *Gebser* (1998) and *Davis* (1999) regarding actual notice and an appropriate person in authority. Bostic was a 15 year old member of the girl's track team. A sexual relationship developed between Bostic and her coach, Smith. The relationship included numerous sexual encounters over the period of about a year. The relationship was brought to the attention of the principal and associate principal by students and Bostic's parents. The principal met with Smith along with the associate principal and the athletic director and discussed the allegations. Smith admitted to discussing his marital problems with Bostic but denied any inappropriate conduct. Later, another teacher observed Bostic and Smith standing very "close together" in a hallway. Smith was again summoned to the principal's office where Smith was reprimanded and told to cease one-on-one contact with Bostic. The principal spoke with Bostic who also denied anything was happening. A few months later Smith's wife, who also taught at the school, reported she caught her husband and Bostic alone in her classroom. Mr. and Mrs. Bostic also engaged a private investigator to monitor the situation. Finally, a member of the Board of Education upon hearing of the

series of events, contacted the police. The police were investigating Smith for another relationship with an underage student and subsequently arrested Smith. Smith was then suspended and later pled guilty to crimes involving both students.

The trial court's instructions told jurors that a school has "actual notice" for purposes of Title IX liability if it has knowledge of "facts sufficiently indicating substantial danger to a student." (*Bostic*, 2007, p. 361) Plaintiff contended that the "substantial danger" language was a higher standard than required by *Gebser* (1998). The plaintiff argued that "actual notice" was satisfied by information sufficient to alert the principal to the possibility of a sexual relationship. The court of appeals reasoned that the *Gebser* court's rejection of constructive notice and *respondeat superior* principles rendered it unlikely the Supreme Court intended "actual notice" to be based on a possibility (*Bostic,* p. 361-62). Lastly, the trial court had refused to instruct the jury that the principal was an appropriate person of authority under Title IX as a matter of law. The court of appeals admitted that ordinarily a school principal is an appropriate person under Title IX, but since that person still must have the requisite actual knowledge it was not an error for the trial court to omit such an instruction to the jury (p. 362). This portion of the court of appeals' reasoning seems to particularly blur the lines between the elements of actual notice, deliberate indifference, and a person of authority.

*Bostic* also seems to be setting a standard for actual notice that is unrealistic in the school environment. It appears that if upon hearing the information, a Board of Education member would contact the police, that the principal who is more engaged in the day-to-day dealings between Bostic and Smith, would have enough notice to take more action in the situation than simply speaking with Smith and Bostic. In school situations, teachers and administrators must be cognizant that they are dealing with minors over whom they have a responsibility to provide protection. Minors, in a subordinate position to coaches and teachers, are less likely to report or admit these sexually harassing situations and the coach or teacher committing the harassment is likely to deny it. Thus, actual notice may be harder to come by, but it shouldn't mean that the person of authority need not do more to seek out the actual notice.

## SPECIAL CONTEXT OF ATHLETICS

While the decisions in *Jennings*, *Simpson* and *Williams* can be seen as a victory for Title IX and its usefulness in responding to sexual harassment

involving athletes in educational programs and activities, until the Supreme Court adopts a similar analysis and clarifies its holding in *Gebser* (1998) and *Davis* (1999), the victory is brief and jurisdictional differences remain. What standard of liability is appropriate in determining whether the objectionable conduct of a coach is "sufficiently severe and pervasive" as to deprive the student of educational benefits? (*Jennings*, 2006). When do prior acts of the alleged harasser create sufficient "notice" upon the educational institution to impose liability? (*Escue*, 2006; *Simpson*, 2007). These questions are still unresolved in many cases and build upon observations made by the Supreme Court in *Oncale v. Sundowner Offshore Services, Inc.* (1998) noting unique aspects of relationships in sport such as those between athletes and coaches that can lead to different results in sexual harassment cases. These unique aspects were summarized by the *Jennings* (2006) court in its observations that "a typical college coach is going to have much more informal, casual, one-on-one contact with a student-athlete than a typical university instructor will have with a student." (*Jennings*, 2006, p. 274) However, another Fourth Circuit Justice cited to Hogshead-Makar & Steinbach's (2003) warning that a coach's special authority over athletes and frequent close contact amplify the potential for harassment rather than lessen it. Justice Michael observed

> This more informal atmosphere can, as the majority suggests, serve to normalize conduct, such as cursing or touching, that would be inappropriate in the more formal setting of the classroom or office. On the other hand, the same informal sports setting, coupled with the coach's intensely personal yet authoritative relationship with his athletes, may enhance the potential for sexual harassment (*Jennings*, p. 290-291).

## CONCLUSION

Scholars have questioned the adequacy of Title IX to address issues involving sexual harassment. The authors in this paper and others suggest part of Title IX's inadequacy is due to its departure from using Title VII standards for imposing liability (Pinarski, 2000; Harris and Groom, 2000). Others have argued that Title IX was too tailored after Title VII in terms of defining sexual harassment (Tripp, 2003) and responding to peer harassment (Davies, 2002). Many suggestions have been made to address Title IX's inadequacies. For example, Mendelson (2003) challenged the NCAA to develop universal sexual harassment policies and compliance procedures, noting that the American Swimming Coaches Association, the U.S. Olympic Committee, the Women's

Sports Foundation, and Stanford University Athletics have developed their own Codes of Ethics. Mendelson also recommended that a coaches' code of conduct be established for all male coaches of women's sports team. Tripp (2003) suggested a complete revision and reformation of Title IX by Congress while DeFrancesco (2007) challenged the courts to more effectively apply the factors set forth in the *Gebser* (1998) and *Davis* (1999) cases.

These divergent opinions emphasize not only the conflict among the courts in resolving these cases, but the importance of the resolution in protecting students (especially student-athletes) from an educational environment that may be permeated with sex-based degradation, insult, ridicule, and intimidation.

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