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Civil Rights - Federal Remedies: The Eighth Circuit Recognizes Same-Sex Harrasment under Title IX and Adopts the Knew or Should Have Known Standard for School District Liability

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CIVIL RIGHTS—FEDERAL REMEDIES: THE EIGHTH CIRCUIT RECOGNIZES SAME-SEX HARASSMENT UNDER TITLE IX AND ADOPTS THE "KNEW OR SHOULD HAVE KNOWN STANDARD" FOR SCHOOL DISTRICT LIABILITY

Kinman v. Omaha Public School District, 94 F.3d 463 (8th Cir. 1996)

I. FACTS

From September 1986 through May 1990, Janet Kinman was a student at Bryan High School in Omaha, Nebraska.[1] Between the fall of 1987 and spring of 1988, Kinman was enrolled in a sophomore English class taught by Sheryl McDougall.[2] At some point during the spring of 1988, Kinman became curious about whether McDougall was gay.[3] In response to this curiosity, Kinman asked McDougall if she had any friends that were gay, and Kinman wrote a letter to McDougall telling McDougall that while she liked McDougall, Kinman was not gay.[4] After McDougall received the letter, Kinman observed McDougall staring at her, but she did not report this to any school official.[5]

Kinman and McDougall remained in contact during the following summer.[6] Later that summer, Kinman attempted suicide and began drinking alcohol.[7] Kinman told her mother that one of her reasons for doing so was that McDougall was attempting to convince her that she (Kinman) was gay, although Kinman told her mother that she did not want to be gay.[8]

During Kinman's junior year, McDougall first admitted to Kinman that she (McDougall) was gay.[9] During the summer of 1989, following

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1. Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 465 (8th Cir. 1996).
2. *Id.*
3. Brief for Appellee at 5, Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463 (8th Cir. 1996) (No. 95-2809). In March 1988, McDougall received an unsatisfactory evaluation for demonstrating a lack of professionalism in relation to an incident involving plans to attend a rock concert with Kinman. *Kinman*, 94 F.3d at 466. Also, during Kinman's sophomore year, her mother contacted school officials and requested that Kinman be removed from McDougall's English class, a request that was not approved. *Id.*
4. *Id* at 465.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* At one point during the year, McDougall called Kinman out of study hall and asked if she had ever been abused. *Id.* Kinman confided in McDougall that she was sexually abused as a child. *Id.* It was in the course of this delicate conversation that McDougall told Kinman that she (McDougall) was gay. *Id.* McDougall also asked Kinman to attend an Alcoholics Anonymous (A.A.) meeting with her, although Kinman did not know it was a gay A.A. meeting until she arrived. *Id.* Kinman argued that McDougall took her to the A.A. meeting on the pretense of seeking help for Kinman's drinking problem. Brief for Appellant at 2, *Kinman* (No. 95-2809). During the course of the meeting, McDougall asked Kinman if she thought a woman at the meeting was attractive and

Kinman's junior year, McDougall asked Kinman out on a "friend date."[10] After the date, Kinman and McDougall went to McDougall's residence, where McDougall proceeded to caress and kiss Kinman.[11] Kinman claims she resisted these advances.[12] Nevertheless, the two ended up having sex and spending the night together.[13] This sexual relationship continued until November of 1989, when McDougall temporarily discontinued the relationship after Kinman's mother complained to the school's principal, Robert Whitehouse.[14] At that time, Kinman alleged that McDougall was stalking and harassing her, a charge McDougall denied.[15]

After Kinman graduated in May of 1990, she renewed her relationship with McDougall and continued it until at least August of 1992.[16] Kinman's mother then notified Whitehouse, who advised his supervisor, John Mackiel, that Kinman's mother had proof (in the form of McDougall's journal) that the relationship was ongoing.[17] Following the authentication of this evidence by school officials, the school district began proceedings to suspend McDougall for violation of school

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informed Kinman that she had slept with this woman. *Kinman*, 94 F.3d at 465.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 465. School officials began to investigate the relationship in the fall of 1989 and, although contrary to school policy, McDougall was not suspended or initially questioned during the investigation. *Id.* School officials arranged for a tracing device to be installed on Kinman's phone in an attempt to determine the truth of Kinman's allegation that McDougall was calling. *Id.* The officials also arranged for Kinman to take a polygraph exam, which indicated some level of deception. *Id.* Kinman then took another polygraph, which also indicated some level of deception. *Id.* at 465-66. School officials also learned of the relationship when a friend of Kinman's informed principal Robert Whitehouse that Kinman and McDougall were involved in a sexual relationship. *Id.* at 466. Further, a school guidance counselor reported to Whitehouse a conversation she had with another friend of Kinman's, who stated that Kinman and McDougall were dating. *Id.* This was also confirmed by Kinman's special education teacher, in addition to a report from a teacher's aide, who stated that McDougall was constantly peering into her classroom to check on Kinman. *Id.*

15. *Id.* McDougall denied the allegations to Whitehouse's supervisor, John Mackiel, the assistant superintendent for personnel. *Id.* McDougall was not given a polygraph exam. *Id.*

16. *Id.* The defendants contend the relationship continued much longer, and that Kinman and McDougall were engaged in sexual relations five or six times a week when Kinman filed her complaint in May of 1993. Brief for Appellee at 14, *Kinman* (No. 95-2809). It is further suggested that these relations continued through Kinman's deposition in January of 1994. *Id.*

17. *Kinman*, 94 F.3d at 466. Mackiel requested a copy of the journal and had a private investigator perform a handwriting analysis, which indicated the journal belonged to McDougall. *Id.* Kinman's mother also provided Mackiel with incriminating photographs of McDougall and Kinman, as well as a series of cards written by McDougall to Kinman. *Id.*

policy.[18] McDougall was subsequently terminated and her teaching certificate revoked in September of 1992.[19]

On May 6, 1993, Kinman brought action in United States District Court for the District of Nebraska against the school district, Whitehouse, Mackiel, and McDougall, individually and in their official capacities, pursuant to 42 U.S.C. § 1983 and 20 U.S.C. § 1681(a) (Title IX) for hostile environment sexual harassment.[20] In considering Kinman's Title IX claim, the district court concluded that Title IX's language does not permit a cause of action against agents of a school district.[21] The court based this decision on the rationale that McDougall's actions did not constitute discrimination under a "program or activity" of the school district.[22] Consequently, the district court granted the defendants' motion for summary judgment on the Title IX claim and Kinman appealed the ruling.[23]

In a unanimous decision, the Eighth Circuit Court of Appeals reversed the trial court's decision on the Title IX issue.[24] In so doing, the court *held* that same sex harassment is actionable under Title IX and that the "knew or should have known" standard for ascertaining institutional liability is the appropriate standard to apply in a hostile environment sexual harassment case.[25]

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18. *Id.* The district has a policy against sexual abuse or harassment of students on the basis of sex. *Id.* at 466 n.1. The prohibition extends to any employee whether (1) he or she is on or off duty; (2) the conduct occurs on or off the school's property; (3) the student does or does not welcome or invite the conduct; (4) the abuse or harassment occurs within two years of the student leaving the district. *Id.*

19. *Id.* at 466; Brief for Appellee at 9-10, *Kinman* (No. 95-2809).

20. *Kinman*, 94 F.3d at 466; Brief for Appellee at 1, *Kinman* (No. 95-2809).

21. Kinman v. Omaha Pub. Sch. Dist., No. 8: CV93-190, slip op. at 7 (D. Neb. June 12, 1995).

22. *Id.* at 8.

23. *Kinman*, 94 F.3d at 469.

24. *Id.* at 463. In ascertaining the school district's liability for Kinman's § 1983 claim, the court held that such liability is premised on the existence of a continuing, widespread, persistent pattern of unconstitutional conduct, as well as deliberate indifference or tacit authorization and causation on behalf of the school district. *Id.* at 467 (citing Jane Doe A. v. Special Sch. Dist., 901 F.2d 642, 646 (8th Cir. 1990)). The court affirmed the lower court's decision that Kinman failed to make such a showing. *Id.* Thus, this article will focus primarily on the Title IX claim of hostile environment sexual harassment and the standard for ascertaining institutional liability for such acts.

25. *Id.* at 469. After remand to the district court and a subsequent trial, a jury awarded Kinman $25,000 in damages. *See* Rick Ruggles, *Jury: Bryan Graduate Was Harassed*, OMAHA WORLD-HERALD, Oct. 24, 1997 *available in* 1997 WL 6317879. Media reports on the verdict indicate that jurors said the school district should not have needed three years to determine that Kinman was involved with McDougall. *See* Paul Goodsell, *District, Ex-Student Disagree on Handling of Affair*, OMAHA WORLD-HERALD, Nov. 24, 1997, *available in* 1997 WL 6322023. Motions by the school district for judgment notwithstanding the verdict and for a new trial were later denied by the district court. *See Judge Won't Reverse Kinman Case Verdict*, OMAHA WORLD-HERALD, Feb. 10, 1998, *available in* 1998 WL 5494517. A motion by Kinman for attorney's fees filed on Nov. 6, 1997 is pending. Telephone interview with James E. Harris, Attorney for Janet Kinman (Feb. 25, 1998).

II. LEGAL BACKGROUND

A. TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

Title IX provides that "[n]o person in the United States shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance."[26] The legislation was enacted to protect individuals from sex discrimination by denying federal financial aid to those educational institutions that bear responsibility for sexually discriminatory practices.[27] To accomplish this goal, employees and students of federally funded educational institutions who are discriminated against on the basis of sex have a private right of action under Title IX for injunctive relief and compensatory damages.[28] In interpreting Title IX, the United States Supreme Court has specifically admonished courts that "there is no doubt that if we are to give it the scope that its origins dictate, we must accord it a sweep as broad as its language."[29]

1. Sexual Harassment Under Title IX

In attempting to alleviate discrimination on the basis of sex, Congress has attempted to strike at the core of sexual discrimination by enacting legislation to prevent it in the workplace[30] and classrooms.[31] In interpreting sex discrimination within Title VII and Title IX, courts have construed sexual harassment as an actionable form of sex discrimination.[32]

In a Title IX context, sexual harassment can manifest itself in several ways, including: a teacher making sexual comments to or inappropriately touching a student; solicitation or coercion of sexual acts by students; or promising to grade students highly or poorly depending on their submission to these advances.[33] To this end, to state a cause of

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26. 20 U.S.C. § 1681(a) (1994).

27. *See* Cannon v. University of Chicago, 441 U.S. 677, 704 n.36 (1979) (citing 117 CONG. REC. 39,252 (1971)).

28. *See* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 75-6 (1992) (allowing monetary damages to those seeking relief for Title IX violations rather than mere injunctive or equitable relief).

29. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982).

30. *See generally* 42 U.S.C. § 2000e to 2000e-17 (1994 & Supp. 1997) (providing that discrimination on the basis of sex is illegal in the workplace); 29 C.F.R. § 1604.11 (1997) (promulgating guidelines on discrimination because of sex, including sexual harassment).

31. *See generally* 20 U.S.C. §§ 1681 to 1688 (1994) (providing for gender equality in public schools).

32. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 56, 73 (1986) (holding hostile environment sexual harassment to be an actionable form of discrimination on the basis of sex).

33. Neera Rellan Stacy, Note, *Seeking a Superior Liability Standard Under Title IX for Teacher-Student Sexual Harassment*, 71 N.Y.U. L. REV. 1338, 1338 (1996).

action under Title IX, a student must show: (1) that he or she was excluded from participation in, denied the benefits of, or subjected to discrimination in an educational program; (2) that the program receives federal assistance; and (3) that the exclusion, denial, or discrimination was on the basis of sex.[34]

To successfully prove a claim of hostile environment sexual harassment, in addition to the basic Title IX elements delineated above, a plaintiff must show: (1) that he or she is a member of a protected group; (2) that the plaintiff was subject to unwelcome harassment; (3) that the harassment was based on sex; (4) that the charged sexual harassment had unreasonably interfered with the plaintiff's education and created an intimidating, hostile or offensive educational environment that seriously affected the psychological well-being of the plaintiff; and (5) that some basis for institutional liability has been established.[35]

In proving that a plaintiff is a member of a protected group, Title IX implicitly provides protection for both genders, as courts have specifically held that, like Title VII, the proper inquiry is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.[36] In order to meet the second requirement that the student was subject to unwelcome harassment, he or she must prove the harassment was not solicited or incited and that it was regarded as undesirable or offensive.[37] In addition, to determine whether the advance is unwelcome, "the age of the student, the nature of the conduct involved, and the harasser's degree of authority over the student must be considered."[38] Relatedly, when the accused claims the harassment was consensual, "the student's age is a critical factor."[39] To successfully prove the third element, that the alleged harassment was based on sex, a plaintiff must show that "but for" the plaintiff's sex, the harassment would not have occurred.[40]

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34. Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996).

35. *See* Does v. Covington County Sch. Bd. of Educ., 930 F. Supp. 554, 568 (M.D. Ala. 1996) (citing Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1194 (11th Cir. 1996); Nelson v. Almont Community Sch., 931 F. Supp. 1345, 1356 (E.D. Mich. 1996)).

36. *See* Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 465 (8th Cir. 1996) (citing Quick v. Donaldson Co., 90 F.3d 1372, 1378 (8th Cir. 1996)) (extending to Title IX the Title VII principle that discrimination of any individual, man or woman, based on that person's sex is illegal).

37. *See Does*, 930 F. Supp. at 569 (citing Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982)).

38. Jeffrey A. Thaler, *Sexual Harassment at School: A Legal Primer*, TRIAL, Nov. 1997, at 62, 66.

39. *Id.* In evaluating the victim's age, the United States Department of Education's Office of Civil Rights [hereinafter OCR] guidelines never view sexual contact or harassment with an elementary student to be consensual. *Id.* Further, for secondary students, "there will be a strong presumption that sexual contact . . . is not consensual." *Id.* (quoting 62 Fed. Reg. 12,040 (1997)).

40. *Does*, 930 F. Supp. at 569 (citing *Henson*, 682 F.2d at 904).

Proving the fourth element in a hostile environment case requires a showing that in its totality, the harassment is so severe or sufficiently pervasive as to alter the conditions of employment and create an abusive working environment.[41] Sexually hostile or intimidating environments are usually characterized by multiple and varied combinations and frequencies of offensive exposures.[42] Thus, under the hostile environment theory, a plaintiff generally must show repeated, habitual comments or conduct that occurred with some frequency, as opposed to a single or isolated offensive incident.[43] Finally, a hostile environment in an educational setting is not created by simple childlike behavior or by an offensive utterance, comment, or vulgarity.[44]

2. *Same-Sex Sexual Harassment Under Title IX*

The language of Title IX does not expressly address same-sex discrimination or harassment.[45] Nevertheless, cases have held that the intent of Title IX is the same regardless of the sex of the one harassing and the one being harassed.[46] As with most aspects of Title IX, liability for sexual harassment by a member of the same sex finds its roots in Title VII.[47] Both the United States Supreme Court and several circuits have recognized same-sex harassment as actionable under Title VII.[48]

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41. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (explaining the requisite level of proof in a hostile environment sexual harassment case). A hostile environment is assessed from the perspective of the victim. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

42. Nelson v. Almont Community Schs., 931 F. Supp. 1345, 1357 (E.D. Mich. 1996).

43. *Id.; see also* Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 783 (1st Cir. 1990) (finding that under Title VII an isolated sexual advance, without more, does not satisfy the abusive environment requirement). *But see* Tomka v. Seiler Corp., 66 F.3d 1295, 1305 (2d Cir. 1995) (stating that a single incident of sexual assault is sufficient to establish a hostile working environment for Title VII liability).

44. Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1194 (11th Cir. 1996) *vacated on other grounds*, 120 F.3d 1390 (11th Cir. 1997) (en banc). In determining whether a plaintiff has met the fourth element of a hostile environment claim, a court must be particularly concerned with: (1) the frequency of abusive conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating rather than merely offensive; and (4) whether it unreasonably interferes with a plaintiff's performance. *Id.* (citing *Harris*, 510 U.S. at 22).

45. *See* 20 U.S.C. § 1681(a)(1) (1994) (prohibiting discrimination in educational institutions receiving federal funding).

46. Does v. Covington County Bd. of Educ., 930 F. Supp. 554, 568 (M.D. Ala. 1996). Likewise, the form of sexual harassment (hostile environment or quid pro quo) does not affect whether harassment by a member of the same sex is actionable under Title IX. *See id.* at 568-69 (noting that both theories of harassment law attack a manifestation of the same evil the law is designed to protect).

47. *See* Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 468 (8th Cir. 1996) (finding same-sex harassment actionable under Title IX based on a similar holding under Title VII) (citing Quick v. Donaldson Co., 90 F.3d 1372, 1378 (8th Cir. 1996)).

48. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., No. 96-568, 1998 WL 88039, at 3 (U.S. Mar. 4, 1998) (recognizing same-sex harassment under Title VII and stating that there is no justification in the statutory language or precedent for a categorical rule excluding such claims). *Quick*, 90 F.3d at 1376 n.4 (holding that same-sex harassment is actionable under Title VII); Baskerville v. Culligan Int'l Corp., 50 F.3d 428, 430 (7th Cir. 1995) (stating that same-sex harassment

Consequently, many of these Title VII principles have been applied to Title IX.[49]

As the Seventh Circuit Court of Appeals noted in *Doe v. City of Belleville*,[50] the linchpin for same-sex harassment under Title VII is that the legislation draws no distinction between men and women, either as plaintiffs or harassers.[51] The court found that the rationale for not distinguishing between the sexes in anti-discrimination legislation is that it makes little difference whether the victim is male or female; in either case, gender has become inextricably intertwined with the harassment.[52] Thus, each sex has the potential to be a victim of sex discrimination and the gender of the harasser is of little consequence.[53] This rationale has provided the basis for the majority of courts to recognize same-sex sexual harassment under Title VII.[54] To that end, many of these same

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is recognizable under appropriate circumstances); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) (recognizing that although this case involved sexual harassment by a male to a female, similar conduct directed by the male supervisor to male employees could be actionable); Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 148 (2d Cir. 1993) (Van Graafeiland, J., concurring) (stating that sexual harassment is actionable if committed by either a member of the same sex or opposite sex of the individual being harassed); Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (stating that the court previously rejected the argument that sexual harassment could not be gender discrimination simply because a homosexual supervisor could harass an employee of the same gender).

49. *See, e.g., Kinman*, 94 F.3d at 468 (citing *Quick*, 90 F.3d at 1379) (recognizing same-sex hostile environment harassment under Title IX and adopting the proposition that the proper inquiry is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed"); *Does*, 930 F. Supp. at 568 (recognizing same-sex quid pro quo sexual harassment in a Title IX claim).

50. 119 F.3d 563 (7th Cir. 1997).

51. *See* Doe v. City of Belleville, 119 F.3d 563, 574 (7th Cir. 1997) (holding that same-sex hostile environment sexual harassment is actionable under Title VII). Similar to Title VII, the language of Title IX also draws no distinction between males and females. *See* 20 U.S.C. § 1681(a) (1994).

52. *Belleville*, 119 F.3d at 578. Particularly with hostile environment claims, gender is of little consequence since the premise of that theory is "that the conditions of the plaintiff's work environment have been altered in a way that made the *environment* hostile to him or her as a man or woman." *See id.* (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993)) (emphasis original). As well, many argue that same-gender claims do not present novel or difficult questions under Title VII. Petitioner's Brief at 34, Oncale v. Sundowner Offshore Servs., Inc., No. 96-568, 1997 WL 458826, (U. S. filed Aug. 11, 1997). Rather, "[t]he courts will have to consider, as they do in the traditional harassment scenario, the conduct of the defendants, the sexual nature of the conduct, its offensiveness and 'unwelcomeness' and whether it altered the reasonable terms and condition's [sic] of the victim's employment." *Id.*

53. *Belleville*, 119 F.3d at 578. As described by the petitioner in *Oncale*, the focus should be on the underlying harassment rather than gender:

> The gender of Mr. Oncale's harasser neither defines nor detracts from the sexually harassing nature of the defendants' conduct. To the contrary, one can assert with some confidence that there is no type of conduct more repulsive to the nonconsenting heterosexual male and more certain to drive him from the workplace than that engaged in by the defendants in this case. Why is such conduct so degrading and humiliating? Because Joseph Oncale is a man. The defendants targeted Joseph Oncale for harassing treatment and selected their method and manner of sexual harassment because he was male and because of his sexual identity as a man, confident that Joseph Oncale would find the employment situation intolerable.

Petitioner's Brief at 18-19, *Oncale* (No. 96-568).

54. *Belleville*, 119 F.3d at 573-74 (citing Fredette v. BVP Management Assoc., 112 F.3d 1503,

reasons have provided the basis for courts to recognize same-sex harassment under Title IX.[55]

B. INSTITUTIONAL LIABILITY FOR SEXUAL HARASSMENT UNDER TITLE IX

Cases addressing sexual harassment under Title IX have predicated recovery on some showing of institutional liability.[56] Due to the slow development of legal standards under Title IX, courts have often looked to standards for employer liability under Title VII[57] for guidance whenconsidering institutional liability for Title IX claims.[58] In looking

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1506 (11th Cir. 1997); Yeary v. Goodwill Indus. Knoxville, Inc., 107 F.3d 443, 447-48 (6th Cir. 1997); Wrightson v. Pizza Hut of Amer., Inc., 99 F.3d 138, 142-43 (4th Cir. 1996); Quick v. Donaldson Co., 90 F.3d 1372, 1376 (8th Cir. 1996); McCoy v. Macon Water Authority, 966 F. Supp. 1209, 1215-17 (M.D. Ga. 1997); Caldwell v. KFC Corp., 958 F. Supp. 962, 967 (D.N.J. 1997); Wehrle v. Office Depot, Inc., 954 F. Supp. 234, 236 (W.D. Okla. 1996); Miller v. Vesta, Inc., 946 F. Supp. 697, 701-02 (E.D. Wis. 1996); Johnson v. Hondo, Inc., 940 F. Supp. 1403, 1409 (E.D. Wis. 1996); Shermer v. Illinois Dep't of Transp., 937 F. Supp. 781-83 (C.D. Ill. 1996); Gerd v. United Parcel Serv., Inc., 934 F. Supp. 357, 360 (D. Colo. 1996); Johnson v. Community Nursing Servs., 932 F. Supp. 269, 272-73 (D. Utah 1996); Wang v. Thomas Pontiac, Inc., 930 F. Supp. 393, 400-03 (D. Minn. 1996); Tietgen v. Brown's Westminster Motors, Inc., 921 F. Supp. 1495, 1502-03 (E.D. Va. 1996); Williams v. District of Columbia, 916 F. Supp. 1, 7-10 (D.D.C. 1996); King v. M.R. Brown, Inc., 911 F. Supp. 161, 166-68 (E.D. Pa. 1995); Easton v. Crossland Mortgage Corp., 905 F. Supp. 1368, 1378-80 (C.D. Cal. 1995), *rev'd on other grounds*, 114 F.3d 979 (9th Cir. 1997); Blozis v. Mike Raisor Ford, Inc., 896 F. Supp. 805, 806-07 (N.D. Ind. 1995); Raney v. District of Columbia, 892 F. Supp. 283, 286-88 (D.D.C. 1995); Nogueras v. University of Puerto Rico, 890 F. Supp. 60, 62-3 (D.P.R. 1995); Griffith v. Keystone Steel & Wire, Div. of Keystone Consol. Indus., Inc., 887 F. Supp. 1133, 1136-37 (C.D. Ill. 1995); EEOC v. Walden Book Co., 885 F. Supp. 1100, 1102-04 (M.D. Tenn. 1995); Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545, 1549-51 (M.D. Ala. 1995); Joyner v. AAA Cooper Transp., 597 F. Supp. 537, 541-42 (M.D. Ala. 1983); Wright v. Methodist Youth Servs., Inc., 511 F. Supp. 307, 310 (N.D. Ill. 1981)). *But see* Oncale v. Sundowner Offshore Servs., Inc., 28 F.3d 446, 451-52 (5th Cir. 1994) (holding that harassment by a male supervisor against a male subordinate was not actionable since Title VII addresses gender discrimination), *cert. granted*, 117 S. Ct. 2430 (1997); Vandeventer v. Wabash Nat'l Corp., 867 F. Supp. 790, 796 (N.D. Ind. 1994) (holding that Title VII is aimed at a gender-biased atmosphere; an atmosphere of oppression by a "dominant" gender); Hopkins v. Baltimore Gas & Electric Co., 871 F. Supp. 822, 834 (D. Md. 1994) (stating that allowing a claim for same-sex harassment "strains" at the intent of Title VII); Goluszek v. H.P. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (refusing to find a cause of action for male-male sexual harassment on the basis that Title VII was enacted to prevent an abuse of power and the victim was in a male-dominated environment); Susan Perissinotto Woodhouse, Comment, *Same-Gender Sexual Harassment: Is it Sex Discrimination Under Title VII?*, 36 SANTA CLARA L. REV. 1147, 1151-52 (1996) (arguing that same sex harassment should not be permitted under Title VII).

55. Does v. Covington County Bd. of Educ., 930 F. Supp. 554, 568 (M.D. Ala. 1996) (recognizing same-sex quid pro quo sexual harassment in a Title IX claim).

56. *See id.* at 568 (citing Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1194 (11th Cir. 1996); Nelson v. Almont Community Sch., 931 F. Supp. 1345, 1356 (E.D. Mich. 1996)).

57. 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." 42 U.S.C. § 2000e-2(a)(1) (1994).

58. *See, e.g.*, Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 75 (1992) (relying on Title VII principles decided in Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)); Kadiki v. Virginia Commonwealth Univ., 892 F. Supp. 746, 749-50 (E.D. Va. 1995) (stating that Title VII provides a persuasive body of standards for shaping a Title IX action). Courts often look to Title VII employer liability standards in considering institutional liability under Title IX. *See* Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 655 (5th Cir. 1997); Doe v. Claiborne County Bd. of Educ., 103 F.3d 495, 514 (6th Cir. 1996); Brine v. University of Iowa, 90 F.3d 271, 275 (8th Cir. 1996); Murray v. New

to Title VII for guidance, there is currently a division among federal courts between several standards for ascertaining institutional liability for hostile environment sexual harassment under Title IX.[59] These standards include: (1) strict liability for school district or institutional liability;[60] (2) institutional liability if the school district knowingly fails to act;[61] (3) no institutional liability unless there is direct discrimination;[62] and (4) liability if the school district knew or should have known of the discrimination.[63]

In adopting the strict liability standard, the court in *Bolon v. Rolla Public Schools*[64] identified three compelling reasons for imputing the acts of teachers to the school district: (1) Title IX's language is very broad; (2) unlike employers, school districts make express assurances to prohibit sex discrimination in exchange for the acceptance of federal funds; and (3) students are required to attend certain levels of school, which places a high duty on public school districts to protect the interests

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York Univ. College of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1376 (N.D. Cal. 1997); Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1421 (N.D. Cal. 1996); *Nelson*, 931 F. Supp. at 1356; *Does*, 930 F. Supp. at 568; Bolon v. Rolla Pub. Sch., 917 F. Supp. 1423, 1429 (E.D. Mo. 1996); Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1022 (W.D. Mo. 1995); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1290 (N.D. Cal. 1993). Commentators have noted that Title VII is more developed than Title IX for four reasons: (1) students, unlike employees, are more transient and therefore, less likely to file claims; (2) students may lack financial resources to pursue their cause of action; (3) courts have historically shown reluctance in evaluating decisions of academic institutions; (4) the scope and nature of relief under Title IX remains unclear. Stacy, *supra* note 33, at 1345 (citing Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 527-28 (1987)).

59. *See Bolon*, 917 F. Supp. at 1427 (explaining different approaches utilized by federal courts to determine institutional liability under Title IX); *see also* Stacy, *supra* note 33, at 1348-52 (discussing the various approaches to institutional liability under Title IX); Thaler, *supra* note 38, at 66 (outlining four standards of institutional liability utilized in federal courts).

60. *Bolon*, 917 F. Supp at 1427.

61. *See* Ellison v. Brady, 924 F.2d 872, 881-82 (9th Cir. 1990) (holding that under this same standard used in Title VII, an employer can be liable if it fails to take "immediate and appropriate" action "reasonably calculated" to remedy the complained of harm); Burrow *ex rel.* Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1207 (N.D. Iowa 1996) (citing *Davis*, 74 F.3d at 1194) (adopting the knowing failure to act standard for Title IX institutional liability); *Bosley*, 904 F. Supp. at 1023 (finding liability for an institution if the institution or school district knew of the harassment and intentionally failed to take proper remedial action); *Patricia H.*, 830 F. Supp. at 1297 (adopting the "knowing failure to act" standard for institutional liability).

62. *Rosa H.*, 106 F.3d at 657 (concluding that "Title IX requires a showing of actual, intentional discrimination on the part of the school district"); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1008 (5th Cir. 1996) (holding that there can be no institutional liability "absent allegations that the school district itself directly discriminated based on sex"); Aurelia D. v. Monroe County Bd. of Educ., 862 F. Supp. 363, 367-68 (M.D. Ga. 1994) (dismissing a plaintiff's complaint when it was not alleged that an employee of the school board had any role in the harassment); *see also* Seamons v. Snow, 84 F.3d 1226, 1233 (10th Cir. 1996) (declining to adopt a standard for institutional liability but questioning the liability of a school district based on mere negligence rather than any deliberate intention to discriminate on the basis of sex).

63. *Murray*, 57 F.3d at 249 (citing 29 CFR § 1604.11(d) (1993)); *Petaluma*, 949 F. Supp. at 1421; *Kadiki*, 892 F. Supp. at 750; Hastings v. Hancock, 842 F. Supp. 1315, 1319 (D. Kan. 1993) (citing Hirschfeld v. New Mexico Corrections Dept., 916 F.2d 572, 577 (10th Cir. 1990)); *see also* 62 Fed. Reg. 12,036 (1997) (OCR regulation advocating a constructive "should have known test" for adjudicating school liability).

64. 917 F. Supp. 1423 (E.D. Mo. 1995).

of children.[65] The court further reasoned that absent a strict liability standard, "the school would be effectively insulated from all Title IX liability."[66]

In analyzing the "knowing failure to act" standard, courts have specified that institutional liability is premised on the intention of the school district in responding (or failing to respond) to the harassment.[67] For instance, in *Patricia H. v. Berkeley Unified School District*,[68] the court adopted this standard in light of factual allegations that the school district not only failed to respond to the plaintiff's complaints regarding sexual abuse by a teacher, but most significantly that the school continued to employ the teacher despite a brief suspension of his license for admitting to an act of sexual misconduct.[69]

The direct or intentional discrimination standard for institutional liability was adopted by the Fifth Circuit Court of Appeals in *Rosa H. v. San Elizario Independent School District.*[70] In that case, the court examined Title IX's structure and legislative history to find that it is unlikely that Congress intended Title IX to make funding contingent upon whether a school district succeeded in preventing teachers from "cultivating covert sexual relationships with students."[71] Thus, the court held that Title IX requires a showing of "actual, intentional discrimination on the part of the school district."[72]

The "knew or should have known" standard has been adopted by several courts and the United States Department of Education's Office of Civil Rights.[73] For example, in *Doe v. Petaluma City School District*,[74] the court adopted the "knew or should have known" standard under Title IX after considering its application in a Title VII context.[75] In its opinion, the court found that the plaintiff must prove that the institution knew or should have known, in the exercise of its legal duties, of the

65. *Bolon*, 917 F. Supp. at 1428.

66. *Id.* at 1429.

67. *See* Burrow *ex rel.* Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1207 (N.D. Iowa 1996) (holding that a student must show that the school district knew of the harassment and intentionally failed to take proper remedial action); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1297 (N.D. Cal. 1990) (stating that a school district may be held liable if it failed to take reasonable steps to aid students victimized by sexual harassment).

68. 830 F. Supp. 1288 (N.D. Cal. 1993).

69. *Patricia H.*, 830 F. Supp. at 1300-01.

70. Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 657 (5th Cir. 1997).

71. *Id.* at 657.

72. *Id.*

73. *See* Thaler, *supra* note 38, at 66 (citing 62 Fed. Reg. 12,036 (1997)).

74. 949 F. Supp. 1415 (N.D. Cal. 1996).

75. *See* Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1421 (N.D. Cal. 1996) (noting that the appropriateness of using Title VII standards in a Title IX case is well established).

harassment.[76] The court found that under this standard an entity cannot be held liable if it takes prompt, appropriate remedial action.[77] Thus, the court concluded that the standard's flexibility allows the schools an appropriate amount of discretion in determining how to best respond to harassment.[78]

III. CASE ANALYSIS

In *Kinman v. Omaha Public School District*,[79] the Eighth Circuit Court of Appeals reversed and remanded the district court's judgment on the plaintiff's Title IX claim on two grounds.[80] First, the court of appeals reversed based on its rejection of the district court's conclusion that same-sex harassment was not actionable under Title IX.[81] Second, the court remanded the case in light of the "knew or should have known" standard and questions as to exactly when the school district obtained knowledge of the alleged harassment.[82]

A. TITLE IX DISCRIMINATION CLAIM

The court noted that Kinman is entitled to bring an action under Title IX[83] based on the United States Supreme Court's recognition of an implied private cause of action under the legislation[84] and because sexual harassment is an actionable form of sexual discrimination.[85] Because Kinman was seeking relief under a hostile environment theory of sexual harassment, she was required to show five elements in her cause of action, including: (1) that she belonged to a protected group; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her education and created an abusive educational environment; and (5) that some basis for institutional liability has been established.[86]

In opposing Kinman's Title IX claim, the school district raised three primary arguments.[87] First, the defendants argued that the sexual contact

76. *Id.* at 1426.
77. *Id.*
78. *Id.*
79. 94 F.3d 463 (8th Cir. 1996).
80. Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996).
81. *Id.* at 468.
82. *Id.* at 469.
83. 20 U.S.C. § 1681(a) (1994).
84. *See Kinman*, 94 F.3d at 467 (citing Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 75-76 (1992)).
85. *See id.* (citing Meritor Sav. Bank v. Vinson, 477 U.S. 56, 64 (1986)).
86. *See id.* at 467-68 (citing Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996)).
87. *Id.* at 468.

between McDougall and Kinman was consensual.[88] The defendants based this argument on the assertion that Kinman willingly participated in the affair and that she continued to engage in the relationship following graduation and through the time of her suit, including the weekend before her deposition in January of 1994.[89] The court determined that a factual issue remained to be considered on remand because Kinman alleged that she initially did not welcome McDougall's advances and that the notion of being gay was so upsetting to her that it led her to attempt suicide.[90] Additionally, the court noted that the United States Supreme Court's holding in *Meritor Savings Bank v. Vinson*[91] explained the relevant question is not whether the plaintiff voluntarily participated in sexual relations, but whether the advances were unwelcome.[92]

The defendants further argued that Kinman was not discriminated against on the basis of sex because sexual harassment between members of the same gender is not actionable, an argument which the court flatly rejected.[93] The court premised its recognition of same-sex harassment under Title IX on the basis that such harassment is actionable under Title VII.[94] Additionally, the court recognized such harassment under Title IX because the "uncontroverted evidence showed that McDougall targeted Kinman because she was a woman."[95] Similarly, the court found no evidence that McDougall directed similar attentions toward male students, supporting the proposition that Kinman was discriminated "because of" her sex.[96]

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88. *Id.*

89. *Id.*; Brief for Appellee at 14, *Kinman* (No. 95-2809).

90. *Kinman*, 94 F.3d at 468. Thus, this issue was remanded in part based on the possibility that any advances by a member of Kinman's own sex would have been unwelcome. *Id.*

91. 477 U.S. 57, 68 (1986).

92. *See Kinman*, 94 F.3d at 467 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)). As the United States Supreme Court noted:

> To distinguish between an actual desire for a relationship, on the one hand, and a mere acquiescence to tendered sexual advances on the other, it is necessary to consider the power disparity between the individuals involved. The question '[p]resents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact.'

Id. at 468 (quoting *Meritor*, 477 U.S. at 68).

93. *Id.*

94. *Id.* (citing Quick v. Donaldson Co., 90 F.3d 1372, 1376 (8th Cir. 1996)).

95. *Id.* (Ginsburg, J., concurring) (stating that the proper inquiry is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed).

96. *Id.*

B. INSTITUTIONAL LIABILITY UNDER TITLE IX

The defendants also claimed that Kinman failed to offer evidence to support liability against the district and school officials for McDougall's conduct.[97] The court noted the disparity among various federal courts concerning the appropriate standard for institutional liability under Title IX for hostile environment sexual harassment.[98] Accordingly, the court found that Title VII provided the necessary guidance to promulgate an institutional liability standard for the Eighth Circuit in considering Title IX claims.[99]

In looking at Title VII standards of liability, the court noted that some degree of culpable behavior should be required to hold a school district or institution liable in a hostile environment harassment case.[100] Since the court had previously utilized the "knew or should have known" standard in a Title VII hostile environment sexual harassment case, it found that standard applicable in this situation, as the standard contemplates some degree of culpable behavior by the employer or school district.[101] To successfully prevail on a hostile environment claim under the "knew or should have known" standard, an employee or student must not only show that the employer knew or should have known of the alleged harassment, but also that the employer also failed to take remedial action.[102]

In light of the adoption of this standard, the court concluded that a factual dispute remained regarding exactly when the school district and school officials obtained knowledge of the relationship between McDougall and Kinman, and whether, once the school and school officials obtained this knowledge, they took reasonable steps to remedy

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97. *Id.*

98. *See id.* (citing Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1008 (5th Cir. 1996) (finding no liability absent direct discrimination by the institution); Bolon v. Rolla Pub. Sch., 917 F. Supp. 1423, 1429 (E.D. Mo. 1996) (holding the school district strictly liable for administrator or teacher sexual harassment); Rosa H. v. San Elizario Indep. Sch. Dist., 887 F. Supp. 140, 143 (W.D. Tex. 1995) (finding institutional liability only if the school knew or should have known of the harassment); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1297 (N.D. Cal. 1993) (finding institutional liability only upon a showing that the district knowingly failed to act)).

99. *Kinman*, 94 F.3d at 469 (citing Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995); Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1022 (W.D. Mo. 1995)).

100. *See id.* In a hostile environment case, a harasser is not acting within the scope of employment by conditioning some job benefit on sexual acts. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 56, 72 (1986). Since agency principles do not apply, courts often require employers to engage in some action or inaction that would constitute liability for the harassment by one of its employees. *See Kinman*, 94 F.3d at 469 (adopting the "knew or should have known" standard for imputing liability to a school district).

101. *Id.*

102. *Id.* (citing Callanan v. Runyan, 75 F.3d 1293, 1296 (8th Cir. 1996)).

the situation.[103] The court then reversed and remanded the case to the district court for further consideration consistent with the court's opinion.[104]

IV. IMPACT

The decision in *Kinman* established for the first time in the Eighth Circuit that same-sex harassment is actionable under Title IX.[105] Although the United States Supreme Court has not addressed same-sex harassment under Title IX, it recently held that such harassment is actionable under Title VII when it reversed the Fifth Circuit Court of Appeals' decision in *Oncale v. Sundowner Offshore Services*.[106] In *Oncale*, the Fifth Circuit had reaffirmed its decision in *Garcia v. Elf Autochem, North America*[107] that sexual harassment by a member of the same sex is not actionable.[108] While the Court acknowledged same-sex harassment was not the principal evil Congress was concerned with where it enacted Title VII, the Court noted that statutory prohibitions often go beyond principal evils to cover reasonably comparable evils.[109] It is on this basis and the broad proscription of discrimination because of sex that led the court to unanimously recognize a same-sex hostile environment sexual harassment claim under Title VII.[110]

It is likely, however, that the *Kinman* decision's most significant impact will be made when the United States Supreme Court considers the question of institutional liability under Title IX.[111] By adopting the

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103. *Kinman*, 94 F.3d at 469.

104. *Id.* The court found there was no genuine issue of material fact on the § 1983 claim since the plaintiff could not prove any set of facts that would show the individual defendants were deliberately indifferent or tacitly authorized the alleged conduct. *Id.* at 467. The court noted that the individual defendants in this case did not turn a "blind eye" to the situation. *Id.* Rather, the court found these individuals attempted to monitor Kinman's phone calls; administered polygraph examinations; interviewed both Kinman and McDougall; and once they had conclusive proof of the relationship, the defendants promptly terminated the teacher and sought revocation of her teaching certificate. *Id.* While the court noted that these defendants could have or should have acted sooner, this does not constitute deliberate indifference or tacit authorization. *Id.* Thus, the court ruled that the district court correctly granted summary judgment on behalf of the individual defendants and the school district on the § 1983 claim. *Id.*

105. *See id.* at 468 (reaffirming Quick v. Donaldson Co., 90 F.3d 1372, 1376 (8th Cir. 1996) (holding that same-sex harassment is actionable under Title VII)).

106. Oncale v. Sundowner Offshore Servs., Inc., No. 96-568, 1998 WL 88039, at 4 (U.S. Mar. 4, 1998). *See* Donald C. Dillworth, *Sexual Orientation Irrelevant in Man-to-Man Harassment*, TRIAL, Oct. 1997, at 82, 84.

107. Garcia v. Elf Autochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994).

108. Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 120 (5th Cir. 1996).

109. *Oncale*, 1998 WL 88039, at 3.

110. *See id.*

111. *See generally* S.B.L. v. Evans, 80 F.3d 307, 309 (8th Cir. 1996) (stating that the Supreme Court has not reached an established standard for institutional liability under Title IX).

"knew or should have known" standard, the court in *Kinman* established the definitive standard of institutional liability in the Eighth Circuit for hostile environment sexual harassment under Title IX.[112]

Since the Supreme Court's 1992 decision in *Franklin v. Gwinnett County Public Schools,*[113] which gave students a private cause of action for monetary damages under Title IX,[114] courts have seen an increased number of Title IX cases.[115] As well, statistics indicate discrimination and sexual harassment cases in schools are on the rise.[116] Such statistics demonstrate the urgency and need to reconcile the ambiguity resulting from the numerous standards of institutional liability currently being adopted by federal courts throughout the country.[117]

To address this problem, the Supreme Court recently granted certiorari to consider that precise question in *Gebser v. Lago Vista Independent School District.*[118] In considering *Gebser*, the Court will address the lower court's decision that actual knowledge by a school official and a failure by that official to take action is required to find institutional liability.[119] Since this is the most protective standard courts have applied in ascertaining institutional liability,[120] the Court may affirm the use of the more moderate "knew or should have known" standard it is considering

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112. Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996).

113. 503 U.S. 60 (1992).

114. Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 75 (1992).

115. *See* Thaler, *supra* note 38, at 62 (stating that since *Franklin*, courts "have issued a large number and variety of decisions, with no further guidance from the Supreme Court").

116. Stacy, *supra* note 33, at 1343. A national survey of more than 1600 students in grades eight through eleven revealed that roughly 80% of the students surveyed believe they had experienced some form of sexual harassment in school, either by teachers, school officials, or peers. *Id.* (citing Mary Jordan, *Sex Harassment Complaints Starting in Grade School: Taunts, Intolerance on the Rise, Survey Finds*, WASH. POST, June 2, 1993, at A1 (reporting on a survey conducted for the American Association of University Women that found that 85% of girls and 76% of boys believed they had been sexually harassed)).

117. *See id.* The urgency is most effectively illustrated by the Fifth Circuit Court of Appeals where that court has adopted conflicting institutional liability standards. *See* Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 400-01 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2434 (1997) (refusing to find institutional liability since notice of sexual abuse was given to a teacher not far enough up the chain of command); Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 660 (5th Cir. 1997) (refusing to find liability absent proof of actual knowledge or direct involvement by the school district in the discrimination).

118. Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 595 (1997). The Supreme Court also recently granted certiorari to consider the question of employer liability under Title VII for hostile environment sexual harassment. *See* Faragher v. City of Boca Raton, 118 S. Ct. 438 (1997). In *Faragher*, the Eleventh Circuit Court of Appeals held that an employer was liable for an employee's hostile environment sexual harassment if the employer "knew or should have known" of the harassment. *See* Faragher v. City of Boca Raton, 111 F.3d 1530, 1535 (11th Cir. 1997).

119. *See* Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223, 1226 (5th Cir. 1997).

120. Linda Greenhouse, *High Court to Weigh Liability of Schools*, N.Y. TIMES, Dec. 6, 1997, at A1.

in the Title VII employer liability case of *Faragher v. City of Boca Raton*,[121] and apply that standard to Title IX when it hears *Gebser*. [122]

Nevertheless, until the Court rules on the issue, by adopting the "knew or should have known" standard in *Kinman*, the Eighth Circuit has effectively established precedent to respond to Title IX sexual harassment cases as they come before the courts in its jurisdiction.[123]

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121. 118 S. Ct. 438 (1997) (considering the Eleventh Circuit Court of Appeal's application of the "knew or should have known" standard for employer liability in a Title VII hostile environment case).

122. *Gebser*, 118 S. Ct. at 595.

123. *See* Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996).

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