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A federal appellate court reinstated a sexual harassment lawsuit against the University of Colorado finding sufficient facts that a jury could conclude there was an official policy at the University of showing high school football recruits a "good time." This decision paves the way for a jury to decide whether the University of Colorado was deliberately indifferent to the likelihood of sexual assaults during recruiting visits.

Tenth Circuit Finds that the University of Colorado Boulder's Failure to Prevent Alleged Sexual Assaults May Be the Result of Deliberate Indifference

By Robert L. Clayton and Alyson J. Guyan

In a decision that could have a far-reaching impact on universities and colleges, the Tenth Circuit Court of Appeals, in *Lisa Simpson; Anne Gilmore v. University of Colorado Boulder*, Nos. 06-1184 and 07-1182 (Sept. 6, 2007), found that the evidence presented was sufficient to support the findings that: (1) Colorado University ("CU" or "University") had an official policy of showing high school football recruits a "good time" on their visits to the CU campus; (2) the alleged sexual assaults were caused by CU's failure to provide adequate supervision and guidance to player-hosts chosen to show the football recruits a "good time;" and (3) the likelihood of such misconduct was so obvious that CU's failure was the result of deliberate indifference.

This case places the burden on universities and colleges to monitor student activities on and off campus and implement new policies and procedures to affirmatively address known misconduct.

Factual Background

On the night of December 7, 2001, Lisa Simpson and Anne Gilmore ("plaintiffs") allege that they were sexually assaulted in Ms. Simpson's apartment by CU football players and high school students on a recruiting trip. The plaintiffs brought separate actions against the University under Title IX of the Education Amendments of 1972. Ms. Simpson filed a complaint in 2002 and Ms. Gilmore filed her complaint in 2003. The two cases were consolidated in 2004. The plaintiffs allege that CU knew of the risk of sexual harassment of female CU students in connection with the CU football recruiting program and failed to take action to prevent future harassment prior to their assaults in 2001.

In 2005, the district court granted summary judgment for CU finding that the plaintiffs could not establish the elements of a Title IX claim. The district court ruled that no rational person could find that: (1) CU had actual notice of sexual harassment of CU students by football players and recruits before plaintiffs' assaults; or (2) CU was deliberately indifferent to such harassment.[1] In 2006, the court denied motions to alter or amend the judgment and to reopen discovery. A second motion for relief from judgment was denied by the district court in 2007. The plaintiffs subsequently appealed that ruling.

The Tenth Circuit's Analysis

In reviewing the district court's granting of summary judgment for CU, the Tenth Circuit reviewed a variety of sources of information suggesting the risks that sexual assault would occur if recruiting was inadequately supervised at CU. The Tenth Circuit took into consideration the reports outlining the serious risk of sexual assault by student-athletes in general, as well as reports specific to CU.

Under Title IX, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[2] The Tenth Circuit reviewed two Supreme Court cases addressing Title IX damages suits for sexual

[1] *Simpson v. Univ. of Colo.*, 372 F. Supp 2d 1229, 1235 (D. Colo. 2005).
[2] 20 U.S.C. § 1681(a).

harassment. One case alleged sexual harassment of a student by a teacher,[3] and the other alleged student-on-student harassment.[4] Because the plaintiffs allege that the assault arose out of an official school program, the recruitment of high school athletes, the court found that neither case translated perfectly to the current analysis, although it did guide the court.

The court found that the administrative enforcement of Title IX permitted the imposition of financial penalties only after funding recipients received actual notice of discrimination and were given an opportunity to institute corrective measures. This way, the recipient would be sanctioned for the failure to respond and not an employee's independent acts. The funding recipient must have substantial control over both the harasser and the context in which the known harassment occurs. Additionally, the deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it. The court also found guidance in civil rights cases alleging municipal liability under 42 U.S.C. section 1983, where the institution itself, rather than its employees or students, are the wrongdoers. In those cases, courts have found evidence of a single violation of federal rights, accompanied by a showing that a municipality had failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, as a trigger for municipal liability.

The appeal focused on the role and responsibility of CU in the alleged sexual assaults. The plaintiffs allege that CU sanctioned, supported, even funded a program premised on showing recruits a "good time" and that without proper control, would encourage the men to engage in offensive acts. The court found that there was an obvious risk of assault during recruiting visits at CU and that CU had been put on notice of this misconduct. This was evidenced by two 1990 assaults by two CU football players, a 1997 assault of a high school student by CU recruits at a party hosted by a CU football player, a 1998 meeting of CU officials with the local district attorney to discuss the need for policies on the supervision of recruits and the implementation of sexual assault prevention training for football players and events that occurred in the football program under Head Football Coach Barnett from 1999-2001.

Even with this prior knowledge, the court found that under Coach Barnett nothing changed in the football program. In fact, the court found evidence that he knew the efforts by CU were not effective in establishing a football team culture that would prevent sexual assaults and that there was evidence that Barnett himself was undermining those efforts. The court discussed Barnett's hostility towards those alleging sexual harassment or sexual assault – an attitude that was inconsistent with CU having made any sincere effort in the past to instruct players not to engage in or promote sexual harassment or assault. The Tenth Circuit found that the evidence before the district court would support the findings that at the time of the assaults on the plaintiffs: (1) Barnett had knowledge of the serious risk of sexual harassment and assault during college football recruiting efforts; (2) Barnett knew that such assaults had indeed occurred during CU recruiting visits; (3) Barnett nevertheless maintained an unsupervised player-host program to show high school recruits "a good time;" and (4) Barnett knew, both because of incidents reported to him and because of his own unsupportive attitude, that there had been no change in the atmosphere since the 1997 assault.

Therefore, the court found that a jury could infer that "the need for more or different training [of player-hosts was] so obvious, and the inadequacy so likely to result in [Title IX violations], that [Coach Barnett could] reasonably be said to have been deliberately indifferent to the need."[5] This ruling sends the case back to the district court for further proceedings.

Lessons Learned

It is important to note that the decision is based on the Tenth Circuit accepting, as truth, the facts presented by the plaintiffs, and therefore, is a narrow standard. However, should the district court rely on the same standard and find CU deliberately indifferent to sexual assaults, that finding would hold universities to a higher legal standard. The Tenth Circuit ruling requires universities to monitor the activities of students both on and off campus - something that is not currently required. Additionally, universities would be required to take appropriate action (i.e. changing policies and procedures, implementing training seminars, or taking alternative corrective actions) to remedy all misconduct of which the university is aware. By relying on the civil rights cases alleging municipal liability, the courts would hold a university liable for misconduct of its students as long as the university had actual knowledge of prior misconduct and it failed to adequately address the conduct.

Robert L. Clayton is a Shareholder and Alyson J. Guyan is an Associate in Littler Mendelson's Washington, D.C office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Clayton at rlclayton@littler.com, or Ms. Guyan at aguyan@littler.com.

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

[4] *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)

[5] *Citing City of Canton v. Harris*, 489 U.S. 378, 390 (1989).