No. 15-113098-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

NAVID YEASIN,

PETITIONER - APPELLEE/CROSS APPELLANT,

V.

THE UNIVERSITY OF KANSAS,

RESPONDENT - APPELLANT/CROSS APPELLEE.

Reply of Respondent - Appellant/Cross-Appellee University of Kansas to Brief of *Amicus Curiae* Kansas State University

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Appeal from the District Court of Douglas County
The Honorable Robert W. Fairchild, District Judge
District Court Case No. 14CV102

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RESPONSE TO STATEMENT OF THE ISSUE

Amicus Kansas State University's (KSU) framing of the issue ignores the facts of this case. This case does not involve a single instance of sexual harassment that occurred off campus. Instead, this case involves a year's-long, on-campus, sexually harassing and abusive dating relationship that preceded Yeasin's June 2013 criminal battery and criminal restraint of Ms. W. off campus. On her return to the University of Kansas (KU) in Fall 2013, Ms. W. complained to KU about Yeasin's treatment of her, and she experienced the ongoing effects of Yeasin's domestic abuse and sexual harassment – fear, anxiety, depression, insomnia, and nightmares – for which she sought medical treatment so she could continue pursuing her education at KU. Yeasin persisted in his harassment of her and retaliated against her for her complaints about his harassment of her, first to police and then to KU.

The issue in this matter is <u>not</u> as KSU asserts "whether Title IX requires a school to discipline a student for sexual violence committed off campus and outside the school's substantial control." KSU Brief at 2. As discussed below, KSU's argument applies the wrong legal standard, and therefore, is contrived to distract from the real issue, which is a university's Title IX's regulatory obligation to respond once it has knowledge of a complaint of sexual violence or retaliation.

ARGUMENT

I. *Davis* set the Standard for Money Damages not the Limits of Title IX Jurisdiction and a University's Regulatory Obligations.

a. Davis' Holding is limited to Private Causes of Action for Money Damages

KSU argues that *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S.Ct. 1661 (1999), "most clearly addressed" a University's obligations to respond to known peer-on-peer sexual violence. KSU Br. at 2-3. However, *Davis* did no such thing. *Davis* instead established deliberate indifference as the standard in a private action for money damages against a University resulting from peer-on-peer sexual harassment:

> We consider here whether the misconduct identified in *Gebser* – deliberate indifference to known acts of harassment – amounts to an intentional violation of Title IX, *capable of supporting a private damages action*, when the harasser is a student rather than a teacher. We conclude that, in certain *limited circumstances*, it does.

Id. 526 at. 643, emphasis added.

The *limited circumstances* recognized under *Davis* for awarding money damages in a private action against an institution for student-on-student harassment were: (1) the school must have "substantial control over both the harasser and the context in which the known harassment occurs," and (2) the sexual harassment must be "severe, pervasive, and objectively offensive." *Id.* 526 U.S. at 645.

KU acknowledges that *Davis*' "limited circumstances" for imposing money damages in a private right of action turns on a university's "substantial

control." Thus, the Supreme Court set a high bar for imposing liability against a university under Title IX in private damages cases. But that high bar for money damages does not define Title IX's regulatory jurisdiction. The *Davis* court itself recognized as much, noting that the question in that case was not whether student-on-student harassment violated Title IX, but instead was whether a recipient of federal education funding could be liable for damages under any circumstances for discrimination in the form of student-on-student sexual harassment. *Davis*, 526 U.S. at 639.

KSU argues that *Davis*' substantial control test limits Title IX jurisdiction. But KSU ignores the fact that *Davis* did not address the U.S. Department of Education's (DOE) regulatory authority under Title IX and said nothing to indicate that it intended its holding to limit DOE's jurisdiction in the regulatory context. As a result, contrary to KSU's representation, *Davis* does not hold that a university's Title IX regulatory liability is determined based on whether the university exercised substantial control over the harasser and the context in which the harassment occurs. Therefore, *Davis* did not determine the applicable regulatory enforcement standard Title IX imposes on universities to respond to student-on-student harassment.

Building on its erroneous construction of *Davis'* holding, KSU asserts that the federal courts in Kansas and the Tenth Circuit "recognized the limited scope of Title IX jurisdiction" in *C.R.K. v. U.S.D. 260*, 176 F. Supp. 2d 1145 (D. Kan. 2001) and in *Rost ex rel. K.C. Steamboat Springs RE-2 School District*,

511 F.3d 1114 (10th Cir. 2008). KSU Brief at 4. But, like KSU's interpretation of *Davis*, review of the cases exposes the fallacy of that statement. Neither *C.R.K.* or *Rost* involved a regulatory enforcement action by the DOE, and neither case discussed Title IX's regulatory jurisdiction. Instead, both *C.R.K.* and *Rost* involved private causes of action for money damages. *See C.R.K.*, 176 F. Supp. 2d at 1167 (Citing *Davis* in its grant of summary judgment for the school, the Court held plaintiff's evidence failed to establish that the school's response was clearly unreasonable.); *See Rost*, 511 F.3d at 1124 (In granting summary judgment for the school district, the Court held the district's response was not clearly unreasonable so as to be deliberately indifferent to the harassment.).

Citing *Davis,* KSU asserts that a school "is not responsible for investigating or disciplining" a student for student-on-student sexual harassment unless the harassment occurs under a school's substantial control, and that, as a matter of law, "the Supreme Court's explicit limits on Title IX jurisdiction do not require universities to investigate or discipline students for off-campus, peer-to-peer misconduct." KSU Br. at 5. Thus, KSU clearly thinks that *Davis* creates a jurisdictional bright line that absolves universities from any responsibility under Title IX – even the responsibility to investigate a complaint of student-on-student sexual assault.

KSU's erroneous interpretation of *Davis*' import was specifically rejected by the DOE. The DOE explained that the Supreme Court's holdings

establishing the deliberate indifference standard for liability under Title IX in private causes of action for money damages did not apply to its regulatory jurisdiction:

> The Court was explicit in *Gebser* and *Davis* that the liability standards established in those cases are limited to private actions for monetary damages. *See*, e.g. *Gebser*, 524 U.S. at 283, and *Davis*, 526 U.S. at 639. The Court acknowledged, by contrast, the power of Federal agencies, such as the Department, to "promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate," even in circumstances that would not give rise to a claim for money damages. *See Gebser*, 524 U.S. at 292.

See Rev'd Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, January 2001, at ii (hereafter *2001 Guidance*).[1]

Thus, contrary to KSU's declaration of the purportedly sweeping consequence of *Davis* for Title IX regulatory jurisdiction, that simply is not the law.

b. Title IX's Plain Language Grants the DOE Broad Regulatory Authority to effect the Purposes of Title IX

KSU criticizes KU's deference to the DOE's regulatory authority. KSU asserts that KU's deference "incorrectly" expands Title IX's scope to off-campus conduct. KSU Br. at 5. But, KSU's argument ignores the plain language of Title IX and the Supreme Court's interpretation of that broad statutory grant of authority given to the DOE.

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[1] U.S. Dept. of Ed., Office of Civil Rights, *available at*: http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (last visited June 16, 2015).

Title IX was enacted in 1972 with two principal objectives in mind: "[T]o avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices." *Canon v. Univ. of Chicago*, 441 U.S. 677, 704, 99 S.Ct. 1946, 1961-1962 (1979).

Under Title IX, the DOE is "authorized and directed to effectuate" Title IX's restriction on discrimination by "issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute." 20 U.S.C. § 1682. The plain language of the statute further articulates the broad enforcement authority vested in DOE:

> Compliance with *any requirement* adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or continue assistance under such program or activity to any recipient as to whom there has been an express finding . . . of a failure to comply with such requirement . . . or (2) by any other means authorized by law

Id. (emphasis added). Congress' use of the "any requirement" language, contrary to KSU's argument, evidences a clear intent by Congress to grant DOE broad regulatory authority to prevent recipients of federal funds from supporting discriminatory practices.

In *North Haven Bd. of Educ. v. Bell*, the Supreme Court confirmed that Title IX's language must be read very broadly:

> There is no doubt that "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language."

Id. 456 U.S. 512, 521, 102 S.Ct. 1912, 1918 (1982) (internal citations omitted).

KSU asserts that DOE's guidance "is not the 'law'" and is not entitled to any deference. KSU Br. at 7. In support of its attack on the deference owed the DOE's interpretation of Title IX, KSU cites *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and the other cases it lists in note 22, each of which take a limited view of regulatory agency authority. However, it is surprising that KSU's discussion of regulatory authority omits any discussion of *Bell, supra.* The omission is curious because *Bell* is directly on point and specifically addresses the DOE's Title IX regulatory authority.

In *Bell*, the DOE invoked its authority under 20 U.S.C. § 1682 and issued regulations prohibiting education funding recipients from discriminating in employment. *Bell*, 456 U.S. 512 at 517, 102 S. Ct. 1912 at 1915. Two schools, each faced with regulatory actions for failing to comply with the regulations, filed suit alleging that the regulations exceeded the DOE's authority under Title IX. *Id.* 456 U.S. at 517-518, 102 S. Ct. at 1916. In rejecting the narrow interpretation of the DOE's regulatory authority under § 1682 urged by the schools, the Court stated: Certainly, it makes little sense to interpret the statute, as respondents urge, to authorize an agency to promulgate rules that it cannot enforce." *Id.* 456 U.S. at 537, 102 S.Ct. at 1926. Confirming the DOE's grant of broad authority under § 1682, the Court held the DOE's employment regulations valid. *Id.* 456 U.S. at 540, 102 S.Ct. at 1928.

As *Bell* recognized, 20 U.S.C. § 1682 granted the DOE broad authority to effect the purposes of Title IX. KSU has not cited a single case that the DOE's

regulatory guidance has exceeded its statutory authority. Therefore, as *Bell* directed, the DOE's regulatory authority must be interpreted with "sweep[ing]" breadth.

c. KU's actions in this Case and Deference to the DOE's Guidance is consistent with the Broad Regulatory Authority granted the DOE

The hostility expressed in KSU's brief for the DOE's regulatory authority is somewhat surprising. Since at least 1997, universities have been on notice of the regulatory standard for Title IX liability for student-on-student harassment as a result of the DOE's guidance. *See Sexual Harassment Guidance 1997* (hereafter, *1997 Guidance*).[2] That *Guidance* articulated a "knew or should have known" standard for regulatory liability, stating:

> [A] school will be liable under Title IX if its students sexually harass other students if (i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action.

Id.

The DOE's *2001 Guidance*, in its discussion of "enduring principles from the 1997 Guidance," reaffirmed a university's obligation to act once it is on notice of sexual harassment:

> A critical issue under Title IX is whether the school recognized that sexual harassment has occurred and took prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. If harassment has occurred, doing nothing is always the wrong response. . . . The important thing is for

[2] U.S. Dept. of Ed., Office of Civil Rights, *available at*: http://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html (last visited June 16, 2015).

> school employees or officials to pay attention to the school environment and not to hesitate to respond to sexual harassment in the same reasonable, commensurate manner as they would to other types of serious misconduct.

Id. 2001 Guidance, at iii (emphasis added).

The DOE's 2011 *Dear Colleague Letter*, classified as a significant guidance document, recognized that "the continuing effects of off-campus sexual harassment" are frequently experienced on campus, resulting in the creation of a sexually hostile environment. [R.5:786]. The DOE could not have been any more clear in what Title IX requires of a university which has knowledge of an off campus sexual assault:

> If a student files a complaint with a school, *regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures.* . . . [i]f a student alleges that he or she was sexually assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator's friends, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment. *The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator or his or her associates.*

Id. at 4, (emphasis added), [R. 5:786].

In 2014, the DOE issued *Questions and Answers on Title IX and Sexual Violence* (hereafter *2014 Q & A*), another "significant guidance document."[3] Again, the DOE was unequivocal in its guidance:

> Yes. Under Title IX, a school must process all complaints of sexual violence, regardless of where the conduct occurred, to determine

[3] U.S. Dept. of Ed., Office of Civil Rights, *available at*: http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf (last visited June 16, 2015).

> whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity.

Id. at 29.

Thus, for over twenty years, the DOE has repeatedly and consistently instructed universities that Title IX requires a university to act once it is on notice of a complaint of sexual harassment.

If anyone can appreciate the obligations to act imposed on a university as a result of the application of a "knew or should have known standard" in matters of sexual assault, it should be KSU in light of the decision in *Nero v. Kansas State University*, 253 Kan. 567, 861 P.2d 768 (1993). In *Nero*, a male student residing in a KSU co-ed dormitory raped another student. *Id.* 253 Kan. at 569. After the rape and while criminal charges remained pending, KSU temporarily re-assigned the assailant to another residence hall and directed him to not enter the shared dining hall. *Id.* During the summer intersession period, KSU allowed the assailant to move into the single open residence hall without notifying any of the residents. *Id.* 253 Kan. at 570. The assailant sexually assaulted a female student in that residence hall. *Id.* In reversing the grant of summary judgment to KSU, the Court held:

> [A] university has a duty of reasonable care to protect a student against certain dangers, including criminal actions against a student by another student or a third party if the criminal act is reasonably forseeable and within the university's control.

Id. 253 Kan. at 584.

Despite KSU's representations otherwise, the DOE's regulatory standard under Title IX in reality imposes no greater burden on KSU or any other university than did *Nero*. Once a university receives a complaint of sexual assault, it must take some action in the exercise of reasonable care to respond to that complaint.

In this case, Yeasin's sexually violent conduct and retaliation against Ms. W. fell squarely within the DOE's *Guidance*. When Ms. W. complained to KU, it responded by initiating an investigation and then took appropriate remedial action initiating a disciplinary proceeding that resulted in Yeasin's expulsion.

Again, KSU has not cited a single case that holds that the DOE's *Guidance* has exceeded its statutory authority. The fact that KSU claims it would not have acted as did KU proves nothing but that KSU has a greater risk tolerance for sexual harassment of its students and for gambling with potential DOE scrutiny for violating Title IX.

CONCLUSION

Based on the foregoing, KU had knowledge of Yeasin's sexual violence and retaliation against Ms. W. when she complained. KU acted appropriately and in accordance with its obligations under Title IX when it initiated an investigation, and subsequently expelled him.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that this 16th day of June, 2015, a true and correct copy of the foregoing was served via U.S. mail, first-class postage prepaid, addressed to:

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