

## Harassment by A Fellow Student Is Bad, Harassment by A Teacher Is Even Worse

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On May 4, 2018, University of Toledo (“UT”) undergraduate Jaycee Wamer contacted a University faculty member to [report inappropriate sexual advances from her instructor](#), Eric Tyger.<sup>1</sup> The faculty member, along with Wamer, submitted a complaint to UT’s Office of Title IX and Compliance.<sup>2</sup> Wamer alleged that two days prior, Tyger placed his arm around her and rested it on her chest while playing with her hair when she was working on her final project in his class.<sup>3</sup> Tyger next placed his hand on Wamer’s thigh and leaned in to ask what kind of perfume she wore while she was retrieving her project from the printer.<sup>4</sup> Tyger also brought up Wamer’s employment at a state park, “mentioning he had once worked there and ‘would go into the empty rooms to f\*\*\* women.’”<sup>5</sup> That evening, Tyger texted Wamer about her work schedule and “insist[ed] that she ‘better come visit [him] again.’”<sup>6</sup> When Wamer did not respond, he followed up the next day texting, “Or don’t answer me. It’s cool.”<sup>7</sup>

Three weeks after the complaint was filed, UT alerted Wamer that it was closing its investigation and would not be taking any action against Tyger.<sup>8</sup> About four months later in October 2018, Wamer met with a more senior UT faculty member who submitted yet another complaint to UT’s Office of Title IX and Compliance.<sup>9</sup> Tyger was placed on administrative leave in November of 2018 and was ultimately recommended for termination in May of 2019.<sup>10</sup>

Although Tyger was eventually terminated, Wamer feels that the University’s actions were too little, too late. After UT initially closed its investigation into Tyger, Wamer struggled to concentrate on her studies and feared running into Tyger.<sup>11</sup> Consequently, she avoided campus, enrolled in

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<sup>1</sup> See *Wamer v. Univ. of Toledo*, 27 F.4th 461, 464 (6th Cir. 2022).

<sup>2</sup> *Id.*

<sup>3</sup> See *id.* at 463.

<sup>4</sup> See *id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Wamer v. Univ. of Toledo*, 27 F.4th 461, 463 (6th Cir. 2022). Wamer also alleged that Tyger would frequently make inappropriate comments to the entire class, such as stating his belief that the women comprising the Me Too movement were “asking for it,” encouraging his students to ask about his drug overdose, and sharing that he would not have gotten married to his wife if she had not become pregnant. See *id.* at 464.

<sup>8</sup> See *id.* at 464.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 464–65.

<sup>11</sup> See *id.* at 464.

online classes, and switched majors to “ensure she would not come into contact with Tyger.”<sup>12</sup> Wamer filed suit under Title IX, claiming that UT was “deliberately indifferent to the reports of sexual harassment” that she initially filed in May of 2018 and that this indifference “unreasonably interfered with [her] participation in and enjoyment of the benefits of UT’s educational programs and activities.”<sup>13</sup>

The district court dismissed Wamer’s suit, but a unanimous three-judge panel of the Sixth Circuit voted to reverse, finding that a Title IX claim concerning teacher-on-student harassment should have a more relaxed pleading requirement.<sup>14</sup> [The district court](#) had analyzed the requirements of a student-on-student pleading standard laid out in *Kollaritsch*.<sup>15</sup> The Sixth Circuit distinguished that (1) the *Kollaritsch* pleading standard is not presumptively applicable to teacher-on student harassment based on precedent; (2) *Kollaritsch* did not hold that the post-notice harassment requirement applies to teacher-student harassment claims; and (3) strong policy concerns weigh against applying *Kollaritsch* to teacher-on-student harassment claims, thus favoring a more lenient pleading standard.<sup>16</sup> Before taking a closer look at each of these findings, it is useful to compare the *Kollaritsch* pleading standard with the pleading standard the Sixth Circuit ultimately decided to apply in Wamer’s case:

<i>Kollaritsch</i> Pleading Standard <sup>17</sup>	<i>Wamer</i> Pleading Standard <sup>18</sup>
<i>Student-On-Student Harassment</i>	<i>Teacher-On-Student Harassment</i>
<i>The Plaintiff must plead . . .</i>	
an incident of actionable sexual harassment;  the school’s actual knowledge of it;  some further incident of actionable sexual harassment;  the further actionable harassment would not have happened but for the objective unreasonableness (deliberate indifference) of the school’s response; and  the Title IX injury is attributable to the post-actual-knowledge further harassment	an incident of actionable sexual harassment;  the school’s actual knowledge of it;  the school’s response was clearly unreasonable (deliberate indifference); and  the school’s deliberate indifference caused her to suffer discrimination established by showing Plaintiff experienced additional instance of harassment; OR  an objectively reasonable fear of further harassment caused the plaintiff to take specific reasonable actions to avoid harassment, which deprived the plaintiff of the educational opportunities

<sup>12</sup> *Id.*

<sup>13</sup> *Wamer v. Univ. of Toledo*, 27 F.4th 461, 465 (6th Cir. 2022).

<sup>14</sup> *See id.* at 463. The three-judge panel consisted of Judge Boggs, Judge Clay, and Judge White. *See id.*

<sup>15</sup> *See generally* *Wamer v. Univ. of Toledo*, No. 20CV942, 2020 WL 6119419 (N.D. Ohio Oct. 16, 2020), rev’d and remanded, 27 F.4th 461 (6th Cir. 2022) (citing *Kollaritsch v. Michigan State Univ. Bd. of Trustees*, 944 F.3d 613 (6th Cir. 2019)).

<sup>16</sup> *See Wamer v. Univ. of Toledo*, 27 F.4th 461, 466–71 (6th Cir. 2022).

<sup>17</sup> *See id.* at 465.

<sup>18</sup> *See id.* at 471.

First, the Sixth Circuit disagreed with the district court's conclusion that the *Kollaritsch* pleading standard presumptively applies to teacher-on-student harassment based on a statement the Sixth Circuit made in *Williams ex rel. Hart v. Paint Valley Local School District*.<sup>19</sup> The district court cited a portion of *Williams* which said that there is "only one standard for 'deliberate indifference' under Title IX pupil harassment cases, and not, as [plaintiff] contends, one standard for student-on-student harassment and a less stringent standard for teacher-on-student harassment."<sup>20</sup> The Sixth Circuit clarified that the *Williams* court discussed the standard for harassment claims in the context of determining what kind of response from a school district constitutes deliberate indifference.<sup>21</sup> The *Williams* court did not, however, engage in an analysis of each element that must be proven in order to make out a harassment claim.<sup>22</sup> While *Williams* leaves open the possibility that there is a difference between student harassment and teacher harassment claims, Supreme Court precedent clearly indicates that there is a difference between the two.<sup>23</sup> In *Davis v. Monroe County Board of Education*, the Court noted that the "relationship between the harasser and the victim . . . affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits."<sup>24</sup>

After disagreeing with the district court's conclusion that the *Kollaritsch* standard presumptively applies to teacher-student harassment cases based on *Williams*, the Sixth Circuit addressed whether *Kollaritsch* decided that the post-notice harassment requirement also applies to teacher-student harassment claims.<sup>25</sup> The court found that the *Kollaritsch* court did not make such a holding, but rather, included specific limiting language throughout its opinion that confined its decision to the context of student-on-student harassment claims.<sup>26</sup> For example, the *Kollaritsch* court noted that the Supreme Court's opinion in *Davis* held that "Title IX private cause of action against a school for its response to *student-on-student* sexual harassment is a 'high standard' that applies only 'in certain limited circumstances.'"<sup>27</sup> The Sixth Circuit, therefore, was not bound to apply the *Kollaritsch* post-notice harassment requirement to teacher-student harassment claims such as Wamer's.<sup>28</sup>

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<sup>19</sup> See *id.* at 467–68.

<sup>20</sup> Wamer v. Univ. of Toledo, No. 20CV942, 2020 WL 6119419, at \*3 (N.D. Ohio Oct. 16, 2020), rev'd and remanded, 27 F.4th 461 (6th Cir. 2022) (quoting *Williams ex rel. Hart v. Paint Valley Loc. Sch. Dist.*, 400 F.3d 360, 367 (6th Cir. 2005)).

<sup>21</sup> See Wamer v. Univ. of Toledo, 27 F.4th 461, 468 (6th Cir. 2022).

<sup>22</sup> See *id.*

<sup>23</sup> See *id.* at 468–69 (citing *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999)).

<sup>24</sup> *Id.* (quoting *Davis*, 526 U.S. at 653).

<sup>25</sup> See *id.* at 471.

<sup>26</sup> See *id.* at 469.

<sup>27</sup> Wamer v. Univ. of Toledo, 27 F.4th 461, 469 (6th Cir. 2022) (quoting *Kollaritsch v. Michigan State Univ. Bd. of Trustees*, 944 F.3d 613, 621 (6th Cir. 2019)).

<sup>28</sup> See *id.*

Finally, while the district court wholly ignored policy concerns, the Sixth Circuit carefully weighed them to determine whether the *Kollaritsch* pleading standard, and more specifically the post-notice harassment requirement, *should* apply to teacher-student harassment claims.<sup>29</sup> First, the more stringent pleading standard in student-on-student harassment cases is logical, as it is more difficult for a school to control the actions of its students.<sup>30</sup> The post-notice harassment requirement gives schools a chance to remedy a student-on-student harassment issue that persists.<sup>31</sup> The school is more directly responsible, however, for the acts of its employees (such as professors and teachers) and “quite obviously ‘subjects’ its students to harassment and discrimination when it fails to respond to harassment” of this sort.<sup>32</sup> The identity of the harasser is also crucial in determining the severity of the impact on a student’s educational experience. When a teacher harasses a student, it is much more likely that the student’s educational experience is undermined because teachers are in a position of power and “are at the core of a student’s access to and experience of education.”<sup>33</sup> Teacher harassment undermines the nurturing relationships that are crucial in carrying out any school’s mission.<sup>34</sup>

While the precise future of Wamer’s case remains uncertain on remand, the Sixth Circuit’s decision to apply a less stringent pleading standard to teacher-on-student harassment claims allows her to avoid a motion to dismiss despite the fact that she did not report further harassment after the University of Toledo initially ceased investigating Tyger. This decision will likely allow many other victims of teacher harassment to avoid dismissals at the pleading stage.<sup>35</sup> It is

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<sup>29</sup> See *id.* at 470–71.

<sup>30</sup> See *id.* at 471.

<sup>31</sup> See *id.*

<sup>32</sup> *Id.* at 470.

<sup>33</sup> See *Wamer v. Univ. of Toledo*, 27 F.4th 461, 471 (6th Cir. 2022).

<sup>34</sup> See Alan McEvoy, *Abuse of Power*, LEARNING FOR JUSTICE (2014), <https://www.learningforjustice.org/magazine/fall-2014/abuse-of-power> [<https://perma.cc/74WJ-JDXM>].

<sup>35</sup> This decision will also likely affect more victims than many people realize. College women between the ages of 18 and 24 are three times more likely than other women to be sexually harassed or violated. See Catherine A. Mackinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2050 (2016) (citing *Who Are the Victims?*, RAPE, ABUSE & INCEST NAT’L NETWORK, <http://rainn.org/get-information/statistics/sexual-assault-victims> [<http://perma.cc/HR4V-G66B>]). Women graduate students in particular face an even more substantial risk of sexual harassment by faculty and staff. See *id.* at 2052. See generally Nancy Chi Cantalupo & William C. Kidder, *Mapping the Title IX Iceberg: Sexual Harassment (Mostly) in Graduate School by College Faculty*, 66 J. LEGAL EDUC. 850, 851–55 (2017). Interestingly, preliminary studies have found that law students are exposed to a significantly higher risk of sexual harassment by faculty compared with other graduate fields of study. See Catherine A. Mackinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2052–53 (citing Jennifer J. Freyd et al., *Presentation at the 20th International Summit and Training on Violence, Abuse, and Trauma: Initial Findings from the University of Oregon 2015 Sexual Violence Survey*, U. Or. Dep’t Psychol. 48–53 (Aug. 24, 2015),

less likely, however, that this outcome will actually cause colleges and universities to improve their responses to students' claims. Even if the victim's lawsuit survives the pleading stage, successfully proving universities' actual knowledge and deliberate indifference as required by the Supreme Court's decision in *Gebser v. Lago Vista Independent School District* is no easy task.<sup>36</sup> Actual knowledge requires that the university both actually knew about the discrimination (not that they *should* have known) and that notice was given to the "appropriate person."<sup>37</sup> Demonstrating a university's deliberate indifference is even more difficult. The plaintiff cannot merely show that the university failed to act reasonably or was negligent, but instead must show that the school *clearly* acted unreasonably.<sup>38</sup>

Although the Sixth Circuit's more lenient pleading standard in teacher harassment cases helps push victims a little closer to a successful case, victims still face a long uphill battle after the pleading stage under the current legal standard for establishing Title IX liability. Universities still have the comfort of knowing victims have a difficult case to prove, even once the victim surpasses the pleading stage. Consequently, it is unlikely that universities will feel inclined to make tangible changes to their responses to students' harassment claims as a result of the Sixth Circuit's decision. In order for this to occur, *Gebser* may need to be reconsidered.<sup>39</sup> That is not to say that the Sixth Circuit's decision should not be celebrated, however. As the old Chinese proverb says, the man who removes mountains begins by carrying away small stones.

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<http://dynamic.uoregon.edu/jjf/campus/UO15-campus-IVAT-24Aug15.pdf>  
[<http://perma.cc/EY9J-KHN3>].

<sup>36</sup> See JARED P. COLE & CHRISTINE J. BACK, CONG. RES. SERV., TITLE IX AND SEXUAL HARASSMENT: PRIVATE RIGHTS OF ACTION, ADMINISTRATIVE ENFORCEMENT, AND PROPOSED REGULATIONS 6–7 (2019). See generally *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

<sup>37</sup> See COLE & BACK, *supra* note 36, at 9–15 (quoting *Gebser*, 524 U.S. 274, 290).

<sup>38</sup> See *id.* at 15–19.

<sup>39</sup> Catherine A. Mackinnon advocates for an alternative approach to *Gebser*, urging for a "due diligence" standard rather than a "deliberate indifference" standard. See Mackinnon, *supra* note 35, at 2096–2104.