

LEGAL UPDATES

PUBLISHED: DECEMBER 27, 2018

## Services

Higher Education  
Title IX

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## Fourth Circuit Imposes Potential Title IX Liability for Allegedly Deficient Institutional Response to Harassment on Anonymous-Messaging Apps

The Fourth Circuit broke new ground in the Title IX landscape last week, reversing a district court's dismissal of a lawsuit in which students alleged their university violated Title IX by failing to adequately respond to harassment occurring through anonymous-messaging apps. In a 2-1 decision, the court held that the university had sufficient control over the harassers and the context in which the harassment occurred, and further held that the First Amendment did not preclude Title IX liability in this context. The court also reversed the dismissal of the plaintiffs' retaliation claim, holding that alleged student-on-student retaliation could serve as the basis for a claim against the institution.

The individual plaintiffs were members of a group at the University of Mary Washington known as Feminists United. The group had concerns over a long period of time about the manner in which the University handled allegations of sexual assault on campus, and they expressed those concerns through meetings with University personnel, including the president. As the group's efforts became more visible, the group and several of its individual members became targets of harassing and threatening anonymous messages through an app called "Yik Yak."

Yik Yak was an anonymous messaging app, through which all individuals within a 1.5 mile radius could view messages and correspond anonymously with one another. Plaintiffs alleged that—through this app—they received sexually harassing and threatening messages over the course of several months. They alleged that they reported this harassment to the University and its president. The president allegedly informed the plaintiffs that First

Amendment considerations prevented him from taking action against the Yik Yak anonymous messages.

The plaintiffs then filed a complaint with the Department of Education's Office for Civil Rights (OCR) alleging that the University's response to their allegations of sexual harassment violated Title IX. They then reported additional harassment and retaliation they suffered through Yik Yak following the OCR complaint. Eventually, the plaintiffs filed suit against the university alleging sex discrimination under Title IX and retaliation under Title IX, as well as against the president, alleging a violation of the Equal Protection Clause.

The district court dismissed the case, ruling that the University lacked control over the harasser(s) and the context in which the harassment occurred, the First Amendment limited the University's ability to respond to the anonymous messages, and the president had qualified immunity for the constitutional claim against him.

The Fourth Circuit began by reversing the district court's dismissal of the Title IX discrimination claim. The court's analysis largely focused on the Supreme Court's admonition that Title IX liability is appropriate only where the institution "exercises substantial control over both the harasser and the context in which the known harassment occurs." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645 (1999). The court found both of these elements were met. With respect to the "context" of the harassment, the court held that even though the harassing messages were sent over cyberspace, the harassment actually occurred on campus because of Yik Yak's "location-based feature." Further, the court held that "to the extent sexual harassment was communicated through [the University's] wireless network," the school had control to disable it.

With respect to control over the harassers, the court held that the University had disciplinary authority over the students who posted messages, and the fact that they were anonymous did not absolve the University of liability, because it took no steps to even try and determine the identity of the harassers. The court also rejected the University's argument that the First Amendment constrained its possible response, because true threats are not protected speech and the University also had a wide variety of acceptable responses that would not have implicated the First Amendment in any way (by, for example, conducting a mandatory training assembly on social-media harassment, or offering counseling services to those impacted).

The Fourth Circuit also reversed dismissal of the plaintiffs' Title IX retaliation claim, holding that student-on-student retaliatory harassment could serve as the basis for institutional liability. And, while the court ultimately affirmed dismissal of the Equal Protection claim on qualified immunity, it first held that deliberate indifference to sexual harassment could serve as a basis for an Equal Protection claim, but such liability was not clearly established when the relevant conduct occurred.

Judge Agee authored a strongly worded dissent, focusing primarily on the court's analysis of "substantial control." Specifically, the dissent noted that the complaint did not identify the harassers, nor could it, because the harassers were entirely anonymous. Further, the dissent contended that nothing more than mere speculation could support an allegation that the harassers were even students under the University's control. While Yik Yak operates within a radius of 1.5 miles, the University's campus is only 0.3 square miles, opening up the scope of potential harassers well beyond the University's control. This fact, according to the dissent, dooms any possibility of alleging that the University had control over the harassers or the context in which the harassment occurred.

The dissent vehemently disagreed with the court's decision to "hold a public university and its officers liable for an allegedly inadequate response to anonymous messages posted by unknown persons on a third-party social media app unrelated to the university." Judge Agee expressed concern about the impact this would have on educational institutions due to the expanded scope of liability imposed by the majority. In fact, the dissent took the rare step of expressly stating that the University "should not hesitate to seek further review."

## **What This Means for You**

Higher education institutions—especially those in the Fourth Circuit—should revisit their policies and procedures related to responding to complaints of anonymous social media harassment. Institutions within the Fourth Circuit should take any steps reasonably available to determine the identity of harassers when harassment is reported on these platforms and should increase training and awareness on these forms of harassment. Institutions outside the Fourth Circuit should be cognizant that this decision will likely be used as persuasive authority to attempt to expand the scope of Title IX liability in all jurisdictions and should consider adopting similar reforms.

## **Contact Us**

Given the nature of the dissent in this case, we anticipate an attempt for further review of this decision at the Fourth Circuit en banc, at the Supreme Court, or both. If you have questions or require more information about the implications of this new development, please contact your Husch Blackwell attorney or Michael Raupp at 816.983.8324.

We will monitor those developments and provide further updates as appropriate.