UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: October 13, 2022

Ms. Lindsay Anne Cordes

Ms. Ena V. Demir

Mr. Thomas N. Kerrick

Mr. Tad Thomas

Re: Case No. 21-5318, *Loandria Dahmer v. Western Kentucky University, et al*
Originating Case No. 1:18-cv-00124

Dear Counsel,

The Court issued the enclosed Order today in this case. Judgment to follow.

Sincerely yours,

s/Virginia Lee Padgett
Case Manager
Direct Dial No. 513-564-7032

cc: Mr. James J. Vilt Jr.

Enclosure

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION

No. 21-5318

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LOANDRIA DAHMER, Plaintiff-Appellant, v. WESTERN KENTUCKY UNIVERSITY, et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

O R D E R

Before: BOGGS, BUSH, and LARSEN, Circuit Judges.

Loandria Dahmer, a Kentucky resident proceeding through counsel, appeals the district court's grant of summary judgment in her civil rights action against Western Kentucky University ("WKU"), Timothy Caboni, Andrea P. Anderson, and Charley Pride, filed under Title IX of the Education Amendments of 1972, *see* 20 U.S.C. § 1681, *et seq.*, and 42 U.S.C. § 1983. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

After enrolling as an undergraduate student at WKU in 2015, Dahmer became involved in the school's Student Government Association ("SGA"). She was an active member in the organization, eventually serving as SGA president from 2017 to 2018. Dahmer alleged, however, that during that time she endured verbal, mental, and emotional abuse that constituted discrimination on the basis of sex. According to Dahmer, the abuse included various expletive-laden, sex-based threats of violence from peers, as well as sexually explicit comments and inappropriate behavior on the part of Pride, WKU's SGA faculty advisor; she thus made claims of both student-on-student and faculty-on-student harassment. Additionally, Dahmer claimed that (1) prior to February 2018, she informed only Pride of the alleged harassment and he failed

to take action consistent with his responsibility to do so; (2) Anderson, WKU's Title IX coordinator, failed to act in accordance with her duties after Dahmer officially reported the alleged harassment in February 2018 and undisputedly provided actual notice to WKU; and (3) Caboni, WKU's president, retaliated against her for reporting the alleged harassment and deliberate indifference.

Dahmer filed suit against WKU and the individual defendants, alleging violations of Title IX and § 1983. After a lengthy period of discovery, the defendants moved for summary judgment, arguing in part that Dahmer had not experienced actionable sexual harassment and was unable to show that WKU was deliberately indifferent to her complaints. They also argued that the remainder of Dahmer's allegations under Title IX were not actionable and that she could not establish a constitutional violation as required by § 1983. Dahmer cross-moved for partial summary judgment on her federal claims, relying on a large trove of deposition evidence to dispute the defendants' arguments. The district court ultimately granted summary judgment in favor of the defendants.[1]

Dahmer now appeals the district court's grant of summary judgment on her Title IX and § 1983 claims, arguing in part that the appellees possessed actual knowledge of and were deliberately indifferent to severe and pervasive sexual harassment, and that her educational environment was affected by a hostile environment.

We review de novo a district court's grant of summary judgment. *Garza v. Lansing Sch. Dist.*, 972 F.3d 853, 972 (6th Cir. 2020). Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When reviewing a motion for summary judgment, we view the evidence and all inferences drawn from the underlying facts "in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). "If a jury could reasonably find for either party, the case must go to a jury trial."

[1] Dahmer's action also included three state-law negligence claims, over which the district court declined to exercise supplemental jurisdiction after granting summary judgment on the federal claims.

Kesterson v. Kent State Univ., 967 F.3d 519, 524 (6th Cir. 2020) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

Title IX

Under Title IX, "[n]o person . . . 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." *Williams ex rel. Hart v. Paint Valley Loc. Sch. Dist.*, 400 F.3d 360, 366 (6th Cir. 2005) (quoting 20 U.S.C. § 1681(a)). Dahmer's Title IX complaint against WKU for student-on-student (i.e., peer) harassment proceeds under two distinct theories: deliberate indifference and hostile environment. *See Doe v. Univ. of Ky.*, 959 F.3d 246, 251 n.3 (6th Cir. 2020) (noting that Title IX "[h]ostile environment claims are distinct from deliberate indifference claims").

In the deliberate-indifference context, a Title IX institution may be liable for damages resulting from student-on-student sexual harassment if the following elements are satisfied: "(1) the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school, (2) the [school] had actual knowledge of the sexual harassment, and (3) the [school] was deliberately indifferent to the harassment." *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 258 (6th Cir. 2000); *see Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 653 (1999). Notably, "[o]nly when an 'appropriate person' at a school knows about sexual discrimination does the school have 'actual knowledge.'" *Kesterson*, 967 F.3d at 527 (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)). "An appropriate person is someone who 'at a minimum has authority to address the alleged discrimination . . . on the [school's] behalf.'" *Id.* (quoting *Gebser*, 524 U.S. at 290); *see also Hill v. Cundiff*, 797 F.3d 948, 971 (11th Cir. 2015) (holding that an appropriate person "must be 'high enough up the chain-of-command that his acts constitute an official decision by the [institution] itself not to remedy the misconduct'" (quoting *Floyd v. Waiters*, 171 F. 3d 1264, 1264 (11th Cir. 1999))).

In the hostile-environment context, a Title IX institution may incur liability if a plaintiff alleges that her educational experience was "'permeated with discriminatory intimidation,

ridicule, and insult that [was] sufficiently severe or pervasive [so as] to alter the conditions of [her]' educational environment." *Doe v. Miami Univ.*, 882 F.3d 579, 590 (6th Cir. 2018) (second alteration in original) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). "A Title IX hostile-environment claim is analogous to a Title VII hostile-environment claim." *Id.* (citing *Doe v. Claiborne County*, 103 F.3d 495, 515 (6th Cir. 1996)). To succeed on such a claim, a plaintiff must establish that (1) she was subject to a sexually hostile environment; (2) she provided actual notice to an "'appropriate person,' who was, at a minimum, an official of the educational entity with authority to take corrective action," and (3) the institution displayed deliberate indifference in response to the harassment. *Klemencic v. Ohio State Univ.*, 263 F.3d 504, 510 (6th Cir. 2001) (quoting *Morse v. Regents of the Univ. of Colo.*, 154 F.3d 1124, 1127-28 (10th Cir. 1998)). Courts should examine "all the circumstances" surrounding the allegations, including the frequency of the discriminatory conduct, its severity, whether the conduct contained a physical threat or humiliation, the degree to which the conduct affected the plaintiff's performance, and whether the plaintiff suffered psychological harm as a result of the conduct. *See Harris*, 510 U.S. at 23.

I. Student-on-Student Harassment

a. Pre-February 2018 Claims

As to Dahmer's claim against WKU for deliberate indifference to student-on-student harassment, the district court first determined that WKU could not have had actual knowledge of any alleged harassment that occurred prior to February 2018 because Pride, the only WKU employee to whom she had reported the harassment up to that time, was not an "appropriate person" under the applicable standard. In coming to that conclusion, the district court noted that although Pride was the university's Director of Student Activities, Organizations, and Leaderships, as well as the SGA faculty advisor, his duty to intervene if a student was experiencing harassment within the SGA did not equate to an "ability to address the harassment 'on the [school's] behalf.'" However, the record reflects that Pride's job responsibilities included a duty to "supervise student organizations," and Pride acknowledged in deposition testimony that he was a "responsible employee." According to WKU's own definition, a

"responsible employee" is an individual "who has authority to address and remedy discrimination/sexual misconduct/harassment [as defined by the university's policy on sexual harassment] on behalf of the institution," and whose knowledge of such conduct "can put the institution on notice." The record, therefore, contained evidence tending to show that Pride could address Dahmer's allegations "on the school's behalf." *Kesterson*, 967 F.3d at 258. Accordingly, the summary-judgment evidence on this specific issue creates an unresolved and genuine dispute of material fact over whether Pride's position and job responsibilities rendered him an "appropriate person" under Title IX, such that WKU would have possessed actual knowledge of the alleged harassment that occurred prior to February 2018.

WKU notes that we may "affirm a decision of the district court on any grounds supported by the record," *Wallace v. Oakwood Healthcare, Inc.*, 954 F.3d 879, 886 (6th Cir. 2020), and argues that Dahmer failed to put forth evidence of actionable peer harassment against her on the basis of sex prior to February 2018. Specifically, it maintains that "the bad behavior [Dahmer] attributes to her fellow students arose from personal animus and disagreements of campus politics," and that the use of derogatory expletives against Dahmer was not based on sex, even though the words in question are traditionally and primarily used to degrade and demean women. WKU also argues that Dahmer still failed to prove that any alleged harassment was severe, pervasive, and objectively offensive to the point of being actionable under Title IX. *See Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613, 620 (6th Cir. 2019). But because the district court did not conduct a full merits analysis of Dahmer's pre-February 2018 claims and WKU did not meet its burden to show that Pride was not an "appropriate person," and because the defendants' own merits argument is not fully developed at this stage, we decline to conduct a merits analysis for the first time on appeal.

As to Dahmer's hostile-environment claim against WKU, the district court concluded that it was "precisely the same" as her deliberate indifference claim. WKU contends that "[t]o the extent [Dahmer] believes she has asserted a hostile environment claim, and the District Court erred by failing to consider it as such, she forfeited that argument by presenting her claim to the District Court as one predicated on WKU's supposed deliberate indifference." But while

Dahmer's amended complaint may not be a model of clarity and organization, she did specifically plead a Title IX hostile environment claim against WKU, and she continued to develop it through the summary-judgment phase. Therefore, we vacate the grant of summary judgment as to the pre-February 2018 claims and remand for further proceedings.

b. Post-February 2018 Claims

By filing an official report with the WKU Title IX office in February 2018, Dahmer undisputedly provided actual notice of alleged sexual harassment to the university. *See, e.g.*, *Kesterson*, 967 F.3d at 527. In order to establish that an educational institution was deliberately indifferent to sexual harassment after it gained actual knowledge, a plaintiff must show "some further incident of actionable sexual harassment, that the further actionable harassment would not have happened but for the objective unreasonableness (deliberate indifference) of the school's response, and that the Title IX injury is attributable to the post-actual-knowledge further harassment." *Kollaritsch*, 944 F.3d at 623-24. "For student-on-student sexual harassment to be *actionable* . . . , it must be (a) severe, ([b]) pervasive, and (c) objectively offensive." *Id.* at 620.

As to Dahmer's post-February 2018 claims against WKU, she alleged that she and other female members of the SGA "still felt unsafe and intimidated," in part because the no-contact orders issued to the perpetrators did not prevent them from attending SGA events. Dahmer also alleged that one of the perpetrators continued to harass her, in part through his creation of a parody Twitter account mocking her legal actions, and that SGA meetings were sexually hostile. The district court found that "[w]hile troubling, these incidents—feeling 'unsafe and intimidated,' being the subject of a 'parody Twitter account,' and being subjected to unspecified instances of 'gender stigma and some terms being used'—are neither specific nor severe enough to constitute actional sexual harassment." The district court compared the facts of the underlying claim to those of several of our published Title IX cases and aptly concluded that "[a]lthough WKU undoubtedly could have handled these issues more effectively, Dahmer cannot demonstrate that she experienced actionable sexual harassment after WKU had 'actual knowledge' of her alleged harassment." *See Doe*, 959 F.3d at 248, 251-52 (finding no actionable sexual harassment when one alleged perpetrator of a rape "stared at [the plaintiff], stood by her

at a party, followed her home, and sat near her at the library," and the other "stared at [the plaintiff] during their shared classes"); *Kollaritsch*, 944 F.3d at 624 (finding no actionable sexual harassment when the plaintiff had repeated encounters with the alleged perpetrator of a sexual assault against her, and suffered panic attacks as a result, because there was no evidence to suggest that the encounters "were sexual" or were "severe, pervasive, or objectively unreasonable"); *Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 363 (6th Cir. 2012) (finding no actionable sexual harassment when the plaintiff was subjected to three instances of harassment—a shove into a locker, a "request for oral sex," and an obscene sexual gesture at a basketball game—because the encounters did "not rise to the level of 'severe, pervasive, and objective unreasonable' offensive conduct"); *Vance*, 231 F.3d at 259 (finding actionable sexual harassment when the plaintiff was stabbed in the hand, held down by several students who attempted to undress her, and subjected to repeated verbal harassment of a sexual nature). Because Dahmer could not present evidence tending to show that any alleged sexual harassment after February 2018 was actionable, let alone that WKU was deliberately indifferent to such harassment, the district court did not err in granting summary judgment to WKU on this claim.

II. Faculty-on-Student Harassment

In addition to her Title IX claims against WKU for student-on-student harassment, Dahmer alleged that WKU was liable for Pride's faculty-on-student harassment because it created a sexually hostile learning environment for female members of the SGA.

Regarding Dahmer's allegations, the district court invoked the Supreme Court's holding that "sporadic use of abusive language, gender related jokes, or occasional episodes of harassment" do not alone create a hostile environment, *see Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998), and found that Dahmer had identified only two instances of Pride's conduct that could potentially constitute sexual harassment: an alleged reference to "sexual activities between students" (specifically, that two other students "debated a lot during SGA so that [they] could . . . get all riled up [and] have more fun later") and a comment questioning whether Dahmer was "that kind of woman" when she attempted to keep open his office door during a one-on-one meeting. The district court properly concluded that the conduct in question

was far less severe than that in other cases where courts had not found hostile environments. And although Pride's behavior may have been inappropriate, Dahmer failed to present evidence that it was "so severe, pervasive, and objectively offensive," that it undermined and detracted from her educational experience and she was denied equal access to WKU's resources and opportunities. *Davis*, 526 U.S. at 561; *see Doe*, 882 F.3d at 590. Therefore, the district court did not err in granting summary judgment on this claim.

III. Retaliation

Dahmer's final claim under Title IX is that WKU retaliated against her by denying a letter of recommendation from Caboni for her Rhodes Scholarship application.[2] In order to successfully establish a Title IX retaliation claim, a plaintiff must show "that (1) [s]he engaged in protected activity, (2) [the funding recipient] knew of the protected activity, (3) [s]he suffered an adverse school-related action, and (4) a causal connection exists between the protected activity and the adverse action." *Bose v. Bea*, 947 F.3d 983, 988 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1051 (2021) (quoting *Gordon v. Traverse City Area Pub. Sch.*, 686 F. App'x 315, 320 (6th Cir. 2017) (alterations in original)). "To qualify as 'adverse,' an educational action must be sufficiently severe to dissuade a 'reasonable person' from engaging in the protected activity." *Gordon*, 686 F. App'x at 320 (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)).

Dahmer argues that Caboni's decision not to endorse her for a Rhodes Scholarship qualified as adverse because she did not receive a Rhodes Scholarship. However, the Dean of the College of Arts & Letters, on behalf of WKU's endorsement committee, wrote a letter giving Dahmer "WKU's strongest endorsement." And although Dahmer did not receive a Rhodes Scholarship, she did become WKU's first Truman Scholarship recipient. While it is undisputed that Dahmer did not receive the letter of recommendation or the scholarship that she sought, she still failed to establish that the lack of a letter from Caboni was severe enough that it would dissuade a reasonable person from engaging in protected activity. *See id.* Therefore, Dahmer

[2] WKU argued that Caboni's decision not to write the letter was a personal choice, rather than something that could be imputed to WKU as an institutional action, but the district court did not address the issue because it held that Caboni's action did not qualify as adverse in the first place.

could not present evidence to successfully establish a Title IX retaliation claim, and the district court did not err in granting summary judgment on this claim.

42 U.S.C. § 1983

"To survive a motion for summary judgment, '[a] § 1983 claim must satisfy two elements: 1) the deprivation of a right secured by the Constitution or laws of the United States and 2) the deprivation was caused by a person acting under color of state law.'" *S.L. v. Pierce Twp. Bd. of Trs.*, 771 F.3d 956, 961 (6th Cir. 2014) (quoting *Ellison v. Garbarino*, 48 F.3d 192, 194 (6th Cir. 1995)). "[D]eliberate indifference to discriminatory peer harassment" can constitute "an equal protection violation based on a school official's response to peer harassment." *Stiles v. Grainger County*, 819 F.3d 834, 851-52 (6th Cir. 2016). The parties stipulated that the defendants were acting under color of state law; thus, the question remaining was whether any of the defendants exhibited deliberate indifference to the alleged sexual harassment such that they violated rights guaranteed to Dahmer by the Equal Protection Clause of the Fourteenth Amendment.

First, WKU, as an "arm of the state," *see McCormick v. Miami Univ.*, 693 F.3d 654, 661 (6th Cir. 2012), was "immune from suit under the Eleventh Amendment," and therefore not subject to Dahmer's § 1983 claim, *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 571 (6th Cir. 2000). Consequently, the district court did not err in granting summary judgment with respect to the § 1983 claim against WKU.

As for Dahmer's remaining § 1983 claims, the district court granted summary judgment because it held that the individual defendants were each entitled to qualified immunity. In doing so, the district court relied partly on the reasoning it employed when granting summary judgment on Dahmer's Title IX deliberate-indifference and hostile-environment claims. *See Stiles*, 819 F.3d at 852 (noting that "[t]he deliberate indifference standard used for proving a § 1983 equal protection violation in peer harassment cases is 'substantially the same' as the deliberate indifference standard applied in Title IX cases" (quoting *Williams*, 400 F.3d at 369)). Because the district court properly granted summary judgment as to Dahmer's post-February 2018 Title IX claims, the grant of qualified immunity to Anderson and Caboni was also proper.

However, because we now vacate and remand Dahmer's pre-February 2018 Title IX claims for further consideration, we likewise vacate and remand the district court's grant of qualified immunity to Pride on Dahmer's § 1983 claims.

Conclusion

For the foregoing reasons, we **VACATE** the district court's grant of summary judgment with respect to Dahmer's pre-February 2018 Title IX claims concerning student-on-student harassment, **VACATE** the district court's grant of qualified immunity to Pride on Dahmer's § 1983 claims concerning those same allegations of pre-February 2018 student-on-student harassment, **AFFIRM** the district court's grant of summary judgment with respect to the remainder of Dahmer's Title IX claims, **AFFIRM** the district court's grant of summary judgment with respect to Dahmer's § 1983 claim against WKU, **AFFIRM** the district court's grant of qualified immunity to Anderson and Caboni, and **REMAND** for further proceedings consistent with this order.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk