



**Litigation Update
Newsletter
May 30, 2019**

Feminist Majority Foundation, et al. v. Hurley, Paino, and University of Mary Washington

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Case Synopsis:

Plaintiff Feminists United (FU) is a student organization at the University of Mary Washington (UMW) and a local affiliate of plaintiff Feminist Majority Foundation, a national organization. In November 2014, UMW's student senate voted to authorize male-only fraternities. Student members of Feminists United questioned the decision and were subjected to offensive and threatening anonymous messages posted on Yik Yak (a defunct social media app that allowed people to post and view anonymous messages, known as Yaks, within a certain geographical area). Members of Feminists United were also subjected to various incidents of verbal harassment of a threatening and sexist nature (including a sexist chant by rugby team members talking about sexual assault).

In February and March 2015, FU members expressed concerns for their safety to UMW's Title IX Coordinator and President Hurley and referred to the online posts. In response, Hurley made an announcement in March 2015 noting that the rugby team would be suspended indefinitely. After the announcement, the number of threatening and harassing Yaks being sent to the plaintiffs increased. By the end of March 2015, FU members had received more than 700 threatening and harassing Yaks which referred to Feminists United members by such terms as "femicunts, feminazis, cunts, bitches, hoes, and dikes" and included threats to "euthanize," "kill," and "[g]rape" FU members. Some of the Yaks named specific members and reported the location of one member in hopes that she would be confronted on campus.

In response, UMW assigned campus police to attend two student events attended by one of the FU members, held two listening sessions, and sent a general communication to the university community. FU members continued to receive threatening and harassing Yaks throughout the summer of 2015. However, the Title IX Coordinator told FU members that the University had "no recourse" for such online harassment and UMW never investigated the harassment and threats, and never asked any law enforcement agencies to investigate them citing concerns for infringing upon students' First Amendment rights.

In May 2015, the plaintiffs filed an OCR complaint, which was subsequently withdrawn. In May 2017, the plaintiffs filed suit in the Eastern District of Virginia, alleging UMW was deliberately indifferent to sex discrimination which served to create and foster a hostile campus atmosphere.¹ UMW moved to dismiss. In

¹ Plaintiffs also alleged 1) UMW retaliated against the plaintiffs for advocating against sexual assault and reporting sexual harassment; and 2) Hurley infringed on the plaintiffs' equal protection rights under the Fourteenth Amendment by failing to act against those UMW students who had sexually harassed them (§ 1983 claim). The Fourth Circuit affirmed the district court's dismissal of the § 1983 claim and part of the Title IX retaliation claim against Hurley but vacated the district court's dismissal of the retaliation claim against UMW and remanded for further proceedings.

September 2017, the district court dismissed the complaint finding that the alleged harassment “took place in a context over which UMW had limited, if any, control.” Plaintiffs appealed.

Findings:

Here, the US Court of Appeals for the Fourth Circuit vacated the dismissal of the Title IX sex discrimination claim and remanded for further proceedings.

In so doing, the court relied upon *Davis v. Monroe County Board of Education* 526 U.S. 629 (1999) noting that an educational institution can only be liable for student-on-student sexual harassment when the institution “exercises substantial control over both the harasser and the context in which the known harassment occurs.”

The court found that UMW had control or “disciplinary authority” over the harasser in that UMW had the ability to punish students who posted sexually harassing and threatening messages online. The court rejected the argument that UMW was unable to control the harassers because the offending Yaks were anonymous by noting UMW cannot escape liability when it never took any action to try to identify the harassers.

The court also found that although the harassment occurred through cyberspace, UMW had substantial control over the context of the harassment because the Yik Yak messages concerned events occurring on campus, specifically targeted UMW students, and originated on or within the immediate vicinity of the UMW campus utilizing the campus’ wireless network. The court also noted UMW could have acted to disable access to Yik Yak campus-wide as it has control over the activities that occur on own network. The court stated, “[W]e cannot conclude that UMW could turn a blind eye to the sexual harassment that pervaded and disrupted its campus solely because the offending conduct took place through cyberspace.”

UMW maintained that the First Amendment would be implicated if they punished students for their speech and barred students from accessing Yik Yak on UMW’s wireless network. In rejecting this argument, the court noted “(1) true threats are not protected speech, and (2) the University had several responsive options that did not present First Amendment concerns.”²

The dissent by Judge Agee took issue with finding that UMW had substantial control over both the harassers and the context of the harassment noting that “the harassing statements were anonymous and untethered to the University’s geographic footprint, and thus could have been communicated by students and non-students alike so long as they were in the general vicinity of the campus.” The dissent went on to state, “Make no mistake, the majority’s novel and unsupported decision will have a profound effect, particularly on institutions of higher education, until the Supreme Court reaffirms that *Davis* means what it says. Institutions, like the University, will be compelled to venture into an ethereal world of non-university forums at great cost and significant liability, in order to avoid the Catch-22 Title IX liability the majority now proclaims.”

² The court agreed with the plaintiffs in that UMW could have addressed the harassing and threatening Yaks without exposing itself to First Amendment liability by taking other obvious and reasonable steps such as more vigorously denouncing the harassing and threatening conduct, clarifying that Feminists United members were not responsible for the rugby team’s suspension, conducting a mandatory assembly of the student body to discuss and discourage such harassment through social media, hiring an outside expert to assist in developing policies for addressing and preventing harassment, or offering counseling services for those impacted by the targeted harassment.

Title IX Takeaways:

- This is a slippery slope as it significantly extends the scope of when a person is considered to be under the control of an institution.
- Institutions would have potential liability for failing to act to address discrimination/harassment that occurs online by unknown individuals within a forum not controlled by the institution.
- If liability can be extended to online sites not controlled by the institution, then this would be especially applicable for those online courses/forums/sites controlled by the institution. Thus, institutions need to be vigilant in monitoring these sites for any prohibited conduct and act to address it should it occur.
- It is a careful balancing act to ensure institution is responding to eliminate, prevent, and remedy sex discrimination while also maintaining constitutional rights of others (when such rights exist).
- Institutions should take whatever supportive and remedial actions they can, to the extent possible, without infringing upon the rights of others.
- True threats that are specific and directed towards an identified individual are not protected speech.
- Sexually harassing speech that creates a hostile environment is not protected.
- Need to have Title IX and IT policies that explicitly prohibit use of the institution's network to send discriminatory, threatening or harassing messages. This prohibition should be widely communicated to students, faculty and staff.