

# University's Handling of Students' Pre-Assault Complaints of Sexual Misconduct Open to Title IX Claim

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Three female former students who allegedly were sexually assaulted while undergraduates may sue their school for a policy of indifference to reports of sexual misconduct under Title IX of the Education Amendments of 1972, the federal appeals court in San Francisco has ruled. *Karasek v. Regents of the Univ. of California*, No. 18-15841 (9th Cir. Jan. 30, 2020).

The Court's opinion would allow a plaintiff to succeed on a "pre-assault" theory of deliberate indifference toward sexual assault on campus.

The Ninth Circuit has jurisdiction over Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

### Background

Three female former students of the University of California, Berkeley, sued the University alleging they were victims of sexual assault while undergraduates. The plaintiffs alleged that the University violated Title IX by failing to adequately respond to their individual assaults and by maintaining a policy of "deliberate indifference" to sexual misconduct reports.

The district court dismissed two of the plaintiffs' individual claims and granted summary judgment against the third. The plaintiffs appealed.

### Pre-Assault Deliberate Indifference Claim May Proceed

The Ninth Circuit affirmed the lower court's decision on the claims of the University's handling of the individual plaintiffs' claims, but it vacated the district court's dismissal of the "pre-assault" claims of deliberate indifference. The Ninth Circuit held that pre-assault deliberate indifference is a cognizable theory of liability under Title IX.

In a pre-assault claim, rather than focusing on the university's handling of his or her individual complaint of sexual misconduct, the plaintiff alleges the university, or a particular program at the university, did not take adequate preemptive steps to avoid or lessen the likelihood of sexual misconduct on campus. Therefore, the university is liable if a plaintiff is victimized by the sexual misconduct the university should have helped avoid.

Under that theory, a university can be held liable for maintaining "a policy of deliberate indifference that heighten[s] the risk of sexual harassment on campus" prior to a sexual assault. According to the appellate court, institutions may face court challenges on the manner in which they handle an individual complaint of sexual misconduct and challenges alleging that the university's policies and practices contributed to the assault happening in the first place.

The Court said a plaintiff asserting a pre-assault claim may survive a motion to dismiss if

he or she plausibly allege:

1. The school maintained a policy of deliberate indifference to reports of sexual misconduct,
2. Which created a heightened risk of sexual misconduct,
3. In a context subject to the school's control, and
4. The plaintiff was harassed as a result.

## Implications

In 2007, the Tenth Circuit (which has jurisdiction over Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) allowed a pre-assault deliberate indifference claim against *a particular university program*. The Ninth Circuit went beyond this, appearing to envision a potential claim for indifference encompassing a whole university campus.

The Court tempered its opinion with a few warnings. It reiterated that “Title IX does not require [a university] to purge its campus of sexual misconduct to avoid liability” or “guarantee[] the good behavior of its students.” It also cautioned that “adequately alleging a causal link between a plaintiff’s harassment and a school’s deliberate indifference to sexual misconduct across campus is difficult.” Finally, the Court stressed the procedural context of its decision: a hearing on appeal from a motion to dismiss. While the Court held that alleging deliberate indifference is enough to survive the motion to dismiss, it left to the district court to decide whether the complaint sufficiently alleged such a claim.

This decision could affect greatly colleges and universities in the Ninth Circuit. Perhaps most troubling for schools is that *Karasek* may open the door to scrutiny of previously adjudicated and closed Title IX complaints. Since *Karasek* makes relevant the steps taken *prior* to the assault in question, the plaintiffs may argue that the nature, adjudications, and findings of previous allegations of Title IX misconduct is inherently relevant to proving their own cases. In addition to increasing the scope and cost of discovery, this will raise a host of privacy concerns.

While the impact of *Karasek* remains to be seen, the decision reminds institutions that their policies and procedures, as well as past and current investigation and adjudication practices, are subject to intense scrutiny. Colleges and universities should ensure they maintain thorough documentation and records of their efforts to prevent and address misconduct and are prepared to address inquiries to their past practices.

For additional guidance on this issue, please contact a Jackson Lewis attorney in the Higher Education or Collegiate & Professional Sports Practice Group.

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