

# University of Colorado Granted Summary Judgment in Football Recruit Sexual Assault Case

by Ken Kozlowski, J.D.\*

Plaintiffs Lisa Simpson and Anne Gilmore, students at the University of Colorado at the time of the alleged incidents, claimed that they were sexually assaulted at a party attended by CU football players and recruits on December 7, 2001. Because CU had made a motion for summary judgment in this matter, all of the facts related below are not disputed by CU and are assumed to be true.

## Allegations of Sexual Abuse

The plaintiffs alleged that a CU football player and a female CU student who had been an athletic department tutor had devised a plan for a football recruiting event to occur on the Friday night in question. The two allegedly planned to provide the recruits with an opportunity to have sex with intoxicated female CU students. The tutor knew that several female students planned to spend the night at Ms. Simpson's apartment playing drinking games.

The tutor arrived at the apartment around 9:00 p.m. and told Ms. Simpson that two CU football players and their recruits might stop by the apartment. At around 11:30 p.m., 16 to 20 CU football players and recruits arrived at the apartment, many of whom had been drinking and smoking marijuana. They continued to do the same at the apartment. After about 30 minutes, some of the players and recruits decided to leave. The tutor, however, approached one of the players and told him he should not leave because "it was about to go down." The latter was understood to mean that sexual favors would be provided to the players and recruits.

At about the same time, Ms. Simpson felt very intoxicated and tired and went to her bedroom, where she lay down and fell asleep. She later awoke to find two recruits removing her clothes. She was sexually assaulted by the recruits as players surrounded the bed. Subsequently, several CU players demanded sex. Ms. Simpson attempted to resist, but was unsuccessful

because she was terrified and surrounded by at least five large football players. While the latter was going on, Ms. Gilmore was also being assaulted in the same room by two other players/recruits. Gilmore stated she was too intoxicated to voluntarily and consensually participate in the sexual contact.

## Known Risk and Deliberate Indifference Alleged

Plaintiffs also alleged that a variety of incidents had occurred prior to December 7, 2001, indicating that the practices of the CU Athletic Department and football programs had created a known risk of sexual harassment, sexual assaults, and sexual discrimination against female students and other women by the players and recruits. Additionally, plaintiffs alleged that the assaults of December 7, 2001, were part of the sexual harassment and assaults of which CU had actual knowledge and to which it was deliberately indifferent.

The plaintiffs filed suit against CU, claiming the sexual assaults they suffered constituted actionable sexual harassment and sexual assault under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688. Section 1681(a) states that "no person in the United States 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."

As Title IX defendants are sometimes referred to as "recipients," and it was undisputed that CU was the recipient of federal financial assistance, they could be sued under Title IX.

## Summary Judgment Granted to CU

In *Simpson v. Univ. of Colorado*, No. 02-RB-2390, 2005 U.S. Dist LEXIS 5633 (Mar. 31, 2005), the United States District Court for the District of Colorado granted summary judgment to CU.

The court first looked at the legal background concerning claims made under Title IX and cited to three cases. The first two were decisions of the United States Supreme Court. In *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), the Supreme Court held that a school district

may be liable for subjecting students to discrimination when the district is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority. A district would only be liable for damages when its deliberate indifference effectively caused the discrimination. The latter standard was adopted in the decision of *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274 (1998) to eliminate any risk that a funding recipient would be liable for damages not for its own official decision, but instead for its employees' independent actions. The Court's decision in *Davis* made it clear that the same standard applied to claims involving student-on-student harassment.

The United States Court of Appeals for the 10th Circuit applied the principles of *Gebser* and *Davis* in *Murrell v. School Dist. No. 1, Denver, Colorado*, 186 F.3d 1238 (19th Cir. 1999). The *Murrell* court concluded that Title IX liability would arise only when a school official who had actual knowledge of the abuse was invested with the duty to supervise the harasser and had the power to take action that would end the abuse.

The District Court in this action involving Simpson and Gilmore stated that based on the principles of *Davis* and *Murrell*, the plaintiffs would have to allege and prove by a preponderance of the evidence the following five essential elements to establish their Title IX claim:

1. That CU had actual knowledge of sexual harassment of female CU students by football players and recruits as part of the football recruiting program;
2. That CU was deliberately indifferent to the known sexual harassment;
3. That the plaintiffs were subjected to severe, pervasive, and objectively offensive sexual harassment caused by CU's deliberate indifference;
4. That the harassment occurred in the context of an educational activity; and
5. That the harassment had the systemic effect of depriving plaintiffs of access to educational benefits or opportunities.

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### Did CU Have Actual Knowledge of Risk of Sexual Harassment?

The District Court then explored the question as to whether CU had actual knowledge of the risk of sexual harassment. The plaintiffs alleged that Head Football Coach Gary Barnett, Athletic Director Richard Tharp, and University Chancellor Richard Bynny had the requisite control over the rules established for the football program.

The plaintiffs put forth seven events that preceded their alleged assaults, stating that they were sufficient to demonstrate that CU officials were on notice that that players and recruits would sexually assault female students. The court decided that only three of the incidents cited by the plaintiffs were known to the relevant CU officials, and disregarded the rest.

**Nonstudents Assaulted.** The first relevant incident took place in 1997 and involved allegations of sexual assaults by several teenage girls that attended a party held by football players at an off-campus motel. Even though the CU officials knew of the incident (with the exception of Barnett, who was hired in January 1999), the victims were not CU students and thus the incident did not, per se, provide notice of a broader risk to CU students that was alleged by the plaintiffs.

**Harassment of Female Football Player.** The second incident involved CU's first female football player, Katherine Hnida. Sometime in 2000, Hnida's father contacted Barnett and Tharp and voiced concerns about multiple instances of sexual harassment of his daughter by CU players, which the coaching staff had allowed to continue. While Hnida's father did not specify at that time (an affidavit) the type of sexual harassment his daughter was subjected to, after the December 7, 2001, assaults took place he informed Bynny that his daughter had been physically, sexually, and verbally assaulted by members of the CU football team.

The court concluded that the harassment Hnida discussed with Barnett in 2000 was at the very least verbal harassment, but that there was nothing in the record to conclude that Hnida described more severe harassment to Barnett in 2000. The Hnida harassment could only contribute to notice, according to the court, if it was combined with other relevant incidents to indicate the existence of a much broader risk. The court also noted that the record

did not contain evidence that, prior to December 7, 2001, Barnett or other relevant CU officials knew of any physical or sexual harassment or sexual assault involving Katherine Hnida. The court concluded that the belated disclosure of the physical and sexual assault of Hnida effectively almost eliminated the efficacy of any notice to CU that female students were at risk of sexual assault by players and/or recruits.

**Trainer Assaulted.** The third and last incident accepted by the court as one that could have possibly provided notice to CU involved an October 2001, incident that involved a female athletic department trainer being sexually assaulted by a football player. The trainer met with Barnett and felt that Barnett had intimidated her into not pressing charges against the player. The court stated that the incident provided notice that a particular player presented a risk of sexual assault, but found it difficult to logically expand the discrete incident to notice that most or all CU football players and recruits presented a risk of sexual assault against CU female students who might come into contact with the players. According to the court, such a "stereotypical generalization" was "unwarranted."

### Evidence Did Not Constitute Adequate Notice Under Title IX

The evidence cited by the plaintiffs indicated, according to the court, that relevant CU officials were aware of some incidents involving sexual harassment, sexual assaults, and alcohol use by certain identified football players and recruits over a period that spanned approximately four years preceding the plaintiffs' assaults. The court held, however, that considering all of the relevant information available to CU officials as a whole, it did not constitute adequate notice under Title IX that female CU students faced a risk that they would be sexually assaulted as part of the CU recruiting program.

**Deliberate Indifference Question Analyzed.** After deciding that there was no adequate notice, the court could have stopped right there. However, they went on and analyzed the deliberate indifference question anyway. In finding that the plaintiffs had not proved deliberate indifference, the court pointed to the following:

- The football player involved in the 1997 incident was suspended for one semester, and for one football game following that suspension.
- The CU Athletic Department devel-

oped new written recruiting guidelines and held a life skills seminar for new athletes that included training on sexual harassment and adopted a sexual harassment protocol.

- Since 1999, the football program had distributed a handbook to all new players that contained information on date rape, social policy, rape awareness and prevention strategies, sexual assault laws, and restrictions on alcohol use. The coaches meet with the players each year who serve as recruiting hosts to review the handbook.

**Action Not Unreasonable.** The court concluded that the actions taken by CU and the football program chronicled above were not clearly unreasonable and did not indicate that CU had intentionally decided to permit severe and pervasive sexual harassment against female CU students. CU had investigated the incidents, imposed discipline on those involved, and implemented policies and training directed to the issues of sexual harassment and assault and alcohol use in the football program. The fact that CU's efforts could now be seen as ineffectual did not establish an internal decision to permit the relevant risk to remain unaddressed and did not help prove the element of deliberate indifference on the part of CU.

The court, after slamming the door on the plaintiffs' claims, did put forth that had they proved notice and deliberate indifference there were one or more genuine issues of material fact relevant to the other elements of the Title IX claim. Summary judgment was granted to the University.

**Comment: This was a rather lengthy recounting of the facts and procedures involving the incidents at the University of Colorado, but the situation presented a classic example of the reasoning employed by a court in the context of a Title IX claim in relation to the Supreme Court decisions rendered in *Gebser* and *Davis*. Had the plaintiffs beefed up their complaint with a bit more notice elements, they might have been able to prove deliberate indifference. Coaches always seem to know what is going on with their players, especially on the college level where they all live on or near campus. Why Hnida's father did not disclose more severe sexual harassment to CU officials before the incidents of December 7, 2001, took place is not explained within the opinion. It is not yet apparent if an appeal will be filed with the U.S. 10th Circuit Court of Appeals. ■**