



# EDUCATION LAW NOTES

Federal and Virginia Developments in School Law

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## Must School Administrators Monitor Social Media For Potential Sexual Harassment?

A divided panel of the United States Court of Appeals for the Fourth Circuit recently held that the University of Mary Washington (UMW) did not do enough to protect female students from alleged sexual harassment through mostly anonymous social media posts. The case was decided on December 19, 2018, and could influence how K-12 administrations monitor and respond to complaints about social media activity when that activity impacts school operations.

An organization called Feminists United on Campus and several individual students asserted Title IX sex discrimination and retaliation claims against UMW and a § 1983 civil rights violation claim against the University's former president. The case stemmed from numerous postings, mostly anonymous, on a former social media application called "Yik Yak." (Yik Yak was an application with geographic limitations – messages could only be received within approximately a mile and a half radius of the poster's location.) The initial postings included Feminists United's opposition to UMW's decision to allow male fraternities on campus. Those messages prompted strong opposing responses, some of them including sexually suggestive and aggressive messages – including threatening to rape some women students.

A Feminists United member also wrote an opinion piece in UMW's student newspaper explaining why she believed UMW is not feminist friendly. It, too, garnered derogatory,

sexist and threatening messages on the newspaper's website. Members of the school's rugby team apparently confronted her, and she reported fears about her safety to UMW's Title IX coordinator. The coordinator offered to mediate a discussion between the student group and the rugby team, and ultimately UMW held a campus-wide open forum about sexual assault. The UMW President emailed the entire student body discussing generally UMW's efforts to end sexual assault.

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Additionally, UMW suspended the rugby team and imposed mandatory anti-sexual assault and violence training. These actions spawned additional threatening and harassing social media posts directed

at Feminists United members: "gonna tie these feminists to the radiator . . .;" "can we euthanize whoever causes this bullsh--?" More than 700 threatening posts were directed at Feminists United members, some of which shared specific members' whereabouts, seemingly inviting additional confrontations. Members discussed their fear of being in danger and not being able to concentrate on school work.

Citing First Amendment concerns, UMW said it could not address "cyber bullying." The lawsuit alleged further that the UMW Title IX Coordinator failed to offer any plan to address the harassment and threats. Feminists United initially filed a complaint with the Office for Civil Rights. When UMW denounced the complaint in a letter, additional social media posts appeared and Feminists United amended

the OCR complaint to include a retaliation claim. Two years later, the organization withdrew the complaint and filed suit alleging sex discrimination, retaliation, and various other civil rights violations.

Ruling on UMW's pre-trial motion to dismiss, the trial court held that an educational institution is only liable for student-on-student sexual harassment when it "exercises substantial control over both the harasser and the context in which the known harassment occurs." The Court held that there was no basis for imputing liability to UMW because the harassment (by means of the social media application, controlled by a third party vendor) took place in a context over which UMW had limited, if any, control. The Court pointed out that UMW did take some actions to prevent further harassment, including coordinating listening circles and sending campus police to two events. It also ruled that Title IX does not require a university to meet specific remedial demands - that banning the social media platform (Yik Yak) might have exposed UMW to First Amendment liability.

The majority of the panel of the Fourth Circuit disagreed and reversed the trial court. It held that UMW did have substantial control, in that some of the posts were made through the University's wireless network. The Court also expressed concern that critical events occurred on campus and the harassment specifically targeted UMW students. The Court emphasized that the lawsuit sufficiently alleged that UMW acted with deliberate indifference: that the University did not engage in efforts that were reasonably calculated to end the harassment. While acknowledging the limited steps UMW took in response to the complaints, the Court of Appeals opined that those actions did not preclude liability at the motion to dismiss stage of litigation. Acknowledging the likelihood that the threats emanated from UMW students, the Court suggested that UMW could have: (1) clearly communicated that it would not tolerate sexually harassing behavior in person or on-line; (2) conducted mandatory assemblies; (3) provided anti-sexual harassment trainings; and

(4) done more to try to identify the harassers.

Regarding UMW's First Amendment concerns, the Fourth Circuit restated the legal principle that true threats are not protected speech, especially when specific targets are identified and violent actions vowed. Further, whether or not statements constitute threats is a jury question not to be disposed of at the motion to dismiss stage. Finally, the Court held that once UMW became aware of the threats, it was obligated to investigate and seek to identify those students who posted them and to report the threats to local law enforcement.

In stark contrast, a dissenting Justice disagreed with "holding 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." The dissent did not agree with the majority that, in these circumstances, UMW exercised substantial control over the harassers and the context of harassment sufficient to impute Title IX liability.

"The University should not hesitate to seek further review." UMW has not yet noted any appeal.

Public school principals grapple regularly with their Title IX responsibilities and the increasing impact of social media on school operations. In 2011, the Fourth Circuit in *Kowalski v. Berkeley County Schools*, sustained the schools' discipline of a student who engaged in on-line bullying directed at a fellow student through her MySpace group. The UMW case, while featuring higher education, may well be the first to address if and when a school's responsibility extends to anonymous postings. Clearly, the case involved other factors – but principals should be sure to consult with division legal counsel to determine if and how to address disruptive postings.

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