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10  
11 **UNITED STATES DISTRICT COURT**  
12 **DISTRICT OF ARIZONA**

13 J.K., a single woman,

14 Plaintiff,

15 v.

16 Arizona Board of Regents, et al.,

17 Defendants.

Case No: CV06-916-PHX-MHM

**ABOR/ARIZONA STATE  
UNIVERSITY'S MOTION FOR  
SUMMARY JUDGMENT**

18 Under Title IX, a federally funded school may be held liable for student-to-student  
19 sexual harassment in its programs only if it has actual knowledge of the harassment and is  
20 deliberately indifferent to it. In this case, Arizona State University removed Darnel  
21 Henderson from a summer transition program after he misbehaved, and later, upon  
22 determining that he sexually assaulted the Plaintiff in her dorm room, promptly expelled  
23 him from the university. Was ASU deliberately indifferent to sexual harassment?

24 The answer is "no." As explained more fully below, ASU prohibits sexual  
25 harassment and has programs specifically intended to reduce sexual assaults. The  
26 university's actions in responding to allegations of misconduct by Henderson reflect not  
deliberate indifference to sexual harassment but, rather, disapproval of it. Accordingly,

1 ASU and the Arizona Board of Regents (collectively, “ASU”) move for summary  
2 judgment under Rule 56 of the Federal Rules of Civil Procedure.

3 **I. Factual Background**

4 In 2002-03, during her senior year in high school, Plaintiff applied for admission  
5 and was accepted by Arizona State University. (DSOF 1.) She also applied to ASU’s  
6 Department of Residential Life to live in on-campus housing. She specifically requested to  
7 room with Heather Patterson, a high school classmate, and to live in the San Pablo  
8 residence hall. (DSOF 2.) Her housing request was approved, and she and Heather moved  
9 into San Pablo at the beginning of the 2003-04 academic year in August 2003. (DSOF 2-  
10 3.)

11 On March 11, 2004, Plaintiff had just finished her mid-term exams in the spring  
12 semester. (DSOF 83.) She and Heather planned a trip to Rocky Point for Spring Break,  
13 which was to begin the next day. (DSOF 85.) Some time during the early evening, Darnel  
14 Henderson stopped by Plaintiff’s room. Henderson, who was also a freshman, had only  
15 recently moved into San Pablo and lived on the same floor as Plaintiff. On this occasion,  
16 Henderson introduced himself to Plaintiff and Heather and the three of them engaged in a  
17 few minutes of casual conversation. Henderson asked Plaintiff and Heather what they had  
18 planned for the evening and they said they did not know. Henderson and Plaintiff  
19 exchanged cell phone numbers. (DSOF 86.)

20 Plaintiff and Heather went out that evening with some other friends, including  
21 Natalie Schwartz, Jessica Ramsey, and some guys from the Theta Chi fraternity. (DSOF  
22 89.) Plaintiff had too much to drink. (DSOF 91.) Around 12:30 a.m., Plaintiff, Heather,  
23 Natalie, and Jessica walked back to the room at San Pablo. (DSOF 90.) Plaintiff and  
24 Heather got into an argument, and Heather left the room to spend the night with a friend.  
25 Natalie and Jessica remained in the room with Plaintiff, just talking and hanging out.  
26

1 (DSOF 92.) A couple of guys that Plaintiff knew came over for a while but did not stay  
2 long. At some point, Henderson also stopped by the room, but he did not stay long either.

3 After awhile, Plaintiff appeared to be falling asleep on her bed. Natalie and Jessica  
4 told her good-bye and left the room. (DSOF 93.) As they left, they shut the door behind  
5 them but did not lock it. (DSOF 94.) The doors to the rooms in San Pablo had push locks,  
6 that is, they could be locked by pushing a button on the knob. (DSOF 95.) Plaintiff  
7 ordinarily locked the door to her room at night, but when she heard Natalie and Jessica  
8 leave and the door shut behind them, she did not push the button to lock it. (DSOF 96.)

9 A few minutes later, Henderson and another San Pablo resident named Kevin  
10 Turchie went to Plaintiff's room. They went inside. Plaintiff was asleep on her bed.  
11 Turchie saw no reason to stay and left the room after a minute or so. (DSOF 97.)  
12 Henderson stayed in the room.

13 Plaintiff woke up to someone having her sex with her from behind. (DSOF 99.)  
14 She asked whoever it was to stop. The person did not stop immediately, so Plaintiff  
15 repeated her request a few moments later. This time the person having sex with her did  
16 stop and got up and left. At some point, Plaintiff looked up and saw that it was Henderson.  
17 (DSOF 100.)

18 Plaintiff went back to sleep. (DSOF 101.) When she awoke later that morning, she  
19 began to recall what happened. (DSOF 102.) She called Heather, who had gone to class  
20 that morning. Heather came back to the room. (DSOF 103.) After hearing Plaintiff  
21 describe what happened, Heather reported the incident to Adam Stuart, the Resident  
22 Assistant (RA) on their floor. (DSOF 104.)

23 Stuart took the information down and immediately notified his supervisors in  
24 Residential Life. Residential Life then notified ASU's Department of Public Safety (DPS).  
25 DPS dispatched an officer to the scene and immediately began a criminal investigation.  
26

1 Residential Life also notified Dr. Deborah Sullivan in Student Life/Judicial Affairs  
2 (“Judicial Affairs”). Dr. Sullivan, whose office enforces the Student Code of Conduct,  
3 also began an investigation of the matter. (DSOF 106.)

4 On April 2, 2004, based on her initial inquiry, Dr. Sullivan issued Henderson a  
5 written notice of charges, reflecting her belief that there was probable cause to believe that  
6 Henderson violated the Student Code of Conduct. (DSOF 107.) That same day,  
7 Henderson was asked to move out of the residence halls and suspended from the football  
8 program. (DSOF 108-09.) Just over a month later, Dr. Sullivan expelled Henderson from  
9 ASU. (DSOF 110-12.)

10 Plaintiff filed this action, claiming a violation of Title IX. She has also sued Steve  
11 Rippon and Dirk Koetter individually, alleging that they deprived her of substantive due  
12 process.

## 13 **II. Legal Discussion**

### 14 **A. Liability Under Title IX May Be Imposed Only in Limited** 15 **Circumstances.**

16 Title IX of the Education Amendments of 1972 provides that “no person . . . shall,  
17 on the basis of sex, be excluded from the participation in, be denied the benefits of, or be  
18 subjected to discrimination under any education program or activity receiving Federal  
19 financial assistance.” 20 U.S.C. § 1681(a). The Supreme Court has found that Title IX  
20 provides an implied right of action for damages. *Franklin v. Gwinnett County Public*  
21 *Schools*, 503 U.S. 60 (1992). The Court later held that damages are available for teacher-  
22 student sexual harassment only if an official who has authority to address the alleged  
23 discrimination on the funding recipient’s behalf has actual knowledge of it and is  
24 deliberately indifferent to it. *Gebser v. Lago Vista Independent School Dist.*, 524 U.S.  
25 274, 290-91 (1998). The Court expressly declined to impose liability on schools based on  
26 agency principles or constructive notice. *Id.* at 283-85.

1           In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Court  
2 considered whether federally funded schools may be held liable under Title IX for sexual  
3 harassment when the harasser is a student rather than a teacher. In a 5-4 decision, the  
4 Court held that schools may be liable for student-on-student harassment in “certain limited  
5 circumstances.” *Id.* at 643. The Court approved the *Gebser* framework but recognized  
6 that some adjustment is required to apply it to student-on-student harassment. To maintain  
7 a Title IX claim for sexual harassment under *Gebser* and *Davis*, a plaintiff must prove the  
8 following: (1)

9           Writing for the majority, Justice O’Connor went to great pains to dismiss a  
10 suggestion by the dissent that the Court’s holding established a mere “reasonableness”  
11 standard. *Id.* at 648-49. She similarly rejected the notion that schools would be required  
12 to expel every student accused of sexual harassment in order to avoid liability under Title  
13 IX. *Id.* at 648. Justice O’Connor observed that “courts should refrain from second-  
14 guessing the disciplinary decisions made by school administrators.” *Id.* (citation omitted).  
15 She promised that “school administrators will continue to enjoy the flexibility they  
16 require” because they would be deemed deliberately indifferent only where their response  
17 to harassment “is clearly unreasonable in light of the known circumstances.” *Id.* Justice  
18 O’Connor stated, “there is no reason why courts, on a motion to dismiss, for summary  
19 judgment, or for a directed verdict, could not identify a response as not ‘clearly  
20 unreasonable’ as a matter of law.” *Id.*

21           **B. ASU Responded Reasonably to Plaintiff’s Report of Sexual Assault.**

22           The Ninth Circuit examined a college’s response to sexual harassment of a student  
23 in *Oden v. Northern Marianas College*, 440 F.3d 1085 (9<sup>th</sup> Cir. 2006). The plaintiff there  
24 filed a complaint alleging she was sexually harassed by her music instructor. The  
25 instructor denied the allegations. By policy, the college was required to convene a formal  
26

1 hearing within 30 days. The college conducted a hearing (though not for nine months), a  
2 hearing committee sustained the allegations of sexual harassment, and the college  
3 president suspended the instructor for a month. The Plaintiff argued that the delay in  
4 holding the hearing, and the failure to fire the instructor, constituted deliberate  
5 indifference. The Ninth Circuit ruled that the college's response was sufficient and  
6 affirmed summary judgment for the college.

7 Here, ASU's response to Plaintiff's report of a sexual assault was prompt and  
8 thorough. Immediately after the incident was reported, Residential Life notified both DPS  
9 and Judicial Affairs. Dr. Sullivan of Judicial Affairs treated the report as a complaint  
10 involving possible Code of Conduct violations. Dr. Sullivan began an investigation.  
11 Three weeks after the report, on April 2, 2004, she issued a written notice of charges to  
12 Henderson. On the same day, Coach Koetter suspended Henderson from the football  
13 program. Henderson was also asked to move out of the residence hall, and he did so.

14 Dr. Sullivan continued with her investigation. She interviewed Henderson. She  
15 interviewed others with information about the night of March 11-12. She reviewed cell  
16 phone records. She found that Henderson more likely than not committed the assault, and  
17 thus violated provisions of the Code of Conduct. Based on these findings, Dr. Sullivan  
18 made the decision to expel Henderson from ASU. She told Henderson of her decision on  
19 May 7. (SOF \_\_\_\_.) She gave Henderson official written notice of the expulsion on May  
20 10, less than two months after the assault on Plaintiff was reported. (SOF \_\_\_\_.) Far from  
21 showing deliberate indifference, this response shows that ASU condemned Henderson's  
22 actions. No reasonable jury could find that ASU, upon getting actual notice of the sexual  
23 harassment of Plaintiff, was deliberately indifferent.

24 **C. ASU Responded Reasonably to Prior Allegations of Sexual Harassment.**  
25  
26

1           Indeed, Plaintiff does not appear to question ASU’s response to the assault on her.  
2 She claims instead that ASU had prior notice that Henderson sexually harassed others in  
3 the Summer Bridge program and failed to remedy it. This is obviously a different scenario  
4 than the ones presented in *Davis* or *Gebser*. Those cases considered the viability of a Title  
5 IX claim where school officials allegedly had notice of and were deliberately indifferent to  
6 the sexually harassing conduct visited upon the plaintiffs. Given the care that Justice  
7 O’Connor took in defining the limited circumstances in which Title IX provides a claim  
8 for student-on-student harassment, *Davis* should not be extended to recognize a claim  
9 premised on alleged deliberate indifference to prior harassment of others.

10           Even if a Title IX claim may be based on prior harassment, Plaintiff’s claim fails.  
11 First of all, none of the persons who may be said to have had notice of the alleged prior  
12 harassment by Henderson had authority to take any more action than they did. Second,  
13 Plaintiff here is merely doing the kind of second-guessing that the *Davis* court cautioned  
14 against. The actions taken in response to the prior harassment—kicking him out of  
15 Summer Bridge—were sufficient under Title IX. *See Porto v. Town of Tewksbury*, 488  
16 F.3d 67 (1<sup>st</sup> Cir. 2007).

17           Plaintiff’s reliance on *Williams v. Board of Regents of the University System of*  
18 *Georgia*, 441 F.3d 1287 (11<sup>th</sup> Cir 2007), is misplaced. First of all, that case involved a  
19 motion to dismiss. There was no evidentiary record, and the opinion only examined the  
20 sufficiency of the allegations in the complaint under the lenient standard that a complaint  
21 may not be dismissed unless it is beyond doubt that the plaintiff can prove no set of facts  
22 that would entitle her to relief. Moreover, the facts alleged in *Williams* are much different  
23 from the undisputed facts here. There, a female student alleged that she was sexually  
24 assaulted in her dorm room by a member of the university’s men’s basketball team. She  
25

1 further alleged that the basketball coach and others recruited the alleged assailant despite  
2 knowledge

3 **D. ASU Took Reasonable Steps to Prevent Sexual Harassment.**

4 ASU has a policy prohibiting sexual harassment, and reminders of it are all over.  
5 The ASU Student-Athlete Handbook expresses the policy. (See DSOF Ex. 6.) The  
6 Residential Life Handbook expresses it. (See DSOF Ex. 17.) The Department of ICA  
7 provides programming on sexual harassment and related concerns. The Department of  
8 Health and Wellness has a rape prevention and education program. (See DSOF, Ex. 24.)  
9 These efforts reflect ASU's strong opposition to sex discrimination and sexual harassment,  
10 and negate any inference of deliberate indifference to sexual harassment.

11 **III. Conclusion**

12 For the foregoing reasons, ASU's summary judgment motion should be granted.  
13 RESPECTFULLY SUBMITTED this 5 October 2007.

14 Terry Goddard  
15 Attorney General

16  
17 By s/ Michael K. Goodwin  
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21 I certify that I electronically  
22 transmitted the attached document  
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