

## Higher Education

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# CALIFORNIA COURT FINDS COLLEGE NOT LIABLE FOR THIRD PARTY HARASSMENT NOT RELATED TO COLLEGE'S PROGRAMS OR ACTIVITIES

*By Karen Baillie*

In *Karasek v. Regents of the University of California*, No. 3:15-cv-03717-WHO (N. D. Cal. April 12, 2018), the court granted summary judgment to the University of California (UC) on the plaintiff's Title IX claims.

The plaintiff, Aryle Butler, was an undergraduate student at UC Berkeley from 2012 to 2015. During the summer of 2012, she was employed as a research assistant to a UC Berkeley graduate student in a remote part of Alaska. Butler did not earn academic credit for her work and was not paid through UC, but was paid directly by the graduate student using grant funds. While working that summer, Butler lived at the Wrangell Mountains Center, an entity unaffiliated with UC. The Center also housed programming for the Alaska Wildlands Studies Program, which was also unaffiliated with UC. Butler claimed she was sexually assaulted by a part-time instructor with the Alaska Wildlands Studies Program at the Center. She filed suit against UC alleging gender discrimination in violation of Title IX.

The court restated the requirements for liability under Title IX: (1) the school must have exercised substantial control over both the harasser and the context in which the harassment occurred; (2) the plaintiff must have suffered harassment that is so

severe, pervasive and objectively offensive that it can be said to deprive her of access to the educational opportunities or benefits provided by the school; (3) the school must have had actual knowledge of the harassment, meaning that a school official who at a minimum had authority to address the alleged discrimination and to institute corrective measures on the school's behalf had actual knowledge of the discrimination; (4) the school must have acted with deliberate indifference to the harassment, meaning that the school's response to the harassment was clearly unreasonable in light of the known circumstances; and (5) the school's deliberate indifference must have subjected the plaintiff to harassment.

Using this framework, the court reasoned that UC could not be found liable because UC never learned of harassment in its own programs and activities. Therefore, Butler could not prove that UC acted with "deliberate indifference to known acts of harassment in its programs and activities." (Slip Op. at p.13). The court noted that when Butler reported the harassment months later on an anonymous basis, UC nonetheless investigated. Further, in addition to the investigation, UC made several accommodations to protect and assist Butler on campus and academically. Even so, Butler argued that UC

should have required that the assailant report to UC when he would be on campus so that UC could alert Butler. The court's opinion is not clear on whether or when Butler made such a request, but notes that Butler never told UC that she encountered the assailant on campus, or that she was aware of him on campus or that she feared he would appear on campus to attend a specific lecture. Given these undisputed facts, the court concluded that no reasonable fact finder could reason that UC acted with deliberate indifference:

"Once she returned to campus, UC may have had an obligation to take steps with respect to third parties.... But it cannot legitimately be expected to take preventative measures to eliminate a hostile environment if it has no reason to know that a hostile environment exists." (Slip Op. at 18).

With respect to the other factors, the court noted that UC did not have any control over the alleged harasser even though Butler argued that he potentially could attend a campus event or be invited to speak as a guest lecturer. Butler admitted that she never saw her assailant after she left Alaska and was never harassed by him on campus or in any UC program or activity. The court reasoned that Butler's alleged continued vulnerability did not amount to "severe, pervasive and objectively offensive" harassment that deprived her of "access to the educational opportunities or benefits provided by the school." Further, UC's alleged inaction did not subject her to additional harassment.

This case was decided under Title IX case law and theory, which subjects recipients of federal funding to liability for sex discrimination and harassment in federally funded programs. The court reached a remarkably similar conclusion to the case we discussed recently that was brought on common law negligence theories. That case, *University of California (UCLA) v. Superior Court of Los Angeles (Rosen)*, held that California schools have a special duty to take reasonable steps to protect students from foreseeable threats. There, the school's threat assessment team was aware that a schizophrenic student had become focused

on a particular student whom he later attacked with a knife in a school lab class. Although these cases were argued under different theories, they appear to reach similar results. ♦

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