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Sexual Torts: Defending Misconduct Claims/Litigation in
Educational and Religious Institutions

I. High Exposure Claims

Sexual misconduct, harassment, abuse, molestation and hazing cases involve some of the highest exposure claims for schools, religious and other non-profit entities. As a result, it is imperative for claim professionals to work together with defense counsel to obtain the best possible result for the insured entity. Although each case presents its own unique set of facts, there are some specific factors to consider in determining which cases should be settled or taken to verdict. The key considerations are addressed in these materials.

II. How is “Sexual Misconduct” Defined?

The term “Sexual Misconduct” includes sexual torts, hazing, harassment, abuse, molestation, and even bullying which results in some type of sexual assault or abuse. For purposes of this discussion, the term sexual misconduct includes this expanded definition.

III. Theories of Liability

Sexual misconduct cases implicate a number of legal theories that a plaintiff could assert to recover damages from a school, religious or non-profit organization.

A. Title IX

Title IX provides, in part, that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance. ...” *20 U.S.C. Section 1681 (a)*. Sexual harassment is a form of discrimination under Title IX. *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). As a result, an educational institution that receives federal funding can be liable under Title IX for sexual abuse of a student by a teacher or a school employee.

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992). In addition, an educational institution that receives federal funding can be liable for student-on-student sexual harassment. *Davis*, 526 U.S. at 633.

To prevail under Title IX for teacher-student discrimination (e.g., abuse, molestation or harassment) a plaintiff must prove: 1) an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures had “actual knowledge of the discrimination; and 2) deliberate indifference by the school to the discrimination. *Gebster v. Lago Vista Independent School District*, 524 U.S. 274 (1998).

In student-on-student cases, a plaintiff must prove: 1) school officials have actual knowledge of the discrimination or harassment, 2) deliberate indifference by the school to the discrimination or harassment, and 3) the harassment must be “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” *Davis*, 526 U.S. at 650. Notably, theories of *respondeat superior* liability or constructive notice do not apply in Title IX cases.

B. 42 U.S.C. Section 1983

Educational institutions are also subject to liability based on the federal statute creating a cause of action for violations of federal or statutory rights. *42 U.S.C. Section 1983*. Section 1983 only provides a cause of action. Consequently, plaintiffs must identify an independent basis for substantive rights. The most common rights enforced through Section 1983 in sexual misconduct cases are the due process clause and equal protection clause of the of the Fourteenth Amendment. *Doe v. Taylor Independent School District*, 15 F. 3d 443, 450 (1994) (public school students “have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment.”). See *Fitzgerald v. Barnstable Sch. Comm.* 555 U.S. 246 (2009) (Title IX not meant to be an exclusive mechanism for addressing gender discrimination in schools or a substitute for Section 1983 claims as a means of enforcing constitutional rights.)

C. Respondeat Superior Liability

In cases where an employee of an educational, religious or other non-profit organization commits an act of sexual misconduct against a child, the potential for vicarious or *respondeat superior* liability needs to be addressed. This theory of liability is usually not a viable legal theory unless a plaintiff can prove the acts were within the scope of employment. *Restatement (Third) of Agency Section 7.07(1)*. An employee acts “within the scope of employment” when performing work assigned by the

employer or engaging in a course of conduct subject to an employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer. *Restatement (Third) of Agency Section 7.07(2)*. Generally speaking, courts have found that sexual misconduct falls outside the scope of employment.

D. Negligent Hiring, Supervision and Retention

When vicarious or *respondeat superior* liability is not a viable legal theory because the conduct at issue falls outside the scope of employment, plaintiffs look to theories of negligent hiring, supervision and retention to hold educational, religious and not-profit organizations liable. Under this theory, “a principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent’s conduct if the harm was caused by the principal’s negligence in selecting, training, retaining, supervising, or otherwise controlling the agent.” *Restatement (Third) of Agency Section 7.05(1)(2006)*.

IV. Legal Defenses

A. No Notice Defense

In addition to the defenses noted above, one of the strongest defenses to sexual misconduct claims is lack of knowledge of the abuse or risk of abuse. Each claim must be analyzed on a case-by-case basis. Whether the plaintiff is asserting a federal or state law claim, if the school, church or youth organization can establish that it was never on notice of any sexual misconduct or the risk of misconduct, this can provide a complete defense to liability. Consequently, the defense team must determine early on who know what and when did they know it? If the defense can establish that the sexual misconduct occurred in secrecy, there was never any reason for the organization to suspect abuse, and that there were preventive measures in place to guard against misconduct, this can be a very powerful defense.

B. Statute of Limitations Defense

For federal civil rights claims, the statute of limitations is generally the state’s personal injury statute. However, in sexual abuse cases involving minors, the statute of limitations generally tolls until the minor reaches the age or majority. In addition, many states have specific statutes for sexual abuse which provide a claimant an extended period to assert such a cause of action. It should also be noted that many states apply a “discovery rule” to abuse cases which can also toll the applicable limitations period. Determining when a sexual abuse case of action accrued in a repressed memory case can be very challenging. Each case must be carefully analyzed for a potential statute of limitations defense.

C. Immunity Defenses

Qualified immunity may be available to school officials in federal lawsuits. State law immunities may also apply to educational, religious and non-

profit organizations depending on the state law of the case. The defense team should identify and assert all potential immunities as affirmative defenses at the time the civil complaint is answered. Discovery should be developed around these immunities for summary judgment if a motion to dismiss is not a viable option.

V. Case Evaluation

The stakes of defending an educational, religious or non-profit organization in sexual misconduct cases increase dramatically if summary judgment is not an option or is denied. A number of factors need to be carefully analyzed in determining whether to settle or take a case to verdict.

Claims professional need to identify whether there is a potential statute of limitations defense. The limitations period for sexual abuse/misconduct claims vary from state-to-state. Most states have adopted extended statutes of limitations for sexual abuse victims. In addition, because most of the sexual misconduct cases involve minors, the statute of limitations is tolled until the plaintiff reaches the age of majority. Most states also have what is known as a “discovery rule” which can further toll the limitations period. This rule is often relied upon by plaintiffs in repressed memory cases.

These cases almost always involve sympathetic plaintiffs claiming both physical and mental health/emotional injuries. The highly emotional appeal of these cases cannot be underestimated especially in cases involving special needs victims. The age, disability and overall credibility of the plaintiff should be carefully considered in each particular case.

In addition, societal impressions that institutional defendants engage in cover-ups is a common theme in these kinds of cases. Whether any such evidence exists should be closely analyzed. Experience has shown that the suggestion of cover-up or turning a “blind eye” to reports of sexual misconduct increases the settlement value and verdict potential. Another challenge in defending these claims is the reality that jurors may hold schools, religious organizations and “youth serving” institutions to a higher standard. Although there is no legal basis to do so, this is a factor that cannot be overlooked.

VI. Claims Management

From a claim perspective, there has been an increase in sexual misconduct related claims filed in the past several years against schools, religious institutions and other non-profit entities. If an actual claim is filed, the claims professional should handle the matter with empathy towards the claimant and their parent, and work to develop rapport to fully investigate the allegations of sexual misconduct.

Whether to defend or settle a matter often turns on if it is determined that the educational, religious or non-profit entity had actual knowledge of the sexual misconduct, if the entity did nothing to take corrective action, and if the entity acted with deliberate indifference.

Developing a partnership with assigned defense counsel is imperative. The team approach is an effective way to manage these claims. Defense Counsel Guidelines should be adhered to as closely as possible. Claims professionals should be apprised of all significant case developments impacting on liability and case evaluation. The claims professional and defense counsel should agree on a defense plan subject to necessary adjustments as the case progresses. Ideally, the claims professional and defense counsel should develop an agreed game plan that both believe will be most beneficial to the client.