IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MIRANDA SUMMAR, OLIVIA WELLS, PRESCILLA PENA, RHEANNA JACKSON, GABRIELLE GLIDEWELL, MORGAN BROWN RUSSELL, and EMILY HEUGATTER,	)	
Plaintiffs,	)	**Case No. CIV-21-473-G**
v.	)	
THE STATE OF OKLAHOMA *ex rel* UNIVERSITY OF CENTRAL OKLAHOMA,	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE CLAIMS OF PLAINTIFFS SUMMAR, WELLS, PENA, JACKSON, GLIDEWELL AND BROWN RUSSELL AND BRIEF IN SUPPORT

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I. Student Plaintiffs' Allegations Fall Short of Deliberate Indifference.

In their response brief, Plaintiffs seek refuge in an official policy claim (also called a pre-harassment claim by some courts - "Official Policy") in hopes their FAC will not be dismissed as to the Student Plaintiffs. However, in so doing, Plaintiffs gloss over the fact that under *any* Title IX theory of recovery, they must allege facts to show deliberate indifference by UCO to known sexual misconduct (i.e., that UCO's response was clearly unreasonable). Because Plaintiffs have pled facts which show there was no deliberate indifference, their Title IX claims against UCO fail *regardless of the theory of recovery*.

UCO briefed the lack of deliberate indifference in its moving papers. (Dkt. 15, p. 18-21). In response, Plaintiffs do not try to point the Court to any particular allegations in the FAC that can plausibly demonstrate UCO acted unreasonably. (Dkt. 17, p. 17-19). Instead, they argue primarily that the issue should not be decided on a motion to dismiss. However, courts do decide this issue on a motion to dismiss where the plaintiff has pled facts inconsistent with a showing of deliberate indifference, i.e., where the plaintiff has failed to plead facts demonstrating the university's conduct was clearly unreasonable. *See Garcia v. Clovis Unifed Sch. Dist.*, 627 F. Supp. 2d 1187, 1198 (9th Cir. 2009)(dismissing plaintiff's Title IX claim and finding no deliberate indifference when school took different corrective action against a teacher each time it was informed of the teacher's harassing conduct); *Barnett v. Kapla*, 2020 WL 7428321, at *15 (C.D. Cal. Dec. 18, 2020); *Emily O. v. Regents of the Univ. of California*, 2021 WL 1535539, at *10 (C.D. Cal. Mar. 9, 2021).

In *Montoya v. New Mexico Inst. Of Mining & Tech. Bd. Of Regents*, 2017 WL 3405561, at *4-5 (D.N.M. Mar. 21, 2017), the plaintiff was fondled by her co-worker after

he forced the plaintiff into his office, made repeated sexual and degrading advances and comments to her, removed his clothing and physically prevented her from escaping. *Id*. Plaintiff alleged she reported the attack, after which the school suggested she seek counseling services and take FMLA leave. Regarding plaintiff's attacker, the complaint alleged the school's only actions were to require him to take a week-long leave of absence, to refrain from going near the plaintiff. *Id*. at *2. The plaintiff alleged the school had shown deliberate indifference because it should have taken additional investigative measures and "imposed harsher discipline." *Id* at *6. In granting the motion to dismiss, the court held plaintiff's complaint failed to state a claim a claim because based on the facts alleged plaintiff could not show deliberate indifference to her complaint. In reaching its conclusion, the court distinguished cases finding deliberate indifference, which routinely contain factual allegations that a school neglected to take any steps to investigate the complaints or impose any form of discipline which resulted in further harassment. *Id*. at *4-6. While the court acknowledged the school "could have undertaken a more elaborate investigation, and that it could have taken more extreme disciplinary measures," the alleged facts did not show "the school took no action to remedy a known instance of sexual harassment" and, therefore, the plaintiff failed to adequately plead deliberate indifference. *Id*. at *6.

Because the allegations in the FAC are inconsistent with a finding of deliberate indifference by UCO, the Student Plaintiffs' claims should likewise be dismissed.

II. Plaintiffs' Cannot Allege Facts to State an Official Policy Claim.

To properly state a claim under a Title IX official policy/pre-assault/pre-harassment theory ("Official Policy"), Plaintiffs must allege facts sufficient to show UCO intentionally

violated Title IX by maintaining an Official Policy of deliberate indifference to earlier complaints of sexual harassment, which Plaintiffs have not done. Under the four-part test set forth in *Karasek v. Regents of the Univ. of Cal.*, 85 F.3d 1103, 1112 (9th Cir. 2020), and set forth for the Court in Plaintiffs' response, Dkt. 15, p. 6, a pre-assault claim must allege facts showing that as a result of the school's deliberate indifference to reports of sexual misconduct (factor 1) Plaintiffs suffered harassment that was so severe, pervasive, and objectively offensive that it effectively deprived the plaintiff of access to the educational opportunities or benefits provided by the school (factor 4). Under this standard, Plaintiffs Wells, Pena, Jackson, and Glidewell cannot bring an Official Policy claim as none have alleged to have suffered harassment that was severe, pervasive and objectively offensive as a matter of law. Likewise, Plaintiff Heugatter has not alleged she suffered sexual harassment at all, and therefore cannot bring such a claim. This leaves only Summar and Brown Russell who could potentially bring an Official Policy claim against UCO.

The sorts of allegations that support an Official Policy claim are plainly distinguishable from the instant case. The *Karasek* factors were fashioned under the Tenth Circuit's reasoning in *Simpson v. Univ. of Colorado Boulder*, 500 F.3d 1170 (10th Cir. 2007), where the court held Title IX liability could attach to a university for the sexual assault of female students where the assault was the result of an Official Policy of using female students to entertain recruits, the policy remained in effect even after the university was put on notice that it created an expectation of sex by recruits and had led to assaults, and the District Attorney had warned the university it needed to develop policies for supervising recruits and training athletes on sexual harassment. *Id*. at 1170. There are no

such allegations of systemic failures in the FAC. While Paragraph 245 does contain threadbare recitals of an Official Policy claim, the conclusory allegation is insufficient to state an Official Policy claim. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir.1991) ("conclusory allegations without supporting factual averments are insufficient to state a claim"); *Bryson v. City of Edmond*, 905 F.2d 1386, 1390 (10th Cir.1990) (court may reject "footless conclusions of law" on motion to dismiss). Absent allegations from which the Court can infer UCO actively created and/or condoned a pattern or practice of deliberate indifference to claims of sexual harassment, Plaintiffs cannot maintain an Official Policy claim. *See Doe v. Union Coll.*, 2020 WL 1063063, at *5 (N.D.N.Y. Mar. 5, 2020); *Roskin-Frazee v. Columbia Univ.*, 2018 WL 6523721, at *5 (S.D.N.Y. Nov. 26, 2018). Importantly, the FAC only raises issues with the *manner* in which Plaintiffs' individual complaints were handled, which cannot be the basis of an Official Policy claim. *See Emily O., supra*, 2021 WL 1535539 at *10 (dismissing plaintiff's Official Policy claim because plaintiff failed to provide adequate factual allegations to show a pattern and practice of deliberate indifference and instead relied the manner her claim was handled).

Even if Plaintiffs have alleged a policy of deliberate indifference, their Official Policy claim fails because (1) the Official Policy must pre-exist the alleged sexual misconduct, *Id*., and (2) the alleged heightened risk must *result in* harassment that was severe, pervasive and objectively offensive and deprived plaintiff of access to educational opportunities. *Karasek*, 956 F.3d at 1112. A study of the FAC shows (1) there are no allegations of behavior after Spring 2018 that Plaintiffs contend are severe, pervasive and objectively offensive, and (2) all allegations of deliberate indifference take place in Spring

2018 or later. *See*, Dkt. 15, p. 9, Dkt. 6, ¶ 41-48 (but *also see* Dkt. 6), ¶ 67-72, 225, 232-234, 235-238, 240-241. Plaintiffs' Official Policy claim fails, and it should be dismissed.

A. The Traditional Title IX Claims Should Also Be Dismissed.

1. Plaintiffs Wells, Pena, Jackson and Glidewell have not alleged sufficient facts to show a hostile environment.

To constitute an actionable Title IX hostile educational environment claim, the alleged misconduct must be sufficiently severe, pervasive, and objectively offensive. *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1246 (10th Cir. 1999). Plaintiffs Wells, Pena, Jackson and Glidewell's allegations of hostile educational environment are devoid of facts suggesting they faced conduct that was abusive, much less subjectively or objectively severe and pervasive. The objective component functions to "police the baseline for hostile environment claims." These Plaintiffs' allegations are based on isolated comments and subjectively flirtatious behavior. These Plaintiffs attempt to piggy-back off the more salacious conduct alleged by Summar which is insufficient to create a colorable harassment claim for any one of them. While it is true a plaintiff may be subjected to harassment by behavior not aimed directly at the plaintiff, courts acknowledge "there are necessarily qualitative differences in severity" between being subjected directly to inappropriate behavior, being present for inappropriate behavior directed at others, and hearing second-hand that another was subjected to inappropriate behavior. *Foreman v. W. Freightways, LLC*, 958 F. Supp. 2d 1270, 1278 fn. 6 (D. Colo. 2013)(regarding use of the "N" word in a racial discrimination case under Title VII); *see also, Duran v. LaFarge N. Am., Inc.*, 855 F. Supp. 2d 1243, 1249 (D. Colo. 2012)("second-hand harassment is less

objectionable than if directed at the complainant personally"); *Temple v. Auto Banc of Kansas, Inc.*, 76 F. Supp. 2d 1124, 1130 (D. Kan. 1999) (the impact of second-hand harassment is "obviously not as great as the impact of harassment directed at the plaintiff"); *Chancellor v. Coca–Cola Enterprises, Inc.*, 2009 WL 4674058, *14 (S.D.Ohio Dec. 3, 2009) ("secondhand information and rumors do not carry the same weight as do comments directed at an individual or that an individual overhears.").

Because Wells, Pena, Jackson and Glidewell were not subjected to the type of conduct alleged by Summar, and only heard about that conduct from others, they were not subject to any severe, pervasive and objectively offensive gender-related conduct, and their traditional Title IX claims should therefore be dismissed.

2. Plaintiffs Cannot Show UCO's Actual Knowledge.

Plaintiffs spend pages detailing what they claim to be the "actual knowledge" standard in traditional Title IX claims. However, Plaintiffs' cases are inapposite because in each there were allegations of actual reports to the school of sexual misconduct by the professor/teacher *prior to* a severe and pervasive incident against the plaintiff. *See, Doe v. Weber State Univ.*, 2021 WL 37646 (D. Utah Jan. 5, 2021)(allegations of inappropriate touching by the alleged harasser reported before plaintiff was assaulted); *J.M. ex. Rel. Morris v. Hilldale Indep. Sch. Dist. No. 1-29*, 397 F.App'x 445, 450 (10th Cir. 2010)(before abuse happened, individuals reported abnormal and inappropriate interactions between alleged harasser and underage student); *S.C. Lansing Unified Sch. Dist.*, 2019 WL 1317506 (D. Kan. Mar. 22, 2019)(plaintiffs alleged four prior students had experienced harassment by alleged harasser and had notified district, that district failed to take action, and this led

to harassment of plaintiff); *Adams v. Ohio Univ.*, 300 F.Supp.3d 983 (S.D.Ohio 2018)(plaintiffs subjected to unwanted sexual touching by professor alleged prior reports of inappropriate sexual relationships by same professor with students to the department chair); *Herman v. Ohio Univ.*, 2019 WL 6255684 (S.D.Ohio Nov. 22, 2019)(plaintiff subjected to *quid pro quo* harassment properly alleged actual knowledge where she alleged there had been three prior official investigations into professor's sexual misconduct).

To survive a motion to dismiss, Plaintiffs must allege a school official with authority to institute corrective measures had "actual knowledge of misconduct, not just actual knowledge of the risk of misconduct" and was deliberately indifferent to the misconduct. *Yap v. Nw. Univ.*, 119 F. Supp. 3d 841, 848 (N.D. Ill. 2015), *citing Doe v. St. Francis Sch. Dist.*, 694 F.3d 869, 871 (7th Cir.2012). A university "cannot, as a matter of law, be liable for any alleged sexual harassment until notified of that harassment." *Yap*, at 848.

As the allegations in the FAC make clear, UCO was not on notice of allegedly harassing behavior by Buss until after the behavior had already ended. While Plaintiffs make allegations of prior sexual misconduct by Buss, FAC ¶ 52-61, there is no indication UCO was put on notice of the alleged misconduct prior to Brown Russell and Glidewell making their reports in December 2017. Further, the FAC makes clear Brown Russell did not report her allegations of sexual misconduct against Buss until 2.5 years after the incident allegedly occurred, and Brown Russell does not allege any further sexual misconduct by Buss after she made her report. FAC ¶ 63-64, 180-192. Summar's relationship with Buss ended in Spring 2018 (corresponding with when UCO issued its findings regarding Brown Russell's complaint), and Summar deliberately hid her

relationship with Buss from UCO until more than two years after it ended. FAC ¶ 102-112. The FAC lacks any allegations of severe and pervasive conduct by Buss toward any Plaintiff after UCO took action against Buss in Spring 2018.

3. Summar, Glidewell, Jackson and Brown Russell are Time-Barred.

As recognized in *Barnett v. Kapla*, 2020 WL 6737381, at *7 (N.D. Cal. Sept. 28, 2020), there is disagreement among the courts regarding when the statute of limitations begins to run in the context of post-harassment/traditional Title IX claims. Some courts focus on when the alleged sexual misconduct occurred. *See*, *Clifford v. Regents of Univ. of Cal.*, 2012 WL 1565702, at *6-7 (E.D. Cal. Apr. 30, 2012); *Padula v. Morris*, 2008 WL 1970331, at *4 (E.D. Cal. May 2, 2008). Other courts look at when the defendant allegedly responded with deliberate indifference. *See*, *Dutchuk v. Yesner*, 2020 WL 1815217, at *6 (D. Alaska Apr. 9, 2020*); Jameson v. Univ. of Idaho*, 2019 WL 5606828, at *4 (D. Idaho Oct. 30, 2019); *Samuelson v. Or. State Univ.*, 162 F. Supp. 3d 1123, 1134-35 (D. Or. 2016).

These Plaintiffs' claims fail using either standard, as the dates are essentially the same because none of these Plaintiffs allege sexual misconduct by Buss after Spring 2018, *See* Dkt. 15, p. 10-11, and Plaintiffs' allegations show the Plaintiffs knew of UCO's alleged deliberate indifference at the same time. The only time the enumerated Plaintiffs allege UCO was put on actual notice of sexual misconduct by Buss during their time at UCO (when acts by UCO could still cause them to experience further harassment) was in December 2017 when Brown Russell and Glidewell made their reports. The FAC alleges that by March 2018, each of these Plaintiffs had experienced discrimination and harassment (FAC ¶ 49-62, 94-112, 140-192); this information had been reported to UCO (FAC ¶ 63-

64); and UCO announced actions the Plaintiffs now call deliberate indifference (FAC ¶ 70-71, 74). However, because the complaint was not filed until May 2021, both their Official Policy and traditional claims are untimely. *Wilson v. Texas Christian Univ., 2021 WL 4197263* (N.D. Tex. Sept. 15, 2021)(dismissing claims occurring prior to statutory period).

Plaintiffs cannot rely on Buss' ongoing presence on campus, without additional sexual misconduct occurring, to salvage their time-barred traditional Title IX claims. There are only limited circumstances, not alleged here, where an alleged harasser's mere presence on campus can be said to support a hostile environment claim. *See, Clifford v. Regents of Univ. of California*, 2012 WL 1565702, at *7 (E.D. Cal. Apr. 30, 2012), aff'd, 584 F. App'x 431 (9th Cir. 2014)(rejecting liability and distinguishing cases involving minors where mere presence was found to lead to hostile environment); *Garrett v. Univ. of S. Fla. Bd. of Trustees*, 2018 WL 1850216, at *5 (M.D. Fla. Apr. 18, 2018)(same). Indeed, allowing plaintiffs to salvage time-barred claims on these grounds "would effectively foreclose remedial measures short of expulsion and undermine the 'flexibility' that the *Davis* Court took care to guard." *M.D. by and through Deweese v. Bowling Green Independent School District*, 709 Fed.Appx. 775 (6th Cir. Oct. 6, 2017)(presence of assailant not enough without ongoing sexual misconduct after school took remedial measures).

Plaintiffs cannot rely on the continuing violation doctrine either. No district court in the Tenth Circuit's purview appears to have applied the continuing violation theory to Title IX claims. Even if this Court were to do so, the allegations in the FAC make clear the doctrine cannot salvage the enumerated Plaintiffs' claims. Courts that have applied the continuing violation doctrine to Title IX claims based on sexual misconduct have looked

to whether the plaintiff alleged additional "acts" of sexual misconduct under the standard set forth in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 110 (2002), that contributed to the same hostile environment practice within the statutory period. While *Morgan* does not give instruction on what constitutes "the same actionable hostile work environment practice," the Tenth Circuit has looked at whether the pre- and post-limitations period acts were "related by type, frequency, and perpetrator" to determine if the continuing violation doctrine should be applied. *See Duncan v. Manager, Dep't of Safety, City & Cty. of Denver*, 397 F.3d 1300, 1309 (10th Cir. 2005).

Using this same standard in the Title IX context, the Second Circuit found allegations of unwanted sexual advances and unwanted shoulder rubs by a teacher toward a student (including the teacher leaning his crotch against the student), all in 2010, were not sufficiently related to claims that the same teacher winked at the same student, blew him kisses, raised his eyebrows at him, and looked him up and down in a sexual manner in 2012 and 2014, for the later actions to be part of the same continuing violation because they were different in type of conduct and separated by years. *Irrera v. Humphreys*, 695 F. App'x 626, 629 (2d Cir. 2017). Summar, Jackson, Glidewell and Brown Russell cannot allege they were subjected to any verbal/physical conduct of a sexual nature like that alleged by Summar *after* UCO issued the results of its investigation in Spring 2018. Thus, these Plaintiffs cannot establish a continuing violation, no matter the standard used.

Conclusion

For all reasons in this reply brief and its original Motion, UCO respectfully requests that the Court grant its motion to dismiss all claims of the Student Plaintiffs in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2021, I electronically transmitted the attached document to the Court Clerk using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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