CIVIL RIGHTS LAW — TITLE IX — SIXTH CIRCUIT REQUIRES FURTHER HARASSMENT IN DELIBERATE INDIFFERENCE CLAIMS. — *Kollaritsch v. Michigan State University Board of Trustees*, 944 F.3d 613 (6th Cir. 2019).

In 1972, Congress passed Title IX,[1] a landmark civil rights law seeking to eliminate sex discrimination in education.[2] But Congress did not make clear the circumstances under which schools could be held liable for violations.[3] Almost thirty years later, in *Davis v. Monroe County Board of Education*,[4] the Supreme Court held that schools may be liable under Title IX if their response to a known act of student-on-student sexual harassment was "deliberately indifferent."[5] Still, *Davis* left ambiguous whether students must prove that the school's response failed to protect them against further actual harassment, or whether students merely need to show the response left them vulnerable to harassment that did not materialize. Recently, in *Kollaritsch v. Michigan State University Board of Trustees*,[6] the Sixth Circuit held that a student-victim must prove that the school's inadequate response caused *further actionable* harassment.[7] While the court attempted to bring clarity to institutional liability post-*Davis*, the ruling introduced a new tort-based test that is itself rife with ambiguity and fails to offer meaningful guidance for future courts.

In 2011, Michigan State University (MSU) student John Doe sexually assaulted fellow student Emily Kollaritsch.[8] Kollaritsch reported the assault, and the university opened an investigation.[9] The investigation lasted over six months.[10] During that time, MSU placed no restrictions on Doe and made no accommodations for Kollaritsch, even though the two lived in the same dormitory.[11] The school concluded that Doe had violated MSU's sexual harassment policy, placing him on probation and issuing an order that prohibited him from contacting Kollaritsch.[12] Doe proceeded to violate the order on at least nine occasions by "stalking, harassing, and intimidating" Kollaritsch, who had a panic attack on

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[1] Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2018).

[2] *See id.* § 1681(a) ("No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.").

[3] Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 637–38 (1999).

[4] 526 U.S. 629.

[5] *Id.* at 648.

[6] 944 F.3d 613 (6th Cir. 2019).

[7] *Id.* at 618.

[8] Kollaritsch v. Mich. State Univ. Bd. of Trs., 298 F. Supp. 3d 1089, 1098 (W.D. Mich. 2017).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Kollaritsch*, 944 F.3d at 624.

each encounter.[13] She reported the violations and then filed a complaint for retaliatory harassment with MSU.[14] During its investigation, MSU provided no interim safety measures, and Kollaritsch obtained a protection order from a local court.[15] MSU concluded that no retaliatory harassment had occurred.[16]

Subsequently, Kollaritsch filed a lawsuit against the MSU Board of Trustees and against Vice President of Student Affairs Denise Maybank.[17] Kollaritsch was joined by three other female students who had similar experiences at MSU, one of whom was assaulted by the same John Doe.[18] The students claimed violations of Title IX and of equal protection under 42 U.S.C. § 1983.[19] For their Title IX claims, they argued that MSU's response was inadequate, leaving them vulnerable to harassment and depriving them of educational opportunities.[20]

The district court partially denied the defendants' motion to dismiss,[21] holding that the students had alleged sufficient facts to establish their Title IX claims.[22] Citing *Davis*, the court reasoned that MSU exhibited deliberate indifference because, among other problems, its investigations were delayed and it failed to offer safety accommodations or to inform victims of their right to appeal, responses that were "clearly unreasonable in light of the known circumstances."[23] The court then highlighted the students' injuries, which included multiple leaves of absence, withdrawal from social activities, and academic struggles.[24]

MSU moved for an interlocutory appeal, and the Sixth Circuit reversed.[25] Writing for the panel, Judge Batchelder[26] first noted that because the court was reviewing a denial, rather than a grant, of a motion to dismiss, its review was limited to pure questions of law.[27] She then stressed the high bar for establishing institutional liability in

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13 *Id.*

14 *Kollaritsch*, 298 F. Supp. 3d at 1098.

15 *Id.* at 1098–99.

16 *Id.* at 1099.

17 *Id.* at 1096.

18 *See id.* The district court dismissed the claims of one of the students. *See id.* at 1110.

19 *Id.* at 1096. The students filed but then conceded due process claims under § 1983 and state law claims. *Id.*

20 *Id.* at 1100.

21 *Id.* at 1096.

22 *See id.* at 1102–03. The court also held that one student sufficiently pled a § 1983 claim against Maybank, who had set aside John Doe's expulsion without providing an explanation. *See id.* at 1103, 1107.

23 *Id.* at 1100 (quoting Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 648 (1999)); *see id.* at 1102–03.

24 *See id.* at 1102–03.

25 *See Kollaritsch*, 944 F.3d at 619, 627. Maybank also moved for an interlocutory appeal on the court's § 1983 ruling. *Id.* at 619.

26 Judge Batchelder was joined by Judge Thapar and joined in part by Judge Rogers.

27 *Kollaritsch*, 944 F.3d at 619.

student-on-student sexual harassment.[28] Judge Batchelder broke down the *Davis* formula into two "separate-but-related torts by separate-and-*un*related tortfeasors: (1) 'actionable harassment' by a student . . . and (2) a deliberate-indifference intentional tort by the school."[29] For the first tort, she explained that an "actionable harassment" is one that is "severe, . . . pervasive, and . . . objectively offensive."[30] While *Davis* defined "pervasive" to mean systemic or widespread, she stated that pervasive also requires "*multiple* incidents of harassment; one . . . is not enough."[31]

Turning to the second tort, Judge Batchelder set forth the "four elements of a deliberate-indifference-based intentional tort: (1) knowledge, (2) an act, (3) injury, and (4) causation."[32] She explained that a school's "knowledge" of the harassment must be actual, not imputed.[33] The "act" in question is a clearly unreasonable response by the school, and the "injury" is the student-victim's deprivation of access to educational benefits.[34] For "causation," Judge Batchelder pointed to language in *Davis* that a school may not be liable for damages unless its "deliberate indifference '*subject[ed]*' its students to *harassment*."[35] She noted that *Davis* understood the verb "subject[s]" to mean that "deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it."[36] In the Sixth Circuit's view, the fact that *Davis* linked the verb "subject[s]" to *harassment*, not *injury*, was critical; it necessarily meant that a deliberate indifference claim requires further actionable *harassment*.[37] Thus, "a plain and correct reading" of causation in *Davis* dictates two ways the school's response can result in further harassment: (1) through action that instigates harassment, or (2) through inaction that renders the victim unprotected from harassment.[38] Either way, *Davis* "presumes that post-notice harassment *has* taken place."[39] The court thus rejected the plaintiffs' interpretation that the

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[28] *Id.* (citing *Davis*, 526 U.S. at 643).

[29] *Id.* at 619–20 (quoting *Davis*, 526 U.S. at 651–52).

[30] *Id.* at 620.

[31] *Id.* For support, Judge Batchelder cited dicta in *Davis* that "[a]lthough, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such [systemic] effect, [it is] unlikely that Congress would have thought such behavior sufficient." *Id.* (quoting *Davis*, 526 U.S. at 652–53) (emphasis omitted).

[32] *Id.* at 621.

[33] *Id.* (citing *Davis*, 526 U.S. at 650).

[34] *Id.* at 621–22.

[35] *Id.* at 622 (quoting *Davis*, 526 U.S. at 644 (first emphasis added)).

[36] *Id.* (quoting *Davis*, 526 U.S. at 645).

[37] *Id.*

[38] *Id.* at 623.

[39] *Id.* (quoting Zachary Cormier, *Is Vulnerability Enough? Analyzing the Jurisdictional Divide on the Requirement for Post-notice Harassment in Title IX Litigation*, 29 YALE J.L. & FEMINISM 1, 23 (2017)).

phrase "*or* . . . make [students] . . . vulnerable to [harassment]" established a separate basis for liability.[40] On these facts, Judge Batchelder concluded that Kollaritsch failed to show that her subsequent encounters with John Doe were severe, pervasive, or objectively offensive.[41] Similarly, the mere fact that MSU allegedly left the other plaintiffs vulnerable to encountering their assailants was insufficient to establish actionable further harassment.[42] The students thus failed to satisfy the causation element under *Davis*; the school's response had not caused them to suffer a second instance of actionable harassment.[43]

Judge Thapar joined the opinion in full but also wrote a separate concurrence.[44] He defended the court's ruling based on the text of Title IX, its foundation in the Spending Clause, and *Davis*'s warning against "sweeping liability" under Title IX.[45] Judge Rogers, who joined the court's opinion only in part, also wrote a separate concurrence to admonish the panel for addressing in dicta what constitutes "actual notice," an issue not raised in the case.[46]

With *Kollaritsch*, the Sixth Circuit took a side in the judicial disagreement that *Davis* created over whether a Title IX plaintiff alleging deliberate indifference must plead that further harassment occurred after the reporting. But *Kollaritsch* didn't just deepen the circuit split; it added another layer of complications by invoking common law tort principles to fill the gaps *Davis* left open. The Sixth Circuit's tangled analysis creates its own ambiguities, demonstrating the risk of importing tort schemes into civil rights statutes.

Davis incited a circuit split over its interpretation of Title IX's mandate that students must not be "subjected" to discrimination.[47] Citing two dictionary definitions for support, the *Davis* Court explained that, to subject students to discrimination, a school must "'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it."[48] This sentence has been the source of considerable confusion and disagreement. Some courts, including the First and Tenth Circuits, have read

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[40] *Id.* at 622–23.

[41] *Id.* at 624–25.

[42] *Id.* at 625.

[43] *Id.* at 624–25. The court also concluded that Maybank was entitled to qualified immunity, as she did not violate a clearly established right when she set aside MSU's previous findings and ordered a new investigation by an outside law firm, which ultimately found no sexual assault. *Id.* at 625–27.

[44] *Id.* at 627 (Thapar, J., concurring).

[45] *Id.* at 628–29 (quoting Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 652 (1999)).

[46] *Id.* at 630 (Rogers, J., concurring).

[47] 20 U.S.C. § 1681(a) (2018) ("No person . . . shall, on the basis of sex . . . be *subjected* to discrimination." (emphasis added)).

[48] *Davis*, 526 U.S. at 645 (first citing *Subject*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1966); and then citing *Subject*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961)).

the disjunctive "or" to create two separate bases for liability; under the second prong, the plaintiff need show only that the school's response made future harassment more likely.[49] Others, including the Eighth and Ninth Circuits, have taken the same approach as *Kollaritsch* and required students to prove actual subsequent harassment.[50]

Compounding the confusion, *Kollaritsch* went beyond *Davis* and explicitly invoked tort principles to reach an interpretation that severely restricts who can plead a deliberate indifference claim. To be sure, interpreting an ambiguous statutory term in accordance with its common law definition is not in itself new or problematic.[51] But in recent years, the reflexive use of tort principles and terminology to interpret statutes has come under increased scrutiny, enough to earn its own label of "tortification."[52] The phenomenon is particularly evident in employment discrimination cases.[53] In *Price Waterhouse v. Hopkins*,[54] Justice O'Connor explicitly referred to Title VII as creating a "statutory employment 'tort.'"[55] In subsequent cases, the Court expanded its project of tortifying employment discrimination law,[56] attaching the "federal tort" label[57] and adopting tort causation standards such as but-for causation[58] and proximate cause.[59] Commentators have criticized

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[49] *See, e.g.*, Farmer v. Kan. State Univ., 918 F.3d 1094, 1103–04 (10th Cir. 2019); Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 172–73 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009); Fryberger v. Univ. of Ark., No. 16-CV-5224, 2019 WL 6119253, at *9 (W.D. Ark. Nov. 18, 2019).

[50] *See, e.g.*, K.T. v. Culver-Stockton Coll., 865 F.3d 1054, 1057–58 (8th Cir. 2017); Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 740 (9th Cir. 2000).

[51] Courts frequently look to common law for guidance when interpreting statutes. *See, e.g.*, United States v. Shabani, 513 U.S. 10, 13 (1994) (discussing "the settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms").

[52] *See* Sandra F. Sperino, *Let's Pretend Discrimination Is a Tort*, 75 OHIO ST. L.J. 1107, 1109 (2014).

[53] *See generally* Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431 (2012) (tracing the Supreme Court's incorporation of tort law concepts into Title VII and other antidiscrimination statutes).

[54] 490 U.S. 228 (1989).

[55] *Id.* at 264 (O'Connor, J., concurring in the judgment).

[56] *See* Martha Chamallas & Sandra F. Sperino, *Torts and Civil Rights Law: Migration and Conflict: Symposium Introduction*, 75 OHIO ST. L.J. 1021, 1022 (2014); *see also* Cheryl Krause Zemelman, Note, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 188, 196 (1993) (noting the "two-decade evolution of Title VII from a public policy–enforcing statute . . . to a compensatory, tort-like statute," *id.* at 188).

[57] *See* Staub v. Proctor Hosp., 562 U.S. 411, 417 (2011).

[58] *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009) (interpreting the statutory language "because of" in the Age Discrimination in Employment Act (ADEA) to require but-for causation); *see also* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013) (extending *Gross* to impute but-for causation to Title VII from the "because of" language in the statute).

[59] *Staub*, 562 U.S. at 419–20 (applying proximate cause to an employment discrimination statute).

this development on various fronts, stressing the need for a more principled approach.[60] First, the tort label is difficult to square with the text of the statutes.[61] Antidiscrimination statutes do not include tort terms of art and do not follow the rigid, element-based structure of tort law,[62] where a plaintiff must prove every "element" of the cause of action.[63] Second, reflexive tortification may frustrate legislative purpose by eliding key distinctions between the two bodies of law.[64] Finally, equating statutory terms with tort analogues prematurely closes off other interpretations.[65] For instance, a more nuanced causation standard may better address discrimination cases, which often involve more complicated mental states than those in typical tort scenarios.[66]

In *Kollaritsch*, the court went beyond *Davis* in terms of tortification by explicitly adopting the tort label and reading in restrictive elements that have their roots in common law.[67] First, the court stated that *Davis* required a student-victim to prove that the school committed a "deliberate-indifference intentional *tort*."[68] Expanding upon this tort, the court endorsed a rigid theory of sex discrimination based on a set of

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[60] *See* William R. Corbett, *What Is Troubling About the Tortification of Employment Discrimination Law?*, 75 OHIO ST. L.J. 1027, 1030 (2014) ("[S]cholarly commentary on the subject . . . has ranged from cautious to suspicious to highly critical."); *see also id.* at 1061 ("The Court majority's approach in *Gross*, *Staub*, and *Nassar* has been to use the tort label to justify the importation of tort law without careful analysis."); Alex B. Long, Response, *What Is Even More Troubling About the "Tortification" of Employment Discrimination*, 76 OHIO ST. L.J. FURTHERMORE 1, 2 (2015) ("[T]he Court is intent on importing tort principles into employment discrimination law whenever possible, regardless of the appropriateness of that action.").

[61] Sandra F. Sperino, *The Tort Label*, 66 U. FLA. L. REV. 1051, 1053 (2014).

[62] *Id.* at 1070–72; *see also* Corbett, *supra* note 60, at 1036–37 (suggesting that discrimination statutes are open to a more flexible interpretation).

[63] For instance, the traditional prima facie case of negligence has four elements: duty, breach, causation, and injury. John C.P. Goldberg & Benjamin C. Zipursky, *The* Restatement (Third) *and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 658 (2001).

[64] *See* Sperino, *supra* note 61, at 1052–54.

[65] *See id.* at 1053.

[66] *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 190 (2009) (Breyer, J., dissenting) ("It is one thing to require a typical tort plaintiff to show "but-for" causation . . . . But it is an entirely different matter to determine a 'but-for' relation when we consider, not physical forces, but the mind-related characterizations that constitute motive."); *see also* Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 515–17 (2006) (discussing arguments for and against "rejecting the 'but for' standard in favor of a more lenient standard" in the context of Title VII, *id.* at 516).

[67] The *Davis* Court referred to common law principles only in passing and as supplemental reasoning. Specifically, in the context of the notice requirement for Spending Clause legislation, the Court noted that "[t]he common law, too, has put schools on notice that they may be held responsible under state law for their failure to protect students from the tortious acts of third parties." Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 644 (1999). Later, when explaining the school's institutional liability, the Court pointed out that "[t]he common law, too, recognizes the school's disciplinary authority." *Id.* at 646. These asides are a far cry from *Kollaritsch*, which imported a rigid, element-based tort law test into the Title IX context.

[68] *Kollaritsch*, 944 F.3d at 620 (emphasis added); *see id.* at 619–20.

requisite elements: knowledge, act, injury, and causation.[69] In doing so, it made clear that for the school to be held liable, a student-victim must prove each and every element like a common law tort claim.[70] Second, the court adopted tort law's cause-in-fact standard by declaring that a plaintiff must prove the subsequent harassment "would not have happened *but for* the clear unreasonableness of the school's response."[71]

The tort analysis in *Kollaritsch* is troubling and reflects many of the concerns raised in the context of employment discrimination law. Title IX is at least as broadly worded as employment discrimination statutes.[72] Importantly, the statutory language does not include tort terms of art or suggest a required element–based theory of sex discrimination. What the text *does* make clear, however, is its broader focus on institutional liability.[73] As written, Title IX directs educational institutions to guarantee a learning environment free from sex discrimination. Reading this broad mandate as imposing a narrow duty to refrain from committing a "deliberate-indifference intentional tort" undermines the core objective of Title IX.[74] Similarly, the but-for causation standard adopted in *Kollaritsch* risks undermining the deterrence objectives of Title IX by setting a significantly higher bar for student-victims.[75]

In addition to raising these broad concerns, the tortification in *Kollaritsch* was problematic in its specific execution. That is, the court applied tort law to Title IX *incorrectly* by conflating the two analytically separate elements of causation and injury.[76] In tort law, the causation element requires that the defendant's wrongful act cause the plaintiff's

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[69] *Id.* at 621; *see also* Sperino, *supra* note 61, at 1070 ("Tort law has developed a preference for a small set of central elements that define each cause of action.").

[70] *See Kollaritsch*, 944 F.3d at 621.

[71] *See id.* at 622 (emphasis added); *see also* Corbett, *supra* note 60, at 1038 (arguing that the adoption of "tort law's most basic causation standard, but-for causation, has made discrimination law look like tort law").

[72] *See generally* Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 781–85 (1999) (highlighting the indeterminate language of both Title VII and Title IX).

[73] *See* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 650 (1999) ("The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender.").

[74] *Cf.* Sperino, *supra* note 61, at 1053.

[75] *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 263 (1989) (O'Connor, J., concurring in the judgment) ("[T]he law has long recognized that in certain 'civil cases' leaving the burden of persuasion on the plaintiff to prove 'but-for' causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care."); *see also* Katz, *supra* note 66, at 515–16 (explaining why but-for causation is difficult to prove).

[76] *See generally* Parks Hiway Enters., LLC v. CEM Leasing, Inc., 995 P.2d 657, 667 (Alaska 2000) ("The tort of negligence consists of four *separate and distinct* elements: (1) duty, (2) breach of duty, (3) causation, and (4) harm." (emphasis added) (citations omitted)); Saelzler v. Advanced Grp. 400, 23 P.3d 1143, 1153 (Cal. 2001) ("Actual causation is an entirely separate and independent element of the tort of negligence.").

alleged injury.[77] As both *Davis* and *Kollaritsch* recognized, an "injury" in the Title IX context means deprivation of "access to the educational opportunities or benefits provided by the school."[78] The proper causation analysis, then, would require the court to examine whether MSU's actions caused the plaintiffs' alleged Title IX injuries, such as their leaves of absence or withdrawal from school activities. Instead, the court asked whether the plaintiffs suffered an entirely different injury: a further actionable harassment. In doing so, it reasoned that "*Davis* does not link the [school's] deliberate indifference directly to the injury" but rather asks whether it "'subject[ed]' its students to *harassment*."[79] By construing *Davis*'s causation analysis as one that does not directly link the wrongful act — deliberate indifference — to the injury — loss of educational opportunities — the court implicitly conceded that tort law and Title IX are an awkward fit. Nevertheless, the Sixth Circuit adopted this framework, further embedding Title IX within principles built for non-discrimination-based tort law.

One might say that the doctrinal mix-up was justified if it offered clarity in this muddled area of law. But the new test under *Kollaritsch* is neither intuitive nor clear. After *Kollaritsch*, a victim's claim against the *school* for its deliberately indifferent response wholly depends on whether a *third-party* student commits another "actionable" — that is, a "severe, pervasive, and objectively offensive" — sexual harassment.[80] Critically, the Sixth Circuit further defined "pervasive" to require "*multiple* incidents,"[81] suggesting that the student-victim must prove that there was a subsequent sexual harassment, which itself consists of multiple acts. Thus, in lieu of determining whether a student is vulnerable to harassment under *Davis*, courts are left to decide exactly how many acts of sexual harassment must be ignored before the school can be held liable. Rather than resolving the ambiguity created by *Davis*, the Sixth Circuit largely reframed the question. Perhaps the only clear lesson that *Kollaritsch* teaches is a chilling one for students to learn: one assault is not enough.

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[77] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 (AM. LAW INST. 2005).

[78] *Kollaritsch*, 944 F.3d at 622 (quoting *Davis*, 526 U.S. at 650).

[79] *Id.* (quoting *Davis*, 526 U.S. at 644).

[80] *Id.* at 628.

[81] *Id.* at 620.