BULLYING ON THE BASIS OF SEX: THE EIGHTH CIRCUIT PROPERLY ESTABLISHED TITLE IX STANDARDS OF LIABILITY FOR SCHOOLS IN WOLFE V. FAYETTEVILLE, ARKANSAS SCHOOL DISTRICT

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I. INTRODUCTION

In Wolfe v. Fayetteville, Arkansas School District, the United States Court of Appeals for the Eighth Circuit determined that an educational entity receiving federal funds may be liable under Title IX of
the Education Amendments of 1972\(^2\) ("Title IX") only if the victim could establish that the harasser intended to discriminate on the basis of sex.\(^3\) As a matter of first impression in any federal appellate court, the Eighth Circuit added this requirement to a Title IX plaintiff's burden of proof.\(^4\)

Title IX prohibits an educational entity receiving federal funds from discriminating against any person based on gender.\(^5\) By enacting this statute, Congress desired to protect potential victims of discrimination and deny the allocation of federal funds to support discriminatory practices.\(^6\) A school's potential liability under Title IX has broadened since the statute's inception.\(^7\) The United States Supreme Court recognized an implied private right of action.\(^8\) The Supreme Court has also acknowledged that a school may be liable for damages under Title IX.\(^9\) Additionally, the Supreme Court has extended Title IX protections to hold schools liable for student-on-student sexual harassment.\(^10\) To guide their interpretations of Title IX claims, courts often employ principles found in Title VII of the Civil Rights Act of 1964\(^11\) ("Title VII"), which prohibits discrimination in the workplace.\(^12\)

This Note will first review the facts and holding of *Wolfe*,\(^13\) This Note explores relevant case law establishing various forms of liability under Title IX, including same-sex and student-on-student discrimination, and the actual notice requirement.\(^14\) This Note asserts that

4. Wolfe, 648 F.3d at 863, 865.
5. See 20 U.S.C. § 1681 (providing that no person shall be subjected to gender-based discrimination under any educational recipient of federal funds).
8. See Cannon v. Univ. of Chicago, 441 U.S. 677, 703 (1979) (implying a private remedy and allowing the plaintiff to maintain her Title IX claim, despite the lack of any such language in the statute).
10. See Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999) (acknowledging that a Title IX plaintiff's complaint may be sufficient if the complaint indicates that the school had actual knowledge and remained deliberately indifferent to acts of discrimination that rose to a certain level of severity).
12. See Franklin, 503 U.S. at 75 (citing a Title VII case for the proposition that, just as a supervisor cannot sexually harass a subordinate, a teacher cannot sexually harass a student). See also Roberts v. Colorado St. Bd. of Agric., 998 F.2d 824, 832 (10th Cir. 1993) (noting Title VII is an appropriate analogy in comparing Title IX claims); Yusuf v. Vassar Coll., 35 F.3d 709, 714 (2d Cir. 1994) (acknowledging that courts consider Title VII case law when interpreting Title IX claims).
13. See infra notes 19-43 and accompanying text.
14. See infra notes 44-114 and accompanying text.
the Eighth Circuit properly relied on Title VII principles. Drawing on those principles, this Note will argue that the Eighth Circuit correctly affirmed the denial of the plaintiff’s proposed jury instruction. Further, this Note will argue that the Eighth Circuit’s decision properly reflects the limitations of Title IX liability. This Note will conclude that the Eighth Circuit properly required the Title IX plaintiff to prove the harasser was motivated by the victim’s gender.

II. FACTS AND HOLDING

In *Wolfe v. Fayetteville, Arkansas School District*, the parents of William Wolfe (“Billy”), a high school student, sued the Fayetteville School District (“FSD”), alleging violations of Title IX of the Education Amendments of 1972 in the United States District Court for the Western District of Arkansas. The plaintiffs alleged that FSD was liable pursuant to 20 U.S.C. § 1681(a) for the student-on-student sexual harassment Billy encountered at school. FSD filed a motion for summary judgment, but the motion was denied by the district court.

At the request of FSD, the district court then empanelled a twelve-person jury because Billy’s circumstances had attracted national attention. Prior to the suit against FSD, Billy was interviewed by *The Today Show, 20/20, Dateline*, and *The New York Times* after a video was uploaded to YouTube depicting his classmates violently punching him as he walked home from school. Billy argued that the various incidents of harassment amounted to sex-based discrimination because of the physical abuse and name-calling, including epithets like “queer bait,” “faggot,” and “homo.” Billy’s classmates explained that they accosted him in general, not because of his perceived sexuality, but because he had bullied a friend of theirs who suffered from cerebral palsy.

When the case went to trial, the plaintiff and defendants each offered jury instructions regarding the Title IX claim. The plaintiff's

15. *See infra* notes 135-149 and accompanying text.
16. *See infra* notes 150-158 and accompanying text.
17. *See infra* notes 159-170 and accompanying text.
18. *See infra* notes 171-180 and accompanying text.
19. 648 F.3d 860 (8th Cir. 2011).
22. Wolfe, 648 F.3d at 864.
23. *Id.* at 862.
24. *Id.* at 863.
25. *Id.*
26. *Id.*
27. *Id.* FSD pointed out that most of Billy’s classmates never had any prior disciplinary history except for their confrontations with Billy. *Id.*
28. *Id.*
proposed instructions stated that sex-based harassment includes falsely labeling the victim as a homosexual in rumors or name-calling, or if the victim failed to meet the other student’s expectations of stereotypical males. However, the district court declined to follow the plaintiff’s proposed instructions. The district court’s instructions stated that in order for the plaintiff to prevail on the Title IX claim, the plaintiff must prove that (1) he was harassed on the basis of sex; (2) the harassment raised to a certain level of severity; (3) the school district had actual notice of the discrimination; and (4) the school district remained deliberately indifferent to the harassing conduct. The court further explained that there must be proof that the harasser was motivated by the victim’s sex. After the instructions were given, the jury found in favor of FSD.

The plaintiffs then filed a motion for a new trial on the basis that the district court erred in granting a twelve-person jury and improperly instructing the jury. After the plaintiff’s motion for a new trial was denied, the plaintiffs appealed to the United States Court of Appeals for the Eighth Circuit. The plaintiffs alleged the district court erred in instructing the jury, arguing that Title IX does not require proof of the harasser’s motivation.

The Eighth Circuit affirmed the district court’s denial of the plaintiffs’ proposed jury instruction. In affirming the district court’s instructions, the Eighth Circuit held that proof of gender-based motivation or intent is required to prevail on a Title IX claim. The Eighth Circuit analogized Title VII principles to Billy’s Title IX claim, noting that the language of Title VII and Title IX were substantially similar and should not be treated differently. The Eighth Circuit

29. Id. at 867. The plaintiff’s proposed jury instruction stated, “Harassment may be sex-based . . . when it includes spreading rumors or name-calling that falsely labeled [Wolfe] as a homosexual in an effort to debase his masculinity or when [Wolfe] did not meet his peers’ stereotyped expectations of masculinity.” Id.
30. Id.
31. Id. at 864.
32. Id. at 864-65. The court defined “on the basis of sex” with the following instruction: “To constitute sex-based harassment under Title IX, the harasser must be motivated by Wolfe’s gender or his failure to conform to stereotypical male characteristics. If you find that the harassers were so motivated, then you may conclude that the harassment was based on his gender. If you find that the harassers were not so motivated, then you may not conclude the harassment was based on his gender.” Id.
33. Id. at 863.
34. Id.
35. Id.
36. Id.
37. Id. at 868. The Eighth Circuit also upheld the district court’s election to employ a twelve-person jury. Id.
38. Id. at 865.
39. Id. at 866 (citing Oncale v. Sundowner Offshore Services, Inc. 523 U.S. 75 (1998)). The court recognized that the Oncale case was premised on a Title VII claim,
reasoned that because Title VII case law requires a showing of the harasser’s motivation, this requirement should also be adopted for a Title IX claim as well.40 The Eighth Circuit reiterated that a school could be held liable for student-on-student harassment, but only when the harassment reached a certain level of severity.41 Thus, name-calling, even if related to the victim’s gender, does not rise to the level required for an actionable Title IX claim.42 Hence, the Eighth Circuit concluded that the plaintiff must prove that the harasser was motivated by the victim’s gender or failure to conform with conventional gender stereotypes.43

III. BACKGROUND

A. TITLE IX: PROVIDING PROTECTION FROM GENDER-BASED DISCRIMINATION IN EDUCATION

Pursuant to Title IX of the Education Amendments of 197244 ("Title IX"), a person is protected from gender-based discrimination by an educational entity that receives federal funding.45 Sexual harassment is discrimination under Title IX, but must rise to a certain level of severity to constitute an actionable claim.46 Courts recognize two forms of sexual harassment, quid pro quo and hostile environment.47 Quid pro quo harassment occurs when a student’s educational benefit is conditioned upon submission to sexual advances.48 A recipient of federal funds can be liable for a hostile learning environment if the recipient remains deliberately indifferent to sexual harassment of a student by a teacher or fellow student.49 A recipient may face liability only if it had actual notice of the harassment.50 Although not expressly stated in the statute, the United States Supreme Court has

-but concluded Title VII's language of "discrimination... because of sex" was equal to Title IX's language of "on the basis of sex." Id. at 865-66.
40. Id. at 867.
41. Id. at 866-67 (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 649-50 (1999)).
42. Id. at 867.
43. Id.
45. 20 U.S.C. § 1681 (providing “[n]o person in the United States 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”). Congress enacted Title IX pursuant to its Spending Clause power. Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 61 (1992).
48. Lam v. Curators of the Univ. of Missouri at Kansas City Dental Sch., 122 F.3d 654, 657 (8th Cir. 1997).
concluded that the victim of discrimination has an implied private remedy.\textsuperscript{51}

B. **Title VII: Providing Protection From Gender-Based Discrimination in Employment**

Title VII of the Civil Rights Act of 1964\textsuperscript{52} ("Title VII") prohibits discrimination in the workplace, including sex-based discrimination.\textsuperscript{53} Title VII also includes the theories of quid pro quo and hostile working environment liability.\textsuperscript{54} The statute was enacted with the intent of striking at the wide spectrum of gender-based discrimination of men and women in the workplace.\textsuperscript{55}

C. **The Supreme Court Tacitly Approves of Using Title VII Case Law to Determine Title IX Liability With an Analogy**

In *Franklin v. Gwinnett County Public School*,\textsuperscript{56} the United States Supreme Court established that a Title IX plaintiff may recover damages.\textsuperscript{57} In *Franklin*, a female high school student sued the Gwinnett County School District for failing to take administrative or legal action, even after an investigation and subsequent discovery of the teacher's sexual harassment.\textsuperscript{58} The United States District Court for the Northern District of Georgia granted the defendant's motion to dismiss, determining that an award of damages was not available under Title IX.\textsuperscript{59} The plaintiff appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed the district court's dismissal, noting that a damages remedy was unavailable for a Title IX violation.\textsuperscript{60} The Eleventh Circuit declined to apply Title VII principles to the case.\textsuperscript{61} The court reasoned that although both statutes were enacted to prevent discrimination, the language of Title VII explicitly prohibits workplace discrimination, whereas Title IX's founda-
tion in the Spending Clause makes the language conditional rather than an absolute prohibition.\textsuperscript{62}

The Supreme Court granted certiorari and reversed the Eleventh Circuit, concluding that damages can be recovered for a Title IX claim.\textsuperscript{63} The Court determined that because Title IX was enacted under the Spending Clause,\textsuperscript{64} an award of monetary damages was permitted for a claim of intentional discrimination.\textsuperscript{65} Analogizing precedent under Title VII, the Court reasoned that just as a supervisor cannot harass a subordinate on the basis of sex, Title IX likewise imposes a duty upon the school district to refrain from discrimination on the basis of sex.\textsuperscript{66}

D. THE SUPREME COURT ACKNOWLEDGES A CAUSE OF ACTION FOR SAME-SEX HARASSMENT

In \textit{Oncale v. Sundowner Offshore Services, Inc.},\textsuperscript{67} the United States Supreme Court held that gender-based discrimination included sexual harassment under Title VII.\textsuperscript{68} In \textit{Oncale}, an employee sued his employer for sex-based discrimination, alleging his male coworkers verbally abused and sexually harassed him, leading him to believe if he did not leave his position his coworkers would have raped him.\textsuperscript{69} Granting the defendant's motion to dismiss, the United States District Court for the Eastern District of Louisiana found because the plaintiff and harassers were all males, the plaintiff could not establish an actionable Title VII claim.\textsuperscript{70} The plaintiff then appealed to a panel for the United States Court of Appeals for the Fifth Circuit, claiming that the genders of the harasser and victim should be irrelevant because the language of Title VII and United States Supreme Court decisions used gender-neutral terms.\textsuperscript{71} The panel affirmed the district court's ruling, stating they were bound by a previous Fifth Circuit decision.\textsuperscript{72}

\textsuperscript{62} Franklin, 911 F.2d at 622.
\textsuperscript{63} Franklin, 503 U.S. at 65, 76.
\textsuperscript{64} U.S. Const., art. I, § 8, cl. 1.
\textsuperscript{65} Id. at 74-75.
\textsuperscript{66} Id. at 75 (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (establishing a connection between Title XI and Title VII principles)).
\textsuperscript{67} 523 U.S. 75 (1998).
\textsuperscript{69} Id. at 77.
\textsuperscript{70} Id. at 77. (citing Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994) (finding that a male sexually harassed by his male supervisor could not establish an actionable Title VII claim)).
\textsuperscript{72} Id. (citing Garcia, 28 F.3d at 446).
The plaintiff then appealed to the United States Supreme Court, which granted certiorari. The Court acknowledged a split in decisions on whether same-sex harassment was actionable under a Title VII theory of hostile working environment. The Court held that nothing in Title VII barred a victim from asserting a sexual discrimination claim merely because the victim and harasser are of the same sex. The defendants argued that if the Court recognized same-sex harassment, this would cause Title VII to turn into a code of civility for the workplace. The Court rejected this argument, noting that Title VII does not make all workplace harassment automatically discriminatory and it does not include regulation of ordinary socialization between men and women. The Court reiterated that the discrimination must be motivated on the basis of sex and the behavior must rise to a certain level of severity to create an objectively hostile working environment.

E. The Supreme Court Recognizes a Cause of Action Against a Funding Recipient for Student-on-Student Harassment

In *Davis v. Monroe County Board of Education*, the United States Supreme Court concluded that a school receiving federal funding could be held liable for student-on-student harassment. In *Davis*, a mother sued the county's board of education under Title IX after her daughter's fifth-grade classmate routinely sexually harassed her. The victim, formerly an above-average student, suffered mentally and emotionally after the harasser repeatedly said sexual and vulgar statements to her and attempted to touch her inappropriately. The victim wrote a suicide letter in April 1993 and in May 1993, the harasser pleaded guilty to sexual battery.

The defendants filed a Rule 12(b)(6) motion to dismiss, which the United States District Court for the Middle District of Georgia granted. The district court reasoned only a recipient's own miscon-

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73. *Oncale*, 523 U.S. at 77.
74. *Id.* at 79.
75. *Id.*
76. *Id.* at 80.
77. *Id.* at 80-81.
78. *Id.* at 81.
81. *Id.* at 632-33.
83. *Id.* at 1189.
duct, not the actions of an individual student, could be the basis for liability under Title IX. The court further stated this bar to liability includes a claim that a school or board failed to respond to complaints of peer harassment.

The plaintiff appealed to the United States Court of Appeals for the Eleventh Circuit, claiming the district court erred in granting the defendant’s motion to dismiss. The Eleventh Circuit reversed the district court’s granting of the defendant’s motion to dismiss, concluding that the plaintiff established a prima facie claim for violation of Title IX because the school board had actual knowledge of the harassment and failed to take action to end the abuse. The court noted an employer may be held liable under Title VII if the employer has notice of a hostile working environment and does not act to remedy the harassment. Recognizing that Title VII principles also apply to Title IX claims, the court concluded that although school officials were not committing the harassment, the school’s inaction resulted in a hostile learning environment and the school failed to end the harassment.

The defendant then filed a motion for rehearing en banc, which the Eleventh Circuit granted. The en banc court affirmed the district court’s dismissal of the plaintiff’s Title IX claim against the school board. After finding that Title IX was enacted pursuant to the Spending Clause, the en banc court noted that Congress is required to give recipients of federal funds notice of the conditions attached to the money when the recipient accepts it. Congress gave recipients of Title IX funds notice that they could not allow their employees to engage in gender discrimination; however, this notice was not sufficient to extend liability for student-on-student sexual harassment.

The plaintiff then appealed to the United States Supreme Court, which granted certiorari to resolve a circuit split regarding whether a federally funded school could be liable for student-on-student sexual harassment. Agreeing with the defendants, the court noted that a

87. *Id.* at 367.
88. *Davis*, 74 F.3d at 1188.
89. *Id.* at 1194.
90. *Id.* at 1193.
91. *Id.* at 1193. The court reasoned that just as working females should not be subjected to sexual abuse in return for earning a living, female students should not have to bear sexual abuse in return for obtaining an education. *Id.* at 1194.
93. *Davis*, 526 U.S. at 637.
95. *Id.* at 1401, 1405.
96. *Davis*, 526 U.S. at 637.
recipient can only be held liable for its own misconduct.\textsuperscript{97} However, the Court recognized that the plaintiff \textit{was} asserting a claim against the school board for its own misconduct, specifically, that it made a decision to remain deliberately indifferent to the harassment in its schools.\textsuperscript{98} In addition, the Court noted that this liability only attaches when a school has the power to control the harasser and the environment in which the harassing occurs.\textsuperscript{99} The Court stated that in order to recover damages, the peer harassment must rise to a sufficient level of severity to constitute sexual harassment, not just name-calling or teasing.\textsuperscript{100} Therefore, the Court reversed the Eleventh Circuit’s judgment and the case was remanded.\textsuperscript{101}

F. THE SUPREME COURT ESTABLISHES AN ACTUAL NOTICE REQUIREMENT

In \textit{Gebser v. Lago Vista Independent School District},\textsuperscript{102} the Supreme Court held that a plaintiff seeking Title IX damages must prove that the recipient of federal funds had actual knowledge of the discrimination and failed to remedy the violation.\textsuperscript{103} In \textit{Gebser}, a high school teacher made suggestive and inappropriate comments to students in class, which the student’s parents reported to the principal.\textsuperscript{104} His inappropriate conduct escalated when he initiated a sexual relationship with a ninth-grade student that continued for almost a whole year without being reported to any school official.\textsuperscript{105} Their relationship was not discovered until a police officer found them engaged in sexual intercourse and the officer arrested the teacher.\textsuperscript{106} The student sued the school for violating Title IX alleging that the school should have been aware of the teacher’s misconduct.\textsuperscript{107} Affirming the district court’s granting of the defendant’s summary judgment, the United States Court of Appeals for the Fifth Circuit reasoned that because the only notice the school had of the teacher’s misconduct was the inappropriate comments in class, these com-

\begin{itemize}
  \item \textsuperscript{97} \textit{Id.} at 640-41.
  \item \textsuperscript{98} \textit{Id.} at 641, 643.
  \item \textsuperscript{99} \textit{Id.} at 644. The court noted that the harassment in this case occurred during school hours and on school property and the school board had authority over the harasser. \textit{Id.} at 646.
  \item \textsuperscript{100} \textit{Id.} at 651.
  \item \textsuperscript{101} \textit{Id.} at 654.
  \item \textsuperscript{102} 524 U.S. 274 (1998).
  \item \textsuperscript{104} \textit{Gebser}, 524 U.S. at 278.
  \item \textsuperscript{105} \textit{See id.} at 278 (stating that the sexual relationship began in the spring of 1992 and they were not caught together until January 1993).
  \item \textsuperscript{106} \textit{Id.}
  \item \textsuperscript{107} \textit{Doe v. Lago Vista Indep. Sch. Dist.}, 106 F.3d 1223, 1225 (1997).
\end{itemize}
plaints were not enough to hold the school liable on a constructive notice theory.\textsuperscript{108} The plaintiff appealed to the United States Supreme Court, which granted certiorari to resolve the various approaches in the circuits regarding whether a recipient was required to have actual notice of the discrimination to be held liable under Title IX.\textsuperscript{109} First, the court noted that while Title VII aims to compensate victims of discrimination, Title IX's purpose is to protect victims from discrimination.\textsuperscript{110} The court stated that a recipient who only had constructive notice would have no reason and no opportunity to take remedial action.\textsuperscript{111} Therefore, to permit a damages remedy based on constructive notice would frustrate the underlying purposes of Title IX.\textsuperscript{112} Accordingly, the Court concluded that a recipient could not be held liable under Title IX if the recipient had no actual knowledge of any discrimination.\textsuperscript{113} Further, the Court determined that the response of the school must constitute deliberate indifference to the discrimination, an official decision not to remedy any violation, because if this were a lower standard, the recipient would face liability for its employee's independent actions.\textsuperscript{114}

IV. ANALYSIS

In Wolfe v. Fayetteville, Arkansas School District,\textsuperscript{115} the United States Court of Appeals for the Eighth Circuit established that a recipient of federal funds for education could be held liable under Title IX\textsuperscript{116} only if the plaintiff proved the harasser's intent was on the basis of sex.\textsuperscript{117} In Wolfe, William "Billy" Wolfe's ("Wolfe") sued the Fayetteville School District ("FSD") in the United States District Court for the Western District of Arkansas, alleging that FSD was liable under Title IX for remaining deliberately indifferent to peer-on-peer sexual

\textsuperscript{108} Doe, at 1225-26.
\textsuperscript{109} Gebser, 524 U.S. at 280.
\textsuperscript{110} Id. at 285.
\textsuperscript{111} Id. at 289. The court explained, "a central purpose of requiring notice of the violation 'to the appropriate person' and an opportunity for voluntary compliance before administrative enforcement proceedings can commence is to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures." Id. The court feared that allowing a plaintiff to recover monetary damages against a recipient who was unaware of any discrimination would amount to an unlimited recovery. Id. at 285.
\textsuperscript{112} Id. at 285.
\textsuperscript{113} Id. at 277.
\textsuperscript{114} Id. at 290-91.
\textsuperscript{115} 648 F.3d 860 (8th Cir. 2011).
\textsuperscript{117} Wolfe v. Fayetteville, Ark. Sch. Dist., 648 F.3d 860, 864, 867 (8th Cir. 2011).
harassment. The district court denied Wolfe's proposed jury instructions and instead provided its own. After the verdict, Wolfe filed a motion for a new trial claiming the district court erred in instructing the jury. Wolfe argued a Title IX claim does not require proof of the harasser's motivation.

Wolfe appealed United States Court of Appeals for the Eighth Circuit, which determined the district court properly denied Wolfe's jury instructions. The Eighth Circuit interpreted the United States Supreme Court's decision in 

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to require that a victim of gender discrimination in the workplace show the harassment at issue was motivated on the basis of sex. Although 

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case, the Eighth Circuit stated that Title VII interpretations are persuasive in examining a Title IX case. The Eighth Circuit also relied on 

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of Education, determining that a school could be held liable if the harassing conduct is gender-oriented. However, this conduct must rise to a sufficient level of severity. Thus, the Eighth Circuit determined that the district court's instruction was correct under the applicable law.

This Analysis will demonstrate that the Eighth Circuit properly concluded that a Title IX plaintiff complaining of peer-on-peer sexual harassment must show that the victim was targeted because of his gender. This Analysis will show that the Eighth Circuit properly relied on applying Title VII principles to Title IX claims. This Analysis will establish that the Eighth Circuit correctly denied the plaintiff's proposed jury instructions because the instruction did not comport with the applicable law. Finally, this Analysis will demonstrate that the Eighth Circuit properly followed previous Supreme Court decisions imposing limits on Title IX liability by requiring the victim establish the harassment was on the basis of sex.

118. Wolfe, 648 F.3d at 863-864.
119. Id. at 863.
120. Id.
121. Id. at 865.
122. Id. at 868.
124. Wolfe, 648 F.3d at 866.
126. Wolfe, 648 F.3d at 866.
128. Wolfe, 648 F.3d at 866.
129. Id. at 866-87.
130. Id. at 865.
131. See infra notes 135-170 and accompanying text.
132. See infra notes 135-149 and accompanying text.
133. See infra notes 150-158 and accompanying text.
134. See infra notes 159-170 and accompanying text.
A. The Eighth Circuit Properly Rely on Title VII Principles

In Wolfe v. Fayetteville, Arkansas School District, the United States Court of Appeals for the Eighth Circuit relied on United States Supreme Court precedent interpreting Title VII to determine the Title IX claim before the court. The court reasoned that the language of Title VII was substantially the same as Title IX and should not be treated differently. Citing Franklin v. Gwinnett County Public School, the Eighth Circuit employed the same analysis for a Title IX claim as a Title VII claim.

In Franklin, a Title IX case, the Supreme Court analogized sexual harassment in schools with harassment in the workplace under Title VII. In doing so, the Supreme Court implicitly authorized applying Title VII principles to Title IX claims. Many courts have employed this same practice of analogizing Title VII and Title IX.

In Oncale v. Sundowner Offshore Services, Inc., the Supreme Court determined that a Title VII plaintiff must show the discrimina-
tion was motivated on the basis of sex and the behavior rose to a certain level of severity to create an objectively hostile working environment. The Court recognized that Title VII did not exclude same-sex harassment claims because the harassment could be motivated by more than just sexual desire, for example, the harasser could be motivated by a general hostility towards one gender. The Court reiterated that a Title VII plaintiff must always provide proof that the harassment at issue was not simply tinged with offensive sexual connotations, but was actually motivated by the victim’s sex.

In Wolfe, the Eighth Circuit expressly recognized that Oncale was a Title VII case. Nonetheless, the court was persuaded by Oncale to require a Title IX plaintiff to provide proof that the harassment at issue was actually motivated because of sex. Consequently, because of this requirement, and because Title VII principles are applicable to Title IX claims, the Eighth Circuit properly determined that this requirement also applies to Title IX cases.

B. THE EIGHTH CIRCUIT WAS CORRECT IN AFFIRMING THE DENIAL OF PLAINTIFF’S PROPOSED JURY INSTRUCTION

In Wolfe v. Fayetteville, Arkansas School District, the United States Court of Appeals for the Eighth Circuit affirmed the denial of the plaintiff’s proposed jury instructions because the instruction misstated the law. The victim in Wolfe was called “queer bait,” “faggot,” and “homo.” In addition, his classmates created a Facebook group that prominently displayed “Homosexual” with Wolfe’s face transposed onto a figure wearing a green fairy costume in the background. Wolfe was also subjected to physical violence. The district court instructed the jury that in order for the plaintiff to prevail,

145. Oncale, 523 U.S. at 79.
146. Oncale, 523 U.S. at 80-81.
147. Wolfe, 648 F.3d at 866.
148. See id. (citing Oncale, 523 U.S. 75 (1998)).
149. Compare Wolfe, 648 F.3d at 867 (determining that a Title IX plaintiff must prove that the discriminatory conduct was motivated by the victim’s sex), with Franklin, 503 U.S. at 75 (noting that the same rules should apply when a teacher harasses a student as when an employer harasses an employee), and Oncale, 523 U.S. at 80 (stating that Title VII prohibits only harassment motivated because of sex).
150. 648 F.3d 860 (8th Cir. 2011).
151. Wolfe v. Fayetteville, Ark. Sch. Dist., 648 F.3d 860, 868 (8th Cir. 2011). Wolfe’s proposed instruction stated, “[h]arassment may be sex-based . . . when it includes spreading rumors or name-calling that falsely labeled Wolfe as a homosexual in an effort to debase his masculinity or when Wolfe did not meet his peers’ stereotyped expectations of masculinity.” Id. 867.
152. Wolfe, 648 F.3d at 862.
153. Id.
154. Id. at 862-63.
The discrimination must have been on the basis of sex; and (2) to constitute discrimination on the basis of sex, the harassment must have been serious enough to prevent his access to the educational benefits afforded him by the school district.\(^{155}\)

The Eight Circuit found Wolfe's proposed jury instructions inaccurately suggested that the gender-based insults he received were sufficient to meet the level of severity necessary to constitute discrimination on the basis of sex under Title IX.\(^{156}\) In doing so, the Eighth Circuit followed the United States Supreme Court's precedent that harassment only constitutes discrimination on the basis of sex if it is elevated to a requisite level of severity.\(^{157}\) The plaintiff's proposed instructions sought an exceptionally lower standard, thereby justifying the Eighth Circuit's decision to deny them.\(^{158}\)

C. THE EIGHTH CIRCUIT'S DECISION PROPERLY REFLECTS THE LIMITATIONS OF TITLE IX LIABILITY

In Wolfe v. Fayetteville, Arkansas School District,\(^{159}\) the United States Court of Appeals for the Eighth Circuit concluded that a Title IX plaintiff asserting a deliberate indifference claim against a recipient of federal funds must establish that the peer-on-peer acts of discrimination were motivated on the basis of sex.\(^{160}\) In Wolfe, the plaintiff argued that Title IX's language and case law does not require motivation as an element of a Title IX claim.\(^{161}\) In denying the plaintiff's proposed instructions, the court followed the United States Supreme Court's decision in Davis v. Monroe County Board of Education,\(^{162}\) which indicated that the harassment must be gender-oriented conduct.\(^{163}\)

In Davis, the dissent feared that extending Title IX liability to peer harassment would expose the funding recipient to lawsuits and
severe financial burden.\textsuperscript{164} The majority countered that the dissent failed to realize the realistic limitations of Title IX liability.\textsuperscript{165} Title IX limitations include (1) that the funding recipient must act intentionally; (2) a recipient will only be held liable for deliberate indifference if it had actual notice of the prohibited conduct; and (3) the student harasser’s behavior must reach a minimum level of severity for the recipient to be held liable.\textsuperscript{166} Furthermore, the majority in Davis noted that peer harassment was less likely to constitute a Title IX violation than teacher-student harassment.\textsuperscript{167}

Many misguided critics, agreeing with the dissent and believing Davis would open the floodgates of Title IX liability, failed to acknowledge these realistic limitations.\textsuperscript{168} In reviewing a peer harassment claim, the Eighth Circuit in Wolfe refused to impose Title IX liability when the plaintiff offered no proof evidencing the harasser’s motivation.\textsuperscript{169} By imposing the requirement that the plaintiff show the harasser’s motivation was on the basis of sex, the Eighth Circuit echoed Title IX jurisprudence by limiting the recipient’s Title IX liability.\textsuperscript{170}

V. CONCLUSION

In Wolfe v. Fayetteville, Arkansas Public School District,\textsuperscript{171} the United States Court of Appeals for the Eighth Circuit required that

\textsuperscript{164} Davis, 526 U.S. 629, 686 (Kennedy, J., dissenting).

\textsuperscript{165} Id. at 652 (majority opinion); see also Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 304 (1998) (Stevens, J., dissenting) (opining that Title IX plaintiffs may not be able to recover damages because the actual knowledge requirement established such a high standard).

\textsuperscript{166} See Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 74 (1992) (determining that a notice problem does not exist for intentional discrimination and further noting that Congress would not have intended for federal funds to be used to aid in intentional violations of Title IX); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 285 (1998) (requiring that an educational entity have actual notice to be held liable and refusing to accept a constructive notice standard); Davis, 526 U.S. 629, 650 (requiring that a plaintiff show that a severe and objectionably offensive takes away from a student’s educational experience).

\textsuperscript{167} Davis, 526 U.S. at 653.

\textsuperscript{168} See Carrie Urrutia Sponseller, Peer Sexual Harassment in Light of Davis v. Monroe County Board of Education: A Successful Balance or Tipping the Scales?, 32 U. Tol. L. Rev. 271, 288 (2001) (“While the threat of liability is clearly a valid concern for school districts, it appears that critics of the Davis decision fail to acknowledge that the standard for school district liability pursuant to Title IX is extremely high”).

\textsuperscript{169} See Wolfe, 648 F.3d at 865 (affirming the denial of the plaintiff’s proposed jury instructions and requiring proof of sex-based motivation to establish a Title IX deliberate indifference claim).

\textsuperscript{170} Compare Wolfe, 648 F.3d at 865 (holding a Title IX plaintiff must prove the harasser was motivated on the basis of sex), with Davis, 526 U.S. at 652 (establishing a Title IX claim must be based on misconduct that rises above a level of simple teasing or name-calling), and Gebser, 524 U.S. at 285 (concluding a Title IX plaintiff must prove that the funding recipient have actual knowledge of the discrimination).

\textsuperscript{171} 648 F.3d 860 (8th Cir. 2011).
for a federal funds recipient to be held liable, a Title IX\textsuperscript{172} plaintiff must show that the harasser's conduct was motivated on the basis of sex.\textsuperscript{173} The Eighth Circuit determined that because Title VII\textsuperscript{174} case law was analogous to Title IX, imposing this requirement in the jury instructions for a Title IX claim was proper.\textsuperscript{175} The Eighth Circuit recognized that the harassment must rise to a requisite level of severity and, as a result, denied the plaintiff's jury instructions that suggested a Title IX claim could be based on mere name-calling or rumor spreading.\textsuperscript{176}

The Eighth Circuit's decision has been met with criticism.\textsuperscript{177} However, the Eighth Circuit properly applied Title VII principles in deciding the Title IX case before it.\textsuperscript{178} The Eighth Circuit correctly denied the plaintiff's jury instructions because the instructions did not comport with Title IX precedent.\textsuperscript{179} Furthermore, the Eighth Circuit properly followed the theme of limiting Title IX liability established in previous United States Supreme Court decisions.\textsuperscript{180} Therefore, the Eighth Circuit properly asserted that a Title IX plaintiff must establish the harasser's conduct was motivated on the basis of sex.

Critics argue that the Eighth Circuit's decision in \textit{Wolfe} creates an insurmountable barrier for Title IX plaintiffs. However, Title IX was not enacted to be a general civility code for the playground, or a blanket protection from other student's conduct motivated by personal animus or jealousy. Furthermore, the United States Supreme Court has noted that peer harassment is less likely to constitute a Title IX violation than teacher-student harassment, and has held that the federal funding recipient must have actual notice of the harassment. Therefore, the narrow set of circumstances in which liability may be imposed on a federal funding recipient preexisted before the Eighth Circuit's ruling in \textit{Wolfe}. If a federal funding recipient is to be held liable in damages for a third party's conduct, there must necessarily

\begin{itemize}
\item \textsuperscript{172} 20 U.S.C. § 1681 (1972).
\item \textsuperscript{173} Wolfe v. Fayetteville, Ark. Sch. Dist., 648 F.3d 860, 867 (8th Cir. 2011).
\item \textsuperscript{174} 42 U.S.C. § 2000(e) et. seq. (1964).
\item \textsuperscript{175} Wolfe, 648 F.3d at 866.
\item \textsuperscript{176} Id. at 863, 867.
\item \textsuperscript{177} See Molly E. Whitman, \textit{Note, Title IX—Sexual Harassment—Eighth Circuit Asserts Harasser's "Motivation" Is Required to Prove Discrimination on the Basis of Sex}, 65 SMU L. Rev. 237, 241 (2012) (calling the Eighth Circuit decision in Wolfe baseless and over-reaching).
\item \textsuperscript{178} See infra notes 135-149 and accompanying text.
\item \textsuperscript{179} See infra notes 150-158 and accompanying text.
\item \textsuperscript{180} See infra notes 159-170 and accompanying text.
\end{itemize}
be a higher standard to establish liability for a specific and severe type of conduct in a narrow set of circumstances, which the *Wolfe* decision accurately reflects.

*Kaylen K. Fleming – '15*