



CAMPUS COUNSEL

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Deliberate Indifference, Revisited

BY LYNETTE PACZKOWSKI • MARCH 11, 2019

In a [prior post](#), we discussed a case against the University of Notre Dame in which the alleged victim argued that Notre Dame's actions were deliberately indifferent because it opened an investigation against her wishes. Now, in a [recent case](#) out of the Eastern District of Michigan, a plaintiff claimed that the University of Michigan acted with deliberate indifference in response to her complaints of harassment, alleging that the University essentially adopted a wait-and-see approach, hoping commencement would resolve the issues.

On the University's Motion for Summary Judgment, the Court held that no jury could find that the University's response amounted to deliberate indifference, noting instead the University's prompt, compassionate and effective responses.

This timeline of events illustrates the University's responses to the plaintiff's complaints:

- **March 13:** The plaintiff first complained about the harasser's text messages and other unwanted conduct. A Title IX investigator responded immediately by providing the sexual misconduct policy and a complaint form. Four days later, the investigator asked the plaintiff to supply her with the unwanted text messages.
- **March 18:** The plaintiff told the investigator that she did not want the harasser to be aware that she was participating in an online class. The investigator immediately accommodated the plaintiff by contacting the professor and making arrangements to hide all class participants' identities.
- **March 25:** One week after being provided with copies of the harasser's text messages, the investigator spoke with the harasser by telephone, and on March 28, she instructed him to have no further contact with the plaintiff and to not retaliate against her.
- **March 29:** The plaintiff complained to the investigator about the harasser sending her a text message. The investigator spoke to the harasser on March 31 and reminded him of the no-contact order.
- **March 31:** The harasser was notified of various mandatory interim measures regarding an upcoming April residency: He was required to stay at a different hotel than the plaintiff; he was not permitted to eat meals in the student dining area; if he attended a student gathering at which the plaintiff was present, he was to leave immediately; and in class,

he was to be seated out of the plaintiff's sight. When the plaintiff contacted the investigator with questions and concerns about these interim measures, she immediately responded with accommodating solutions. The evening of the first day of the April residency, the harasser violated the no-contact order by calling the plaintiff derogatory names on Facebook; the harasser was spoken to hours later and barred from participating in the rest of that weekend's classes.

- **April 10:** In response to inflammatory emails sent to university faculty (but not to the plaintiff), the harasser was told that he was barred from participating in commencement events and that he must not contact faculty or the plaintiff. Arrangements were made to have the university police department conduct a "threat assessment" and provide security for commencement activities.
- **April 29:** The plaintiff communicated her belief, based on a Facebook post she had seen, that the harasser was intending to attend commencement (although the harasser's attorney had recently assured the University to the contrary). This information was immediately passed on to various school officials and to the police.
- **April 29 (or early April 30):** The plaintiff saw the harasser. Due to the existing security arrangements, the plaintiff found the police immediately, who promptly removed the harasser from the building. Later the same day (or in the early hours of May 1), the harasser was located, arrested and jailed, and then placed on an airplane back to California.

Client Tip: In this case, the Court found that, in contrast to the inaction that has led to a finding of deliberate indifference in other cases, the University responded immediately and effectively, stopping the harasser's text messages to the plaintiff, his Facebook posts mentioning her and his physical interaction with her. When the harasser violated the University's directive to stay away from the plaintiff and to not attend commencement events, he was promptly removed and, very shortly thereafter, arrested and put on an airplane home. Thus, this case affirms prior guidance to institutions that the test is one of reasonableness, and not perfection. Institutions should, however, note the promptness of the University's responses and its diligence in establishing and enforcing interim measures.