

No. _____

Supreme Court of the United States

Melissa Maher,

Petitioner,

v.

Iowa State University,

Respondent.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Eighth Circuit

**PETITION FOR A WRIT OF
CERTIORARI**

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QUESTIONS PRESENTED

1. Does discrimination making a student vulnerable to harassment after a sexual assault create a cause of action for deliberate indifference by the institution under Title IX?
2. Is it reasonable in light of the known circumstances to require a student to accept unequal housing as an accommodation to prevent vulnerability to sexual harassment after a sexual assault?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Melissa Maher respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit Opinion and the Petitioner's Appendix 1-6 are reported at 915 F.3d 1210. The Opinion and Order of the United States District Court for the Southern District of Iowa, is unreported, Petitioner's Appendix 7-23.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 2019. (Pet. App. 1-5). This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

20 U.S.C. §681(A): “No person in the United States shall on the basis of sex be excluded from participation and be denied the benefits of or be subjected to discrimination under any education program or activity receiving federal assistance...”

STATEMENT

Melissa Maher (Maher) was a student at Iowa State University (ISU) in March 2014 when she was sexually assaulted by another student in ISU housing. She reported the rape to the police, but she did not immediately identify the assailant. Shortly after the assault, Maher left ISU and intended to withdraw from all but one of her classes. ISU failed to withdraw her from her classes as requested and, as a result, at the end of the semester she was placed on academic probation and told that her scholarships were at risk. She returned to the ISU campus in late May 2014 to give a statement and identify the name of her assailant. ISU then began an investigation of the incident.

In August 2014, Maher returned to ISU to continue her education. Shortly after moving in, she discovered that the assailant was living in the building next door to her. Maher informed ISU that the housing arrangements made her fearful. ISU investigated and suggested two alternatives to Maher's on-campus housing in an apartment with her own bedroom. Those two alternatives were a temporary solution that required her to move in and out of a university hotel or a converted dorm den which she would share with four other students who were strangers to her. Maher asked that the assailant be moved and the University stated that it did not wish to move him while its investigation was continuing. As a result, Maher chose not to move but chose to wait while the University completed its investigation.

ISU completed its investigation of the assault issuing findings on September 19, 2014. In its findings ISU concluded that Whetstone sexually assaulted

Maher. ISU subsequently charged Whetstone with misconduct, but after a hearing was requested the hearing process and appeals were not resolved until January 2017. Although ISU agreed that Maher had been raped, ISU refused to move Whetstone and offered no reasonable alternatives to Maher.

The existing housing placed Maher in close proximity to Whetstone where she saw him attending events for the apartment community they lived in and saw him multiple times a week going to and from classes. As a result of seeing Whetstone, Maher suffered from frequent Post-Traumatic Stress Disorder episodes where she relived the incident, immobilizing her and making it impossible for her to concentrate on her studies. Maher described the episodes: “The event would recur and recur. The event would keep happening and you might be present, but you are not mentally present, you’re mentally back in that time, and you can’t - - like nobody can talk you out of it. Nobody can tell you ‘You’re fine, you’re right here,’ and you feel like you’re stuck and you can’t get out and there’s no voice of reason that can get you out of there.” Because ISU chose not to move her assailant and provided no alternatives to Maher, she withdrew from ISU “because everything was too triggering for me, and I took steps - - Iowa State caused me to take steps backwards that I had taken forward while I was at home recovering for the summer, but being in such close proximity to him made me backtrack all of my progress that I had made, it felt like, and I couldn’t focus on school. I was too worried about if I was going to have a PTSD episode or I was going to have a panic attack the next time I was going to run into him or I don’t understand how you are supposed to be able to focus on your studies when that’s all you are concerned about...” While ISU’s Title IX coordinator

felt that Whetstone should be moved, particularly advocating for such a change after finding that Whetstone sexually assaulted Maher, ISU did not move him and offered no alternatives to Maher.

This action was filed September 9, 2016, claiming that ISU was deliberately indifferent to Maher's circumstances after the incident. The District Court for the Southern District of Iowa had Jurisdiction under 28 U.S.C. §1331. After discovery, ISU filed a Motion for Summary Judgment, which was granted on the grounds that the statute of limitations had run and that there was no evidence of severe and pervasive harassment. The matter was appealed to the Eighth Circuit Court of Appeals, which affirmed on other grounds, finding that because victims of pure harassment do not have a Title IX right to make remedial demands, dissatisfaction with the school's response does not mean the school's response can be characterized as deliberate indifference and that it is entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional statutory claims. The Eighth Circuit Court of Appeals further held that "after ISU's investigative report concluded that Whetstone sexually assaulted Maher, there was no reason for ISU to think that Maher's dissatisfaction with its proposed housing alternatives would have changed."

ARGUMENT

The basic tenet of Title IX is equal opportunity for students of different sexes. Melissa Maher was sexually assaulted by someone she had met that day on the ISU campus. While there is no evidence that ISU had prior knowledge of her attacker's propensity, once ISU had knowledge, it needed to respond reasonably. ISU was not prepared to respond, made numerous missteps along the way, and ultimately offered Maher no housing opportunities equal to those of her attacker. Her scholarships and academic standing were placed at risk and her housing choices were much worse than her assailant. As a result, she lost the equal educational opportunities ISU and Title IX promised her. Her attacker lived in the same apartment complex she did and was allowed to stay there through that semester. Ms. Maher was set back years by ISU's unwillingness and inability to offer her reasonable, comparable accommodations free from vulnerability from sexual harassment in the wake of the assault.

The United States Supreme Court in *Davis v. Monroe County Bd. Of Education*, 526 U.S. 629 (1999) established criteria for a school's liability when it denies a person benefits or subjects them to discrimination, holding that a school is liable when its deliberate indifference causes a student to undergo harassment or makes them liable or vulnerable to harassment. *Id.* at 644-45. While students do not have a right to make remedial demands, the school must respond in a way that is not clearly unreasonable in light of the known circumstances. *Id.* at 648-49.

In applying *Davis*, the Eighth Circuit dismissed Maher's action because there was no direct evidence of sexual harassment, even while there was evidence

that Maher was vulnerable to harassment living so close to her assailant. Both the Third Circuit and the Tenth Circuit Court of Appeals have recognized the Supreme Court's holding that making the student vulnerable to sexual harassment is sufficient to create a cause of action. The Eighth Circuit Court of Appeals gave no consideration to the inequity between the housing the assailant enjoyed compared to the substitute housing offered to the victim. The Court of Appeals found that any offer made absolved ISU from liability and excused ISU's decision to simply stop providing assistance, which was not reasonable in light of the circumstances. The Supreme Court needs to clarify the *Davis* decision in light of the split to ensure all aspects of the *Davis* decision are fully implemented by the lower courts.

1. Discriminating against a student and making her vulnerable to sexual harassment is prohibited under Title IX.

The Eighth Circuit Court of Appeals found that because there was no direct sexual harassment, the case should be dismissed. In *Davis*, the Court held that making a student vulnerable to sexual harassment created a cause of action when coupled with discrimination that denied a student education opportunities. 526 U.S. at 644-45. The Third Circuit and the Tenth Circuit, as well as courts in other circuits, have applied this Court's reasoning in finding liability. Vulnerability is important, as recognized by the Third Circuit, the Tenth Circuit and this Court, because a victim will not be able to focus on their studies and receive equal treatment when they fear for their safety after having been sexually assaulted on campus.

In *Williams vs. Board of Regents University System of Georgia*, 477 F.3d 1282, 1297 (3rd Cir. 2007), the Third Circuit Court of Appeals held that failing to take precautions to prevent further attacks, for example by removing the attacker from student housing or suspending the alleged assailants or implementing a more protective sexual harassment policy to deal with further incidents, were adequate grounds for suit under Title IX.

In *Williams* the victim was sexually assaulted by multiple students in a University of Georgia (UGA) dormitory in January 2002. She reported the assault and then withdrew from UGA. The police and UGA investigated. Almost a year after the incident, a UGA judiciary panel imposed no sanctions against the assailants.

In examining the Title IX claims of Williams, the Third Circuit identified the following test: First that the plaintiff must prove that deliberate indifference occurred in response to the discrimination she faced. *Williams*, 477 F.3d at 1295 citing *Davis*, 526 U.S. at 633. Second, that the deliberate indifference must at a minimum “cause [students] to undergo’ harassment or ‘make them liable or vulnerable’ to it.” *Williams*, 477 F.3d at 1295-96 citing, *Davis*, 526 U.S. at 644-45. Finally, that the deliberate indifference subjected the plaintiff to further discrimination. In Williams’ case, the Third Circuit found that UGA “effectively denied Williams an opportunity to continue to attend UGA” because UGA failed to take any precautions that would prevent future attacks. *Williams*, 477 F.3d at 1297. UGA was deliberately indifferent to Williams when it took no action to protect the victim from the assailants, offer her a safe campus environment free from harassment, or vulnerability from harassment

while the assailants remained on campus, which subjected her to further discrimination by not allowing her to continue her studies. *Id.*

The Tenth Circuit Court of Appeals also recognized that deliberate indifference to vulnerability to harassment constituted sufficient evidence to maintain a cause of action under Title IX when the perpetrators remained on campus. *Farmer v. Kansas State University*, 918 F.3d 1094 (10th Circuit 2019). In *Farmer*, Tessa Farmer was raped at a Kansas State University (KSU) fraternity during a party. She reported the rape to the police and to KSU’s Office of Institutional Equity alleging a violation of KSU’s sexual misconduct policy. KSU said the rape occurred off campus and refused to investigate. Farmer then lived in fear of running into her attacker, missed classes, struggled in school, withdrew from KSU activities, fell into a deep depression, slept excessively and engaged in self-destructive behaviors. *Id.* at 1099-1100. Another victim, Sara Weckhorst, attended a separate KSU fraternity event and after passing out was raped by multiple men at a fraternity house. KSU again declined to investigate because the rapes occurred off-campus. Weckhorst alleged after the rapes she was “always afraid, apprehensive, and hyperalert on campus and off. Every man who passes her on the sidewalk terrifies her at least once a day on campus, Sara is overcome by panic, anxious that any passing man could be one of the student assailants. She is constantly on the lookout for J.F.” *Id.* at 1101. The Tenth Circuit Court of Appeals held that where a school has “actual knowledge of sexual harassment that is severe, pervasive and objectively offensive enough to deprive a student of access to the educational benefits and resources” offered, the school cannot “turn a blind eye to that harassment.” *Id.* at

1104. The court went on to conclude, “Plaintiffs can state a viable Title IX claim for student on student harassment by alleging that the funding recipient’s deliberate indifference caused them to be “vulnerable to” further harassment without requiring an allegation of subsequent actual sexual harassment.” Id. For both students in *Farmer*, the failure to take action led to unequal education opportunities arising from the vulnerability to harassment as a result of the rapes.

In Maher’s case, ISU investigated the assault and found that Whetstone sexually assaulted Maher. ISU had no reasonable alternative housing for Maher, offering only a temporary solution or moving her from an individual bedroom into a room full of strangers. ISU refused to move Whetstone from his individual bedroom housing, even when ISU knew his housing in the building next to her assailant was adversely affecting Maher and disrupting her studies. ISU’s own Title IX coordinator advocated to move Whetstone, but the University refused to take any action or offer reasonable alternatives to Maher. Although the clear affects of living in close proximity to Whetstone made Maher suffer PTSD episodes, made her unable to attend to her studies, and ultimately forced her to withdraw from ISU, the Court of Appeals found that she was not subject to further sexual harassment and dismissed the action. *Farmer* recognized the affects of vulnerability to harassment on victims of sexual assault and cited a litany of cases that have made similar findings that making a student vulnerable to harassment was sufficient to support a cause of action:

see *Fitzgerald v. Barnstable Sch. Comm.*,
504 F.3d 165, 172 (1st Cir. 2007) (citing

Davis and stating that “to ‘subject’ a student to harassment, the institution’s deliberate indifference must, at a minimum, have caused the student to undergo harassment, made her more vulnerable to it, or made her more likely to experience it”), *rev’d on other grounds*, 555 U.S. 246, 129 S.Ct. 788, 172 L.Ed.2d 582 (2009); *id.* at 172 (stating that *Davis*’s language, “mak[ing] them liable or vulnerable to” harassment, “sweeps” broader than requiring further actual harassment to have occurred); *Hernandez v. Baylor Univ.*, 274 F.Supp.3d 602, 613 (W.D. Tex. 2017) (citing *Davis* and stating that “the Supreme Court has made clear that to ‘subject’ a student to harassment a school need only make the student vulnerable to that harassment;” further stating that a recipient’s actionable “discriminatory harm can include the harm faced by student-victims who are rendered vulnerable to future harassment and either leave school or remain at school and endure an educational environment that constantly exposes them to a potential encounter with their harasser or assailant;” elaborating that the required harm could include “forcing the student to change his or her study habits … or lowering the student’s grades”); see also, e.g., *Joyce v. Wright State Univ.*, No. 3:17-cv-387, 2018 WL 3009105, at *8 (S.D. Ohio June 15, 2018); *Karasek v. Regents of Univ. of*

Calif., No. 15-cv-03717-WHO, 2015 WL 8527338, at *12-*13 (N.D. Cal. Dec. 11, 2015) (unreported) (citing cases); *Takla v. Regents of Univ. of Calif.*, No. 2:15-cv-04418-CAS(), 2015 WL 6755190, at *4-*5 (C.D. Cal. Nov. 2, 2015) (unreported); *Kelly v. Yale Univ.*, No. Civ. A 3:01-CV-1591, 2003 WL 1563424, at *4-*5 (D. Conn. Mar. 26, 2003) (unreported). To underscore that a Title IX plaintiff is not required to allege that she suffered actual additional incidents of sexual harassment, the Supreme Court in *Davis* referred to the Random House Dictionary definition of “subject” to include, “to make liable ...; lay open; expose.” *Davis*, 526 U.S. at 645.

Farmer, 918 F.3d at 1103-1104.

The Eighth Circuit’s holding in Maher’s case is at odds with the US Supreme Court’s holding in *Davis* and with the Third Circuit and the Tenth’s Circuits holdings in reliance on express language in *Davis*. Maher was constantly vulnerable to further harassment because she lived in close proximity to her assailant. Maher requested accommodations and ISU failed to act, even after it agreed that Maher had been sexually assaulted. ISU gave preference to the assailant, providing him with better accommodations which allowed him to continue his studies while Maher was forced to withdraw to protect her own sanity. The Petition for Certiorari should be granted to resolve the split between the Circuits and correct the misapplication of *Davis* by the Eighth Circuit Court of Appeals.

2. The Actions of the School Must be Reasonable in Light of the Known Circumstances

The Eighth Circuit held that once Maher turned down suggestions by ISU she was unable to pursue an action as it was reasonable for Iowa State to think that Maher would not accept the prior offer when it refused to move her assailant. The Eighth Circuit's decision results in unequal treatment of the female victim and the male assailant after a sexual assault.

Numerous courts have recognized the necessity to take action to alleviate the feeling of vulnerability to harassment and the fear of further attacks after a sexual assault. See *Supra* and *Farmer*, 918 F.3d at 1103-1104. While a student does not get to choose her remedy, Title IX is premised on the concept of equal opportunity. Therefore, the remedies offered should at least maintain a balance between the victim and the assailant with equal opportunities. As a matter of policy based on equality, it is unfair that the victim of a crime should be greatly disadvantaged in trying to continue her education in favor of the assailant's rights.

The Eighth Circuit held without explanation that the temporary housing that require Maher to move out on weekends or the housing with a group of strangers was reasonable and that after "ISU's investigative report concluded that Whetstone sexually assaulted Maher, there was no reason for ISU to think that Maher's dissatisfaction with its proposed housing alternatives would have changed." The Eighth Circuit's decision is based on assumptions, not on facts.

It has long been the rule that summary judgment must be determined based on the facts presented and

all reasonable inferences must be viewed in a light most favorable to the non-moving party. *Matsushita Electric Industrial Co, Ltd vs. Zenith Radio Corporation*, 475 U.S. 574, 587-8 (1986), quoting, *United States vs. Diebold, Inc.*, 369 U.S. 654, 655 (1962). In determining whether there is a genuine issue as to material facts, “all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or Judge to resolve the parties’ differing version of the truth at trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), quoting, *First National Bank of Arizona, v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968). Therefore, where there are disputes over facts that might affect the outcome of the suit under the governing law, summary judgment is precluded. *Anderson*, 477 U.S. at 248.

No facts presented supported the Eighth Circuit’s assumptions regarding ISU’s motives for denying a change in housing after the investigation was completed. After the investigation, Maher was denied the change she requested and ISU offered no alternatives. The Eighth Circuit makes inferences in favor of the moving party, assuming that the same housing options were available a month into the semester and that ISU had knowingly decided that Maher would not accept these other options as she had turned them down when ISU suggested that moving the assailant was still an option.

Maher was never offered housing equal to that given to the assailant when she requested a change in housing. ISU told Maher when the offer was made to move her that ISU didn’t want to make a change while their investigation was continuing. Maher decided to wait until ISU completed its investigation under the

belief that ISU might make a different decision at that time. After completion of its investigation, interviewing fifteen witnesses over four months, ISU refused to move the assailant and made no offers to move Maher at that time. While ISU moved forward with a disciplinary process against the assailant, an initial decision wasn't entered until July 2015 and the appeals process continued into 2017. The long disciplinary process did not resolve the immediate needs of the victim.

ISU admitted that Whetstone raped Maher, but then took no action to resolve the close proximity of the victim and the assailant, arguing only that no further sexual harassment had occurred and ignoring Maher's vulnerability to harassment due to her close proximity to her assailant. Much like the victims in *Farmer, Williams, Talka and Kelly*, whenever Maher saw the assailant it caused her to relive the incident, fear for her safety, and not be able to focus on her studies. While the assailant continued with his studies in his single bedroom apartment, Maher was forced to withdraw for her own peace of mind when the University made no offer to move the assailant or provide her with comparable housing. The Eighth Circuit's holding ignores the change in circumstance when ISU issued its findings and the rulings of other Circuits that recognize that vulnerability to harassment is sufficient to discriminate against the victim and proved unequal educational opportunities to the victim and the assailant. The Eighth Circuit further ignores the ultimate deliberate indifference of ISU to Maher where, ultimately, ISU turned a blind eye to the assailant's effect on Maher and discriminated against her by denying her the same educational opportunities the assailant received from ISU.

CONCLUSION

Maher's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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