Flores v. Morgan Hill Unified School District: Behind the Specter of Qualified Immunity—Applying the Appropriate Standard for Summary Judgment Under Equal Protection

I. INTRODUCTION

The plaintiffs, former students of Morgan Hill Unified School District, who were, or were perceived to be gay, lesbian, or bisexual by other students were subjected to student-to-student antihomosexual harassment at school.[1] The students sued school administrators (Defendants) under 42 U.S.C. § 1983, Title IX of the Education Amendments of 1972 under 20 U.S.C. §§ 1681-1688, the California Constitution, and California statutes, alleging that the school administrators' response or lack of response to the harassment complaints denied them equal protection.[2] The defendant administrators initially moved for summary judgment on the merits of the equal protection claim.[3] The United States District Court for the Northern District of California denied the administrators' summary judgment request, stating that there existed "sufficient evidence to create a triable issue of fact."[4] The defendants responded by filing a summary judgment

1. *See* Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1132 (9th Cir. 2003). The suit is composed of various complaints from six students of several high schools where administrators allegedly failed to adequately respond. *See id.* Each student was subjected to an onslaught of sexual comments and antigay slurs along with threats or actual physical violence. *See* Christine Hwang, *Sexual Harassment in Public Schools: Speeches from the HWLJ Symposium*, 12 HASTINGS WOMEN'S L.J. 123, 137-38 (2001). One student was beaten at a school bus stop by fellow students shouting "faggot" and hospitalized as a result. *Id.* at 137-38. Two female plaintiffs had pennies hurled at them accompanied by requests for sexual favors. *Id.* at 138. Another girl was struck on the head with an object while boys yelled, "[f]ucking dyke, come over here and suck my dick." *Id.* Administrators either completely failed to respond or inflicted only light punishment, which not only failed to deter the accountable students, but had them bragging about the light punishment. *See Flores*, 342 F.3d at 1135-36.

2. *See id.* at 1133. According to the court, "[t]his appeal relates only to the plaintiffs' § 1983 claim that defendants denied the plaintiffs' Fourteenth Amendment right to equal protection on the basis of their actual or perceived sexual orientation." *Id.*; *see also* 42 U.S.C. § 1983 (2003).

3. *See Flores*, 324 F.3d at 1133.

4. *Id.*

motion on grounds of qualified immunity.[5] The district court initially denied qualified immunity based on the conclusion that the law was clearly established, which was the only existing requirement that the court could consider at the time.[6] The defendants appealed to the United States Court of Appeals for the Ninth Circuit, which vacated and remanded the case for reconsideration based on the Supreme Court's intervening decision of *Saucier v. Katz*.[7] *Saucier* created the additional requirement that courts, in adjudicating claims of qualified immunity, initially determine whether the facts established a constitutional violation before deliberating whether the law was clearly established.[8]

The district court, on remand, once again denied summary judgment and held that the plaintiffs had presented sufficient evidence of a constitutional violation based on the administrators' failure to act, which could be interpreted as induced by the students' perceived or actual sexual orientation.[9] The district court also reiterated its earlier decision that the right to be free from discrimination based on sexual orientation was "clearly established."[10] The defendants then filed an interlocutory appeal of the denial of qualified immunity with the Ninth Circuit.[11] A review by the United States Court of Appeals for the Ninth Circuit *held* that the failure of the administrators to discipline the offending students and the failure to train teachers, students, and campus monitors regarding harassment based on sexual orientation presented sufficient evidence of an intent to discriminate against the plaintiffs and that at the time of the harassment, the right to be free from intentional discrimination on the basis of sexual orientation was clearly established. *Flores v. Morgan Hill Unified School District*, 324 F.3d 1130, 1134 (9th Cir. 2003).

II. BACKGROUND

Government officials performing discretionary functions are generally shielded from liability for civil damages to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[12] This qualified immunity defense must be considered early in the proceeding because it

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5. *Id.* at 1134.
6. *See id.* (citing Doe v. Petaluma City Sch. Dist., 54 F.3d 1447, 1449 (9th Cir. 1995)).
7. *Id.* at 1134 (citing Saucier v. Katz, 533 U.S. 194 (2001)).
8. *See id.*
9. *See id.*
10. *Id.*
11. *See id.*
12. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

provides the complete right not to stand trial rather than a mere defense to liability.[13] *Saucier v. Katz*, handed down by the Supreme Court during the initial appeal of the noted case, established the sequence of inquiry in a qualified immunity case by instituting the threshold question: whether, in the light most favorable to the plaintiff, the state actor's conduct violated a constitutional right.[14] This created a two-tiered immunity analysis: the initial inquiry of whether a constitutional violation exists, which raises issues that thereby generate a foundation for the secondary question of whether this right was clearly established, assuming the threshold question passes muster.[15]

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[16] Congress enacted § 1983 to extend the protection of this right to include state agencies, which the Supreme Court later broadened to include an official's abuse of position.[17] The noted case involves student-to-student harassment, which was previously held not to be official activity; however, in *Davis v. Monroe County Board of Education,* the Supreme Court enlarged § 1983 to permit liability for civil damages by recipients of federal funding, including schools, for student-to-student sexual harassment.[18] The *Davis* Court relied on its earlier opinion in *Gebser v. Lago Vista Independent School District* to issue four requirements to impose liability on school districts for student-to-student harassment under Title IX.[19] The school district must first "exercise[] substantial control over both the harasser and the context in which the known harassment occurs."[20] The harassment must then be "so severe, pervasive, and objectively offensive" that the victims are denied the

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13. *See* Saucier v. Katz, 533 U.S. 194, 194 (2001).

14. *See id.* at 201. The lower court decision of *Flores v. Morgan Hill* was initially vacated and remanded for determination of the qualified immunity standard in light of the Supreme Court's decision in *Saucier*. Flores v. Morgan Hill Unified Sch. Dist., 18 Fed. Appx. 646, 648 (9th Cir. 2003).

15. *See Saucier*, 533 U.S. at 201.

16. U.S. CONST. amend. XIV.

17. *See* 42 U.S.C. § 1983 (2003); *see also* Jeffrey I. Bedell, *Personal Liability of School Officials Under § 1983 Who Ignore Peer Harassment of Gay Students*, 2003 U. ILL. L. REV. 829, 847 (2003).

18. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 653 (1999). This case involved a sexual harassment claim under Title IX of the Education Amendments of 1972. *Id.* at 629. *Davis* established the standard for a claim against school officials for student-to-student harassment to survive summary judgment. *Id.* at 639-53. The main requirements *Davis* established are the notice requirement and the expansion of intent to include "deliberate indifference." *Id.*

19. *See id.* at 639-49; *see also* Gebser v. Lago Indep. Sch. Distr., 524 U.S. 274 (1998).

20. *Davis*, 526 U.S. at 645.

benefits of educational opportunities.[21] Third, the school district must have actual knowledge of the harassment.[22] Finally, the school will only be liable only if it is "deliberately indifferent."[23]

In the seminal case of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court clarified that equal protection cases, in addition to a showing of discriminatory effect, require proof of discriminatory intent.[24] In order to raise an equal protection claim under § 1983, the Ninth Circuit has consistently held that plaintiffs must provide sufficient evidence "that the defendants, acting under the color of state law, discriminated against them as members of an identifiable class and that the discrimination was intentional."[25]

Intent is subjective and is difficult to prove because it cannot always be affirmatively asserted; it may, however, be imputed from a totality of surrounding circumstances.[26] The Supreme Court, in *Davis v. Monroe County Board of Education*, appended the intent requirement of the Equal Protection cases to include "deliberate indifference."[27] The *Davis* Court indicated that the "deliberate indifference standard" is satisfied only if the actor's response or lack thereof, to known acts of harassment, is clearly unreasonable in light of known circumstances.[28]

The circuit courts have attempted to narrow this definition because the standard is so vague. In a sexual discrimination case, the United States Court of Appeals for the Sixth Circuit in *Vance v. Spencer County Public School District* first rejected the notion that any action, even clearly ineffective action, satisfies the standard because it is clearly repugnant to the Supreme Court's "clearly unreasonable [response]"

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21. *Id.* at 651.
22. *Id.* at 650.
23. *Id.* at 644.
24. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977).
25. *Flores*, 324 F.3d at 1134.
26. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279-80 (1979). This Massachusetts case challenged, under the Equal Protection Clause of the Fourteenth Amendment, a statute giving absolute lifetime preference for benefits to veterans as discrimination against women and reaffirmed the need for both discriminatory intent as well as discriminatory impact. *See id.* at 278. The case also allowed a totality of circumstances analysis as opposed to a requirement of direct proof of intent. *See id.* at 280; *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977) (holding that departure from established practices may imply discriminatory intent).
27. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 644 (1999).
28. *Id.* at 648.

standard.[29] In *Wills v. Brown University*, the United States Court of Appeals for the First Circuit announced that prompt and reasonable measures to end harassment satisfy the standard; however, if it is discovered that the measures are ineffective or inadequate, the actor may be required to enact new measures to avoid any further liability.[30] In a Title VII civil rights race case, the Ninth Circuit opined that the deliberate indifference standard holds actors liable for their inaction when the need for intervention is obvious or inaction is likely to result in discrimination.[31] Reasonable measures entail action, but do not require that the applied remedy actually resolve the conflict, merely that the response not be clearly unreasonable.[32]

If an official actor has committed a constitutional violation, he may still be shielded from civil liability if his actions did not violate a "clearly established" right.[33] This adds a notice constraint to the plaintiffs' claim that ensures that officials are not liable for their own acts that they cannot be sure are unlawful.[34] *Saucier* envisions a tort-like concept where the law is clearly established when a reasonable officer knew or should have known that his conduct was unlawful in the particular situation.[35] Therefore, if the official is not put on notice that his behavior is clearly prohibited, summary judgment based on qualified immunity is appropriate.[36] This standard does not mean the official is on notice only if the action in question has previously been held unlawful, only that "in the light of pre-existing law the unlawfulness must be apparent."[37] Therefore, the fundamental question to ask is whether the law at the time of action gave fair warning that the actions were unconstitutional.[38]

Officials who have committed a constitutional violation might retain a defense of qualified immunity if they can state a reason for the

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29. *See* Vance v. Spencer County Sch. Dist., 231 F.3d 253, 260 (6th Cir. 2000). A complete lack of response is obviously deliberate indifference. *See* Murrell v. Sch. Dist. No. 1, 186 F.3d 1238, 1243-44 (10th Cir. 1999).

30. *See* Wills v. Brown Univ., 184 F.3d 20, 25 (1st Cir. 1999).

31. *See* Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1034 (9th Cir. 1998). *Monteiro* involved an Equal Protection claim under Title VI of the Civil Rights Act of 1964, in which a parent objected to a school's required reading of literature that used racially derogatory terms. *See id.* at 1022.

32. *See Davis*, 526 U.S. at 648-49.

33. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

34. *See* Saucier v. Katz, 533 U.S. 194, 206 (2001).

35. *See id.* at 202.

36. *See Harlow*, 457 U.S. at 818.

37. Hope v. Pelzer, 536 U.S. 730, 739 (2002) (citing Andersen v. Creighton, 483 U.S. 635, 640 (1987)).

38. *Id.* at 741.

action that is rationally related to a legitimate government purpose.[39] Although the Ninth Circuit in *High Tech Gays v. Industrial Security Clearance Office* found that homosexuals are a protected class under equal protection analysis,[40] the proper standard of review for sexual orientation cases, according to the Supreme Court in *Romer v. Evans*, is merely rational basis.[41] If the officials can state a reason for their action that is rationally related to a government policy, then it can be justified because sexual orientation has been clearly established to only require rational basis analysis.[42] In *Romer*, the Supreme Court found that national security interests trumped the right to be free from the possibility of discrimination based on sexual orientation.[43] In *Nabozny v. Podlesny*, however, the United States Court of Appeals for the Seventh Circuit held that the government does not have a legitimate interest in allowing student-to-student assaults.[44]

III. COURT'S DECISION

In the noted case, the Ninth Circuit followed the guidelines promulgated by the Supreme Court in *Saucier v. Katz* to determine whether school administrators were eligible for qualified immunity for failing to effectively respond to sexual-orientation harassment complaints.[45] In a unanimous decision, the court found that the record contained sufficient evidence to deny summary judgment because a jury could conclude that the defendants intentionally discriminated against the plaintiffs in violation of the Equal Protection Clause.[46] The court also held that at the time of the harassment, there was a clearly established right to be free from intentional discrimination based on sexual orientation.[47]

The court, using the precedent of *High Tech Gays v. Industrial Security Clearance Office,* found that for equal protection purposes the plaintiffs are members of an identifiable class because they allege discrimination based on their sexual orientation.[48] Using the *Saucier* two-

39. *See* Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).
40. High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573-74 (9th Cir. 1990).
41. *See* Romer v. Evans, 517 U.S. 620, 631-33 (1996).
42. *See id.* at 632-33; *see also High Tech Gays*, 895 F.2d at 573.
43. *Romer*, 517 U.S. at 632-33.
44. Nabozny v. Podlesny, 92 F.3d 446, 458 (7th Cir. 1996).
45. *See* Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1132 (9th Cir. 2003).
46. *See id.* at 1138.
47. *Id.*
48. *Id.* at 1134-35 (citing High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 570-71 (9th Cir. 1990)).

tiered approach to qualified immunity, Chief Judge Schroeder immediately launched into the question of whether a constitutional violation existed.[49] This was an appeal from the denial of a motion for summary judgment; therefore the court merely had to decide whether sufficient evidence existed to raise an inference that the defendants acted with "deliberate indifference" by responding to known peer harassment in a way that was clearly unreasonable, a minimal standard.[50]

It is well established that equal protection claims require a showing of discriminatory intent.[51] Although the Ninth Circuit has not previously considered a sexual-orientation case under § 1983, the court has decided in earlier § 1983 decisions to include "deliberate indifference" as an unconstitutional motive satisfying discriminatory intent.[52] Chief Judge Schroeder separately analyzed the claims against each defendant for deliberate indifference.[53] The three judges embraced an interpretation of deliberate indifference, which in essence determined whether the given facts of each claim fell within any circuit case definition of deliberate indifference.[54] This interpretation complied with the standard of review for summary judgment, where the record is assessed "in the light most favorable to plaintiffs."[55] Applying this standard, the judges found sufficient evidence of deliberate indifference against all the defendants.[56]

The majority of the claims involved the direct failure to act on the part of school administration or school employees in response to reports of harassment.[57] However, the complaint of the failure to train school officials involves a responsibility of the school district to address harassment by adequately training its employees in the proper response to complaints of harassment.[58] According to the court, this is perhaps a more tenuous argument, but it is one acknowledged as viable by other courts and it is often the only claim one can make to hold liable the school district and its school administrators.[59] The Ninth Circuit judges also found sufficient evidence to deny the motion for summary judgment on this claim.[60]

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49. *See id.* at 1134.
50. *Id.* at 1133-34.
51. *See id.* at 1134.
52. *See id.* at 1135.
53. *See id.* at 1135-36.
54. *See id.*
55. *See id.* at 1135.
56. *See id.* at 1135-36.
57. *See id.*
58. *See id.* at 1136.
59. *See id.* (citing Plumeau v. Sch. Dist. No. 40, 130 F.3d 432, 439 n.4 (9th Cir. 1997)).
60. *Id.*

The second prong to the deliberate indifference analysis involves determining whether the alleged constitutional violation was clearly established at the time of the reported harassment.[61] Chief Judge Schroeder construed the notion of a clearly established right by relying on the Supreme Court's decision in *Hope v. Pelzer*, which stated that prior case law is not a requirement; the proper standard is whether the defendants had "fair warning" that their conduct was unlawful in light of preexisting law.[62] The court found no merit in the defendants' argument for a narrow definition of notice, which limited clearly established rights to those proclaimed expressly in statutes or federal regulations.[63] The Chief Judge disposed of this argument stating that case law alone can render a law clearly established.[64] Supporting this proposition, the court relied on a previous holding "where prior cases have delineated governing legal principles, the law is 'clearly established' for immunity purposes regardless of whether a statute or regulation is the source."[65] The court pointed to clearly established precedent in *High Tech Gays v. Industrial Security Clearance Office* that state employees violate an individual's right to equal protection when they treat the individual differently based on the individual's sexual orientation.[66]

The court also countered the defendants' challenge that no prior cases exist to establish the scope of a school administrator's duty to address peer sexual-orientation harassment.[67] The equal protection guarantee is not a specific prescription of duties, but a requirement that the policy for homosexual and bisexual peer student harassment be enforced on par with heterosexual peer harassment.[68] The Chief Judge pointed out that the evidence indicates that the "defendants discriminated in the enforcement of school policies that required investigation and remedy of student harassment," making the equal protection claim appropriate.[69]

The broad interpretation of "deliberate indifference" allowed the court to conclude that the defendants' actions in response to complaints

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61. *See id.*

62. *Id.* at 1136-37 (citing Hope v. Pelzer, 536 U.S. 730, 740-41 (2002)).

63. *See id.* at 1137.

64. *See id.* If the court has defined governing legal principles through case law, the defendants have notice that the behavior may be proscribed. *Id.* (citing Armendariz v. Penman, 75 F.3d 1311, 1326-28 (9th Cir. 1996)).

65. *Id.* (citing High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 536, 573-74 (9th Cir. 1990)).

66. *See id.*

67. *See id.* at 1137-38.

68. *See id.* at 1137.

69. *Id.* at 1138.

of sexual orientation harassment were such that a jury could find the intent to discriminate.[70] The defendants' contention that they took action, though ineffective, was dismissed out of hand with the court's conclusion that there was a viable question for a jury to decide.[71] The defendants also failed to provide any justification for their differential enforcement of the harassment cases, thereby disallowing any rational basis justification for their failure to take proper action.[72] The court, in accord with *Nabozny v. Podlesny*, could not ascertain any justification for permitting student assaults based on sexual-orientation and therefore allowed the claims to proceed.[73]

IV. ANALYSIS

The Ninth Circuit adopted a broad interpretation of the *Saucier* standards, which enabled the plaintiffs' suit to continue in the judicial system. The judges interpreted "deliberate indifference" loosely by checking if the facts presented fit within any prescribed circuit definition.[74] A relaxed standard is acceptable and affordable because it merely decides if the issue can proceed to a jury rather than the merits of the case. The court also consistently and broadly construed the idea of a clearly established right by using the *Hope v. Pelzer* standard, which only requires that the preexisting law provide "fair warning."[75]

The decision in the noted case is a predictable culmination in light of previous consistent Supreme Court and circuit court decisions attacking qualified immunity.[76] However, its significance is in establishing the notion that the equal protection rights of homosexuals are well entrenched in our system and officially place government actors on notice that antigay discrimination may violate the Constitution.[77]

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70. *See id.*
71. *See id.*
72. *See id.* (citing Nabozny v. Podlesny, 92 F.3d 446, 458 (7th Cir. 1996)).
73. *See id.*
74. *See id.* at 1135-36.
75. *See id.* at 1136-37 (citing Hope v. Pelzer, 536 U.S. 730 (2002)).
76. Other circuit courts cited throughout the noted case previously developed persuasive precedent supporting the Ninth Circuit's decision. *See* Nabozny v. Podlesny, 92 F.3d 446, 458 (7th Cir. 1996) (establishing that the government has no legitimate government interest in allowing student-to-student assaults in a gender and sexual orientation case brought under § 1983); Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253, 260 (6th Cir. 2000) (developing the definition of deliberate indifference as a clearly unreasonable response to a sexual discrimination case brought under Title IX).
77. *See* Arthur S. Leonard, *The Gay Rights Workplace Revolution*, 30-SUM HUM. RTS. 14, 15 (2003).

The overall impact of this case is perhaps less notable because the Ninth Circuit is known for possessing a liberal slant, which perhaps makes it more receptive to homosexual discrimination suits.[78] The Ninth Circuit also has a "uniquely high rate of being summarily reversed by the Supreme Court."[79]

A Yale law professor states a common negative view of this phenomenon: "When you're not picking up the votes of anyone on the [c]ourt, something is screwy."[80] Many view the validity of Ninth Circuit court rulings with great skepticism.[81] Conversely, the noted case is supported by other circuit court interpretations and this is a long awaited decision, a natural conclusion to numerous qualified immunity suits beginning with racial discrimination and sex-based discrimination suits.

However, the case only allows the defeat of summary judgment. The plaintiffs still must prove the elements set out in *Davis* and *Saucier*, and the likelihood of a successful suit is unsure at best.[82] Homosexuals are not considered a protected class, therefore the sexual-orientation harassment suits are subject to rational basis scrutiny, the feeblest level of judicial inquiry.[83] If any legitimate reason related to a state interest can be stated for the official's actions, then the action is justified for governmental purposes and there is no constitutional violation.[84] The *Nabozny* decision, when liberally interpreted, is groundbreaking because it suggests that the court could never find a rational reason for permitting student-to-student assaults, and the Ninth Circuit's decision seems to affirm this interpretation.[85] However, this idea is contradicted by the example of the Department of Defense, where the courts' deference to

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78. *See* Adam Liptak, *Court that Ruled on Pledge of Allegiance Often Runs Afoul of Justices*, N.Y. TIMES, June 30, 2002, at A1.

79. Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711, 711 (2000).

80. Liptak, *supra* note 78, at A1.

81. *See id.*

82. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 639-51 (1999); Saucier v. Katz, 533 U.S. 194, 201 (2001). *Davis*'s four requirements to impose liability on school districts for student-to-student harassment under Title IX are the following: the school district must exercise substantial control over the harasser and the context where the harassment occurs; the harassment must be "so severe, pervasive and objectively offensive" that the victims are denied the benefits of equal educational opportunities; the school district must have actual knowledge of the harassment; and the school's response must be deliberately indifferent. *Davis*, 526 U.S. at 659-51. *Saucier*'s two-tiered approach to qualified immunity asks whether the state actor's conduct violated a constitutional right, and whether this right was clearly established. *See Saucier*, 533 U.S. at 201.

83. *See* Romer v. Evans, 517 U.S. 620, 632-33 (1996); *see also* High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573-74 (9th Cir. 1990)

84. *See* Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

85. *See* Bedell, *supra* note 17, at 855.

military "expertise" shows that there are circumstances, though perhaps now limited, where the government has special discretion to disregard equal protection analyses.[86]

Nevertheless, even if the plaintiffs prevail in satisfying the difficult requirement of proving discriminatory intent, *Davis* also states that damages can only be awarded in cases where harassment is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[87] This is another vague standard that can range from mere name-calling or a drop in grades to fear of attending school.[88] The cases that have prevailed in the circuits involve radically extreme activities including mock-rapes in classrooms and students being stabbed and physically or sexually assaulted.[89] The *Davis* court even acknowledges that students in school regularly encounter a certain amount of teasing and the standard requires more: a certain unstated, perhaps commonsensical, balance between severity and persistence.[90]

Neither have there been any circuit court cases that have explored the issue of punitive damages in Title IX cases.[91] Courts have addressed the viability of such claims, but the issue of damages, compensatory or punitive, has yet to be reached.[92] The Supreme Court, however, in two relevant decisions, has held that "municipalities generally were not liable for punitive damages."[93] Even if the plaintiffs' suit succeeds, the rewards may be nominal.

The Ninth Circuit's broad analysis reveals the ambiguity of the Supreme Court's announced tests for "deliberate indifference" and "clear establishment" of the law and re-confirms its liberality in choosing not to create its own specific definition, choosing instead to use an

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86. Leonard, *supra* note 77, at 15.

87. *Davis*, 526 U.S. at 650.

88. *See id.* at 651-53.

89. *See* Nabozny v. Podlesny, 92 F.3d 446, 451 (1996); *see also Davis*, 526 U.S. at 634.

90. *See Davis*, 526 U.S. at 652.

91. *See* C. Britton & W. Bradley Colwell, *Survey of Illinois Law: Significant Developments in Education Law*, 27 S. ILL. U. L.J. 741, 754 (2003).

92. *Id.*

93. *Id.* In *Newport v. Fact Concerts, Inc.*, the Supreme Court established a two-tier test for allowing punitive damages against municipalities: (1) Congress must evince an intent to remove the immunity of municipalities and/or government organizations from punitive damages, or (2) public policy must require an opposite outcome. 453 U.S. 247, 263-66 (1981). Regarding the first prong, Congress has not specifically addressed the issue of punitive damages in Title IX Education cases. Furthermore, the presumption against exacting punitive damages has been widely upheld because it lacks detrimental effect and unfairly "punishe[s] innocent taxpayers and bankrupts local governments." Schultzen v. Woodbury Cent. Cmty. Sch., 187 F. Supp. 2d 1099, 1110 (N.D. Iowa 2002) (citing Newport v. Fact Concert, Inc., 453 U.S. 247, 263-66 (1981)).

amalgamation of various circuits' definitions.[94] The generous interpretation may be an indication of this court's receptiveness to remedy sexual orientation harassment; however, other less socially progressive circuits may not be similarly amenable and the odds of a satisfying and successful suit remain uncertain.

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94. *See* Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1137-38 (9th Cir. 2003).