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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

HALEY VIDECKIS and LAYANA WHITE, individuals,

Plaintiffs,

vs.

PEPPERDINE UNIVERSITY, a corporation doing business in California,

Defendant.

Case No. 2:15-cv-00298-DDP (JCx)

NON-AGREED UPON AND OBJECTED TO [PROPOSED] JOINT JURY INSTRUCTIONS

Trial Date: July 18, 2017

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		(9th Cir. 1998)(applying Title VII standards in a Title IX suit).	
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PRELIMINARY INSTRUCTIONS

DEFENDANT'S [PROPOSED] INSTRUCTION (D-5) (not proposed at all by Plaintiff):

Burden of Proof - Clear and Convincing Evidence

When a party has the burden of proving any claim or defense by clear and convincing evidence, it means that the party must present evidence that leaves you with a firm belief or conviction that it is highly probable that the factual contentions of the claim or defense are true. This is a higher standard of proof than proof by a preponderance of the evidence, but it does not require proof beyond a reasonable doubt.

(Ninth Circuit Manual of Model Jury Instructions Civil No. 1.7)

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Plaintiff's statement in opposition of Defendant's proposed instruction 1.7:

Plaintiffs are reviewing the instruction in light of the Court's rulings on Defendant's motion to strike and are considering its application to this matter.

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Defendant's statement in support of Defendant's proposed instruction 1.7:

Punitive damages under California law must be proven by clear and convincing evidence. (California Civil Code 3294(a); CACI 3943.) Moreover, Pepperdine's affirmative defense of waiver must be proven by clear and convincing evidence. (*DRG/Beverly Hills, Ltd. V. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60.)

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PLAINTIFF'S [PROPOSED] INSTRUCTION (P-35) (not proposed at all by Defendant):

4.7 RATIFICATION

A purported principal who ratifies the acts of someone who was purporting to act as the principal's agent will be liable for the acts of that purported agent, provided that the principal made a conscious and affirmative decision to approve the relevant acts of the purported agent while in possession of full and complete knowledge of all relevant events.

Source: Ninth Circuit Model Civil Jury Instructions No. 4.7

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Plaintiff's statement in support of Plaintiff's proposed instruction 4.7:

Plaintiffs assert the instruction is necessary and appropriate, but are evaluating this instruction in light of Defendant's position and authority.

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Defendant's statement in opposition of Plaintiff's proposed instruction 4.7:

Agency principals such a ratification, scope of authority and respondeat superior liability are have no application in this case and will only confuse the jury. All of Plaintiffs' claims are "intentional torts" and a principal is not liable for an agent's intentional tort. Ratification only arguably becomes relevant here in addressing the issue of punitive damages under California law and the California instruction, CACI 3946, addresses the issue. (*See, Defendant's offered instruction D-50.)*

As to Title IX, the Supreme Court has stated repeatedly that liability must be based upon the funding recipient's own intentional conduct and not on principals of respondeat superior. As stated by the Supreme Court in *Davis v. Monroe County Bd of Education*, 526 U.S. 629 (1999) at page 642, "We also recognized, however, that this limitation on private damages actions is not a bar to liability where a funding recipient intentionally violates the statute. [Citation omitted]" and at page 643 "*Gebser* thus established that a recipient intentionally violates Title IX, and is subject to a private damages action, where the recipient is deliberately indifferent to known acts of teacher-student discrimination." The Supreme Court addressed this issue in a teacher/student harassment case in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285-291 (1998). The Supreme Court expressly rejected the argument that vicarious liability could exist stating,

> The administrative enforcement scheme [of Title IX] presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. Applying those principles here, we conclude that it would "frustrate the purposes" of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of respondeat superior or constructive notice, i.e., without actual notice to a school district official.

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(*Gebser v. Lago Vista Indep. Sch. Dist*., *supra* at 290-291.) The *Gebser* Court identified the specific elements necessary for a fund recipient to be found liable for damages, stating:

> Consequently, in cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.

(*Gebser v. Lago Vista Indep. Sch. Dist*., *supra* at 290.)

Moreover, the same principal applies to a fund recipient's liability for retaliation for complaints about sexual discrimination. (*Jackson v. Birmingham Bd. of Educ*., 544 U.S. 167 (2005).) The Supreme Court recognized in *Jackson v. Birmingham Bd. of Educ*., 544 U.S. 167 (2005), that retaliation is a form of "intentional sex discrimination." (*Jackson v. Birmingham Bd. of Educ., supra* at 173-174.) It also required action by a fund recipient itself to establish liability stating, "To prevail on the merits, Jackson will have to prove that the Board retaliated against him because he complained of sex discrimination." (*Id*, at 184.)

Generally, there is also no vicarious liability to an employer for the intentional torts of its employee under California law. (See, *John R. Oakland Unified School District* (1989) 48 Cal.3d 438 [school district not vicariously liable for the sexual molestation of a student by a teacher]; *Montague v. AMN Healthcare, Inc.* (2014) 223 Cal.App.4th.1515 [staffing company not vicariously liable for offered employee act in poisoning another employee]; Lisa *M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291 [hospital not responsible for an ultrasound technician molesting a woman].)

As a result of all the above, agency instructions are not relevant to this case and should not be given.

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PLAINTIFF'S [PROPOSED] INSTRUCTION (P-36) (not proposed at all by Defendant):

4.8 ACT OF AGENT IS ACT OF PRINCIPAL— SCOPE OF AUTHORITY NOT IN ISSUE

Any act or omission of an agent within the scope of authority is the act or omission of the principal.

Source: Ninth Circuit Model Civil Jury Instructions No. 4.8

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Plaintiff's statement in support of Plaintiff's proposed instruction 4.8:

Plaintiffs assert the instruction is necessary and appropriate, but are evaluating this instruction in light of Defendant's position and authority.

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Defendant's statement in opposition of Plaintiff's proposed instruction 4.8:

The same analysis applies to this agency instruction as to instruction 4.7 regarding ratification and Pepperdine objects to it on the same grounds.

We repeat the argument and authority here for the Court's ease of reference but note it is not any different than the argumenta and authority set out responding to instruction 4.7.

Agency principals such a ratification, scope of authority and respondeat superior liability are have no application in this case and will only confuse the jury. All of Plaintiffs' claims are "intentional torts" and a principal is not liable for an agent's intentional tort. Ratification only arguably becomes relevant here in addressing the issue of punitive damages under California law and the California instruction, CACI 3946, addresses the issue. (*See, Defendant's offered instruction D-50)*

As to Title IX, the Supreme Court has stated repeatedly that liability must be based upon the funding recipient's own intentional conduct and not on principals of respondeat superior. As stated by the Supreme Court in *Davis v. Monroe County Bd of Education*, 526 U.S. 629 (1999) at page 642, "We also recognized, however, that this limitation on private damages actions is not a bar to liability where a funding recipient intentionally violates the statute. [Citation omitted]" and at page 643 "*Gebser* thus established that a recipient intentionally violates Title IX, and is subject to a private damages action, where the recipient is deliberately indifferent to known acts of teacher-student discrimination." The Supreme Court addressed this issue in a teacher/student harassment case in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285-291 (1998). The Supreme Court expressly rejected the argument that vicarious liability could exist stating,

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> The administrative enforcement scheme [of Title IX] presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. Applying those principles here, we conclude that it would "frustrate the purposes" of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of respondeat superior or constructive notice, i.e., without actual notice to a school district official.

(*Gebser v. Lago Vista Indep. Sch. Dist*., *supra* at 290-291.) The *Gebser* Court identified the specific elements necessary for a fund recipient to be found liable for damages, stating:

> Consequently, in cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.

(*Gebser v. Lago Vista Indep. Sch. Dist*., *supra* at 290.)

Moreover, the same principal applies to a fund recipient's liability for retaliation for complaints about sexual discrimination. (*Jackson v. Birmingham Bd. of Educ*., 544 U.S. 167 (2005).) The Supreme Court recognized in *Jackson v. Birmingham Bd. of Educ*., 544 U.S. 167 (2005), that retaliation is a form of "intentional sex discrimination." (*Jackson v. Birmingham Bd. of Educ., supra* at 173-174.) It also required action by a fund recipient itself to establish liability stating, "To prevail on the merits, Jackson will have to prove that the Board retaliated against him because he complained of sex discrimination." (*Id*, at 184.)

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for the sexual molestation of a student by a teacher]; *Montague v. AMN Healthcare, Inc.* (2014) 223 Cal.App.4th.1515 [staffing company not vicariously liable for offered employee act in poisoning another employee]; Lisa *M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291 [hospital not responsible for an ultrasound technician molesting a woman].)

As a result of all the above, agency instructions are not relevant to this case and should not be given.

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SUBSTANTIVE INSTRUCTIONS

PLAINTIFF'S [PROPOSED] INSTRUCTION (P-42) (not proposed at all by Defendant):

Title IX – Discrimination

The plaintiffs have brought a claim under Title IX of the United States Education Amendments of 1972, 20 U.S.C. Sections 1681-1688. Title IX provides that no person in the United States shall, on the basis of sex, be excluded from participate in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

To establish this claim, Plaintiffs must prove the following:

1. That Pepperdine received Federal financial assistance for its education programs or activities;

2. That Plaintiffs were subjected to discrimination, denied the benefits of and excluded from participation as players on Pepperdine's Women's Basketball Team on the basis of their sexual orientation.

Source: 20 U.S.C. § 1681(a)

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Plaintiff's statement in support of Plaintiff's proposed instruction re Title IX Discrimination:

Plaintiffs' assert that this instruction is necessary and appropriate. Plaintiffs, however, are considering Defendant's arguments and authority on this issue as well as Defendant's offered instruction D-40 below.

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Defendant's statement in opposition of Plaintiff's proposed instruction re Title IX Discrimination:

This instruction is repetitive and confusing. It sets up incomplete standards that can distract the jury. It appears to show a lower standard for liability as required by *Jackson v. Birmingham Bd. of Educ*., 544 U.S. 167 (2005); *Davis v. Monroe County Bd of Education*, 526 U.S. 629 (1999), and *Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274 (1998), as discussed post. The jury will be misled and confused. Pepperdine offers D-40, Amended as the correct instruction.

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DEFENDANT'S [PROPOSED] INSTRUCTION (D-40 Amended) (not proposed at all by Plaintiff):

Title IX

Plaintiff Haley Videckis and Plaintiff Layana White each claim that she was harmed by being subjected to discrimination, harassment, and/or retaliation at school because of her sexual preference and that Pepperdine University is responsible for that harm. To establish this claim, Plaintiff Videckis and Plaintiff White must prove all of the following:

1. That she suffered discrimination and/or harassment based upon her sexual orientation, and/or retaliation for making complaints about discrimination or harassment based on her sexual orientation;

2. That the discrimination, harassment, and/or retaliation was so severe, pervasive, and objectively offensive that it effectively deprived her of the right of equal access to educational benefits and opportunities;

3. That Pepperdine University had actual knowledge of that discrimination, harassment, and/or retaliation; and

4. That Pepperdine University acted with deliberate indifference in the face of that knowledge.

To establish that Pepperdine University had actual knowledge of the harassment, discrimination and/or retaliation, Plaintiffs must prove an official who at a minimum had authority to address the alleged discrimination and to institute corrective measures had actual knowledge of the discrimination, harassment and/or

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retaliation.[1] The individual engaged in the discriminatory, harassing, and/or retaliatory conduct cannot be the official with actual knowledge for the proposes of establishing Pepperdine's actual knowledge and deliberate indifference.[2]

Pepperdine University acted with deliberate indifference if its response to the harassment was clearly unreasonable in light of all known circumstances.

(CACI 3069, modified; *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 1179-181 (2005); *Davis v. Monroe County Bd of Education*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).)

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[1] *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)

[2] *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291 (1998)

Plaintiff's statement in opposition of Defendant's proposed instruction re Title IX:

Plaintiffs have agreed the form of instruction of Defendant's offered D-40 above on the issue of Education Code Section 66270 and are considering possibly doing so on Title IX, but object to adding "objectively" in front of "offensive." Plaintiffs are still evaluating the "objectively" issue, but maintain this objection at this time.

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Defendant's statement in support of Defendant's proposed instruction re Title IX:

Defendant offers this instruction for Plaintiffs' Title IX claims. It is built on CACI 3069 which instructs on Education Code Section 220 liability based upon its following Title IX and the cases interpreting it. (*Donovan v. Poway Unified School District* (2008) 167 Cal.App.4th 567.) Though Eduction Code Section 220 is no longer in this case, Education Code Section 66270 is virtually identical to Education Code Section 220 and if there is a private right of action under Section 66270 Defendant asserts it is based upon Title IX jurisprudence just like a private right of action under Section 220.

Defendant added the following language to the form instruction to better reflect Title IX case law and decisions under Education Code Section 220. Specifically, Defendant added

- "objectively" in front of "offensive" so that the phrase reads "severe, pervasive and ***objectively*** offensive" consistent with *Davis v. Monroe County Bd of Education, 526 U.S. 629, 651 (1999)* and *Karasek v. Regents of the Univ. of Cal.*, 2015 U.S. Dist. LEXIS 166524 *; 2015 WL 8527338 (2015, USDC No. Dist. California) [peer and teach to student harassment case under Title IX].
- "To establish that Pepperdine University had actual knowledge of the harassment, discrimination and/or retaliation, Plaintiffs must prove an official who at a minimum had authority to address the alleged discrimination and to institute corrective measures had actual knowledge of the discrimination, harassment and/or retaliation," based upon *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) and *Salazar v. South San Antonio School District*, ___ F.4th ___, 2017 U.S. App. LEXIS 10649 * (5th Cir. 2017)

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- "The individual engaged in the discriminatory, harassing, and/or retaliatory conduct cannot be the official with actual knowledge for the proposes of establishing Pepperdine's actual knowledge and deliberate indifference," based upon *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). (*See also, Salazar v. South San Antonio Indep. Sch. Dist.*, ___ F.4th ___, 2017 LEXIS 10649 (5th Cir. 2017).)

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DEFENDANT'S [PROPOSED] INSTRUCTION (D-42) (not proposed at all by Plaintiff):

Estoppel

Defendant Pepperdine University contends Plaintiff Hailey Videckis and Plaintiff Layana White should be estopped from asserting that Defendant Pepperdine invaded their privacy, discriminated, harassed, and/or retaliated against them, or intentionally inflicted emotion distress upon them by inquiring of their medical condition and seeking records regarding it. Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it. Defendant Pepperdine must prove all of the following:

1. That Plaintiff Videckis and Plaintiff White knew the facts of their claim;

2. That Plaintiff Videckis and Plaintiff White intentionally and deliberately failed to inform Defendant Pepperdine of their complaint that their privacy was being invaded, they were being discriminated, harassed and/or retaliated against, or that Defendant Pepperdine was intentionally inflicting them with emotional distress by inquiring as to their health and seeking their medical records;

3. That Defendant Pepperdine believed the representation by Plaintiff Videckis and Plaintiff White that their claim did include inquiry into health and seeking their medical records; and

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4. That Defendant Pepperdine acted on the statement in structuring and conducting its Title IX investigation.

(California Evidence Code 623; CACI 336; *DRG/Beverly Hills, Ltd. V. Chopstix Dim Sum Café & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54)

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Plaintiff's statement in opposition of Defendant's proposed instruction re Estoppel:

Plaintiffs are considering this instruction as the evidence is presented.

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Defendant's statement in support of Defendant's proposed instruction re Estoppel:

Defendant does not know if Plaintiffs will be opposed this instruction. Defendant asserts it is entitled to the instruction based upon Plaintiffs' actions in not disclosing the full extent of their complaints either informally or at the outset of the Title IX investigation and that the instruction is supported by California Evidence Code 623; CACI 335; *DRG/Beverly Hills, Ltd. V. Chopstix Dim Sum Café & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54.

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DEFENDANT'S [PROPOSED] INSTRUCTION (D-43) (not proposed at all by Plaintiff):

Waiver

Defendant Pepperdine University contends Plaintiff Hailey Videckis and Plaintiff Layana White waived a known right having knowledge of the facts. The waiver may be express or implied, based on the conduct indicating an intent to relinquish the rights. To succeed, Defendant Pepperdine must prove all of the following:

1. That Plaintiff Videckis and Plaintiff White knew they were required to make known their claim after knowledge of the facts; and

2. That Plaintiff Hailey Videckis and Plaintiff Layana White freely and knowingly gave up their rights when they failed to report their claim in the Title IX investigation.

(Authority: CACI 2506; CACI 336; *DRG/Beverly Hills, Ltd. V. Chopstix Dim Sum Café & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54)

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Plaintiff's statement in opposition of Defendant's proposed instruction re Waiver:

Plaintiffs are considering this instruction as the evidence is presented.

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Defendant's statement in support of Defendant's proposed instruction re Waiver:

Defendant does not know if Plaintiffs' will be opposed to this instruction. Defendant asserts it is entitled to this instruction based upon the fact that Plaintiffs did not complain that they were being discriminated against or harassed based upon their sex or sexual orientation until they made their formal Title IX complaint and even then they did not complain that the alleged discrimination or harassment was based upon being asked for information regarding the medical conditions or the records supporting their medical conditions. Defendant asserts it is entitled to this instruction based under CACI 2506; CACI 336; *DRG/Beverly Hills, Ltd. V. Chopstix Dim Sum Café & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54.

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DEFENDANT'S [PROPOSED] INSTRUCTION (D-44) (not proposed at all by Plaintiff):

Unclean Hands

Defendant Pepperdine contends Plaintiff Hailey Videckis and Plaintiff Layana White's own misconduct precludes them from relief on their claims. To succeed, Defendant Pepperdine must prove all of the following:

1. That Plaintiff Videckis and Plaintiff White engaged in misconduct that violates law, conscience, or good faith in connection with the matter in controversy;

2. That Plaintiff Videckis and Plaintiff White's misconduct was sufficiently severe that Defendant Pepperdine would have discharged each of them because of that misconduct alone had Defendant Pepperdine known of it; and

3. That Defendant Pepperdine would have discharged each of them for their misconduct as a matter of settled campus policy.

(CACI 2506; *Thompson v. Tracor Flight* (2001) 86 Cal.App.4th 1156 at 1173; *Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 C.A.2d 675, 728)

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Plaintiff's statement in opposition of Defendant's proposed instruction re Unclean Hands:

Plaintiffs are considering this instruction as the evidence is presented.

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Defendant's statement in support of Defendant's proposed instruction re Unclean Hands:

Defendant does not know if Plaintiffs will be opposed to this instruction. Defendant asserts it is entitled to this instruction based upon Plaintiffs' illegal recording of conversations, violating Penal Code Section 623. Defendant asserts it is entitled to this instruction under CACI 2506 and *Thompson v. Tracor Flight* (2001) 86 Cal.App.4th 1156 and *Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304*, United Steelworkers of America, AFL-CIO (1964) 227 C.A.2d 675, 728.

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PLAINTIFF'S [PROPOSED] INSTRUCTION (P-43) (not proposed at all by Defendant):

10.1 CIVIL RIGHTS—DISPARATE TREATMENT—WHEN EVIDENCE SUPPORTS "SOLE REASON" OR "MOTIVATING FACTOR"

The plaintiffs have brought a claim of discrimination against the defendant. The plaintiffs claim that their sexual orientation was either the sole reason or a motivating factor for the defendant's decision to discharge the plaintiffs from the basketball team. The defendant denies that the plaintiffs' sexual orientation was either the sole reason or a motivating factor for the defendant's decision to discharge the plaintiffs from the basketball team.

Source: Ninth Circuit Model Civil Jury Instructions No. 10.1 (modified from instructions for Title VII claims); *See Oona R.-S.-by Kate S v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998)(applying Title VII standards in a Title IX suit).

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Plaintiff's statement in support of Plaintiff's proposed instruction 10.1:

Plaintiffs' assert that this instruction is necessary and appropriate based upon the authority cited. Plaintiffs are evaluating the need for this instruction and considering withdrawing it in favor of Defendant's offered instruction D-40 based upon the CACI formulation of Education Code liability, though without "objectively" in front of "offensive."

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Defendant's statement in opposition of Plaintiff's proposed instruction 10.1:

Defendant asserts that Title VII standards are not applied in Title IX cases as clearly held by the Supreme Court in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283-288 (1998). (*See also* the discussion under Defendant's offered instruction D-40, Amended, *supra*.) Plaintiffs' cited authority, *Oona R.-S.-by Kate S v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998), was decided April 24, 1998. *Gebser* was decided two months later, June 22, 1998, thus making the *Oona R.-S.-by Kate S* case a derelict on the law. As a result, this instruction is a misstatement of the law and will mislead and confuse the jury. Moreover, it is Defendant's position that it did not "discharge" Plaintiffs from the basketball team and thus the instruction is misleading.

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PLAINTIFF'S [PROPOSED] INSTRUCTION (P-44) (not proposed at all by Defendant):

10.2 CIVIL RIGHTS—DISPARATE TREATMENT—"SOLE REASON"—ELEMENTS AND BURDEN OF PROOF

As to the plaintiffs' claim that their sexual orientation or perceived sexual orientation was the sole reason for the defendant's decision to dismiss them from the basketball team, the plaintiffs have the burden of proving both of the following elements by a preponderance of the evidence:

1. the plaintiffs were dismissed from the basketball team by the defendant; and

2. the plaintiffs were dismissed solely because of the plaintiffs' sexual orientation or perceived sexual orientation.

If you find that the plaintiffs have proved both of these elements, your verdict should be for the plaintiffs. If, on the other hand, the plaintiffs have failed to prove either of these elements, your verdict should be for the defendant.

Source: Ninth Circuit Model Civil Jury Instructions No. 10.2 (modified from instructions for Title VII claims); *See Oona R.-S.-by Kate S v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998)(applying Title VII standards in a Title IX suit).

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Plaintiff's statement in support of Plaintiff's proposed instruction 10.2:

Plaintiffs' assert that this instruction is necessary and appropriate based upon the authority cited. Plaintiffs are evaluating the need for this instruction and considering withdrawing it in favor of Defendant's offered instruction D-40 based upon the CACI formulation of Education Code liability, though without "objectively" in front of "offensive."

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Defendant's statement in opposition of Plaintiff's proposed instruction 10.2:

Defendant asserts that Title VII standards are not applied in Title IX cases as clearly held by the Supreme Court in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283-288 (1998). (*See also* the discussion under Defendant's offered instruction D-40, Amended, *supra*.) Plaintiffs' cited authority, *Oona R.-S.-by Kate S v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998), was decided April 24, 1998. *Gebser* was decided two months later, June 22, 1998, thus making the *Oona R.-S.-by Kate S* case a derelict on the law. As a result, this instruction is a misstatement of the law and will mislead and confuse the jury. Moreover, Defendant did not "dismiss" Plaintiffs from the basketball team and as such the instruction is misleading.

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PLAINTIFF'S [PROPOSED] INSTRUCTION (P-45) (not proposed at all by Defendant):

10.3 CIVIL RIGHTS—DISPARATE TREATMENT—"MOTIVATING FACTOR"—ELEMENTS AND BURDEN OF PROOF

As to the plaintiffs' claim that their sexual orientation or perceived sexual orientation was a motivating factor for the defendant's decision to dismiss them from the basketball team, the plaintiffs have the burden of proving both of the following elements by a preponderance of the evidence:

1. the plaintiffs were dismissed from the basketball team by the defendant; and

2. the plaintiffs' sexual orientation was a motivating factor in the defendant's decision to dismiss the plaintiffs from the basketball team.

Source: Ninth Circuit Model Civil Jury Instructions No. 10.3 (modified from instructions for Title VII claims); *See Oona R.-S.-by Kate S v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998)(applying Title VII standards in a Title IX suit).

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Plaintiff's statement in support of Plaintiff's proposed instruction 10.3:

Plaintiffs' assert that this instruction is necessary and appropriate based upon the authority cited. Plaintiffs are evaluating the need for this instruction and considering withdrawing it in favor of Defendant's offered instruction D-40 based upon the CACI formulation of Education Code liability, though without "objectively" in front of "offensive."

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Defendant's statement in opposition of Plaintiff's proposed instruction 10.3:

Defendant asserts that Title VII standards are not applied in Title IX cases as clearly held by the Supreme Court in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283-288 (1998). (*See also* the discussion under Defendant's offered instruction D-40, Amended, *supra*.) Plaintiffs' cited authority, *Oona R.-S.-by Kate S v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998), was decided April 24, 1998. *Gebser* was decided two months later, June 22, 1998, thus making the *Oona R.-S.-by Kate S* case a derelict on the law. As a result, this instruction is a misstatement of the law and will mislead and confuse the jury. Moreover, Defendant did not "dismiss" Plaintiffs from the basketball team and as such the instruction is misleading.

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PLAINTIFF'S [PROPOSED] INSTRUCTION (P-46) (not proposed at all by Defendant):

10.5 CIVIL RIGHTS—HOSTILE ENVIRONMENT—HARASSMENT BECAUSE OF PROTECTED CHARACTERISTICS—ELEMENTS

The plaintiffs seek damages against the defendant for a sexually hostile work environment while attending Pepperdine. In order to establish a sexually hostile environment, the plaintiffs must prove each of the following elements by a preponderance of the evidence:

1. the plaintiffs were subjected to invasions of their privacy and repeated inquiries into their relationship;

2. the conduct was unwelcome;

3. the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiffs' schooling and create a sexually abusive or hostile environment;

4. the plaintiffs perceived the environment to be abusive or hostile; and

5. a reasonable student in the plaintiffs' circumstances would consider the environment to be abusive or hostile.

Whether the environment constituted a sexually hostile environment is determined by looking at the totality of the circumstances, including the frequency of the harassing conduct, the severity of the conduct, whether the conduct was physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interfered with Plaintiffs' performance.

Source: Ninth Circuit Model Civil Jury Instructions No. 10.5 (modified from instructions for Title VII claims); *See Oona R.-S.-by Kate S v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998)(applying Title VII standards in a Title IX suit).

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Plaintiff's statement in support of Plaintiff's proposed instruction 10.5:

Plaintiffs' assert that this instruction is necessary and appropriate based upon the authority cited. Plaintiffs are evaluating the need for this instruction and considering withdrawing it in favor of Defendant's offered instruction D-40 based upon the CACI formulation of Education Code liability, though without "objectively" in front of "offensive."

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Defendant's statement in opposition of Plaintiff's proposed instruction 10.5:

Defendant asserts that Title VII standards are not applied in Title IX cases as clearly held by the Supreme Court in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283-288 (1998). (*See also* the discussion under Defendant's offered instruction D-40, Amended, *supra*.) Plaintiffs' cited authority, *Oona R.-S.-by Kate S v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998), was decided April 24, 1998. *Gebser* was decided two months later, June 22, 1998, thus making the *Oona R.-S.-by Kate S* case a derelict on the law. As a result, this instruction is a misstatement of the law and will mislead and confuse the jury.

Defendant further assert that if the Court decides this instruction will be helpful to the jury, it must include Title IX standards in by adding "objectively offense" into numbered paragraph "3".

If the Court concludes that some form of this instruction should be given, Defendant asserts it should at a minimum state:

10.5 CIVIL RIGHTS—HOSTILE ENVIRONMENT—HARASSMENT BECAUSE OF PROTECTED CHARACTERISTICS—ELEMENTS

Plaintiff Haley Videckis and Plaintiff Layana White each seek damages against Defendant Pepperdine University for a sexually hostile work environment while attending Pepperdine. In order to establish a sexually hostile environment, Plaintiff Videckis and Plaintiff White must prove each of the following elements by a preponderance of the evidence:

1. Plaintiff Videckis and/or Plaintiff White were each subjected to invasions of their privacy and repeated inquiries into their relationship by Defendant Pepperdine;

2. Defendant Pepperdine's conduct was unwelcome;

3. Defendant Pepperdine's conduct was so severe, pervasive, and objectively offensive that it effectively deprived Plaintiff Videckis and/or Plaintiff White of the

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right of equal access to educational benefits and opportunities and thereby created a sexually abusive or hostile environment;

4. Plaintiff Videckis and/or Plaintiff White perceived the environment to be abusive or hostile; and

5. A reasonable student in Plaintiff Videckis' and/or Plaintiff White's circumstances would consider the environment to be abusive or hostile.

Whether the environment constituted a sexually hostile environment is determined by looking at the totality of the circumstances, including the frequency of the harassing conduct, the severity of the conduct, whether the conduct was physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interfered with Plaintiffs' performance.

To establish that Pepperdine University created the sexually hostile environment the plaintiffs must prove that an official who at a minimum had authority to address the alleged sexually hostile environment and to institute corrective measures had actual knowledge of the creation of the sexually hostile environment and was deliberately indifferent to its existence. The Pepperdine official with actual knowledge cannot be the individual, or one of the individuals, engaged in creating the sexually hostile environment.

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PLAINTIFF'S [PROPOSED] INSTRUCTION (P-47) (not proposed at all by Defendant):

10.8 CIVIL RIGHTS—RETALIATION—ELEMENTS AND BURDEN OF PROOF

The plaintiffs seek damages against the defendant for retaliation. The plaintiffs have the burden of proving each of the following elements by a preponderance of the evidence:

1. the plaintiffs engaged in or was engaging in an activity protected under federal law, that is making informal or formal complaints or demands;

2. Defendant Pepperdine subjected the plaintiffs to an adverse action, that is, an action a reasonable student would have found materially adverse, meaning they might have been dissuaded from making or supporting a charge of discrimination; and

3. the plaintiffs were subjected to the adverse action because they made informal or formal complaints or demands.

A plaintiff is "subjected to an adverse action" because of her participation in protected activity if the adverse employment action would not have occurred but for that participation.

If you find that the plaintiffs have proved all three of these elements, your verdict should be for the plaintiffs. If, on the other hand, the plaintiffs have failed to prove any of these elements, your verdict should be for the defendant.

Source: Ninth Circuit Model Civil Jury Instructions No. 10.8 (modified from instructions for Title VII claims); *See Oona R.-S.-by Kate S v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998)(applying Title VII standards in a Title IX suit).

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Plaintiff's statement in support of Plaintiff's proposed instruction 10.8:

Plaintiffs' assert that this instruction is necessary and appropriate based upon the authority cited. Plaintiffs are evaluating the need for this instruction and considering withdrawing it in favor of Defendant's offered instruction D-40 based upon the CACI formulation of Education Code liability, though without "objectively" in front of "offensive."

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Defendant's statement in opposition of Plaintiff's proposed instruction 10.8:

Defendant asserts that Title VII standards are not applied in Title IX cases as clearly held by the Supreme Court in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283-288 (1998). (*See also* the discussion under Defendant's offered instruction D-40, Amended, *supra*.) Plaintiffs' cited authority, *Oona R.-S.-by Kate S v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998), was decided April 24, 1998. *Gebser* was decided two months later, June 22, 1998, thus making the *Oona R.-S.-by Kate S* case a derelict on the law. As a result, this instruction is a misstatement of the law and will mislead and confuse the jury.

If the Court decides that a form of this instruction is needed, it should at a minimum reflect Title IX standards and read as follows:

10.8 CIVIL RIGHTS—RETALIATION—ELEMENTS AND BURDEN OF PROOF

Plaintiff Haley Videckis and Plaintiff Layana White each seek damages against Defendant Pepperdine University for retaliation. The plaintiffs have the burden of proving each of the following elements by a preponderance of the evidence:

1. Plaintiff Videckis and/or Plaintiff White engaged in or were engaging in a protected activity by complaining about acts of sexual orientation discrimination or harassment;

2. Defendant Pepperdine subjected Plaintiff Videckis and/or Plaintiff White to an adverse action, that is, an action that was so severe, pervasive, and objectively offensive that it effectively deprived Plaintiff Videckis and/or Plaintiff White of the right of equal access to educational benefits and opportunities such that a reasonable student would have been dissuaded from making or supporting a charge of discrimination at the time, or after, the protected activity took place; and

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3. Plaintiff Videckis and/or Plaintiff White were subjected to the adverse action because they made informal or formal complaints or demands to a Pepperdine official who at a minimum had authority to address the alleged discrimination and to institute corrective measures to address the actions that discriminated or harassed based upon sexual orientation and who was not engaged in the complained about activity.

To establish that Pepperdine University retaliated against them, Plaintiffs must prove an official who at a minimum had authority to address the alleged discrimination and to institute corrective measures took the retaliatory action against them and who was not the wrongdoer against whom they complained.[3]

A plaintiff is "subjected to an adverse action" because of her participation in protected activity if the adverse action would not have occurred but for that participation.

If you find that the plaintiffs have proved all three of these elements, your verdict should be for the plaintiffs. If, on the other hand, the plaintiffs have failed to prove any of these elements, your verdict should be for the defendant.

[3] *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998); Salaz*ar v. South San Antonio Indep. Sch. Dist.*, ___ F.4th ___, 2017 LEXIS 10649 (5th Cir. 2017)*M.D. v. Bowling Green Indep. Sch. Dist.*, 2017 U.S. Dist. LEXIS 11504 *23 - 24 (Western District of Kentucky, Bowling Green Division 2017)

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PLAINTIFF'S [PROPOSED] INSTRUCTION (P-48) (not proposed at all by Defendant):

PROTECTED ACTIVITY

Protected activity includes Plaintiffs' opposition toward discriminatory act by the defendant. Both formal and informal complaints or demands are protected activities.

Source: Ninth Circuit Model Civil Jury Instructions Comment to 10.8 (modified from instructions for Title VII claims); *See E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013-14 (9th Cir.1983); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 506 (9th Cir.2000); *See also Oona R.-S.-by Kate S v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998)(applying Title VII standards in a Title IX suit).

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Plaintiff's statement in support of Plaintiff's proposed instruction re Protected Activity:

Plaintiffs' assert that this instruction is necessary and appropriate based upon the authority cited. Plaintiffs are evaluating the need for this instruction and considering withdrawing it in favor of Defendant's offered instruction D-40 based upon the CACI formulation of Education Code liability, though without "objectively" in front of "offensive."

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Defendant's statement in opposition of Plaintiff's proposed instruction re Protected Activity:

Defendant asserts that Title VII standards are not applied in Title IX cases as clearly held by the Supreme Court in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283-288 (1998). (*See also* the discussion under Defendant's offered instruction D-40, Amended, *supra*.) Plaintiffs' cited authority, *Oona R.-S.-by Kate S v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998), was decided April 24, 1998. *Gebser* was decided two months later, June 22, 1998, thus making the *Oona R.-S.-by Kate S* case a derelict on the law. *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493 (2000), is a work place discrimination case under Title VII and once again does not apply in a Title IX context. As a result, this instruction is a misstatement of the law and will mislead and confuse the jury.

Moreover, to be actionable, the complaints must have been made to the University itself in the body of an "appropriate person" empowered to take corrective action who was not the wrongdoer. (*Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277, 290 (1998); *Salazar v. South San Antonio Indep. Sch. Dist.*, ___ F.4th ___, 2017 LEXIS 10649 (5th Cir. 2017)*M.D. v. Bowling Green Indep. Sch. Dist.*, 2017 U.S. Dist. LEXIS 11504 *23-24 (Western District of Kentucky, Bowling Green Division 2017)

Thus, if this instruction is to be used, it must state:

PROTECTED ACTIVITY

Protected activity includes Plaintiffs' opposition toward a discriminatory act by Defendant Pepperdine University. Both formal and informal complaints or demands are protected activities if they were made to an official of Defendant Pepperdine who at a minimum had authority to address the alleged discrimination and to institute corrective measures who was not the wrongdoer against whom they complained.

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PLAINTIFF'S [PROPOSED] INSTRUCTION (P-49) (not proposed at all by Defendant):

"ADVERSE ACTION" IN RETALIATION CASES

An action is an adverse action if a reasonable person would have found the action materially adverse, which means it might have dissuaded a reasonable student from making or supporting a charge of discrimination.

Source: Ninth Circuit Model Civil Jury Instructions No. 10.10 (modified from instructions for Title VII claims); *See Oona R.-S.-by Kate S v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998)(applying Title VII standards in a Title IX suit).

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Plaintiff's statement in support of Plaintiff's proposed instruction re "Adverse Action" in Retaliation Cases:

Plaintiffs' assert that this instruction is necessary and appropriate based upon the authority cited. Plaintiffs are evaluating the need for this instruction and considering withdrawing it in favor of Defendant's offered instruction D-40 based upon the CACI formulation of Education Code liability, though without "objectively" in front of "offensive."

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Defendant's statement in opposition of Plaintiff's proposed instruction re "Adverse Action" in Retaliation Cases:

Defendant asserts that Title VII standards are not applied in Title IX cases as clearly held by the Supreme Court in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283-288 (1998). (*See also* the discussion under Defendant's offered instruction D-40, Amended, *supra*, and *Davis v. Monroe County Bd of Education, 526 U.S. 629 (1999)*.) Plaintiffs' cited authority, *Oona R.-S.-by Kate S v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998), was decided April 24, 1998. *Gebser* was decided two months later, June 22, 1998, thus making the *Oona R.-S.-by Kate S* case a derelict on the law. As a result, this instruction is a misstatement of the law and will mislead and confuse the jury.

If, however, this instruction is used, it must reflect Title IX standards and should read:

"ADVERSE ACTION" IN RETALIATION CASES

An action is an adverse action if a reasonable person would have found the action so severe, pervasive, and objectively offensive that it effectively deprived her of the right of equal access to educational benefits and opportunities and thus it might have dissuaded a reasonable student from making or supporting a charge of discrimination.

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PLAINTIFF'S [PROPOSED] INSTRUCTION (P-50) (not proposed at all by Defendant):

10.11 CIVIL RIGHTS—TITLE VII—"ADVERSE ACTION" IN DISPARATE TREATMENT CASES

An action is an adverse action if it materially affects the terms, conditions, or privileges of Plaintiffs' educational opportunities.

Source: Ninth Circuit Model Civil Jury Instructions No. 10.11 (modified from instructions for Title VII claims); *See Oona R.-S.-by Kate S v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998)(applying Title VII standards in a Title IX suit).

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Plaintiff's statement in support of Plaintiff's proposed instruction 10.11:

Plaintiffs' assert that this instruction is necessary and appropriate based upon the authority cited. Plaintiffs are evaluating the need for this instruction and considering withdrawing it in favor of Defendant's offered instruction D-40 based upon the CACI formulation of Education Code liability, though without "objectively" in front of "offensive."

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Defendant's statement in opposition of Plaintiff's proposed instruction 10.11:

Defendant asserts that Title VII standards are not applied in Title IX cases as clearly held by the Supreme Court in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283-288 (1998). (*See also* the discussion under Defendant's offered instruction D-40, Amended, *supra*, and *Davis v. Monroe County Bd of Education*, 526 U.S. 629 (1999)) Plaintiffs' cited authority, *Oona R.-S.-by Kate S v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998), was decided April 24, 1998. *Gebser* was decided two months later, June 22, 1998, thus making the *Oona R.-S.-by Kate S* case a derelict on the law. As a result, this instruction is a misstatement of the law and will mislead and confuse the jury.

If the Court chooses to offer a form of this instruction, it should reflect Title IX standards and at a minimum read as follows:

10.11 CIVIL RIGHTS—TITLE VII—"ADVERSE ACTION" IN DISPARATE TREATMENT CASES

An action is an adverse action if it was so severe, pervasive, and objectively offensive that it effectively deprived her of the right of equal access to educational benefits and opportunities.

;

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PLAINTIFF'S [PROPOSED] INSTRUCTION (P-54) (not proposed at all by Defendant):

DAMAGES-INVASION OF PRIVACY

Damages flowing from an invasion of privacy include an award for mental suffering and anguish.

Source: *Miller v. National Broadcasting Co.*, 187 Cal. App.3d 1463, 1481 (1986) citing *Farifield v. American Photocopy Equipment Co.*, 138 Cal. App.2d 82 (1955).

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Plaintiff's statement in support of Plaintiff's proposed instruction re Damages Invasion of Privacy:

Plaintiffs assert this instruction is necessary for informing the jury that damages for invasion can be awarded for mental suffering and anguish even if there are no special damages attributed to the intrusive conduct. The parties are considering the use of CACI 1820, the damage instruction covering intrusion.

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Defendant's statement in opposition of Plaintiff's proposed instruction re Damages Invasion of Privacy:

The offered special instruction is not necessary since CACI 1820 addresses appropriate damages and it is properly left to the end of the instructions for the purposes of setting damage amounts. Moreover, the giving of multiple damage instructions places too much weight on the issue and should be addressed as set out by standard instructions.

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PLAINTIFF'S [PROPOSED] INSTRUCTION (P-56, modified to address Education Code §66270):

3069. Harassment in Educational Institution (Ed. Code, § 66270)

Plaintiffs claim that they were harmed by being subjected to harassment at Pepperdine because of their sexual orientation and that Defendant Pepperdine is responsible for that harm. To establish this claim, Plaintiffs must prove all of the following:

1. That Plaintiffs suffered harassment that was so severe, pervasive, and offensive that it effectively deprived them of the right of equal access to educational benefits and opportunities;

2. That Pepperdine had actual knowledge of that harassment; and

3. That Pepperdine acted with deliberate indifference in the face of that knowledge.

Pepperdine acted with deliberate indifference if its response to the harassment was clearly unreasonable in light of all the known circumstances.

Source: CACI Jury Instructions No. 3069

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DEFENDANT'S [PROPOSED] INSTRUCTION (D-40 Amended and to address Education Code Section 66270):

Education Code Section 66270

Plaintiff Haley Videckis and Plaintiff Layana White each claim that she was harmed by being subjected to discrimination, harassment, and/or retaliation at school because of her sexual preference and that Pepperdine University is responsible for that harm. To establish this claim, Plaintiff Videckis and Plaintiff White must prove all of the following:

1. That she suffered discrimination and/or harassment based upon her sexual orientation, and/or retaliation for making complaints about discrimination or harassment based on her sexual orientation;

2. That the discrimination, harassment, and/or retaliation was so severe, pervasive, and objectively offensive that it effectively deprived her of the right of equal access to educational benefits and opportunities;

3. That Pepperdine University had actual knowledge of that discrimination, harassment, and/or retaliation; and

4. That Pepperdine University acted with deliberate indifference in the face of that knowledge.

To establish that Pepperdine University had actual knowledge of the harassment, discrimination and/or retaliation, Plaintiffs must prove an official who at a minimum had authority to address the alleged discrimination and to institute corrective measures had actual knowledge of the discrimination, harassment and/or

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retaliation.[4] The individual engaged in the discriminatory, harassing, and/or retaliatory conduct cannot be the official with actual knowledge for the proposes of establishing Pepperdine's actual knowledge and deliberate indifference.[5]

Pepperdine University acted with deliberate indifference if its response to the harassment was clearly unreasonable in light of all known circumstances.

(CACI 3069, modified; *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 1179-181 (2005); *Davis v. Monroe County Bd of Education*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).)

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[4] *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)

[5] *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291 (1998)

Plaintiff's statement in support of Plaintiff's proposed instruction RE VIOLATION OF CALIFORNIA EDUCATION CODE § 66270:

Plaintiffs have agreed to use CACI 3069 as the appropriate form for their claim that Education Code § 66270 was violated but have not agreed to the Title IX standards inserted by Defendant and thus assert Plaintiffs' offered instruction P-56 is the appropriate choice.

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Defendant's statement in opposition of Plaintiff's proposed instruction RE VIOLATION OF CALIFORNIA EDUCATION CODE § 66270:

An instruction under Education Code §66270 should be based upon Title IX jurisprudence (*Donovan v. Poway Unified School District* (2008) 167 Cal.App.4th 567). To accomplish this end, Defendant asserts Plaintiffs' instruction should be modified as follows:

- "objectively" in front of "offensive" so that the phrase reads "severe, pervasive and ***objectively*** offensive" consistent with *Davis v. Monroe County Bd of Education, 526 U.S. 629, 651 (1999)* and *Karasek v. Regents of the Univ. of Cal.*, 2015 U.S. Dist. LEXIS 166524 *; 2015 WL 8527338 (2015, USDC No. Dist. California) [peer and teacher to student harassment case under Title IX].
- "To establish that Pepperdine University had actual knowledge of the harassment, discrimination and/or retaliation, Plaintiffs must prove an official who at a minimum had authority to address the alleged discrimination and to institute corrective measures had actual knowledge of the discrimination, harassment and/or retaliation," based upon *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) and *Salazar v. South San Antonio School District*, ___ F.4th ___, 2017 U.S. App. LEXIS 10649 * (5th Cir. 2017)
- "The individual engaged in the discriminatory, harassing, and/or retaliatory conduct cannot be the official with actual knowledge for the proposes of establishing Pepperdine's actual knowledge and deliberate indifference," based upon *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). *(See also, Salazar v. South San Antonio School District*, ___ F.4th ___, 2017 U.S. App. LEXIS 10649 * (5th Cir. 2017).)

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PLAINTIFF'S [PROPOSED] INSTRUCTION (P-60):

3060. Unruh Civil Rights Act—Essential Factual Elements (Civ. Code, §§ 51, 52)

Plaintiffs claim that Pepperdine denied them full and equal accommodations, advantages, facilities, privileges or services because of their sexual orientation or perceived sexual orientation.

To establish this claim, Plaintiffs must prove all of the following:

1. That Pepperdine discriminated against Plaintiffs in connection with its provision of full and equal accommodations/advantages/facilities/privileges/services to Plaintiffs;

2. That a substantial motivating reason for Pepperdine's conduct was its perception of Plaintiffs' sexual orientation;

3. That Plaintiffs were harmed; and

4. That Pepperdine's conduct was a substantial factor in causing Plaintiffs' harm.

Source: CACI Jury Instructions No. 3060, Civil Code §§ 51, 52

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DEFENDANT'S [PROPOSED] INSTRUCTION (D-18):

Unruh Civil Rights Act - Essential Factual Elements (Civ. Code, §§ 51, 52)

Plaintiff Haley Videckis and Plaintiff Layana White claim that Pepperdine University denied each of them full and equal accommodations, facilities, privileges and/or services because of their sexual orientation or perceived sexual orientation. To establish this claim, Plaintiff Videckis and Plaintiff White must prove all the following:

1. That Defendant Pepperdine intentionally denied full and equal accommodations, facilities, privileges and/or services to Plaintiff Videckis and/or Plaintiff White;

2. That a substantial motivating reason for Defendant Pepperdine's conduct was Plaintiff Videckis' and/or Plaintiff White's sexual orientation;

3. That Plaintiff Videckis and/or Plaintiff White was harmed; and

4. That Defendant Pepperdine's conduct was a substantial factor in causing Plaintiff Videckis' and/or Plaintiff White's harm.

(CACI, No. 3060, modified)

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Plaintiff's statement in opposition of Defendant's proposed instruction re Unruh Civil Rights Act - Essential Factual Elements (Civ. Code, §§ 51, 52 and in favor of Plaintiff's version of the same:

Plaintiffs object to the inclusion of the word "intentionally" in numbered paragraph "1". Plaintiffs assert that the intentionality requirement is not clearly established and that, to the extent that it is, it is properly reflected in the CACI form instruction as offered by Plaintiffs.

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Defendant's statement in support of Defendant's proposed instruction re Unruh Civil Rights Act - Essential Factual Elements (Civ. Code, §§ 51, 52 and in favor of Defendant's version of the same:

Defendant asserts its offered instruction is the better formulation of the standard CACI instruction for the Unruh Civil Rights Act, Civil Code §51 for the following reasons:

1. A violation of the Act requires that a defendant's action s be intentional. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1149). While the intent element is addressed in the "motivating reason" element, Defendant asserts it is not clear enough as the form is drafted and the addition of the word "intentional" is appropriate for a clear explanation of the law.

2. Plaintiffs should be called out separately since proof of the elements as to one does not necessarily mean proof of the elements as to the other. Thus, having them named separately is consistent with the true burdens and with 9th Circuit Model Instruction 1.8, "Two or More Parties – Different Legal Rights."

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DATED: July 27, 2017 ZUBER LAWLER & DEL DUCA LLP

By: /s/ Jayesh Patel[6]
Jayesh Patel
Robert W. Dickerson Jr.
Attorneys for Defendant PEPPERDINE UNIVERSITY

DATED: July 27, 2017 ANDERSON, McPHARLIN & CONNERS LLP

By: /s/ David R. Hunt
Paula Tripp Victor
David R. Hunt
Peter B. Rustin
Attorneys for Defendant PEPPERDINE UNIVERSITY

Attestation of Concurrence

I, David R. Hunt, as the ECF user and filer of this document, attest that concurrence in the filing of this document has been obtained from Jayesh Patel.

Dated: July 27, 2017 /s/ David R. Hunt
David R. Hunt

[6] This authority was granted after the parties' extensive meet and confer and instructions being given on completion as memorialized via email communications. Defendant made every possible effort to accurately reflect Plaintiffs'' counsel's direction. Defendant notes, however, Plaintiffs' counsel has not had the opportunity to review the final document before its submission and thus may have edits or modifications they wish to offer.

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