

## Outside Counsel

## Expert Analysis

# E-Mail, Text, Facebook...Lawsuit? Legal Minefield of Cyberbullying

Cyberbullying occurs when one person uses technology at his or her disposal to threaten another person. According to the New York State Department of Criminal Justice Services, it can be defined as “the repeated use of information technology, including e-mail, instant message, blogs, chat rooms, pagers, cell phones and gaming systems to deliberately harass, threaten or intimidate others.”<sup>1</sup> Variations of cyberbullying include offensive and sexually charged messages to the recipient, cyberstalking, sharing intimate information about the victim with others, monitoring the victim’s online activities, and even infecting the victim’s computer with a virus.

Seemingly impersonal and distant cyberbullying and other forms of online harassment can hurt the recipient’s feelings, destroy lives (as is evident in the recent case involving a Rutgers University student), and, in some cases, result in expensive lawsuits. Cyberbullying is possible among all groups, from children and young adults in educational institutions to sophisticated professionals at large companies. Although much has been written about cyberbullying, case law involving cyberbullying is new and constantly evolving.

In this article, we will discuss several recent cases on cyberbullying in educational settings and offer our thoughts on this evolving area of law.

### Defamation and Distress

We all remember a bully in our schoolyard. Unfortunately, bullying is no longer limited to the kids’ lunchrooms and gym locker rooms. Bullying is now online. Just how different is traditional bullying from cyberbullying? Unfortunately, cyberbullying doesn’t stop when the school bell rings, and it need not occur on school grounds. With technology and the Internet, it can also be anonymous and hard to trace.

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Although cyberbullying is not an independent tort, the victims of cyberbullying may pursue causes of action for intentional infliction of emotional distress, or defamation. Certainly not an easy burden to meet, intentional infliction of emotional distress occurs when the harasser’s conduct is so “outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”<sup>2</sup> There are additional elements that must be met—the victim must prove intent to cause or knowledge of substantial probability of causing severe emotional distress. Additionally, the victim must be able to establish a connection between the harassing conduct and the injury sustained, and whether that injury is psychological, financial, or even physical. Of course, plaintiff must also be able to prove that he or she suffered from severe emotional distress.

If the victim of online harassment chooses to proceed with a cause of action for defamation, plaintiff is required to show that: (1) defendant made an oral or written false and defamatory statement; (2) regarding the plaintiff; (3) that is published to others by the defendant; and (4) that there is resultant injury or per se harm. It is for the court to decide in the first instance whether the writings and/or statements are susceptible to a particular defamatory meaning which plaintiff ascribes to them.<sup>3</sup>

In a recent case of *Finkel v. Dauber*,<sup>4</sup> the Supreme Court in Nassau County found that statements posted on a secret Facebook group created by the defendants (five of the plaintiff’s fellow school mates) did not amount to defamation.

The Facebook group, called “Ninety Cents Short of a Dollar” was a private Facebook group with membership restricted to invitees only.<sup>5</sup>

Although the plaintiff’s name was never mentioned, the plaintiff alleges that the references to the “11th cent” throughout the group’s postings was about plaintiff, because of an edited photograph on the site of plaintiff, seemingly resembling a “devil,” cross-referenced with a post commenting that the 11th cent turned into a devil.<sup>6</sup> The postings by the group’s members basically stated, according to the court, that “the Plaintiff contracted AIDS by having sex with a horse or a baboon or that she contracted AIDS from a male prostitute who also gave her crabs and syphilis, or that having contracted sexually transmitted diseases in such manner she morphed into the devil.”<sup>7</sup>

Finding that “[t]he entire context and tone of the posts constitute evidence of adolescent insecurities and indulgence, and a vulgar attempt at humor,” the court dismissed the defamation claim. The court stated that “Determining whether a given statement expresses fact or opinion is a question of law for the court and one which must be answered ‘on the basis of what the average person hearing or reading the communication would take it to mean.’” It went on to hold that the online statements directed against plaintiff, “taken together, can only be read as puerile attempts by adolescents to outdo each other” and not as statements of fact.<sup>8</sup>

Trial courts still view cyberbullying cases with a dose of skepticism, and plaintiffs have a high burden to meet in proving defamation or emotional distress.

Additionally, the plaintiff’s second cause of action for negligent supervision against the harasser’s parents failed because the parents could not be held liable for “negligent supervision of a child, absent an allegation that the parent

entrusted the child with a dangerous instrument which caused harm to a third party."<sup>9</sup> The court declined to declare a computer a dangerous instrument, as it "would create an exception that would engulf the rule against parental liability."<sup>10</sup> Finally, the court rejected the plaintiff's claim that the posts constitute cyber bullying, and stated that "the Courts of New York do not recognize cyber or internet bullying as a cognizable tort action."<sup>11</sup>

As this case illustrates, trial courts still view cyberbullying cases with a dose of skepticism, and plaintiffs certainly have a high burden to meet in proving defamation or emotional distress as result of cyberbullying.

### Use of Title IX

Title IX of the Education Amendments of 1972, states that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." The Supreme Court in *Davis v. Monroe Cty Bd. of Educ.*<sup>12</sup> held that educational institutions may, in certain circumstances, be liable to student victims of harassment and bullying. Title IX is often used by students and their parents who allege that the educational institutions tolerated peer-to-peer or teacher-to-peer sexual harassment and failed to investigate legitimate complaints, thus depriving students of educational opportunities.

In *S.S. v. Hastings-on-Hudson Unified School District*,<sup>13</sup> (in which the authors' firm represented the defendants) plaintiff S.S. was a freshman in the Hastings High School during the 2004-2005 school year. Between March 17 and March 25, 2005, plaintiff received three short e-mails, all of which were sent from another e-mail account by a student named "M.X." The three e-mails were extremely sexually explicit, referred to the victim's various body parts, mocked plaintiff's weight, and were perceived by plaintiff to be physically threatening.

Following an investigation by the district, S.S. and her parents sued the district for deprivation of S.S.'s educational opportunities under Title IX. Plaintiffs asserted that due to these three incidents of harassment, the student became afraid for her physical safety, was forced to stop socializing with other teens, stopped getting good grades, and was eventually forced to leave the school.

Since this was a Title IX case, plaintiffs had a burden to establish that (1) the perceived incidents of harassment were severe and pervasive; and (2) that the educational institution, the district, in this case, was deliberately indifferent and did not conduct a sufficient investigation.<sup>14</sup>

The Second Circuit reiterated the standard that was first set out by the Supreme Court in *Davis*, supra. The *Davis* court held that in order to prevail on a claim against an educational

institution under Title IX, plaintiffs must show that (1) the school acted with "deliberate indifference" to sexual harassment (2) and that the harassment was so "severe, pervasive, and objectively offensive that it effectively barred... access to an educational opportunity or benefit."<sup>15</sup> The circuit court went on to hold that although each case is to be evaluated on its own facts and there are no clear and established boundaries for what constitutes sufficiently severe and pervasive harassment, the three e-mails received over a single 10-day period with no negative effect on plaintiff's educational life, did not "rise to the level of actionable sexual harassment under federal law."<sup>16</sup>

In other words, the Second Circuit held that the length, content, and effect of cyberbullying on the victim's life will determine the outcome of the case brought by the victim of school online harassment. Not every e-mail or text, no matter how offensive, can be a basis for federal claims.

In *Brodsky v. Trumbull Board of Educ.*,<sup>17</sup> plaintiffs Maria Brodsky and her minor child, S.B. brought suit against defendants for depriving plaintiff of educational opportunities under Title IX, claiming that the defendants "tolerated and encouraged a pattern of sexual misconduct and gender discrimination" against S.B. S.B. was an eighth grade student at Madison Middle School over the course of the 2005-2006 school year. She was the victim of harassment and bullying by her peers in and outside of school.

A few incidents occurred through online instant messaging between S.B. and other students. Plaintiff was called names, and comments were made with respect to her sexual orientation. The case involved numerous instances of online and offline name calling and harassment. The issue on summary judgment was whether plaintiffs presented sufficient evidence of each element of a Title IX claim to survive summary judgment.<sup>18</sup>

The court found that "the evidence shows that while S.B. suffered numerous instances of rude and unkind treatment by various peers, the alleged behavior was not sufficiently pervasive or severe from an objective standpoint so as to give rise to a claim under Title IX."<sup>19</sup> It appears that the court based its decision on the fact that the victim and the harasser knew each other and had a "history" of insulting each other. The court noted that federal law is not "intended and does not function to protect students from bullying generally...or to provide them recourse for mistreatment not based on sex."<sup>20</sup> Additionally, the court found no evidence that plaintiff was deprived of any educational opportunities.

What do these cases teach us? Educational institutions should be mindful of two elements of online harassment and should react with due speed to all legitimate complaints. Of course, there is a difference between a stray e-mail and string of offensive e-mails intent on personally attacking the recipient. All incidents, however,

must be thoroughly investigated. Title IX liability for an educational institution arises only if, in addition to severity and pervasiveness of online harassment, the institution failed to take reasonable steps to investigate harassment. Of course, reasonableness is a very subjective standard and, certainly, some alleged victims would be dissatisfied with the investigation no matter how thorough or prompt.

Nonetheless, the institution should follow these basic steps in order to assist the victim and protect itself from costly suits: (1) commence an investigation immediately upon receipt of an oral or written complaint; (2) take all threats to the recipient, no matter how implausible, seriously; (3) preserve all evidence; (4) work with Internet technology specialists inside and, if needed, outside of the institution to trace the offensive e-mails or messages to the sender; (5) take appropriate actions against the alleged harasser. The institution must also develop an effective set of written policies dealing with online harassment and enforce its policies fairly and consistently.

### Conclusion

With the proliferation of social networks and other online communication programs, we are witnessing an increase in federal and state cases alleging cyberbullying. Although some federal laws already deal with online harassment (such as Title IX in schools), it appears that the two recovery theories most often used by plaintiffs are defamation and intentional infliction of emotional distress.

1. [http://criminaljustice.state.ny.us/missing/i\\_safety/cyberbullying.htm](http://criminaljustice.state.ny.us/missing/i_safety/cyberbullying.htm).
2. *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293 (1983).
3. *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235 (1991); *Chalpin v. Amordian Press Inc.*, 128 A.D.2d 81, 515 N.Y.S.2d 434 (1987).
4. 906 N.Y.S.2d 697 (Sup. Ct. Nassau County 2010).
5. *Id.* at 700.
6. *Id.* at 700-01.
7. *Id.* at 702.
8. *Id.*
9. *Id.* at 702.
10. *Id.*
11. *Id.* at 702-03.
12. 526 U.S. 629 (1999).
13. 2010 WL 1407359 (2d Cir.).
14. *K.M. ex. Rel. D.G. v. Hyde Park Cent. School Dist.*, 381 F.Supp.2d 343, 360 (S.D.N.Y. 2005).
15. *Id.* at 232.
16. *Id.* at 234.
17. 2009 WL 230708 (D. Conn.).
18. *Id.* at \*6.
19. *Id.*
20. *Id.* at 7.