IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JAMES and CHERIE BOSTIC and JENNIFER BOSTIC, Plaintiffs, v. THE SMYRNA SCHOOL DISTRICT, THE SMYRNA BOARD OF EDUCATION, SMYRNA HIGH SCHOOL, CLARENCE E. LLOYD, IN HIS INDIVIDUAL and OFFICIAL CAPACITIES, ANTHONY E. SOLIGO, IN HIS INDIVIDUAL and OFFICIAL CAPACITIES, JOHN SMITH, IN HIS INDIVIDUAL and OFFICIAL CAPACITIES, and EVELYN SMITH Defendants.	)	Case No. 01-0261 KAJ

MEMORANDUM ORDER

I. Introduction

In July 2003, a jury found, after a five day trial in this case, that the Smyrna School District, the Smyrna Board of Education, and Smyrna High School (collectively referred to herein as the “Institutional Defendants”) were not liable for sexual harassment of Plaintiff Jennifer Bostic (“Bostic”) under Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681 et seq. (“Title IX”), and that the Institutional Defendants, Clarence E. Lloyd (“Lloyd”), individually and in his official capacity as Principal of Smyrna High School, and Anthony E. Soligo (“Soligo”),

individually and in his official capacity as Associate Principal of Smyrna High School,[1] did not violate 42 U.S.C. § 1983 by depriving Bostic of her constitutional rights to equal protection, due process, and right to be free from unreasonable searches and seizures. (Docket Item ["D.I."] 142; D.I. 28 at ¶¶ 13-28.)[2]

Presently before the Court is a Motion for a New Trial (D.I. 144; the "Motion") filed by Bostic pursuant to Fed. R. Civ. P. 59(a). For the reasons discussed below, the Motion will be denied.

II. Standard of Review

Fed. R. Civ. P. 59(a) states that "[a] new trial may be granted to all or any of the parties and on all or part of the issues ... in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." The decision to grant or deny a new trial is within the sound discretion of the trial court. *See Allied Chem. Corp. v. Darflon, Inc.*, 449 U.S. 33, 36 (1980); *Olefins Trading, Inc. v. Han Yang Chem. Corp.*, 9 F.3d 282 (3d Cir. 1993). Where a motion for a new trial is based primarily on the weight of the evidence, the court should grant such a motion "only if the record shows that the jury's verdict resulted in a miscarriage of justice, or when the verdict, on the record, cries out to be overturned or shocks the conscience." *Williamson v. Consolidated Rail Corp.*, 926

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[1] The Institutional Defendants and Lloyd and Soligo are collectively referred to herein as the "School Defendants."

[2] In addition, the jury found that the School Defendants were not liable to Bostic or her parents for intentional infliction of emotional distress. (D.I. 142.) The jury also found that defendant John Smith was liable to Bostic for sexual harassment under Title IX and that he violated Section 1983 with respect to Bostic's constitutional rights. (*Id.*) Accordingly, the jury awarded Bostic money damages from John Smith. (*Id.*)

F.2d 1344, 1353 (3d Cir.1991). "This limit on the trial court's power to grant a new trial seeks to ensure that a trial court does not substitute its 'judgment of the facts and the credibility of the witnesses for that of the jury.'" *Fineman v. Armstrong World Indus.*, Inc., 980 F.2d 171, 211 (3d Cir. 1992).

III. Discussion

Bostic alleges that she is entitled to a new trial for two reasons. First, she argues that the jury's verdict was against the weight of the evidence. (D.I. 144 at 3-12, 17-18.) In support of her position, Bostic states that the Institutional Defendants are liable under Title IX and § 1983 because defendants Lloyd and Soligo had notice of an improper and inappropriate relationship between Bostic and defendant Smith, but were deliberately indifferent to that information, and even "tried to prevent the reporting of the information to the proper authorities." (*Id*. at 12.) Second, Bostic maintains that I failed to instruct the jury properly with respect to Title IX and § 1983. According to Bostic, my instructions to the jury regarding "actual notice," "appropriate official," "supervisory liability," and "lack of training" were erroneous. (*Id*. at 12-16, 18-19.) I will discuss each of these arguments in turn.

A. The weight of the evidence

After several years of litigating this matter, the plaintiff clearly views the jury's verdict as unsatisfactory. That reaction, while not surprising, does not mean that the verdict was against the weight of the evidence. There is ample evidence in the record, some of which is summarized in the School Defendants' Answering Brief (D.I. 148), from which the jury could reasonably conclude that the School Defendants were not liable to Bostic for sexual harassment under Title IX, or for violations of § 1983 for

deprivation of her constitutional rights.[3] The jury's verdict did not "shock the conscience" or result in a "miscarriage of justice." It would therefore be improper for me to cast aside the jury's judgment of the facts and credibility of the witnesses, and I will not do so.

B. The court failed to properly instruct the jury

1. Title IX instructions

At trial, I gave the jury the following instructions with regard to the Institutional Defendants' Title IX liability:

> 16. Title IX
> ... In order for Jennifer Bostic to establish her Title IX claim against the Institutional Defendants, she has the burden of proving by a preponderance of the evidence that a school official with the power to take action to correct the discrimination had actual notice of the discrimination, and further, that the Institutional Defendants then responded to that notice with deliberate indifference.
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> 17. "Actual Notice" and "Appropriate Person"
> An educational institution has "actual notice," sometimes called "actual knowledge" of discrimination, if an appropriate person at the institution has knowledge of facts sufficiently indicating substantial danger to a student so that the institution can reasonably be said to be aware of the danger.
> An "appropriate person" is ... one with the power to take action to correct the discrimination. A school principal who is entrusted with the responsibility and authority normally associated with that position will ordinarily be an

[3]For example, the jury could have reasonably concluded that Lloyd and Soligo did not have "actual notice" of the sexual relationship between Bostic and defendant Smith because they believed the testimony of Lloyd and Soligo on that point and rejected contrary evidence. Even if the jury believed that Lloyd and Soligo knew Smith and Bostic had a relationship that had strayed from the bounds of the strictly professional, the jury could have credited testimony that Lloyd and Soligo did not have actual notice of the sexual character of the relationship.

> "appropriate person." Other school officials may be "appropriate persons," depending on their power to take corrective action to address the discrimination and institute measures.

(D.I. 134 at 16-18.)

Those instructions are not erroneous. In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), the Supreme Court held that "a damages remedy will not lie under Title IX unless an [appropriate] official ... has actual knowledge of discrimination in the recipient's programs and fails adequately to respond. We think, moreover, that a response must amount to deliberate indifference to discrimination." *Id*. at 290. Bostic incorrectly argues that the actual knowledge standard is met by "*information* sufficient to *alert* the principal *to the possibility* that a teacher was involved in a sexual relationship with a student" (emphasis in the original). (D.I. 144 at 13) (quoting *Gebser*, 524 U.S. at 291).[4] Mere possibilities, alone, are not a basis for liability in light of the instruction in *Gebser* that a constructive notice standard is inappropriate. *Gebser*, 524 U.S. at 285 ("[I]t 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.").

Furthermore, Bostic incorrectly asserts that my instruction on actual notice was

[4] *Gebser* states, "[a]pplying the framework to this case is fairly straightforward, as petitioners do not contend they can prevail under an actual notice standard. The only official alleged to have had information about [the teacher's] misconduct is the high school principal. That information, however, consisted of a complaint form parents of other students charging only that [the teacher] had made inappropriate comments during class, which was plainly *insufficient* to alert the principal to the possibility that [the teacher] was involved in a sexual relationship with at student." 524 U.S. at 291 (emphasis added).

erroneous as a matter of law because there "is no substantial danger test under the actual notice standard for Title IX liability." (D.I. 144 at 14.)[5] In *Rosa H. v. San Elizario Independent School District*, 106 F.3d 648 (5th Cir. 1997), the court applied the Supreme Court's Eighth Amendment "deliberate indifference" jurisprudence in *Farmer v. Brennan*, 511 U.S. 825 (1994) to Title IX. Explaining its rationale for analogizing an Eighth Amendment case with a Title IX case, the court in *Rosa H.* stated that, "[j]ust as a prison official has not punished an inmate unless he actually knows of a danger to the inmate and chooses not to alleviate the danger, a school district has not sexually harassed a student unless it knows of a danger of harassment and chooses not to alleviate that danger. Although drawn from a different body of law, *Farmer* ... clarif[ies] the indispensable role that deliberate action plays when liability stems from intentional conduct such as punishing or discriminating." 106 F.3d at 659. The Supreme Court adopted this analogy to the jurisprudence dealing with deliberate indifference. *See Gebser*, 524 U.S. at 290 ("The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. ... That framework finds rough parallel in the standard of deliberate indifference"). Following its analogy, the court in *Rosa H*. then explained that a school district could escape liability if it could demonstrate "that [it] did not know of the underlying facts indicating a sufficiently substantial danger [to a student] and that [it

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[5]It should be noted that this instruction is substantially the same as the charge on "Actual Knowledge" in 3C Kevin F. O'Malley, *Federal Jury Practice & Instructions* § 177.36 (5th ed. 2000), and that Bostic's counsel did not make a specific objection at the prayer conference to the "substantial danger" language in jury instruction 17, the instruction dealing with "actual notice." (D.I. 146 at 17-20.)

was] therefore unaware of a danger ... ." 106 F.3d at 659 (quoting *Farmer v. Brennan*, 511 U.S. 825, 843-844 (1994). Although the "substantial danger" standard is not mentioned in *Warren v. Reading School District*, 278 F.3d 163 (3d Cir. 2002), this standard is not inconsistent with that case and therefore not erroneous as a matter of law. *See id.* at 165-166 (holding that, based on a memorandum sent to a teacher from a principal to stop playing classroom games that involve physical contact, a jury could hold that the principal had "actual knowledge" that the teacher was abusing students.)

Bostic's next argument, that I erred in not instructing the jury that Lloyd was an "appropriate official," is also misguided. (D.I. 144 at 15.) The Third Circuit makes it clear that the determination of whether a principal is an appropriate official is a question of fact for the jury. "[W]e agree that the evidence was sufficient to allow the jury to conclude that [the principal] was an 'appropriate person' under Title IX." *Warren*, 278 F.3d at 172. Therefore, because an individual's status as an "appropriate official" or "appropriate person" is a fact question, Bostic was not entitled to an instruction that Lloyd was an "appropriate official" as a matter of law. Moreover, Bostic was not, as she asserts (*see* D.I. 144 at 16), entitled to an instruction that Soligo was an appropriate official. *Warren* held that it was error to allow the jury to consider whether an official subordinate to the principal was an "appropriate official" absent evidence that the principal had delegated his powers to the official. 278 F.3d at 174. In short, it was the plaintiff's obligation to adduce evidence that Lloyd had delegated his powers to Soligo, and then the jury's province to decide whether to believe that evidence.

Finally, my instruction to the jury that an "appropriate official" is an official with "power to correct the discrimination" was not, contrary to Bostic's contention, improper.

(*See* D.I. 144 at 16.) The Supreme Court, in *Gebser*, held that "[a]n 'appropriate person under [Title IX] is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination." 524 U.S. at 290. *Gebser's* definition of an "appropriate person" is thus accurately presented in the instruction given to the jury in this case.

2. 42 U.S.C. § 1983 instruction

On the issue of the School Defendants' §1983 liability, part of the instruction that was given to the jury at trial reads as follows:

> Assuming that you find Mr. Smith is liable to Ms. Bostic under § 1983, Mr. Lloyd and Mr. Soligo may also [be] liable to [Ms.] Bostic under that statute if she knows that Mr. Lloyd and Mr. Soligo encouraged the specific misconduct, or directly participated in it, or, at a minimum, that they officially authorized, approved or knowingly acquiesced in [Mr.] Smith's unconstitutional conduct. Personal participation in the immediate act that violated Ms. Bostic's constitutional rights is not required. It is sufficient if Mr. Lloyd and Mr. Soligo set in motion a series of acts by Mr. Smith, or knowingly refused to terminate a series of acts by Mr. Smith, which they knew or reasonably should have known would cause Mr. Smith to inflict the constitutional injury.

(D.I. 134 at 20.)

The last sentence of this instruction, contrary to Bostic's assertion, does not misstate the law. (*See* D.I. 144 at 18.) The Third Circuit has stated that "[s]upervisory liability [under §1983] cannot be based solely upon the doctrine of *repondeat superior*, but there must be some affirmative conduct by the supervisor that played a role in the discrimination. ... The necessary involvement can be shown in two ways, either 'through allegations of personal direction or of actual knowledge and acquiescence ... .'" *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990). Bostic alleged that

Lloyd and Soligo acquiesced in her abuse, not that they personally participated in it. Therefore, the instruction to the jury that Lloyd's and Soligo's alleged acquiescence must be knowing was proper.

It was also not error to not instruct the jury that "lack of training ... was a basis for liability of the Institutional Defendants" (D.I. 144 at 18) because Bostic did not present sufficient evidence to submit a "failure to train" claim to the jury. In *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3d Cir. 1989), the court said that:

> if the need for more or different [sexual abuse] training [for teachers] is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, 'the policy makers of the city can reasonably be said to have been deliberately indifferent to the need.' ... '[i]n that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.'

Id. at 725 (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)). *See also Garcia v. County of Bucks*, 155 F. Supp. 2d 259, 268 (E.D. Pa. 2001) (to maintain a municipal liability claim under § 1983, "a plaintiff must show that a responsible municipal policymaker had contemporaneous knowledge of the offending occurrence or knowledge of a pattern of prior incidents of similar violations of constitutional rights and failed to take adequate measures to ensure the particular right ..."). Here, Bostic failed to present any evidence that defendant Smyrna Board of Education (the policy makers of the city pursuant to 14 Del. C. § 1049) had contemporaneous knowledge of the sexual abuse of Bostic, or knowledge of a pattern of prior incidents of similar sexual abuse, such that the need for more or different training was so obvious and the inadequacy of existing training was so likely to result in a constitutional violation that the

Smyrna Board of Education could reasonably be found to have been deliberately indifferent to the need for such training. Therefore, there was no basis for municipal liability for lack of training, and not instructing the jury on “failure to train” liability was thus proper.

IV. Conclusion

Accordingly, IT IS HEREBY ORDERED that Bostic’s Motion is DENIED.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

January 15, 2003
Wilmington, Delaware