

HOT TOPICS



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Sexting



"It's from Santa, and it goes way, way beyond jolly."

CartoonStock.com

Sexting: the Problem

- A 2018 study published in JAMA Pediatrics, summarized 39 studies with a total of about 10,300 students under age 18.
 - 15% of teens say they send sexts
 - 27% receive them
 - 1 in 8 have forwarded a sext

State Obscenity Charges – new (Neb. Rev. Stat. 28-807 to 28-829)

- Neb. Rev. Stat. 28-813.01
 - (1) It shall be unlawful for a person nineteen years of age or older to knowingly possess any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers. Violation of this subsection is a Class IIA felony.

State Obscenity Charges – new (Neb. Rev. Stat. 28-807 to 28-829)

- Neb. Rev. Stat. 28-813.01
 - (2) It shall be unlawful for a person under nineteen years of age to knowingly and intentionally possess any visual depiction of sexually explicit conduct which has a child **other than the defendant** as one of its participants or portrayed observers. Violation of this subsection is a **Class I misdemeanor**. A second or subsequent conviction under this subsection is a Class IV felony.

**Child Pornography Prevention Act
Neb. Rev. Stat. 28-1463.01 to 28-1463.06**

(1) It shall be unlawful for a person to knowingly make, publish, direct, create, provide, or in any manner generate any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.

(2) It shall be unlawful for a person knowingly to purchase, rent, sell, deliver, distribute, display for sale, advertise, trade, or provide to any person any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.

Child Abuse Implications



"I'm disappointed; if anyone should have seen the red flags, it's you."

Neb. Rev. Stat. 28-707 (Child Abuse)

- A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be...
 - "Placed in a situation to be sexually exploited by allowing [or] encouraging such minor child to ... engage in ... obscene or pornographic photography, films, or depictions"

Neb. Rev. Stat. 28-711

(1) When any . . . school employee . . . any other person has reasonable cause to believe that a child has been subjected to child abuse or neglect . . . he or she shall report such incident or cause a report of child abuse or neglect to be made to the proper law enforcement agency or to the department on the toll-free number

Neb. Rev. Stat. 79-293

(1) The principal of a school or the principal's designee shall notify as soon as possible the appropriate law enforcement authorities . . . of any act of the student described in section 79-267 which the principal or designee knows or suspects is a violation of the Nebraska Criminal Code.

Criminal Penalties

▪In addition to any ethical and social obligations and penalties, the failure to report child abuse or neglect as required by law subjects you to up to 3 months in jail, a \$500 fine, or both.

Intimidation by Telephone

- Neb. Rev. Stat. § 28-1310.
- Call or send an electronic communication with the intent to intimidate, threaten, or harass and
 - (a) Uses obscene language or suggests any obscene act;
 - (b) Threatens to inflict physical or mental injury to such individual or any other person or physical injury to the property of such individual or any other person; or
 - (c) Attempts to extort money or other thing of value from such individual or any other person.
- Class III Misdemeanor (3 months jail; \$500 fine)

Steps in Investigating Sexting

- First: preserve the evidence
- Second: contact law enforcement
- Third: conduct a Title IX Investigation
- Fourth: take appropriate in-school remedial steps
- Fifth: train, educate, work on culture

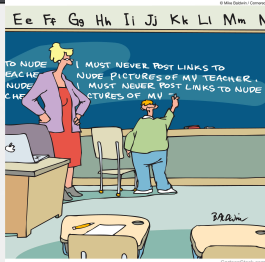
So, two 16-year-olds exchange nudes

- They both could be charged under 28-813.01
 - but they both will have an affirmative defense
- They both could be charged under 28-1463.03,
 - But they both will have an affirmative defense
- They BOTH can be charged and convicted under 28-707 for abusing one another.

So, two 16-year-olds exchange nudes

- Does the school have to call the cops? Yes
 - Child abuse = mandatory report
 - Principal may also have independent reporting obligation under 79-293

Civil Liability – Revenge Porn



Civil Liability -- Revenge Porn

- Average of 100 victims per month
- 90% female
- 83% picture originally a selfie
- 60% have personal information shared with pic
- 93% suffered "significant emotional distress"
 - 1/2 stalked or harassed in person
 - 1/3 offline stalking and harassment

Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act (Neb. Rev. Stat. §§ 25-3501 to 25-3508.)

- Allows for civil lawsuits if:
 - An intentional disclosure or threat to disclose;
 - A private, intimate image;
 - Of an identifiable individual;
 - Without the consent of the depicted individual;
 - By a person who knows:
 - The depicted individual did not consent to the disclosure;
 - The intimate image was private; and
 - The depicted individual was identifiable; and
 - The disclosure harms the depicted individual.

Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act (Neb. Rev. Stat. §§ 25-3501 to 25-3508.)

- Allows for actual damages and emotional distress
 - (w/o requiring proof of physical manifestation)
- If the actual damages are difficult to quantify, presumed damages of up to \$10,000 against each defendant.
- Allows for
 - attorney's fees
 - costs
 - injunctive relief

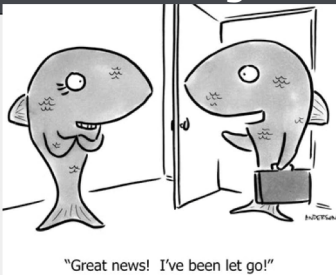
**Hoewischer v. White
551 B.R. 814 (E.D. Ohio 2016)**

- Couple in relationship (but he is married)
- He pressured her to send nudes; she complied
- After they broke up, she started receiving Facebook messages from strangers
- Eventually discovered that ex had posted her pics and her home address to a "revenge porn" website

Hoewischer v. White
551 B.R. 814 (E.D. Ohio 2016)

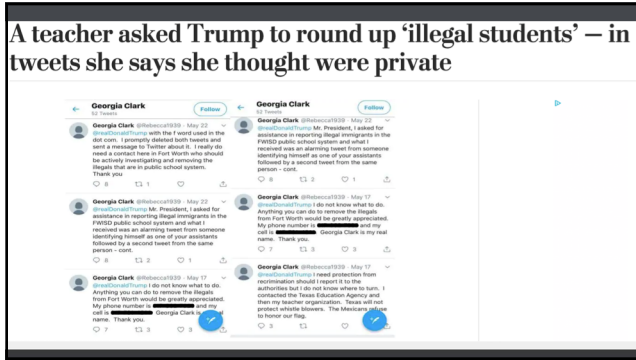
- She sues for IIED
- Court awards \$151,123.00
- White and his wife declare bankruptcy
- Court refused to discharge the judgment in bankruptcy

Staff Behaving Badly



Substitute teacher fired for filming porn in classroom: School









**Lopez v. Hobbs Mun. Sch. Dist.
2019 U.S. Dist. Lexis 138134**

- Older soccer players hazed younger ones "with the knowledge and acquiescence of school officials"
- Sexual misconduct included:
 - grabbing their butts
 - slapping or grabbing testicles
 - "tea bagging"
 - "dog piling"

**Lopez v. Hobbs Mun. Sch. Dist.
2019 U.S. Dist. Lexis 138134**

- Head coach learned of a video of one such incident
 - Ordered its destruction so as to not damage the soccer team
- Occurred:
 - On the playing field during practice
 - On the school bus
 - In hotel rooms during away games

**Lopez v. Hobbs Mun. Sch. Dist.
2019 U.S. Dist. Lexis 138134**

- J.L. was the target of one such incident
 - Became withdrawn, irritated, and lost interest in playing soccer
- School officials either:
 - Took no action to stop it or
 - Affirmatively instructed students not to report the conduct
- Mom sues

Lopez v. Hobbs Mun. Sch. Dist.
2019 U.S. Dist. Lexis 138134

- Due Process
- Negligence
 - Operation
 - Failure to protect
 - FTR sexual misconduct
 - Failure to train
 - Hiring
 - Failure to follow [NSAA] policy on hazing, sexual misconduct, and harassment

Lopez v. Hobbs Mun. Sch. Dist.
2019 U.S. Dist. Lexis 138134

- Title IX
- Civil Conspiracy
- Assault and Battery
- IIED

- School filed MTD

Lopez v. Hobbs Mun. Sch. Dist.
2019 U.S. Dist. Lexis 138134

- Court allowed all claims to go forward against the school district (except for punitive damages)
 - Due process
 - If facts true, "shock the conscience"
 - Title IX
 - If facts true, school was "deliberately indifferent"

L.E. v. Lakeland Joint Sch. Dist. #272
2019 U.S. Dist. LEXIS 137624

- CC/track coach takes boys to college camp
- L.E. bathed and returned to his tent to change clothes
- While L.E. in his underwear, 3 teammates:
 - Entered L.E.'s tent
 - Took him to the ground, pinned down arms and legs
 - Pushed the handle of a toilet plunger into his

L.E. v. Lakeland Joint Sch. Dist. #272
2019 U.S. Dist. LEXIS 137624

- Coach spoke with L.E. privately
 - L.E. cried and said M.D. "shoved a plunger into [his] butt"
- What did coach do?
 - Gathered male students
 - Chastised them for "screwing around"
 - Had them apologize to L.E.

L.E. v. Lakeland Joint Sch. Dist. #272
2019 U.S. Dist. LEXIS 137624

- What did coach NOT do?
 - Report the assault to the District!
- All students remain on team, season continues
- Teammates gave L.E. a "rough time"
 - "You liked it in your ass."
 - Multiple derogatory "gay jokes"
 - Told L.E. that he would "get raped at State."

L.E. v. Lakeland Joint Sch. Dist. #272
2019 U.S. Dist. LEXIS 137624

- Mom didn't find out for one year!
- She took another year to report it to the school!
- School
 - Issued written reprimand
 - Reported to Idaho equivalent of the PPC
 - Both FTR abuse and neglect

L.E. v. Lakeland Joint Sch. Dist. #272
2019 U.S. Dist. LEXIS 137624

- Title IX Coord. and Asst. Supt.
 - Wrote addendum to reprimand
 - Reprimand and PPC investigation were unwarranted and concluded that coach "responded appropriately to the information he had."
- Mom sues under Title IX
- School moved for summary judgment

L.E. v. Lakeland Joint Sch. Dist. #272
2019 U.S. Dist. LEXIS 137624

- School
 - No substantial control over camp
- Court
 - True, but had control over high school

L.E. v. Lakeland Joint Sch. Dist. #272
2019 U.S. Dist. LEXIS 137624

- School
 - L.E. not subjected to severe, pervasive, and objectively offensive harassment following the attack
- Court
 - Mere fact that L.E. continued to see and interact with attackers at school may be enough alone
 - But there was more - gay jokes, "you liked it in your ass," "going to get raped."
 - Diagnosed with PTSD, major depressive disorder

L.E. v. Lakeland Joint Sch. Dist. #272
2019 U.S. Dist. LEXIS 137624

- School
 - Didn't have actual knowledge
- Court
 - Jury could conclude coach had "authority to address the alleged discrimination and to institute corrective measures on the [District's] behalf"

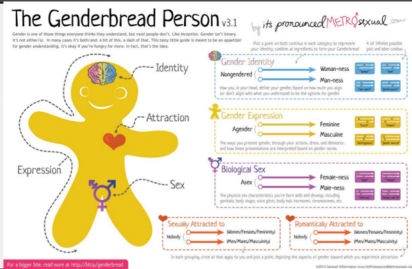
L.E. v. Lakeland Joint Sch. Dist. #272
2019 U.S. Dist. LEXIS 137624

- School - Even if had actual knowledge of camp incident, L.E. never reported school incidents
- Court disagreed

L.E. v. Lakeland Joint Sch. Dist. #272 2019 U.S. Dist. LEXIS 137624

- While the District must have had actual knowledge of some harassment, "actual knowledge of every incident could not possibly be required." Otherwise, a student would have to report each instance of harassment to an appropriate official even when the official was deliberately indifferent to earlier reports.
- L.E. reported that M.D. shoved a plunger into his anus, and beyond Coach Lawler asking the boys to apologize, there was no response. It would be unreasonable to bar L.E.'s Title IX claim simply because he did not report later instances of harassment after the District did not do more in response to his assault.

Transgender Update





**"Movin' On Up.....
To a De-luxe Supreme Court in DC"**

- *Altitude Express v. Zarda*
 - Ee alleges fired because of his sexual orientation
 - 6th Cir. Panel: sex orientation not protected
 - 6th Cir. *en banc*: sex orientation discrimination is "because of ... Sex" and violates Title VII
 - Interesting: DOJ and EEOC filed briefs on opposite sides

**"Movin' On Up.....
To a De-luxe Supreme Court in DC"**

- *Bostock v. Clayton County, Georgia*
 - Ee claims fired because of sexual orientation
 - 11th Cir. Panel: sex orientation not protected
 - 11th Cir. denied *en banc* review

**"Movin' On Up.....
To a De-luxe Supreme Court in DC"**

- *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*
 - Funeral home Ee transitioning from male to female
 - Owner: "violated God's commands"
 - 6th Cir.:
 - transgender status protected by Title VII: "[I]t is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex."
 - No Religious Freedom Restoration Act protection

Heading to the SCOTUS

- Compare with recent Eighth Circuit op's:

"[S]exual orientation and gender identity discrimination are not protected classes under Title VII."

"Courts have routinely rejected attempts to use a sex-stereotyping theory to bring under Title VII what is in essence a claim for discrimination on the basis of sexual orientation."

Virginia high school teacher fired for refusing to use transgender student's new pronouns

By Graham Moonaw / Richmond Times-Dispatch Dec 7, 2018

TRY 1 MONTH FOR 99¢



ANY
QUESTIONS
?
