

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-40179

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VIRA JEAN BERNARD,  
Individually and a/n/f of  
Tahara Bernard, a minor,

Plaintiff-Appellee,

v.

KATHY SHEPHERD, ET AL.,

Defendants,

BEAUMONT INDEPENDENT SCHOOL  
DISTRICT and JOHN NICKLEBUR,

Defendants-Appellants.

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Appeal from the United States District Court  
for the Eastern District of Texas  
(1:93-CV-80)

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December 5, 1995

Before KING, STEWART, and PARKER Circuit Judges.

PER CURIAM:\*

A parent brought this action individually and as next friend of her minor daughter against a substitute teacher at her daughter's school, the principal of the school, and the school

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

district. Specifically, the parent sought recovery under 42 U.S.C. § 1983 and Title IX of the Education Amendments of 1972 for damages resulting from a classroom incident in which the substitute teacher allegedly sucked her daughter's neck. After the parent dismissed all claims against the substitute teacher, the remaining defendants moved for summary judgment. The district court denied summary judgment and the defendants bring this interlocutory appeal. We dismiss the school district's appeal on the grounds of qualified immunity as frivolous. Further, we hold that this court lacks jurisdiction over the denial of the motion as to the Title IX issues. Finally, with respect to the principal's qualified immunity defense, we reverse the denial of the principal's motion and remand with instructions that the district court enter summary judgment in his favor on the § 1983 claim.

## **I. BACKGROUND**

### **A. Facts**

The facts of this case are mostly undisputed. The Beaumont Independent School District ("BISD") first hired Caffie Shepherd ("Shepherd") as a substitute teacher in 1988. Between the date of Shepherd's hiring and December 1991, BISD did not receive any complaints accusing Shepherd of sexual molestation or other impropriety. On December 6, 1991, Shepherd substituted at Odom Middle School ("Odom"), which is a BISD school. Tahara Bernard ("Tahara") was a student at Odom and in a class that Shepherd was

teaching on that day. After this class, Tahara reported to Patricia Griggs ("Griggs"), a counselor at Odom, that Shepherd had "sucked on" her neck in the classroom in front of her classmates. Griggs reported this incident to the assistant principal. Meanwhile, Tahara was sent to the school nurse complaining of pain in her neck.

School officials questioned Shepherd about the incident. Among those conducting the questioning was Principal John Nicklebur ("Nicklebur"). Shepherd admitted that she had kissed Tahara on the neck, but denied any sexual connotation. Rather, Shepherd explained the kiss as an exchange of affection between student and teacher. Nicklebur immediately relieved Shepherd of her teaching duties and escorted her from the campus. School officials promptly notified Tahara's mother, Vira Jean Bernard ("Bernard"), of the situation. They also reported the incident to police and began their own investigation. Nicklebur reports that none of the students in Shepherd's class verified that Shepherd had sucked Tahara's neck in a sexual manner. Since this incident, BISD officials have never assigned Shepherd to the same class or school that Tahara was attending. Shepherd did continue to teach, however, at other BISD schools.

## **B. Procedural History**

On February 17, 1993, Bernard filed suit individually and as next friend of Tahara against Shepherd and BISD in state district court in Jefferson County, Texas. Subsequently, the case was

removed to the United States District Court for the Eastern District of Texas. Bernard added Nicklebur as a defendant in her amended complaint.<sup>1</sup> Later, the parties stipulated to the dismissal with prejudice of all claims against Shepherd.

Bernard sought damages under Title IX of the Education Amendments of 1972<sup>2</sup> and 42 U.S.C. § 1983. Bernard alleged that Shepherd's conduct constituted sexual harassment and a violation of Tahara's right to bodily integrity. Further, Bernard claimed that BISD and Nicklebur had knowledge of Shepherd's behavior and did not adequately respond to it. Bernard also alleged that BISD and Nicklebur knew or should have known that Shepherd had previously experienced mental problems and that their failure to take appropriate action in this regard led to the December 6, 1991 incident.

On August 26, 1993, BISD and Nicklebur filed a joint motion for summary judgment, asserting the defense of qualified immunity. Specifically, BISD and Nicklebur claimed that, because they had no notice that Shepherd would engage in this inappropriate behavior, they were entitled to summary judgment on their immunity defense under our opinion in Doe v. Taylor Indep.

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<sup>1</sup>Bernard had originally sued Clifford Hardeman ("Hardeman") as Odom's principal. After discovering that Nicklebur was in fact the principal at the time of the incident, Bernard named Nicklebur as a defendant and the district court granted summary judgment to Hardeman with no objection by Bernard.

<sup>2</sup>20 U.S.C. §§ 1681-1688.

Sch. Dist., 975 F.2d 137 (5th Cir. 1992).<sup>3</sup> In response, Bernard effectively conceded that BISD and Nicklebur would be entitled to qualified immunity under the "notice" test set out in Doe; however, Bernard claimed that the motion by BISD and Nicklebur failed to address her main contention--that BISD and Nicklebur were liable under § 1983 because (1) there was no policy in place that would screen potential substitute teachers for prior mental problems, (2) this lack of a policy represented a deliberate indifference to Tahara's constitutional rights, and (3) the inadequate policy caused the violation of those rights. Later, BISD and Nicklebur supplemented their motion with a request for summary judgment on Bernard's Title IX claims. In this supplemental motion, BISD and Nicklebur argued that Title IX precludes Bernard's § 1983 claims and that Bernard had failed to state a claim under Title IX.

After a hearing, the district court denied the motion for summary judgment. In its subsequent order denying the motion, the court gave no reasons for its decision, stating only that it found that the motion was "not meritorious." BISD and Nicklebur then brought this interlocutory appeal, asserting our appellate jurisdiction over orders denying summary judgment on the issue of qualified immunity.

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<sup>3</sup>This opinion was subsequently vacated and reheard en banc. Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443 (5th Cir.), cert. denied, 115 S. Ct. 70 (1994). The en banc court adopted essentially the same "notice" test that the panel used to delineate the duty owed by school officials to students in this type of situation. Id. at 454.

## II. DISCUSSION

### A. Jurisdiction

As an initial matter, we address whether we have jurisdiction to hear this interlocutory appeal. Neither party has raised jurisdiction as an issue on appeal; however, we must examine the basis of our jurisdiction sua sponte, if necessary. Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987).

#### 1. Qualified Immunity

Ordinarily, the denial of a motion for summary judgment is not appealable until a final judgment has been entered in the case. Enplanar, Inc. v. Marsh, 11 F.3d 1284, 1291 n.7 (5th Cir.), cert. denied, 115 S. Ct. 312 (1994); In re Corrugated Container Antitrust Litig., 694 F.2d 1041, 1042 (5th Cir. 1983). The reason for this rule is that courts of appeals only have jurisdiction over "final decisions" of the district courts. 28 U.S.C. § 1291; Sorey v. Kellett, 849 F.2d 960, 961 (5th Cir. 1988). As an exception to this rule, however, the Supreme Court has held that the denial of a motion for summary judgment based on qualified immunity is immediately appealable to the extent that it turns on an issue of law. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985); see also Tamez v. City of San Marcos, 62 F.3d 123, 124-25 (5th Cir. 1995).

The Court recently clarified the parameters of this exception in its opinion in Johnson v. Jones, 115 S. Ct. 2151 (1995). If the district court explicitly denies summary judgment

as to qualified immunity for purely legal reasons, the order is immediately reviewable on appeal. See id. at 2156-59. If, however, the district court expressly denies the motion solely because there are genuine issues of material fact for trial, the order is not immediately reviewable. Id. at 2156; see also Tamez, 62 F.3d at 125. If the district court denies the motion both for legal reasons and because of the existence of fact issues, then the court of appeals must separate the two determinations and review only the legal ruling. See Johnson, 115 S. Ct. at 2158-59; see also Stella v. Kelley, 63 F.3d 71, 75 (1st Cir. 1995) (applying this bifurcated approach to jurisdiction over a denial of summary judgment on the issue of qualified immunity). Finally, if the district court did not state its reasons for denial of the summary judgment, the court of appeals may only review the order to the extent that it depends upon the resolution of purely legal questions. See Johnson, 115 S. Ct. at 2159. In undertaking this review, the court of appeals must take, as given, the facts assumed by the district court in denying the motion for summary judgment. Id. If the district court does not state these assumptions, then the court of appeals "may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed." Id.

With respect to the denial of summary judgment as to qualified immunity in this case, we are faced with the latter

situation--the district court denied the motion for summary judgment without stating its reasons or assumptions of fact. Accordingly, we only have jurisdiction to review this order to the extent that it turns on issues of law. Indeed, the parties' contentions on appeal are strictly legal ones, as the material facts are undisputed. This general agreement as to the underlying facts spares us the "cumbersome review" contemplated by Johnson. The only fact that is in dispute is whether Shepherd kissed Tahara or sucked her neck, and even this fact question does not appear to be material to the issue of qualified immunity. Rather, for purposes of this appeal, we determine that the district court likely assumed that Shepherd engaged in inappropriate conduct toward Tahara that may have implicated Tahara's interest in bodily integrity.

Accordingly, we hold that we have jurisdiction to review the district court's denial of summary judgment on the issue of Nicklebur's qualified immunity defense to the extent that it turns on a question of law. We dismiss BISD's appeal on the grounds of qualified immunity as frivolous.<sup>4</sup>

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<sup>4</sup>"If upon the hearing of any interlocutory motion or as a result of a review under Loc. R. 34, it shall appear to the court that the appeal is frivolous and entirely without merit, the appeal will be dismissed." 5th Cir. R. 42.2. The qualified immunity defense generally applies to claims for damages against state and local officials in their individual capacities. We have specifically held that the qualified immunity defense is not available to school districts. Minton v. St. Bernard Parish Sch. Bd., 803 F.2d 129, 133 (5th Cir. 1986); Kingsville Indep. Sch. Dist. v. Cooper, 611 F.2d 1109, 1112 (5th Cir. 1980).



## 2. Title IX Issues

The district court's order also denied summary judgment on the other issues raised by BISD and Nicklebur in their motion: (1) Bernard's Title IX claim precludes any claims she might have under § 1983; and (2) Bernard failed to state a claim under Title IX. These issues are unrelated to the qualified immunity defense. Accordingly, the Mitchell exception allowing interlocutory appeals from the denial of qualified immunity does not apply. Moreover, the fact that we have jurisdiction over the denial of summary judgment as to one issue does not necessarily mean that jurisdiction attaches to other issues raised in the same motion. We have held that such "pendent appellate jurisdiction" does not exist over an otherwise nonappealable order where it is not "inextricably entwined" with an appealable order. Silver Star Enters., Inc. v. M/V SARAMACCA, 19 F.3d 1008, 1014 (5th Cir. 1994); see also Swint v. Chambers County Comm'n, 115 S. Ct. 1203, 1212 (1995) (holding that court of appeals did not have "pendent party appellate jurisdiction" over denial of county commission's motion for summary judgment where appeal was taken from denial of officials' summary judgment motion on qualified immunity). The Title IX issues are not inextricably entwined with Nicklebur's qualified immunity defense; indeed, the defendants raised these issues in a separate motion. Finally, BISD and Nicklebur have only invoked our jurisdiction on the basis of the denial of their qualified immunity defense; they have not stated in their brief the basis for our jurisdiction

over the other summary judgment issues, as required by Federal Rule of Appellate Procedure 28(a)(2)(ii). Accordingly, we hold that we lack jurisdiction to review the district court's denial of summary judgment on the issues of whether Title IX precludes Bernard's § 1983 claims and whether Bernard has stated a claim under Title IX.

## **B. The District Court's Order**

### 1. Standard of Review

We review the denial of a motion for summary judgment de novo. Walton v. Alexander, 44 F.3d 1297, 1301 (5th Cir. 1995) (en banc). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Under Rule 56(c), the party moving for summary judgment bears the initial burden of informing the district court of the basis for its motion and identifying the portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Norman v. Apache Corp., 19 F.3d 1017, 1023 (5th Cir. 1994). If the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio

Corp., 475 U.S. 574, 585-87 (1986); Norman, 19 F.3d at 1023. The burden on the non-moving party is to do more than simply show that there is some metaphysical doubt as to the material facts. Matsushita, 475 U.S. at 586.

## 2. Nicklebur's Qualified Immunity

To determine whether a defendant official is entitled to qualified immunity, a court must first ascertain whether the plaintiff has sufficiently stated a claim for the violation of a constitutional right. Brewer v. Wilkinson, 3 F.3d 816, 820 (5th Cir. 1993), cert. denied, 114 S. Ct. 1081 (1994); Duckett v. City of Cedar Park, 950 F.2d 272, 278 (5th Cir. 1992). If the plaintiff has asserted the violation of a constitutional right, the court must then determine whether that right had been clearly established so that a reasonable official in the defendant's situation would have understood that his conduct violated that right. Brewer, 3 F.3d at 816.

At the outset, we note that Bernard has radically redefined her claim as stated in her amended complaint. Whereas the complaint primarily alleged that Nicklebur had notice of prior misconduct by Shepherd, Bernard's response to the summary judgment motion concedes that Nicklebur had no notice. Rather, Bernard now contends that the essence of her claim is that BISD's policy regarding the hiring of substitute teachers was so inadequate that it represented a deliberate indifference to the constitutional rights of BISD students.

Given this characterization of Bernard's argument, we conclude that, at least with respect to Nicklebur, she has failed to state a constitutional violation. Specifically, if the alleged cause of the deprivation of Tahara's rights is a constitutionally deficient policy, Bernard has failed to allege any facts that would state a claim against Nicklebur. First, we note that a plaintiff bringing a § 1983 action against a public official must plead more than conclusory allegations. Schultea v. Wood, 47 F.3d 1427, 1433 (5th Cir. 1995) (en banc). With respect to a policy that inadequately screened substitute teachers, the only allegation in Bernard's amended complaint that could reasonably be construed to state a claim against Nicklebur is the statement that Nicklebur should have known of Shepherd's alleged prior mental problems. This conclusory allegation clearly fails to satisfy the pleading requirement imposed on Bernard with respect to her § 1983 claim.<sup>5</sup> Further, in her response to the summary judgment motion, the one document in which Bernard develops her inadequate policy argument, Bernard fails to identify Nicklebur as a policymaker. Indeed, in every allegation regarding the defects in the hiring policy or the lack of a policy to investigate mental health records, Bernard attributes this conduct to BISD, and not to Nicklebur.

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<sup>5</sup>Arguably, this statement even fails the liberal notice pleading requirements of the Federal Rules of Civil Procedure; it does not mention a "policy" or allege that Nicklebur should have learned of Shepherd's alleged prior behavior through the hiring process. Indeed, it is little wonder that Nicklebur failed to address this "constitutionally deficient policy" argument in his motion for summary judgment.

Therefore, even accepting Bernard's factual allegations as true, she has failed to assert a claim against Nicklebur for the violation of a constitutional right. Accordingly, we reverse the district court's order denying summary judgment to Nicklebur on the § 1983 claim and remand with instructions to enter summary judgment in his favor on the issue of his qualified immunity defense to Bernard's § 1983 claim.<sup>6</sup>

### **III. CONCLUSION**

For the foregoing reasons, we DISMISS BISD's appeal on the issue of qualified immunity as frivolous; however, we REVERSE the court's order denying summary judgment to Nicklebur on his qualified immunity defense to the § 1983 claim and REMAND with instructions to enter summary judgment in his favor on the § 1983 claim. As to all other issues, we DISMISS the appeals of BISD and Nicklebur for lack of jurisdiction.

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<sup>6</sup>It is appropriate to grant summary judgment to Nicklebur because, even if there were fact issues regarding his conduct, they would have no bearing on our determination that Bernard has failed to state a constitutional claim against Nicklebur under the facts she has alleged.