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School Liability Tests Well in Court

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A ground-breaking district court ruling allowing school district administrators to be sued for ignoring gay-bashing and sexual orientation harassment among students appears as if it will pass muster with the 9th U.S. Circuit Court of Appeals.

In arguments before a three-judge panel Thursday, six officials with the Morgan Hill Unified School District appealed U.S. District Judge James Ware's ruling that they were not entitled to qualified immunity from a lawsuit filed by several former students subjected to taunts, ridicule and death threats for their sexual orientation.

Defense attorney Mark Davis argued Tuesday that reasonable school officials, at the time of the controversy, could have differed about the appropriate response to the plaintiffs' complaints of harassment and were thus entitled to qualified immunity protection.

In reply, plaintiffs' attorney James Emery countered that officials should have taken greater steps - and knew they should have taken greater steps - to protect the students, who complained loudly and often about the treatment they received at school.

When the case first came before Ware, said Davis, a Hoge, Fenton, Jones & Appel partner, "the law was not clearly established."

But Emery and a judge on the panel challenged that assertion.

"Hasn't the law always been that you can't treat one class differently than another without a rational basis for doing so?" Judge Mary Schroeder asked. She was joined on the bench by Senior Judge Joseph Sneed and Judge Richard Paez.

It wasn't until last year that the U.S. Supreme Court held that school administrators could be liable for student-on-student sexual harassment.

The case may not be the precedent-setting blockbuster it once could have been. Recently passed laws and legal decisions protecting homosexuals from harassment have since curtailed the importance of Ware's 1998 ruling, which initially echoed throughout a rapidly developing area of law.

Emery, a Keker & Van Nest partner, combined two principles to argue that the officials should have known their actions were unlawful, saying homosexuals have been a protected class under 9th Circuit law since at least 1989 and that officials knew equal protection laws applied to sexual harassment. Therefore, he said, they should have known equal protection applied to sexual orientation harassment as well.

"It's a very simple argument - one plus one equals two," Emery said.

One who will likely not side with Emery's clients is Judge Sneed, who pestered Emery for the facts of the case and said, "I want to know what you think the school authorities did that was contrary to the law."

Emery, for the most part, was able to avoid delving into the facts of the case, despite Sneed's insistence.

"Do you remember your youth?" asked Sneed, 39 years Emery's elder. "It sometimes got nasty out there."

Indeed it did, especially for Emery's clients.

The American Civil Liberties Union brought the suit after district and school officials at Live Oak High School failed to diffuse a volatile anti-gay climate that was the subject of articles and letters in the school paper and on the agenda of district meetings.

Graffiti telling gay students to "Keep it in the closet" were found frequently, and several students received death threats and pornographic material in their lockers. Flyers were posted around campus announcing a "support group" for gay bashers, with a phone number of 1-800-RED-NECK.

Students reportedly tossed fruit and epithets at gay students. One plaintiff was beaten to the point of hospitalization.

The case is *Alana Flores, et al v. Morgan Hill Unified School District, et al*, 00-15506.