

# Chisholm v. St. Marys City Sch. Dist. Bd. of Educ.

947 F.3d 342 (6<sup>th</sup> Cir. 2020)

CHAD A. READLER, Circuit Judge. Playing football is not for the fainthearted. During games, players risk physical injury in the name of beating an opponent. Even at practice, players put their physical wellbeing at risk to compete for starting positions and to gain an edge for an upcoming game.

These competitive desires are often spurred on by a team's coach. As much as in any sport, football coaches push their players to achieve, often in the face of adversity. Through their words and actions, many coaches push quite hard. Sometimes, their efforts can cross lines of decency. Can they also cross legal lines drawn by Title IX of the Education Amendments Act?

All of this sets the backdrop for today's contest, one fought not on the field, but in the courtroom. We are asked to decide whether federal or state law limits the types of verbal motivational tactics a high school football coach may employ. In separate suits below, two former players for the St. Marys (Ohio) Memorial High School Football Team brought claims for federal Title IX violations and state-law intentional infliction of emotional distress against their coach, Defendant Doug Frye. The players claim that Frye harassed them by using numerous derogatory terms—most notably, the term "pussy"—with the intent to insult (and presumably to motivate) the two in front of their teammates. Plaintiffs also sued the St. Marys school board, superintendent, and athletic director for failing to address Frye's conduct. In both suits, the district court entered summary judgment in favor of Defendants. Plaintiffs now bring separate appeals, which we have consolidated for review.

As a matter of decency, Frye's conduct was distasteful, and no doubt offensive to many. But as a matter of law, his conduct did not constitute sex-based discrimination, in violation of Title IX, nor was it conduct intolerable in a civilized society, in violation of Ohio tort law. Accordingly, we **AFFIRM** the judgment of the district court.

## I. BACKGROUND

... First, football's popularity can be attributed in part to the sport's physical nature. Dating back to the violent gladiator games of Ancient Rome, and likely much earlier, spectators have long enjoyed tests of strength, speed, and aggression, even when the participants risk their health and wellbeing. More than any other modern team sport, football highlights these same traits—strength, speed, and aggression. It draws upon the combative nature of its participants and their coaches, with the sport enjoying a competitive, confrontational, and motivational foundation not seen in other team activities.

Second, football's popularity feeds a strong desire for team success. At the professional and collegiate levels, on-field success translates directly into notoriety for teams, players, and coaches, and significant revenue for the respective professional organization or university. Even in the more localized high school setting, community pride and year-long bragging rights are at stake when one's team takes the field. Facing this pressure to succeed, football teams are sometimes willing to take chances on troubled yet talented players, decisions that may otherwise be difficult to rationalize. And the same can be said of coaches, whose sometimes crude or outlandish antics are tolerated in favor of on-the-field success. Today's case reflects one such example.

[The opinion summarized Frye's coaching history, featuring harassment allegations going back to 1995, including reprimands for obscene language and physical contact with players, coercion of injured players, resignation from another school under a state regulatory order regarding his teaching license. In addition, the opinion noted the challenges at St. Mary's during the plaintiffs' matriculation, including an 0-20 record in two seasons, leading to a

politically divisive decision by the School Board to hire Frye under the close supervision of the district superintendent. The focus of this litigation was Frye's treatment of plaintiff Reid Lininger, victimized by the Coach calling him and other teammates various names, including "pussy, bitch, and pretty boy." Further investigations ensued when Dane Chisholm, who had engaged in off-field misconduct in school, and on-field misconduct (punching an opposing player), was kicked off the team. Both the School Board and the state education department concluded that no disciplinary action against Frye was necessary.]

Following the controversy, Frye remained the head coach at St. Marys. Chisholm finished his senior year and enlisted in the Army. Still a junior, Lininger transferred to nearby Anna High School, where he played receiver for the varsity football team and was chosen for the homecoming court. Despite those achievements, Lininger claims that he suffered severe emotional distress for the remainder of his time in high school.

... Plaintiffs filed separate complaints in federal court. Each alleged federal Due Process, Equal Protection, 42 U.S.C. § 1983, and Title IX claims along with state-law claims for intentional and negligent infliction of emotional distress against the same defendants—the St. Marys Board of Education, [Superintendent Shawn] Brown, [Athletic Director James] Hollman, and Frye. Following discovery in each case, the district court granted summary judgment to Defendants on all claims. Both Plaintiffs appealed, pursuing only their claims for Title IX violations and intentional infliction of emotional distress. We consolidated the cases for resolution on appeal.

## II. ANALYSIS

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*A. Plaintiffs Are Not Entitled To Title IX Relief Because They Were Not The Target Of Sex-Based Discrimination.*

...

Plaintiffs' Title IX theory is somewhat unusual. It hinges entirely on Frye's use of the term "pussy." Plaintiffs say the use of that term was a form of sex discrimination due to its gender-based connotations. To Plaintiffs' mind, the term portrayed them as "feminine" and thus seemingly less valuable teammates in the "masculine" setting of football, revealing Frye's favoritism of one sex over the other. And because, Plaintiffs add, Frye's repeated use of the term ultimately denied them educational benefits at St. Marys, Frye's conduct ran afoul of Title IX. We therefore must decide whether a high school football coach's use of the term "pussy"—in the context of football-related activities—is enough to implicate Title IX protections.

...

[The court borrowed from Title VII claims involving sex discrimination in employment in analyzing the Title IX claim. It noted that customarily the plaintiff can prevail by showing (1) sexual advances, (2) a general hostility to one sex, or (3) treating members of each sex differently in a mixed-sex workplace. Judge Reader concluded that the plaintiffs failed to satisfy any of these traditional routes.]

Of course, Plaintiffs cannot be faulted for finding Frye's use of the term "pussy" offensive, even in a football setting. But crude or vulgar language alone does not rise to the level of a Title IX violation. After all, Title IX, like Title VII, is not a "general civility code." *See Oncale*, 523 U.S. at 81. Plaintiffs may also be correct that Frye used the term as an assault on their masculinity. To Frye, the term was a vehicle for criticizing male athletes for not acting in an aggressive or "tough" manner. Yet the mere use of an offensive or gendered term does not in itself rise to the level of discrimination on the basis of sex. *See Oncale*, 523 U.S. at 81 ("[The plaintiff] must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted *discrimina[tion]* . . . because of . . . sex.") (original emphasis). Here, Frye's aim was to chide Plaintiffs for not acting with the forcefulness Frye believed was called for on the football field. Critically, there is no evidence of Frye favoring one sex over the other in that respect. That shortcoming dooms any claim for relief under the traditional understanding of Title IX....

Outside of these traditional applications of Title VII and Title IX, a plaintiff can also demonstrate sex discrimination by showing that he or she was mistreated for failing to conform to traditional sex stereotypes. The seminal Supreme

Court case on that score, *Price Waterhouse v. Hopkins*, involved a female employee of an accounting firm who was explicitly instructed to look and act more feminine to improve her chances of a promotion. 490 U.S. 228, 235 (1989). Among those clichéd instructions, the employee was told to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry," and to behave less "aggressively" with firm staff. *Id.* These traits, of course, had no relevance to the performance of her job duties. And, it bears noting, these traits were not expected of the firm's male employees. *Id.* Rather, this "advice" and the ensuing adverse employment outcome were the result of Price Waterhouse's stereotypical views about how a woman should look and behave in the workplace. In that way, the company's conduct likely ran afoul of federal protections against sex discrimination.

...

[The court distinguished *Price Waterhouse*.] Frye criticized Chisholm and Lininger in a crude, foulmouthed way because they, in his view, were not "tough" enough. Toughness, while sometimes celebrated in men, is certainly not discouraged in women, especially in a professional or team setting. Indeed, in sports, law enforcement, business, law, politics, the armed services, and myriad other activities and professions, women are called upon to be as tough as men. And in many instances, women outpace their male colleagues in that respect. By the same token, were women to join Frye's team, he undoubtedly would demand nothing less of them than their male teammates. This is worlds apart, then, from the gender-inspired expectations about appearance (such as wearing makeup, jewelry, or certain hairstyles) that loomed large in *Price Waterhouse* and *Smith* [a lower court case involving a transgender plaintiff].

Second, and of even greater significance, the qualities complained of in *Price Waterhouse* and *Smith* were not related to the plaintiffs' abilities to perform well in their jobs. Here, by comparison, Frye's abusive language targeted a fundamental requirement for football players—toughness. By his remarks, Frye was not offering a commentary on whether Chisholm and Lininger were exemplars of their sex. For better or worse, Frye's comments were about playing football, not gender roles. Frye thought that Lininger's performance as a quarterback suffered because of Lininger's fear of being hit by players on the opposing team. And Frye criticized Lininger for sitting out games and practices due to injury. To Frye's somewhat boorish mind, a "pussy" was a wimp or coward, perhaps a "snowflake" in the current lexicon, but, critically, not a feminine individual. As previously mentioned, gut-wrenching hits and other brutal interactions are part and parcel of football. With such interactions come pain and, all too often, injury. Resilience, a strong will, and possibly even a measure of disregard for one's physical well-being, are necessary ingredients for success in football. And that is true for male and female players alike.

That resilience is the trait Frye sought to draw out of Lininger and Chisholm. While beneath the dignity of a teacher and youth mentor, Frye's use of an offensive, gendered insult to motivate his players does not put this case across the Title IX goal line. *See Vickers*, 453 F.3d at 764 (citing *Smith*, 378 F.3d at 575).

[The court further concluded that this conduct did not deprive plaintiffs of educational opportunities on the basis of sex.] To make that assessment, we must consider the context in which Frye made these comments. Plaintiffs were high school football players, and Frye was their coach. Though the record suggests that Frye's use of profanity in general, and the term "pussy" in particular, was pervasive, Plaintiffs have not shown that Frye's statements were sufficiently severe or objectively offensive to merit Title IX relief. On the football field, where emotions and adrenaline can run high, it is not unheard of for coaches and players alike to use offensive or gendered language, especially in the heat of a game. Viewed in this light, Frye's conduct, while less than laudable, does not meet the high bar for severe, pervasive, and objectively offensive conduct. *See Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 360, 363 (6th Cir. 2012) (holding that three separate occasions of sexual harassment—a male student shoving a female student into a locker, demanding that she perform oral sex on him, and making obscene sexual gestures at her—was not "severe, pervasive, and objectively offensive").

This conclusion, of course, might be different in another setting. Conduct considered blasé on the gridiron might very well shock the conscience of the chess club or debate team. The Supreme Court made precisely this observation in *Oncale*, when it stated that the evaluation of conduct as sex-based discrimination "depends on a constellation of

surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." 523 U.S. at 82. ...

*B. Plaintiffs' State-Law Claims Likewise Fail Because Frye's Conduct Was Not Sufficiently Outrageous, And Any Anguish Experienced by Plaintiffs Was Not Sufficiently Severe.*

In addition to their federal Title IX claim, Plaintiffs also claim that Frye's conduct amounted to intentional infliction of emotional distress, an Ohio state-law claim. According to Plaintiffs, Frye's conduct caused Lininger to develop depression and anxiety, which made it more difficult for him to make friends at his new school. Likewise, Plaintiffs say that Frye's comments and failure to reinstate Chisholm following his dismissal from the team disrupted his home life and caused him to be skeptical of adult leadership.

Under Ohio common law, a claim for intentional infliction of emotional distress requires Plaintiffs to meet a four-factor test:

- (1) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff;
- (2) that the actor's conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was such that it can be considered as utterly [\*\*26] intolerable in a civilized community;
- (3) that the actor's actions were the proximate cause of the plaintiff's psychic injury; and
- (4) that the mental anguish suffered by the plaintiff is serious and of a nature that no reasonable man could be expected to endure it.

*Burkes v. Stidham*, 107 Ohio App. 3d 363, 668 N.E.2d 982, 989 (Ohio App. 1995). For purposes of argument, we assume that Frye, by his derogatory comments, intended to cause Plaintiffs emotional distress, the first in Ohio's four-factor test. We likewise assume the third factor—that Frye's conduct was the proximate cause of Plaintiffs' alleged mental anguish. Neither Lininger nor Chisholm, however, can show that Frye's conduct was "so extreme and outrageous as to go beyond all possible bounds of decency," let alone conduct "considered as utterly intolerable in a civilized community," as required by the second factor. *Id.* Nor, for that matter, can either one show that the mental anguish resulting from Frye's conduct was so severe that no reasonable player could be expected to endure it, as required by the final factor. *Id.*

Ohio law sets a high bar for establishing an emotional-distress claim. To clear that bar, a plaintiff must show "outrageous" conduct by the defendant. Hurt feelings caused by insults, threats, and other indignities are not "outrageous" as a matter of Ohio law. *Reamsnyder v. Jaskolski*, 10 Ohio St. 3d 150, 10 Ohio B. 485, 462 N.E.2d 392, 394 (Ohio 1984). Rather, as Ohio courts have recognized, and as we have all experienced, the world is not always kind, meaning that, for common-law tort purposes, the average person is expected to be somewhat thick-skinned. *Id.* ... That is true for everyday circumstances, let alone in the rough-and-tumble world of football.

That is not to say we condone Frye's comments. They are offensive and inappropriate at best. But they are also not unheard of on the gridiron, where the foul-mouthed coach is something of an unfortunate cultural cliché. All things considered, Frye's statements were not "utterly intolerable in a civilized community." *Burkes*, 668 N.E.2d at 989.

For similar reasons, we cannot say, as required by the final factor, that any emotional anguish Plaintiffs experienced was "serious and of a nature that no reasonable man could be expected to endure it." *Id.* As we have said, Frye's comments were harsh, pointed, and intended to demean. Yet even intense name-calling is not something "no reasonable man could be expected to endure," especially on the football field. *Id.*

...

ROGERS, Circuit Judge, concurring. I concur in full.

Title IX, a federal sex discrimination statute, simply does not prohibit abuse of students merely because a coach uses coarse language with a sexual connotation, like "pussy."

This of course is not to excuse abusive conduct like that attributed to defendant in this case. Such conduct should not be tolerated in our high schools. Motivation by humiliation, ridicule, and shaming is counterproductive, and sends terrible messages to our young people. Good training can be very stressful, and tough—very tough—without such abuse. Moreover, constant coarse language, a sign of insecurity, engenders disrespect more often than respect. The way to root out such bad practices, however, is to rely on school boards, administrators, school councils, PTAs, and parents. It is not to create a federal court action to curb such practices. As the majority opinion explains, Congress has not done so.

HELENE N. WHITE, Circuit Judge, dissenting in part.

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I agree that consideration of the context surrounding Frye's behavior is necessary in determining whether Frye's treatment of Plaintiffs was extreme and outrageous. *See, e.g., Stepien v. Franklin*, 39 Ohio App. 3d 47, 528 N.E.2d 1324, 1330 (Ohio App. 1988). However, the majority overlooks important aspects of that context. This is not a case of a professional or collegiate football coach employing tough coaching methods to motivate consenting adults. Viewing the facts in the light most favorable to Plaintiffs, it appears instead that Frye used his position of authority to degrade, name-call, and single out minor students over an extended time and on a near-daily basis. Frye engaged in this name-calling in front of other impressionable students, who mimicked his behavior on and off the field. In Lininger's case, students followed in Frye's footsteps by calling Lininger "pussy" and "soft" or confronting him in the school hallway to tell him that "Coach Frye says you're a pussy." (R. 39, PID 1358, 1372.) At times, Frye's name-calling was precipitated by what he apparently perceived to be a lack of toughness or, in Chisolm's case, insubordination; at others, Frye appeared to single Plaintiffs out for reasons having nothing to do with their efforts on the field. Viewed as a whole, Frye's behavior constitutes more than "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Reamsnyder v. Jaskolski*, 10 Ohio St. 3d 150, 10 Ohio B. 485, 462 N.E.2d 392, 394 (Ohio 1984). I therefore conclude that there is sufficient evidence from which to conclude that Frye's actions were so extreme and outrageous as to fall outside the bounds of decency. *Burkes v. Stidham*, 107 Ohio App. 3d 363, 668 N.E.2d 982, 989 (Ohio App. 1995).

As the majority describes, Frye has a long history of similar abusive behavior toward student athletes in other districts and in St. Marys. ... In short, during each of Frye's coaching tenures on the record, his actions gave rise to serious concerns, disciplinary actions, or formal complaints. This supports the conclusion that his treatment of Plaintiffs fell outside the bounds of decency. *Burkes*, 668 N.E.2d at 989.

...

Finally, Plaintiffs have presented evidence sufficient to allow a reasonable jury to conclude "that the emotional distress actually suffered" as a result of Frye's behavior "reached the level of serious or debilitating emotional distress." *Meyers*, 721 N.W.2d at 1076. Frye's treatment of Lininger had repercussions on and off the field, including bullying by his peers and loss of friends. Eventually, he felt compelled to leave St. Marys and moved to a different school for his senior year. The expert psychologist who examined Lininger reported that Lininger shared that he was "depressed," "withdrawn," "isolated," and "ostracized" from the St. Marys community. Lininger described feeling panic and anxiety as a result of Frye's treatment of him. Lininger further testified that he was prescribed antidepressants and sought a counselor to help him cope with his feelings of anger and sadness. Similarly, Chisolm testified that the events underlying this case strained his relationships and caused him to distrust adults. He described feelings of sadness and being unable to enjoy anything in his hometown. The expert psychologist concluded that Chisolm experienced mental-health and psychological problems as a result of Frye's and the school's treatment of him.