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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 D.G., et al.,

10 Plaintiffs,

11 v.

12 Tucson Unified School District,

13 Defendant.

No. CV-18-00583-TUC-JGZ (MSA)

ORDER

14
15 Pending before the Court is Defendant Tucson Unified School District's Motion for
16 Reconsideration. (Doc. 67.) The Defendant (TUSD) asks the Court to reconsider its order
17 denying summary judgment on Plaintiffs' individual claim under Title IX. (*Id.*) Pursuant
18 to Local Civil Rule 7.2(g)(2), Rules of Practice and Procedure of the U.S. District Court
19 for the District of Arizona, the Court ordered Plaintiffs to respond to Defendant's
20 Motion. (Doc. 68.) Plaintiffs filed a Motion to Strike and Response. (Doc. 69.) Having
21 considered the filings, the Court will deny both the motion to strike and the motion for
22 reconsideration.

23 **I. Motion to Strike**

24 Plaintiffs request that Defendant's motion for reconsideration be stricken as
25 "improper," because the Court did not err in its original consideration of Defendant's
26 motion for summary judgment. (Doc. 69.) Plaintiffs' filing is more appropriately
27 characterized as an opposition on the merits to Defendant's request for reconsideration.
28 The motion for reconsideration is explicitly authorized by Local Rule 7.2(g). The motion

1 to strike lacks a proper basis. Accordingly, the Court will deny Plaintiffs’ motion to strike
2 Defendant’s motion for reconsideration.

3 **II. Motion for Reconsideration**

4 Reconsideration is proper upon a “showing of manifest error or a showing of new
5 facts or legal authority that could not have been brought to its attention earlier with
6 reasonable diligence.” LRCiv 7.2(g)(1). “Any such motion shall point out with specificity
7 the matters that the movant believes were overlooked or misapprehended by the Court, any
8 new matters being brought to the Court’s attention for the first time and the reasons they
9 were not presented earlier, and any specific modifications being sought in the Court’s
10 order.” *Id.* “A motion for reconsideration should not be used to ask a court ‘to rethink what
11 the court had already thought through—rightly or wrongly.’” *Def. of Wildlife v. Browner*,
12 909 F. Supp. 1342, 1351 (D. Ariz. 1995) (quoting *Above the Belt, Inc. v. Mel Bohannan*
13 *Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)). A motion for reconsideration may not
14 “be used to raise arguments or present evidence for the first time when they could
15 reasonably have been raised earlier in the litigation.” *Kona Enters, Inc. v. Estate of Bishop*,
16 229 F.3d 877, 890 (9th Cir. 2000).

17 **A. Analysis**

18 In its November 23, 2020 Order, the Court denied Defendant’s request for summary
19 judgment on Plaintiffs’ individual claim under Title IX. To establish such a claim, a
20 Plaintiff must prove five elements:

21 First, the school must have “exercise[d] substantial control over both the
22 harasser and the context in which the known harassment occur[red].”
23 Second, the plaintiff must have suffered harassment “that is so severe,
24 pervasive, and objectively offensive that it can be said to deprive the
25 [plaintiff] of access to the educational opportunities or benefits provided by
26 the school.” Third, a school official with “authority to address the alleged
27 discrimination and to institute corrective measures on the [school’s] behalf”
must have had “actual knowledge” of the harassment. Fourth, the school
must have acted with “deliberate indifference” to the harassment, such that
the school’s “response to the harassment or lack thereof [was] clearly
unreasonable in light of the known circumstances.” . . . And fifth, the school’s
deliberate indifference must have “subject[ed] the plaintiff] to harassment.”

28 *Karasek v. Regents of Univ. of Cal.*, 956 F.3d 1093, 1105 (9th Cir. 2020) (internal citations

1 omitted). The Court concluded that the Defendant only disputed Plaintiffs’ ability to
2 prove “elements two and three: ‘actual knowledge’ by TUSD of ‘severe, pervasive
3 harassment.’” (Doc. 66, p. 11.) The Court found that a reasonable juror could conclude that
4 TUSD had actual knowledge of Corral’s severe and pervasive harassment of students.
5 (Doc. 66, p. 13 & n.3.)

6 In its motion for reconsideration, Defendant argues that the Court erred in its
7 conclusion that Defendant did not dispute element four: whether it was deliberately
8 indifferent to Corral’s harassment of students. Defendant also asserts that the Court erred
9 in failing to fully consider the remoteness in time of the prior complaints against John
10 Corral in evaluating whether TUSD had actual knowledge—element three. (Doc. 67.)

11 **i. Deliberate Indifference**

12 TUSD did not argue in its motion for summary judgment that the undisputed
13 evidence was insufficient as a matter of law to support a finding that TUSD was
14 deliberately indifferent to the harassment such that its response (or lack of response) to the
15 harassment was clearly unreasonable, except within the framework of the actual knowledge
16 requirement.¹ In its summary judgment motion, TUSD, citing *Parents for Privacy v.*
17 *Dallas School District Number 2*, 326 F. Supp. 3d 1075, 1101 (D. Or. 2018), asserted four
18 elements were necessary for stating a hostile environment claim: plaintiff must show that
19 “the school district: (1) had **actual knowledge** of; (2) and was **deliberately indifferent** to;
20 (3) harassment because of sex that was; (4) ‘so severe, pervasive, and objectively offensive
21 that it can be said to deprive the victims of access to the educational opportunities or
22 benefits provided by the school.’” (Doc. 45, p. 5-6 (emphasis in original).)² TUSD argued
23 “[t]here is no evidence that the District had actual knowledge of severe, pervasive

24 ¹ Although TUSD argued that there was insufficient evidence of deliberate indifference
25 in its reply (Doc. 52, p. 8), the Court did not consider that specific argument because
26 “[a]rguments raised for the first time in [a] reply brief are deemed waived.” *Delgadillo v.*
Woodford, 527 F.3d 919, 930 n.4 (9th Cir. 2008).

27 ² When TUSD filed its motion for summary judgment in October 2019, the Ninth
28 Circuit had not yet rendered its opinion in *Karasek*, which set forth the five-element test.
Karasek, 956 F.3d at 1105. Both *Karasek* and *Parents for Privacy* rely on the Supreme
Court decision in *Davis*, and the differences in the statements of the required elements are
not relevant to the issues raised in the pending motions.

1 harassment under Title IX,” (Doc. 45, p. 5); there were insufficient facts in the record to
2 support a finding of both “actual knowledge” and “severe, pervasive, and objectively
3 offensive” harassment, (*Id.* at 5-7); and, within the discussion of actual knowledge, “even
4 if the school was negligent, it could not have been deliberately indifferent to the harassment
5 *because it lacked actual knowledge of the harassment.*” (*Id.* at 7 (emphasis added).)
6 TUSD’s argument that Plaintiff lacked evidence of deliberate indifference was subsumed
7 within its argument that it could not have acted with deliberate indifference to the
8 harassment because it was not aware of the harassment.

9 Nonetheless, the Court did address the issue of deliberate indifference. The Court
10 concluded that a reasonable juror could find that TUSD had actual knowledge of Corral’s
11 assault and harassment of students. The Court cited *Davis v. Monroe County Board of*
12 *Education*, 526 U.S. 629, 654 (1999), for the proposition that Plaintiffs may be able to
13 show both actual knowledge and deliberate indifference. (Doc. 66, p. 13.) The Court noted
14 that TUSD, the legal department, principal, legal counsel, human resources, and assistant
15 superintendent of middle schools, were aware of allegations of Corral’s sexual misconduct
16 and that TUSD had the authority through its board and officials to address the alleged
17 discrimination. (*Id.*) Despite TUSD’s finding that Corral violated its policies and the
18 assistant superintendent’s recommendation that Corral not be placed around students or at
19 any school, the same assistant superintendent reinstated Corral as a school monitor and
20 transferred him to another middle school—an environment where he was known to have
21 repeatedly sexually harassed students throughout his career as a security monitor. (*Id.* at
22 15.) The Court concluded whether TUSD’s limited response was clearly unreasonable (ie.
23 deliberately indifferent), in light of the known circumstances was an issue for the jury. *See*
24 *Karasek*, 956 F.3d at 1105 (“[T]he reasonableness of the response depends on the
25 educational setting involved—what would be unreasonable in the context of an elementary
26 school might not be unreasonable in the context of a university.” (quoting *Davis*, 526 U.S.
27 at 649)).

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1 complaints, and involved significantly different behavior—a single incident of
2 inappropriate touching [smacking buttocks] and a series of inappropriate name-calling.”

3 *Id.* at 1154. The Court explained:

4 The instances of dating two non-traditional students nearly his own age do
5 not provide NOC with any knowledge that [the professor] posed a substantial
6 risk of sexual harassment to NOC's students: even though one of these
7 relationships may have been improper (the district court noted that one of the
8 dating relationships did not even violate school policy, even though it was
9 not condoned, []), there is no insinuation anywhere in the record that these
10 relationships were non-consensual.

11 *Id.* (internal citation omitted). The court concluded that the prior instances of alleged
12 harassment were “too dissimilar, too infrequent, and/or too distant in time” to provide the
13 university with actual knowledge of sexual harassment in its programs. *Id.* at 1153.

14 In contrast to *Escue*, in the present case, TUSD was aware of numerous reports of
15 *similar* acts of inappropriate misconduct by Corral against seven middle school female
16 students over an eight-year period. It was alleged by numerous students that Corral
17 inappropriately touched female middle school students and made sexual comments towards
18 and about the students. There was no question about whether the contact was consensual:
19 it could not be. The students were underage. As described in the Order denying summary
20 judgment, TUSD, including its human resources department, was aware of the many
21 reports of misconduct by Corral:

22 Corral’s harassment in 2000 was reported and recorded in TUSD’s student
23 management information system. (Doc. 49-1, pp. 17, 33.) A letter shows that
24 TUSD and multiple officials, including the legal department, were made
25 aware of Corral’s harassment in 2002. (*Id.* at 42.) With respect to the 2008
26 investigation, TUSD, the legal department, principal, legal counsel, human
27 resources, and assistant superintendent of middle schools, were aware of
28 allegations of Corral’s sexual misconduct. (*Id.* at 58-59.) And TUSD,
through its board and officials, had the authority to address the alleged
discrimination, as evidenced by its exercise of that authority when it found
Corral violated its policies.

(Doc. 66, p. 13.) Although these reports of misconduct occurred some years prior to the
alleged acts at issue in this case, remoteness in time is but one consideration in determining
actual knowledge.

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III. Conclusion

For the foregoing reasons,

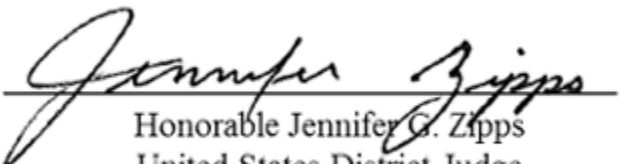
IT IS ORDERED that Plaintiffs’ Motion to Strike (Doc. 69) is **DENIED**.

IT IS FURTHER ORDERED that Defendant’s Motion for Reconsideration (Doc. 67) is **DENIED**.

IT IS FURTHER ORDERED that the parties shall file a Joint Proposed Pretrial Order and any *Daubert* motions within fourteen (14) days of this order. The content of the proposed pretrial order shall include, but not be limited to, that prescribed in the Form of Pretrial Order found on the Court’s website, under the tabs: Judges Information/Judges Orders, Forms and Procedures for Judge Zipps:

<http://www.azd.uscourts.gov/sites/default/files/judge-orders/JGZ%20Joint%20Proposed%20Pretrial%20Order%20-%20Civil.pdf>

Dated this 26th day of February, 2021.


Honorable Jennifer G. Zipps
United States District Judge