

The Next Frontier: Addressing Universities' Title IX Summary Judgment Arguments in Discovery

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Lay of the Land

Current Landscape

- Title IX Summary Judgment decisions:
- Orders Compelling Discovery: OSU; Gischel; Williams Col.; Yale;

Horizon Issues

- Cat's Paw
- “similarly situated” arguments
- “same actor” arguments
- “honest belief” arguments

Colgate Univ. (1st Cir. Jan.15, 2019)

Doe v. Colgate Univ., 2019 WL 190515 (1st Cir. Jan. 15, 2019)
affirmed dismissal of Title IX claim in summary judgment by

- ▣ Sustaining FRE 702 disqualification of plaintiff's expert witness
- ▣ Finding bias favoring accusing students does not establish gender bias.
- ▣ Determining university rebutted plaintiff's gender bias evidence with gender-neutral explanations.

Plaintiff waived challenge to district court dismissal of contract claim. *See Handout, (detailing rationale for same).*

Establishing pretext with circumstantial evidence

Pursuant to *McDonnell Douglas*' burden shifting test, Title IX plaintiffs must establish a university's gender-neutral rationale imposing discipline was pretext for discrimination by showing the rationale: "(1) has no basis in fact; (2) did not actually motivate the adverse [disciplinary] action; or (3) was insufficient to warrant the adverse action." *Waters v. Drake*, Case No: 2:14-cv-1704, 2016 WL 4264350 (S.D. OH. Aug. 12, 2016).

Direct evidence = no burden shifting

Trustees of Boston Coll., (1st Cir. 2018)

Affirming summary judgment dismissal of Title IX erroneous result claim in part because:

- ▣ disciplinary procedures not based on gender because no sexual misconduct complaints made against females;
- ▣ university's use of the terms such as "victim," "survivor," or "perpetrator" not linked to gender of students.
- ▣ No causal link between federal/OCR pressure and adverse actions by investigators and/or adjudicators.

Contract claims to jury, while negligence and NIOED claims dismissed. *See, Handout (detailing rationale for same).*

Valencia Coll. (11th Cir. 2018)

Affirming summary judgment dismissal of Title IX erroneous result claim - without addressing gender bias issues - because:

- ▣ plaintiff incorrectly believed the college “could not regulate off-campus conduct,” and
- ▣ plaintiff admitted engaging in prohibited conduct). *Doe v. Valencia College*, No. 17-12562, 2018 WL 4354223, *12 (11th Cir. Sept. 13, 2018)

First Amendment and Due Process claims also dismissed. See, *Handout* (detailing rationale for same).

Montana State., (D. MT. Dec. 21, 2018)

- Title IX claim survived summary judgment because university: (a) disciplining plaintiff for comments about transgender student (“TS”) while not disciplining TS for “showing a pocket knife when asked about her concerns about a potential encounter with” plaintiff; (b) “discriminat[ing] against [plaintiff] based on his gender by conducting a biased investigation in favor of” TS. *Powell v. Montana State Univ.*, No. 2:17-cv-15 SEH, Docket 134, p.24-25 (D.MT Dec. 21, 2018)
- Due process claims to jury. *See Handout, (detailing rationale for same).*

Drake Univ (S.D.IA Oct. 2018) – 1 of 3

- Sending selective enforcement claim to the jury because issues of fact remained regarding whether university “dissuaded” plaintiff from filing a sexual misconduct complaint against his accuser Jane Doe. *Rossley Jr. v. Drake Univ. et al.*, 342 F.Supp.3d 904, 933-34 (S.D.IA Oct. 2018).

Drake Univ. (2 of 3)

- Dismissed erroneous result claim by determining the following did not establish actionable gender bias: (1) gender-biased “trauma” informed views that caused decision makers to “explain away Jane Doe’s inconsistencies and ‘counterintuitive’ behavior” (2) “victim-centered . . . gender-bias[]” related to (i) females filing “most claims of sexual misconduct;” (ii) policies that identified complainants as “survivors;” and (iii) “political pressure” related to OCR 2011 DCL). *Rossley Jr. v. Drake Univ. et al.*, 342 F.Supp.3d 904, 925-26 (S.D.IA Oct. 2018).

Drake Univ. (3 of 3)

- *Dismissing* deliberate indifference claim because plaintiff did “not claim Defendants’ alleged failure to investigate his sexual assault” by Jane Doe caused plaintiff “to experience any separate harassment following his assault.”).
- Due process, ADA, promissory estoppel, claims dismissed. See, Handout (detailing rationale for same).
- Portion of contract claim sent to jury. See, Handout.

Vassar Coll., (S.D.N.Y. 2015)

Affirming dismissal of male plaintiff's Title IX claim in summary judgment in part because:

- ▣ A male student was found “not responsible in a sexual misconduct case;”
- ▣ Vassar “expelled female students for making false bias claims;”
- ▣ “no suggestion that the decision to expel [plaintiff] was motivated by gender-bias;”
- ▣ Plaintiff's lack of previous discipline, three character references, and impact statement did not require the university to impose a lesser sanction than expulsion. *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448 (2d Cir. 2015) (emphasis added).

McDaniel Coll. (S.D. Md. 2017)

Dismissing Title IX erroneous outcome claim because:

- Plaintiff presented no evidence supporting his belief that his adjudicator's "strong feminist views" motivated her recommendation that his tenured faculty member position be terminated, and
- adjudicator's non-gender based animus towards plaintiff contributed to her decision to terminate plaintiff's employment).
Naumov v. McDaniel College Inc., No. GJH-15-482, 2017 WL 1214406, *5 (S.D. Md., Mar. 21, 2017).

Portion of contract claim to jury. See *Handout*, (detailing rationale for same).

Recent Non-Title IX Summary Judgment Decisions of Note

Doe v. George Washington Univ. No.18-cv-553, 2018 WL 3869131 (D.C. Aug. 24, 2018).

- granting plaintiff's motion for summary judgment on contract claim based on university's violation of code of conduct provisions related to appeals in Title IX disciplinary proceedings.

District court remanded and university once again found plaintiff responsible. This prompted amended complaint addressed in *Doe v. George Washington Univ.* No.18-cv-553, 2018 WL 6700596 (D.C. Dec. 20, 2018). See, *Handout* (discussing same).

Doe v. Board of Trustees of the Univ. of Illinois, No.2:17-cv-2180-CSB-EIL, Docket #54, p.19 (C.D. Ill. July 24, 2018) granting summary judgment dismissal of due process claims.

- no lost "liberty" interest since plaintiff did not attempt to enroll in another university and therefore "was [not] denied a continuing education opportunity because of any statement made in public by Defendant about his disciplinary record."
- no lost "property" interest because plaintiff did not rely on university's relevant policies since he did not read them prior to enrolling at the university.

FRCPP 56 (d) Responses to Summary Judgment Motions

- *Doe v. Williams College*, No. 3:16-cv-30184-MGM, Docket 153 (D.C. Mass., Dec. 13, 2018) (granting plaintiff's Fed. R. Civ. P. 56(d) based motion "to obtain a copy of the 2011-2012 Williams College Handbook in order to support assertions in opposition to Defendant's motion for summary judgment.).
- *Doe v. St. Joseph's Univ.*, Case No. 18-2044, Document 24, Order (E.D. Pa. Aug. 3, 2018) (unpublished) (granting Title IX plaintiff's motion to compel discovery while dismissing defendant university's motion for summary judgment without prejudice).

Arguments based on Title VII reverse discrimination standards

OSU raised argument to dismiss Title IX lawsuit filed by band director:

- ▣ “Ohio State . . . [alleges] Waters cannot establish a *prima facie* case . . . [under the] first *McDonnell Douglas* factor, [which requires] a plaintiff in a reverse discrimination case [to] satisfy a heightened standard of establishing that ‘background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority.’

Universities' "similarly situated" arguments

Waters rejected a plaintiff's "similarly situated" argument in part because:

1. The plaintiff and the female coach "did not engage in the same or substantially similar conduct."
2. The plaintiff and the female coach were employed in different departments and received discipline from different supervisors;
3. he supervisor who disciplined the plaintiff/band director was not aware of the university's interactions with the female coach when the supervisor terminated the plaintiff; and
4. The university's terminations of the plaintiff involved different criteria, standards and policies than those applied in evaluating the allegations against the female coach.

Utilizing “Cat’s Paw” to disprove universities’ internal appeal arguments.

Waters described the “cat’s paw theory” as a Title VII liability theory which arises when “one who uses another to accomplish his improper purposes.” Under the cat’s paw theory, *Waters* noted:

“When an adverse hiring decision is made by a supervisor who lacks impermissible bias, but that supervisor was influence by another individual who was motivated by such bias ... the employer may be held liable under a ‘rubber-stamp’ or ‘cat’s paw’ theory of liability.’ A plaintiff proceeding under a cat’s paw theory must show: (1) [the non-decisionmaking individual was] motivated by discriminatory animus; (2) who intended to cause an adverse employment action; and (3) proximately caused the adverse employment action.”

Addressing “same actor” arguments

The “same actor” doctrine is a Title VII concept which defendant employers use to undermine employment sex discrimination claims if defendant’s employee- who engaged in an adverse employment action – is the same gender as the plaintiff/employee.

Responding to universities' "honest belief" arguments

The Sixth Circuit's "honest belief" rule allows employers to seek summary judgment even if the basis for the alleged adverse employment action was "mistake, foolish, trivial, or baseless" provided the employer had an "honest belief" for taking the adverse action.

- ▶ The "employer's proffered reason is considered honestly held if the employer can establish it reasonably reli[ied] on particularized facts that were before it at the time the decision was made."
- ▶ To rebut the assertion, a Title VII plaintiff may; (a) present evidence of "an error on the part of the employer that is too obvious to be unintentional;" or (b) show "more than a dispute over facts upon which the [adverse employment decision] was based."

The Battle for Leningrad – Title IX Discovery Disputes

Expect particularly intense battles over requests for:

- All materials related to every Title IX disciplinary proceedings handled by any investigator or adjudicator involved in plaintiff's disciplinary proceedings;
- Materials related to uncharged counterclaims made by male students charged with sexual misconduct;
- University communications with OCR;
- Title IX training materials and information on modifications to Title IX policies;
- Documents allegedly protected by attorney/client privilege and/or prepared by outside consulting groups.

Battle Plans Of Two Title IX Plaintiffs

Handouts contain subpoenas to OCR; court filings related to motions to compel; courts' discovery orders; and plaintiff's discovery requests from

- ▣ Doe v. Ohio State University; and
- ▣ Gischel v. University of Cincinnati.

Orders on Motion To Compel (1 of 4)

Gischel v. Univ. of Cincinnati, Case No. 17-cv-475-SJD, Docket 28, (S.D. Oh. Jun. 21, 2018)

- granting motion to compel OCR's response to subpoena for documents related to OCR investigations of defendant university in part documents were "relevant" to plaintiff's claims that university "felt pressure from the OCR to discriminate against males accused of sexual misconduct."

Orders on Motion To Compel (2 of 4)

Doe v. The Ohio State Univ., Case No. 2:16-cv-171, 2018 WL 4958958 (S.D.OH. Oct. 15, 2018) granted motion to compel:

- Communications related to university's communications with OCR regarding OCR investigations;
- Materials related to 35 Title IX disciplinary proceedings;
- Title IX training provided to investigators and adjudicators involved in plaintiff's disciplinary proceeding; and
- Requiring university respond to request for admission regarding whether defendant "charge[d]" any female students who "were alleged to have violated" any of the Title IX policies defendant alleged plaintiff violated."

Orders on Motion To Compel (3 of 4)

Montague v. Yale Univ., Case No.16-cv-885(AVC), Document 161 (D. Conn. Aug. 1, 2018) granting motions to compel filed by both parties

- University required to produce “any materials presented or distributed in connection with [Title IX] training; and any recording of the training.”
- Plaintiff required to produce records related to Plaintiff’s expert witness Dr. Smith: “Dr. Smith’s bills, including an itemization as to the tasks performed, the amount of time spent, and the hourly rate for each,” and “communications between Dr. Smith and plaintiff’s counsel which relate to compensation for Dr. Smith’s study or testimony in this matter . . . [and] documents demonstrating Dr. Smith’s calculation of the value of the plaintiff’s lost wages and benefits.”).

Questions and Comments