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## Two federal courts allow respondents' Title IX lawsuits to proceed to trial

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In respondents' Title IX lawsuits challenging sexual misconduct adjudications, courts have differed regarding the necessary factual allegations to state a plausible gender discrimination claim in order to avoid a dismissal on the pleadings and allow the case to proceed to discovery. If a case survives past a motion to dismiss and discovery ensues, courts have scrutinized at the summary judgment stage whether questions of fact exist to support a reasonable inference of Title IX gender discrimination. Colleges and universities have mostly prevailed in their summary judgment motions, where courts focus on whether the record evidence, not merely the plaintiff's allegations, contains admissible and material factual proof to support a reasonable inference of gender discrimination.

During the week of July 8, 2019, the United States District Courts for the Southern District of Iowa and the District of Connecticut issued the first two reported federal court decisions denying summary judgment motions and allowing respondents' Title IX gender discrimination claims to proceed to jury trials. Both courts took a more receptive approach to finding possible inferences of Title IX discrimination than predecessor courts have in granting college and university summary judgment motions. We analyze both rulings below and address the factual issues that were deemed triable.

### *Doe v. Grinnell College, et al.*

John Doe was a sophomore student at Grinnell College when two female students separately reported that he engaged in nonconsensual sexual intercourse with each of them. In its formal resolution process, Grinnell conducts a fact-finding investigation leading to the submission of an investigative report outlining the findings and incorporating the parties' comments. The report is reviewed by an adjudicator, who holds three separate, private, non-adversarial meetings with the investigative team, the complainant, and the respondent. The adjudicator recommends appropriate educational outcomes to the Dean of Students, and the policy allows an appeal of the determination. Grinnell investigated both reports against Doe, held him responsible, denied his appeal and dismissed him from the college.

Doe sued Grinnell and three former college administrators, asserting Title IX erroneous outcome, breach of contract and estoppel claims against Grinnell and negligent misrepresentation claims against the administrators. In his Title IX erroneous outcome claim, Doe asserted that the record shows: (1) articulable doubt as to the accuracy of the outcome of his disciplinary proceeding and (2) gender bias as a motivating factor behind the findings.

Regarding the first prong of the erroneous outcome analysis (the accuracy of the outcome), Doe argued that Grinnell failed to conduct an impartial review of his appeal because the appeals officer consulted with the adjudicator, seeking responses to the appeal officer's inquiries. Grinnell's policy requires that the appeals officer must be an "impartial decision-maker" and does not state whether the adjudicator may have any role in the appeals process. The appeal officer's consultation with the adjudicator may have impacted the appellate review, which poses triable questions of fact on the accuracy of the disciplinary outcome.

Regarding the second prong of the erroneous outcome analysis (gender bias as a motivating factor), Doe contended that a reasonable jury could find gender bias motivated the inaccuracy in his disciplinary proceeding on four grounds: 1) gender-biased Title IX trainings attended by decision makers; 2) the political climate on campus generated by campus activists; 3) the reasoning behind the determinations of responsibility in his sexual misconduct case; and 4) the statistical data of outcomes of other sexual misconduct cases at Grinnell. Doe failed to present triable questions as to the training, political climate and statistical aspects of his Title IX claim, but he proffered genuine questions of material fact concerning the reasoning behind the determination of his responsibility.

Doe's contentions about Grinnell's training failed because the materials and presentations were gender neutral overall. The use of female pronouns and names in certain hypothetical examples may simply reflect the reality that more complainants are female than male—but it does not reveal gender bias. Doe did not connect Grinnell's responses to campus activism (including policy changes) to any gender-based impact upon his disciplinary case. Doe's statistical overview of other disciplinary cases failed to show discernible patterns, especially where the other cases involved distinct circumstances minimizing their utility as suitable comparators.

Doe's Title IX claim avoided summary judgment because a reasonable jury could deduce that biased assumptions regarding the behavior of women during sexual encounters impacted the findings. His disciplinary case turned on questions of consent and coercion. The court concluded that the adjudicator may not have fully considered record evidence suggesting that the second complainant was not coerced, and instead engaged in consensual sexual activity, notwithstanding her stated desire to "get [it] over with." A reasonable jury may conclude that the adjudicator was influenced by a gendered assumption that a woman would not consent to sex that she felt was meaningless. Also, the record suggested that the adjudicator may have made gender-based assumptions about coercion because Doe and the second complainant engaged in sexual intercourse without birth control, assuming that a woman would not consent to sex without protection. The court also found triable questions of fact comparing the adjudicator's analysis in Doe's disciplinary case to her review of a prior sexual misconduct disciplinary case between two female students, where the adjudicator's reasoning appeared to differ in the earlier case because the respondent was a female.

Regarding Doe's contract claim, the record showed that procedural deviations from Grinnell's policies may have occurred during Doe's disciplinary case, raising questions of fact regarding their materiality and impacts. The court entered summary judgment dismissing Doe's claims of estoppel and negligent misrepresentation.

## ***Doe v. Quinnipiac University, et al.***

John Doe sued Quinnipiac University (“QU”) and three administrators, claiming that he was treated unfairly as a male respondent in a disciplinary case and as a complainant in related cases. The disciplinary cases concerned his interactions with two of his ex-girlfriends, Jane Roe and Jane Roe 2, and addressed allegations of intimate partner violence under QU’s Title IX and student conduct policies. Doe was found responsible for several charges. Separately, Roe was found not responsible for Doe’s allegations against her. QU did not proceed with a case against Roe 2 because she was no longer a student at the university.

Doe brought claims against the QU defendants alleging three Title IX theories (erroneous outcome, selective enforcement and deliberate indifference); state law contract, tortious interference with contract and negligence claims; and a claim for reckless and wanton misconduct. The Connecticut Federal District Court first reviewed whether QU committed spoliation of evidence because two QU administrators shredded and destroyed notes taken during the investigation and hearing phases, which Doe argued may have contained information showing gender bias. The destruction occurred after a litigation hold was put into effect. The court stated “[t]he destroyed evidence relates directly to [Doe’s] claims that he was subjected to an unfair investigatory process in both his capacities as a respondent and complainant.” The court concluded that there was no comparably available and preserved evidence to replace what had been destroyed. “Under these circumstances, a reasonable factfinder is entitled to determine whether [the shredded notes] likely contained evidence supporting [Doe’s] claim under Title IX that gender was a motivating factor in the decision to discipline him.”

Regarding Doe’s Title IX claims, the court adhered to the Second Circuit’s application of the *McDonnell Douglas* burden shifting paradigm. The first inquiry concerned whether Doe presented a *prima facie* case of discrimination. The court concluded that at least four parts of the record raised disputed questions of fact to preclude the entry of summary judgment on the erroneous outcome and selective enforcement claims. First, the record reflects a genuine dispute about whether QU applied materially disparate standards to the respective claims of intimate partner violence made by Doe (as a male) and Roe (as a female). Second, Doe was required to file a formal complaint against Roe in order to have his claims against her and his defenses investigated, while similar formal filing requirements were not imposed on Roe 2 to have her claims against Doe investigated. Third, Roe’s statements that she felt unsafe around Doe were credited, while Doe’s comparable claims that he felt unsafe around Roe were not. Fourth, the shredding of the hearing and interview notes added to the possible taint of gender bias for a factfinder’s review.

With Doe meeting his burden of showing a *prima facie* case, the *McDonnell Douglas* paradigm examined whether QU had shown a legitimate, non-discriminatory reason for the apparently disparate treatment. The court concluded that, looking at the record in its entirety, QU failed to meet its burden to show non-discriminatory proof through uncontested facts. The court, however, entered summary judgment in QU’s favor on the Title IX deliberate indifference claim because Doe’s claims, while credible to suggest an erroneous outcome or selective enforcement theories, failed to reach the high standard of proof required to show that QU’s actions were “clearly unreasonable in light of known circumstances.”

In his contract claim, Doe alleged twenty-nine breaches. QU equated the breach of contract claim to allegations of “educational malpractice” that would interfere with the university’s discretion and

cited to a disclaimer in its handbook (which incorporates the Title IX policy) stating that its provisions are informational, non-contractual and subject to change at QU's discretion. The court rejected QU's characterization and held that the handbook disclaimer does not preclude the breach of contract claim. The court rejected Doe's other claims for interference with contractual relationships and alleging negligence. However, the court found that a jury should be allowed to assess whether the QU defendants engaged in wanton and reckless misconduct against Doe, for reasons similar to those permitting the Title IX erroneous outcome and selective enforcement claims to be tried.

## **Takeaways**

Both courts' summary judgment rulings are not final liability determinations of the Title IX claims, and the institutions will defend themselves before juries contending that no Title IX gender discrimination occurred. Both rulings took a wider approach than predecessor courts in allowing the Title IX claims to reach trial. Particularly, where courts have granted summary judgment motions under the erroneous outcome analysis, they have reviewed each of the two prongs (accuracy of the outcome and whether gender bias was a motivating factor) with a clearer degree of separation than that applied in the two above-analyzed rulings. The Southern District of Iowa and Connecticut Federal District Courts seemed concerned by the disciplinary cases' outcomes, which likely impacted their probing to find questions of fact suggesting that gender bias could have impacted the findings (even if through circumstantial or inferential evidence).

Also, the Connecticut Federal District Court's spoliation analysis is worthy of attention. Administrators in a Title IX process, particularly hearing panelists, may destroy their handwritten notes or personal copies of case documents to protect confidentiality and because of their sensitive nature. A sound cautionary practice would be to preserve such documents with the Title IX coordinator or a delegated custodian, especially because they may prove to be highly material and probative evidence in a subsequent Title IX lawsuit exploring an administrator's thought process and reasoning during the disciplinary case.

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