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Ninth Circuit ruling widens circuit split on pleading requirements in lawsuits challenging sexual misconduct disciplinary proceedings

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When a lawsuit challenging a sexual misconduct disciplinary proceeding is subject to a motion to dismiss for failure to state a claim, the trial court performs its first gatekeeping function in determining whether plausible claims have been pled to allow the case to proceed to discovery. Competing considerations must be balanced. On one hand, the plaintiff will assert that most of the relevant information is in the hands of the college or university, so claims cannot be fully developed and factually supported until discovery occurs. On the other hand, the college or university will assert that the complaint contains far-reaching allegations about not only the student's disciplinary case but also other disciplinary matters, the campus environment or the fairness of policies, which should be tested at the outset before expansive discovery occurs on such wide-ranging issues.

With the proliferation of lawsuits by students who have been expelled, suspended or otherwise disciplined for sexual misconduct, cases are reaching the federal circuit courts on appeals of trial court rulings, where binding precedents are established within each circuit and splits in circuit authority raise uncertainty nationally and set the stage for possible Supreme Court review. A circuit split has ensued with differing tests to determine the sufficiency of a pleading, which has recently widened with the Ninth Circuit's ruling in *Austin v. University of Oregon*, No. 17-35559, 2019 WL 2347380 (9th Cir. June 4, 2019).

Prior Second Circuit and Sixth Circuit rulings

Under Supreme Court precedent in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the general test to assess a civil pleading on a motion to dismiss evaluates the facial plausibility of the complaint, accepting the truth of well-pled factual allegations and the sufficiency of its factual content to allow a court to draw a reasonable inference that the defendant is liable for the alleged misconduct. In *Doe v. Columbia University*, 831 F.3d 46 (2d Cir. 2016), the Second Circuit modified this pleading standard for Title IX claims. The Second Circuit analogized between what its precedent requires of plaintiffs in Title VII employment-discrimination cases and what it should require of plaintiffs alleging Title IX claims. The Second Circuit held that the well-known burden-shifting evidentiary paradigm in Title VII cases under

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), provides the appropriate standard, at the pleading stage, for reviewing a motion to dismiss in a Title IX case. Specifically, the circuit court held that a complaint under Title IX "is sufficient with respect to the element of discriminatory intent . . . if it pleads specific facts that support a minimal plausible inference of such discrimination." This standard lessens the burden on a Title IX plaintiff to survive a motion to dismiss within the Second Circuit.

In *Doe v. Miami University*, 882 F.3d 579 (6th Cir. 2018), the Sixth Circuit expressly disagreed with the Second Circuit's analysis as contrary to its precedent and to the requirements of *Iqbal* and *Twombly*. The Sixth Circuit noted that it had previously declined to modify its pleading requirements under Title VII employment-discrimination claims and would similarly not do so under Title IX claims. The Sixth Circuit requires that a Title IX pleading must be "plausible" based upon its well-pled factual allegations and not merely raise a "minimal inference" of gender discrimination.

The Ninth Circuit's ruling

The *Austin* case reached the Ninth Circuit on an appeal by three male students of the district court's dismissal of their complaint against the University of Oregon, which alleged that the University discriminated against them on the basis of their sex in violation of Title IX and violated their due process rights in connection with the University's sexual misconduct proceedings. The plaintiffs, who were student-athletes on scholarship, were found responsible for sexual misconduct based upon a female student's complaint that they forced her to engage in non-consensual sex at an off-campus apartment. Under the University's disciplinary process, the male students were held to be responsible for the charges and were suspended for at least four years and until the female student is no longer enrolled at the University. Their scholarships were revoked and would not be renewed. The student-athletes sued the University and various administrators, alleging Title IX claims and due process violations, which a federal district court dismissed after giving the plaintiffs three attempts to plead a complaint that could avoid dismissal. The plaintiffs appealed the dismissal to the Ninth Circuit.

Like the Sixth Circuit, the Ninth Circuit declined to adopt the Second Circuit's analysis in *Columbia University*. Citing to Supreme Court precedent, the Ninth Circuit held that Federal Rule of Civil Procedure 8(a), not the evidentiary presumption set forth in *McDonnell Douglas*, provides the appropriate standard for reviewing, at the pleadings stage, a motion to dismiss a Title IX claim. Rule 8(a) requires that a pleading must state a short and plain statement showing that the pleader is entitled to relief. Citing to *Iqbal* and *Twombly*, the Ninth Circuit held that the plaintiff's pleading must state enough facts to be plausible on its face. The circuit court held that the *McDonnell Douglas* framework is a tool more appropriately applied at the summary judgment stage as an evidentiary test to determine whether a case will reach trial, not at the outset in evaluating a pleading and the plausibility of its allegations.

Regarding the merits of the appeal, the Ninth Circuit held that, putting aside the plaintiffs' mere conclusory allegations, their complaint failed to make any claims of discrimination on the basis of sex cognizable under Title IX. The circuit court rejected each of the plaintiffs' three theories of Title IX liability: selective enforcement, erroneous outcome and deliberate indifference. It made clear that "[j]ust saying so is not enough." While the complaint included allegations about a speech by the University's president and campus protests, the plaintiffs failed to plead a plausible link connecting these events to the University's disciplinary actions and the fact that the plaintiffs are

male. By contrast, the Second Circuit in *Columbia University* found similarly pled allegations to raise a "minimal inference" of gender discrimination sufficient to survive a motion to dismiss.

The Ninth Circuit upheld the dismissal of the plaintiffs' selective enforcement claim because their pleading did not claim that any female University students have been accused of comparable misconduct, and thus failed to show that similarly situated students—those accused of sexual misconduct—are disciplined unequally. The plaintiffs' erroneous outcome claim failed because the plaintiffs did not articulate any basis to discern that the administration or outcomes of their disciplinary proceedings were flawed because of their sex. Lastly, their claim of "deliberate indifference" was found to have been waived because it was not meaningfully addressed in their appeal.

The Ninth Circuit also reviewed in a rather summary fashion the plaintiffs' claims alleging due process violations. Without expressly deciding the issue, the circuit court assumed that the plaintiffs have property and liberty interests in their education, scholarships and reputation. Nonetheless, the Ninth Circuit found no error in the district court's dismissal of the due process claims because the plaintiffs received notice and a meaningful opportunity to be heard. They were represented by counsel and had an express choice of the hearing process (either a special administrative conference or a panel hearing). They expressly chose the special administrative conference, which carried lower potential sanctions than a panel hearing, removing the possibility of expulsion and allowing for less detailed transcript notation. Because the plaintiffs were represented by counsel and negotiated the scope of sanctions, they had no plausible claim of any due process violations.

Takeaways

Currently, there are several appeals pending before federal circuit courts seeking review of dismissals of Title IX claims on the pleadings, and more appeals are certain to follow as district court rulings proliferate and vary on whether a complaint is sufficiently pled. If another circuit court adopts the Second Circuit's more relaxed pleading standard, the split in authority will become more pronounced and could be ripe for review by the United States Supreme Court.

The consequences of this split are significant. When cases challenging a Title IX disciplinary process proceed to the discovery stage, the scope of the examination through document productions and deposition inquiries is typically expansive and expensive. Colleges and universities not only must produce evidence relating to the underlying discipline case, but often must disclose information about "comparator" disciplinary proceedings that occurred within several years before or after the disciplinary case at issue. Some courts have permitted information about "comparator" disciplinary cases to be produced in chart form, while others have mandated the full production of disciplinary files with proper redactions and subject to appropriate protective orders. Topics pertaining to campus activism, debates and protests also become prime topics of the expansive discovery inquiries. Further, discovery often probes the details and contents of the trainings afforded to investigators and hearing panelists. In sum, discovery usually entails the production of thousands of documents and includes many depositions (potentially reaching the highest levels of administration).

While "just saying so" may not be enough to pass muster in a Title IX pleading to survive a dismissal, the varying and still-evolving standards of what is enough to permit a lawsuit to proceed

to discovery pose serious implications and costs, which must be carefully analyzed and understood when accessing the chances of obtaining a dismissal of a lawsuit at the outset.

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