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## Third Circuit affirms judgment in university's favor in a case involving Title IX cross-complaints

By Steven M. Richard

With the proliferation of Title IX lawsuits nationally in federal district courts, the resulting rulings are increasingly being appealed and addressed by federal circuit courts. On October 25, 2019, the United States Court of Appeals for the Third Circuit affirmed a judgment in a university's favor concerning its investigation and adjudication of student sexual misconduct cross-complaints. Although the Third Circuit's issued its ruling as "non-precedential," its analysis provides important guidance on proper and simultaneous responses to contrasting sexual misconduct complaints involving common parties and incidents. *John Doe v. Princeton University*, No. 18-1477 (3rd Cir. 10/25/19).

### Background

Plaintiff, litigating pseudonymously as "John Doe," was a male graduate student at the university, who describes himself as homosexual but did not publicly disclose his sexual orientation during his enrollment. Doe met a male undergraduate student (referenced in the litigation under the pseudonym "Student X"), whom he claimed sexually assaulted him twice. Doe contends that, after the second assault, Student X's friends created a hostile environment by publicly attacking his sexual orientation and accusing him of being a liar. Doe notified the university that he was sexually assaulted twice by Student X and that Student X's friends were harassing him, while Student X filed a cross-complaint against Doe.

Consistent with its policies, the university assembled a panel of administrators to investigate the cross-complaints, which issued charges against both students. Student X was charged with non-consensual sexual penetration and sexual contact, sexual harassment, and stalking. Doe was charged with sexual harassment, stalking, and retaliation. Ultimately, the panel found both students "not responsible" for any charges. Doe filed an appeal, which was denied.

Doe asserted several errors in the university's response, for allegedly interviewing Student X twice before meeting with Doe, failing to interview all of Doe's witnesses, obtaining information about Doe's previous sexual history, and giving Student X the opportunity to submit purported new evidence during the panel's deliberation phase. Also, Doe contended that he felt increasingly isolated on campus and suicidal during the proceedings, especially because the university banned

him from attending a religious community center where he and Student X could interact. Doe also asserted that the university should have issued a no-contact order against Student X's friends.

Doe claimed that he suffered "significant stress and emotional upheaval" from the reported sexual assault by Student X, which negatively impacted his grades and academic standing. During the investigation, he requested the accommodation of an extension to take a mid-term examination in order to focus on submitting evidence to the panel. The university denied the extension request, but offered him a leave of absence. During the final semester of his graduate program, Doe concluded that he would be unable to meet his degree requirements and requested reenrollment for the following semester. The university notified him that he must maintain a B average during his final semester to enroll for the next semester. Doe failed to maintain a B average, and the university terminated his enrollment.

Doe filed a Title IX lawsuit against the university, as well as state law claims for breach of contract, estoppel and reliance, and negligence. The trial court dismissed his complaint, and Doe appealed to the Third Circuit, which affirmed the judgment for the reasons addressed below.

## **The Title IX claims**

Doe offered three theories to hold the university liable under Title IX: (1) disparate treatment based upon his sex, (2) deliberate indifference to an allegedly hostile environment created by Student X's friends, and (3) retaliation against him for his complaint against Student X.

First, Doe asserted that the university displays bias against male sexual assault complainants and that, had he been a female victim of sexual assault by a male assailant, the proceedings would have been different. The trial court found his allegations to be far too generalized and factually unsubstantiated to state a plausible Title IX claim. While Doe pled many grievances with how the university conducted its process in response to his complaint and Student X's cross-complaint, he did not plead any facts indicating that any alleged unfavorable treatment was due to his sex.

Second, Doe claimed that the university was deliberately indifferent to his complaints of sexual assault by Student X. His allegations were predicated on his view that procedural flaws occurred in the investigative process. Rejecting this contention, the Third Circuit found that the university investigated and adjudicated Doe's complaint against Student X and that none of the alleged procedural flaws rendered the response as being "clearly unreasonable." Doe also contended that the university was deliberately indifferent to a hostile environment created by Student X's friends. The Third Circuit held that the alleged harassment by the other students (yelling a slur at Doe and calling him a liar) was not "so severe, pervasive, and objectively offensive" to constitute sexual harassment under Title IX.

Third, Doe alleged that the university retaliated against him for his complaint against Student X by "facilitating Student X's cross-complaint and/or initiating its own charges against [Doe], and "failing to provide academic accommodations and respond to [Doe's] psychiatric problems." On his first retaliation theory, Doe failed to allege that he suffered an adverse action because of a protected activity. The university did not on its own initiate charges against Doe; rather Student X filed a cross-complaint. "Investigating and adjudicating a student's cross-complaint is not adverse action." On his second retaliation theory, Doe failed to show any causal connection between his filing of his sexual assault complaint and the university's alleged failure to provide him with academic assistance. "The fact that he had a sexual assault complaint pending at the time he requested

academic accommodations to prepare evidence for the proceeding does not lead to an inference that the denial of his accommodation request was in retaliation for invoking Title IX’s protections.”

Additionally, the Third Circuit’s rejection of Doe’s Title IX claims addressed the necessary level of pleading specificity to survive past a motion to dismiss. Doe argued that his allegations should suffice at the pleading stage because he was entitled to a temporary presumption of discrimination based upon a showing of a “minimal inference of bias.” In support of his argument, Doe cited to the Second Circuit’s ruling in *Doe v. Columbia University*, 831 F.3d 46 (2d Cir. 2016), which applied the Title VII burden-shifting paradigm to the Title IX pleading analysis. As we have noted in prior alerts, other circuits, particularly the Sixth and Ninth Circuits, have declined to endorse the Second Circuit’s seemingly more relaxed pleading standard. The Third Circuit similarly found Doe’s contention to be “an incorrect articulation of [its] pleading standard for discrimination claims. Rather, the pleading must set forth some facts—beyond conclusions—that raise an inference of disparate treatment.” This evolving split within the federal circuit courts bears careful analysis in a college or university’s defense of a Title IX lawsuit, especially the viability of filing a motion to dismiss at the outset of litigation.

## **The State Law claims**

In his breach of contract claim, Doe contended that the university violated its policy’s language promising “appropriate interim measures” during the investigation. Specifically, he contended that the university should have issued no-contact orders to protect him against harassment. Rejecting the claim, the Third Circuit held “[u]niversity officials have significant discretion when to impose interim measures, and the interim measure Doe requested, a no-contact order, was something [the university] does not issue to students.” Similarly, the Third Circuit found unavailing Doe’s claim that the university arbitrarily imposed academic requirements as he sought more time to complete his graduate program under the stress of an ongoing disciplinary process. The court held that the university’s right to exercise its discretion to impose reasonable and appropriate academic requirements should not be impaired solely because of an ongoing disciplinary process.

The Third Circuit easily rejected Doe’s claims of promissory estoppel and negligence. Regarding his estoppel claim, Doe claimed that the university promised, in return for his acceptance of admission and tuition, that he would not suffer harassment, unfair procedures, or arbitrary termination of his enrollment. Doe failed to allege an enforceable “clear and definite promise” because the aspirational promises that he identified represent only “general expectation[s]” a student has when attending a university. Doe’s negligence claims were dismissed under charitable immunity grounds.

## **Takeaways**

Though a “non-precedential” ruling, the Third Circuit analysis offers several legal and practical insights to assist colleges and universities in addressing disciplinary cases, particularly those involving competing and contrasting sexual misconduct claims. Increasingly, lawsuits are addressing claims where a disciplined respondent student asserts that he or she was actually the victim of the sexual encounter, which may have been documented in a cross-complaint or have been raised as a defensive allegation in the disciplinary process. In the First Circuit’s recent ruling in *Haidik v. University of Massachusetts—Amherst*, 933 F.3d 56 (1st Cir. 2019), the appellate court found no Title IX violation where the plaintiff alleged that the university filed charges against him when a female student accused him of sexual misconduct, yet filed no charges against her when he accused her of misconduct. In that case, the plaintiff’s accusations came second in time before the

university and arose only defensively, and he was told that he could initiate a separate charge under the university's policies but declined to do so. As First Circuit and Third Circuit rulings make clear, a school must ensure appropriate and equal access for students to file cross-complaints concerning their alleged interactions. As best as reasonably possible, such cross-complaints should be investigated and adjudicated in a consolidated manner or on a parallel course, as the timing of the filings and extent of the respective allegations permit.

Further, the Third Circuit's analysis is important to show that exposure to a single slur or incidence of taunting by other students, while offensive, will likely be insufficient to support the level of severity and pervasiveness required in a hostile environment claim. The ruling also reinforces the high burden of proof that a plaintiff must show to establish deliberate indifference by a school in response to isolated student conduct.

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