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# Does Title VII preempt a Title IX claim by an employee alleging employment discrimination?

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Title IX of the Education Amendments of 1972 ("Title IX") states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Title IX's prohibition on discrimination is enforceable through an implied cause of action. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688-89 (1979). Sexual harassment is an actionable form of discrimination under Title IX, see *Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60, 75 (1992), and both damages and injunctive relief are available in private suits under Title IX. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255 (2009). Title IX's "broad directive that 'no person' may be discriminated against on the basis of gender appears, on its face, to include employees as well as students." *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 520 (1982). An employee's retaliation claim may proceed under *Cannon's* allowance of an implied cause of action. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005).

Title VII of the Civil Rights Act of 1964 ("Title VII") governs employment relationships, prohibiting discrimination based on sex. 42 U.S.C. § 2000e-2(a)(1), 2000e-3(a). Specifically, Title VII prohibits an employer from discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because of the individual's sex. Unlike Title IX, Title VII imposes administrative requirements before an employee may seek relief in court.

The United States Supreme Court has not addressed whether a Title VII claim preempts a Title IX claim in an employment lawsuit. Federal circuit courts that have addressed the issue, and district courts within circuits that have not yet done so, differ in their analysis of whether an employee may litigate a Title IX claim based upon the same underlying facts supporting a Title VII claim. The determination impacts significantly the timing, travel, and scope of an employment gender discrimination or retaliation claim against a federal funding recipient.

## No preemption

The First, Third, Fourth, Sixth, and Eighth Circuits have held that a Title VII claim does not preempt a plaintiff's Title IX claim. See *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 896 (1st Cir. 1988) (Title VII and Title IX prohibit the same conduct, utilizing Title VII as "the most appropriate

analogue" in a Title IX case); *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 564 (3d Cir. 2017) (reasoning that whether a plaintiff "could also proceed under Title VII is of no moment, for Congress provided a variety of remedies, at times overlapping, to eradicate private-sector employment discrimination." (internal quotation omitted)); *Preston v. Comm. of Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 205-06 (4th Cir. 1994) (holding that a private right of action separate from Title VII exists under Title IX for employment discrimination); *Ivan v. Kent St. Univ.*, 92 F.3d 1185, 1996 WL 422496, at * 2 (6th Cir. 1996) (allowing plaintiff to proceed with an independent Title IX claim for alleged sex discrimination in employment); *Brine v. Univ. of Iowa*, 90 F.3d 271, 276 (8th Cir. 1996) (agreeing with First and Fourth Circuit decisions in *Lipsett* and *Preston*).

In *Mercy Catholic Medical Center*, the Third Circuit analyzed the evolution of the above-cited Supreme Court Title IX precedent to conclude that an employee may litigate a Title IX discrimination or retaliation claim independent of or concurrent with a Title VII claim. The Third Circuit articulated four principles supporting its conclusion. First, the Supreme Court has held that private-sector employees are not limited to Title VII in their search for relief, such as a separate racial discrimination claim under 42 U.S.C. § 1981, despite Title VII's broad statutory range to provide relief from employment discrimination. Second, it should be left for Congress's constitutional purview, not judicial proclamations, whether an alternative avenue of relief from employment discrimination undesirably circumvents Title VII's administrative requirements. Third, the Supreme Court has held that Title IX's implied private cause of action encompasses employees, not just students. Fourth, the Supreme Court has further held that an employee may litigate sex-based retaliation claims.

## Preemption

By contrast, the Fifth and Seventh Circuits have held that a plaintiff's Title IX employment discrimination is preempted by Title VII. These two circuits have concluded that Title IX was not intended to enable employees of educational institutions complaining of gender discrimination or sex-based retaliation to bypass the remedial administrative scheme Congress established in Title VII. See *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995); *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857 (7th Cir. 1996). In *Lakosk*i, the Fifth Circuit noted Congress enacted Title VII to empower individuals with judicial redress for employment discrimination, whereas it enacted Title IX to empower federal agencies that provide funds for educational institutions to terminate funding upon a finding of employment discrimination. "In other words, Congress intended to bolster the enforcement of pre-existing Title VII prohibition of sex discrimination in federally funded educational institutions; Congress did not intend Title IX to create a mechanism by which individuals could circumvent the pre-existing Title VII remedies." 66 F.3d at 757.

Courts disagreeing with this analysis contend that the two circuits established their precedents before subsequent Supreme Court rulings clarifying Title IX's reach and the scope of its implied cause of action, yet they remain the law in the Fifth and Seventh Circuits and continue to be adopted by district courts within other circuits that have not yet addressed the preemption question. See, e.g., *Drisin v. Fla. Int'l Univ. Bd, of Trs.*, No. 1:16-CV-24939, 2017 WL 3505299, at *5 (S.D. Fla. June 27, 2017) (noting that Eleventh Circuit has not addressed the issue and applying Fifth Circuit's ruling in *Lakoski* as the most persuasive circuit court decision regarding the preemption analysis)

## Impacts

Whether a college or university can be subjected to a Title IX employment-based discrimination claim that parallels a Title VII claim will have significant impacts in litigation. The first impact concerns timing. Title VII's procedural requirements regarding the filing of an administrative claim vary dependent upon whether the applicable jurisdiction has a local fair employment practice agency tasked with enforcing state laws on employment discrimination. Depending on the answer, the timing requirements to seek administrative review by the Equal Employment Opportunity Commission and the local agency range from 180 days to 300 days from the alleged discriminatory action. Title IX, which does not prescribe an exhaustion of administrative remedies, contains no statutory limitations period, so a federal court will typically apply its state's statute of limitations period for a personal injury action (typically 2 or 3 years after accrual of the claim). Title IX's time period to seek relief allows for a current or former employee's delayed filing, which imposes broader evidentiary retention issues and poses greater risks of witnesses (such as supervisors or co-workers) becoming unavailable or having faded memories of the underlying events.

Further, the available monetary remedies for Title VII and Title IX claims differ. Under Title VII, compensatory and punitive damages are statutorily capped on a sliding scale based upon the size of the employer. Under Title IX, compensatory damages are not capped, but punitive damages are not available.

Other legal nuances arise in the interrelationship between Title VII and Title IX employment claims. For example, under Title VII, the Supreme Court has recognized the applicability of the "continuing violation doctrine" to extend the limitations period to bring a claim premised upon an alleged hostile work environment, provided that an act contributing to the claim occurs within the filing period. If so, the entire period of the hostile environment may be considered under Title VII. Courts have disagreed on the propriety of applying the continuing violation doctrine to Title IX's limitations analysis, which starts with a longer period to file suit that could be even further significantly extended under the continuing violation analysis.

Additionally, courts have found that the preemption question differs where the plaintiff claiming sex discrimination is both a student and an employee of the federally funded educational program. In finding no preemption of a Title IX claim, courts have emphasized that such cases present the special circumstance where discrimination and harassment in a job results in simultaneous harms to both the person's employment and education.

Courts will continue to address whether and to what extent a plaintiff may litigate employment-based Title IX claims with a concurrently pled Title VII claim, which will eventually include determinations by federal appellate courts that have not yet defined the controlling preemption precedent within their circuits. The split in authority, especially if it widens, could provoke Supreme Court review for its resolution. In the meantime, colleges and universities should understand the controlling precedent, if any, within its jurisdiction to evaluate the best strategic and legally supportable defenses against employee lawsuits alleging discrimination or retaliation based upon gender.

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