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Sixth Circuit addresses the pleading standard applicable to a respondent's Title IX challenge

By Steven M. Richard

As we have addressed in prior alerts, the United States Court of Appeals for the Sixth Circuit has recently issued significant rulings in Title IX private causes of action, which have established precedents within its federal districts (Kentucky, Michigan, Ohio, and Tennessee) and received attention beyond the circuit. Particularly, the court held in *Doe v. Baum*¹ that, as a matter of procedural due process, a student at a public college or university accused of sexual misconduct is entitled to cross-examine his or her accuser. *Baum* influenced the right of cross-examination afforded under the grievance process in the Department of Education's Title IX rules on sexual harassment, effective on August 14, 2020.

On June 29, 2020, the Sixth Circuit reversed a lower court's dismissal of a respondent's erroneous outcome challenge to a sexual misconduct disciplinary case. The ruling is significant not so much for the underlying disciplinary process—which differs from what will be required under the grievance process of the new Title IX rules—but rather for the Sixth Circuit's examination of the level of pleading required to state a plausible erroneous outcome challenge in a private Title IX cause of action. In a split 2–1 ruling, the Sixth Circuit held that the plaintiff had sufficiently pled that the disciplinary process was biased against him because of his sex.²

Facts

The following allegations in Plaintiff John Doe's complaint against Oberlin College were assumed to be true for purposes of the judicial review of whether he pled a plausible Title IX claim. John alleged that he was erroneously expelled as a result of a sexual encounter during February 2016 with another student, Sally Roe, who contended that she was unable to give consent due to intoxication. Nine days after the incident, Sally reported to the college allegations that John assaulted her. One week later, John was notified that the college was investigating a report that he sexually assaulted Sally while she was incapacitated and unable to provide consent. The college hired an investigator, who interviewed the parties and other student witnesses.

¹ *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).

² *John Doe v. Oberlin College*, No. 19-3342 (6th Cir. June 29, 2020).

The college's policy states that the investigation of a sexual assault claim should usually be completed within 20 business days and the resolution of the entire process should normally take no more than 60 business days. The investigator took four months to issue his report. Two months into the investigation, John wrote to the Title IX coordinator requesting information and an update, noting the considerable stress that he felt during the process. The coordinator did not respond, although the college's policy assures parties that it will provide notification of reasons for a delay and the expected adjustment in time frames.

John did not know the substance of the allegations against him until July 2016, when the investigator submitted his report. A hearing was held in October 2016, and John was assisted by an advisor that the college assigned to him a few days earlier upon his request. During the hearing, Sally contradicted a prior statement about whether John used force against her. John's advisor left the hearing early and later retweeted on social media a comment about believing all survivors.

The hearing panel held John responsible because consent was not present due to Sally's intoxication, and the college accepted the panel's recommendation of John's expulsion. John appealed, stating that new witnesses and information contradicted Sally's version of events and challenging the severity of his expulsion sanction. John's appeal was denied.

John filed a lawsuit in an Ohio federal district court contending that the college violated Title IX by reaching a gender-biased erroneous outcome, as well as asserting state law claims. The lower court granted the college's motion to dismiss John's complaint for a failure to plead a plausible Title IX claim, while declining to exercise supplemental jurisdiction over the state law claims. John appealed the judgment to the Sixth Circuit, which held that the Title IX claim was sufficiently pled and the litigation should proceed.

The majority's analysis

To state a Title IX claim under the "erroneous outcome" theory, a plaintiff must allege facts to (1) cast some articulable doubt on the accuracy of the disciplinary proceeding's outcome and (2) demonstrate a particularized causal connection between the flawed outcome and sex discrimination. The parties agreed that John's allegations, assumed to be true, met the first prong. The focus concerned whether John had plausibly pled that the outcome of his disciplinary case was caused by sex bias.

Regarding the second prong, the Sixth Circuit held that it was unnecessary that the "causal bias must be unique to the plaintiff's own case." To the contrary, the court concluded that "patterns of decision-making" in a school's disciplinary cases can establish the requisite connection between the outcome and bias.

The majority found a number of allegations reasonably supporting inferences of bias:

- John raised "clear procedural irregularities," including the college policy's statement that an investigation should be completed within 20 days and the matter resolved within 60 days; the investigation in John's case took 120 days and the hearing panel's decision was issued about 240 days after the case's opening. The delay was compounded by the college's alleged failure to twice do what it promised. First, the college did not inform the parties of the reasons for the delay and ignored John's plea for information. Second, the hearing panel failed to test Sally's credibility, when her hearing testimony contradicted her prior

statements to the investigator about John’s alleged use of force.

- The majority found it “remarkable” that John’s advisor did not attend the entire hearing, even though his role was to assist the respondent.
- The college faced external pressures during this time from an Office for Civil Rights investigation of its policies and practices with respect to sexual harassment and sexual assault complaint processes.
- John also cited to a “Spring 2016 Campus Climate Report,” which stated that—during the academic year in which his case was determined—every case that went to a hearing panel resulted in a decision of the respondent’s responsibility on at least one charge.
- Finally, the majority stated that “the strongest evidence is perhaps the merits of the decision itself in [John’s] case.” It found that the degree of doubt passed from “articulable” to “grave,” as the disciplinary result suggested gender bias. The hearing panel’s decision was “arguably inexplicable,” based upon an alleged misapplication of the college’s definition of incapacitation.

The majority concluded that “on this record—and making all inferences in [John’s] favor at this stage of the litigation—one could regard this as nearly a test case regarding the college’s willingness to ever acquit a respondent sent to one of its hearing panels during the 2015–16 academic year. [John] has amply stated a claim for sexual discrimination in violation of Title IX.”

The dissent

The dissent warned that the majority conflated the erroneous outcome analysis. The parties agreed that John’s pleading met the first prong—allegations casting some articulable doubt on the accuracy of the disciplinary proceeding’s outcome—but disputed whether he had sufficiently alleged that the outcome was influenced by his sex. The dissent objected that the majority wrongly blurred the lines between the two prongs, stressing that the second prong requires a particularized showing of causation. The dissent warned that the majority’s analysis “reduces the pleading standard in Title IX claims . . . contrary to [] binding precedent.”

Takeways

Federal appellate courts differ in their analysis of pleadings asserting Title IX challenges to disciplinary processes. The Third and Seventh Circuits have recently held that the pleading analysis should not depend upon the elements of various theories that have evolved judicially (such as the “erroneous outcome” theory), but should address the question of whether the alleged facts plausibly support an inference of discrimination “on the basis of sex.” The Second Circuit has adopted a relaxed pleading standard by requiring a plaintiff to allege a minimum inference of discriminatory intent. The Ninth Circuit has rejected the Second Circuit’s standard, concluding that the minimal inference analysis does not properly vet a pleading’s plausibility. The Sixth Circuit also previously declined to adopt the Second Circuit’s standard, but has now applied a fungible approach to the two prongs of the erroneous outcome theory.

As pleading distinctions evolve, the issue could ultimately make its way to the Supreme Court. In the meantime, a school must know and assess the applicable law in its circuit when facing a Title IX challenge to the result of a disciplinary case. A strategic decision should be evaluated whether to file a motion to dismiss (where all factual allegations must be assumed to be true). Unless the pleading appears clearly deficient, a motion to dismiss may not be a preferred economic and strategic choice.

Instead, the school's litigation strategy may be better served by answering the complaint, proceeding to discovery, and waiting until a summary judgment motion to state its legal arguments for the first time in a dispositive motion based upon a developed record.

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