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## Tenth Circuit affirms summary judgment ruling in university's favor in a respondent's Title IX lawsuit

By Steven M. Richard

As we have addressed in previous alerts, federal district court rulings in Title IX respondent lawsuits are increasingly reaching appellate review before federal circuit courts, where binding precedents are established or clarified and splits among circuits could set the stage for United States Supreme Court review. Currently, appeals in respondent lawsuits are awaiting rulings before the Third, Sixth, Eighth, and Ninth Circuits. In the first of several anticipated federal circuit court opinions this year, the United States Court of Appeals for the Tenth Circuit issued a detailed unanimous analysis addressing six commonly asserted Title IX arguments and affirming a trial court's entry of summary judgment in a university's favor. The court also rejected the plaintiff's effort to impose constitutional requirements on a private university. *John Doe v. University of Denver, et al.*, No. 18-1162 (10th Cir. March 9, 2020).

### Background

The lawsuit concerned a "he said, she said" sexual encounter between John Doe and Jane Doe, two freshmen, early in their college experience during the fall of 2014. Six months later, Jane filed a complaint with the university, accusing John of sexual misconduct.

The university conducted a prompt investigation, undertaken by two administrators, who interviewed John and Jane separately twice and allowed each to offer corrections to the summaries of their respective interviews. The investigators also interviewed other witnesses identified by the parties. They issued a single preliminary report to John and Jane, allowing them to offer further corrections to their statements. The preliminary report was John's first opportunity to see Jane's specific allegations against him.

Thereafter, the investigators issued their final report, finding it more likely than not that John's actions resulted in non-consensual sexual contact with Jane by means of coercion. No hearing was held in the responsibility determination. The university convened an outcome council to review the disciplinary case and determine the sanction, resulting in John's expulsion. John filed an appeal, which was denied.

John sought judicial redress by suing the university and several administrators, alleging constitutional and Title IX challenges. The United States District Court for the District of Colorado

granted the university's summary judgment motion, finding that no state action existed to support John's constitutional claim and that his Title IX claim failed because he did not proffer evidence showing that the university's actions were motivated by gender bias.

## **Analysis**

### ***No state action to support a constitutional challenge***

Before addressing John's Title IX claim, the Tenth Circuit easily dispatched his constitutional claim. The University of Denver is a private university, and its actions are not normally subject to constitutional requirements. John bore the burden to demonstrate that the university should be deemed a state actor under the facts and circumstances of his disciplinary process. Specifically, John argued that the federal government's issuance of the April 2011 Dear Colleague Letter ("DCL") and the threatened loss of federal funding in the event of the university's noncompliance with the federal guidance created a sufficient governmental nexus to justify his constitutional claim.

Without having to delve too deeply into the merits of the claim, the Tenth Circuit found that John's constitutional argument was legally flawed. He wrongly asserted his constitutional claim under the Fourteenth Amendment to the United States Constitution, which is concerned with the actions of state governments (as opposed to the Fifth Amendment, which focuses on federal governmental action). John's Fourteenth Amendment claim failed to adduce any evidence of a state's involvement in his disciplinary proceeding. Regardless, even if John had properly framed his constitutional challenge under the Fifth Amendment to focus on the university's connection to the federal government, it is doubtful that the Tenth Circuit would have recognized such a novel constitutional theory, since courts have not imposed constitutional requirements upon private universities merely because they have been subject to and complied with Office for Civil Rights' guidance documents.

### ***None of John's six justifications for his Title IX claim passed legal muster***

#### *Compliance with the DCL alone does not evidence gender bias*

John contended that the 2011 DCL and its impacts in compelling the university's compliance gave rise to an inference of gender bias. The Tenth Circuit rejected this argument, noting that the DCL is gender-neutral on its face and evidence that a school "felt pressured to conform with its guidance cannot alone satisfy Title IX's fundamental requirement that the challenged action be 'on the basis of [gender].'" A gender discrimination claim requires a particularized showing of "something more," actually connecting the university's actions to the respondent's gender.

#### *Gender-bias cannot be implied merely because most respondents are male*

Adopting recent opinions issued by the First and Sixth Circuits, the Tenth Circuit rejected John's statistically based assertion that gender bias can be reasonably implied because, in a five-year period after the issuance of the DCL, all respondents in the university's sexual misconduct cases were either listed as males or could be presumed to be males based upon the nature of the complaint. Statistical disparities in the gender makeup of complainants and respondents can be explained by "an array of alternative" non-discriminatory reasons, where the school's policies are gender-neutral on their face. The gender composition of filing complainants and named respondents is typically beyond the control of the school.

*Alleged anti-respondent bias does not equate to Title IX gender discrimination*

Surveying cases nationally, the Tenth Circuit held that a contention of a school's purported anti-respondent bias, even if supported by questions of fact at the summary judgment stage, does not create a reasonable inference of anti-male bias, given that both males and females can be named as respondents in sexual misconduct cases. John sought to rely upon on purported "pro-victim" language in the university's training materials, which, at most, would demonstrate an alleged anti-respondent bias that cannot simply be equated to an anti-male bias.

*Alleged flaws in the investigation must be have been influenced by gender bias*

John argued that the investigators exhibited bias by finding him responsible for non-consensual sexual contact despite evidence supporting his version of the events. The Tenth Circuit found that the record showed that the investigators were not faced with a clear situation where the weight of the evidence either undisputedly or substantially favored John's version.

*The severity of the sanction does not necessarily equate to gender bias*

John claimed that his expulsion was a draconian, gender-influenced sanction. The university's gender-neutral policy allows it to consider a number of factors in sanctioning, including the nature and severity of the incident, prior history, and community concerns. The policy also expressly states that non-consensual sexual misconduct typically results in a dismissal. John failed to eliminate the non-discriminatory explanation that, as expressly stated in its policy, the university has legitimate interests in expelling students — regardless of their gender — who engage in non-consensual sexual contact.

*Encouragement of the filing of sexual misconduct complaints does not equate to gender bias*

Finally, John argued that the university actively targeted males through its initiatives to promote the reporting of sexual misconduct. He cited posters placed on the campus encouraging victims to file complaints, which he characterized as implying messages that a perpetrator is always a male. "At most, encouragement of this nature might possibly be construed as exhibiting a bias against potential respondents because it increases the likelihood that potential respondents will be subjected to investigation and possibly sanctioned if found responsible. But both men and women can be potential respondents, and therefore any gender bias against them would not be bias on account of gender."

## **Takeaways**

Perhaps the most-discussed aspect of the Tenth Circuit's unanimous ruling will not be its analysis as described above (which is helpful to colleges and universities facing Title IX respondent lawsuits), but rather a lengthy footnote concluding its opinion (which one of the three panellists declined to endorse). Expressing concerns about the overall fairness of the university's investigation, the court noted that the distinction between an alleged anti-respondent bias (which is not a basis to recover in a Title IX lawsuit) and impermissible gender bias in a sexual misconduct proceeding (which is a basis for Title IX relief) may not always be entirely discernible.

The Tenth Circuit indicated that there was credible record evidence suggesting that John's version may not have been as readily accepted during the investigation and that he encountered seeming obstacles in his defense. In a passage that may be often-discussed and debated in future lawsuits, the court stated that "[a] few procedural irregularities in this vein are not necessarily uncommon or even troubling. After all, sexual-misconduct investigations and proceedings will not be perfect. But an accumulation of irregularities all disfavoring the respondent becomes deeply troubling because

benign, stochastic explanations for the errors become implausible. Instead, it looks more like railroading.” The court noted that such procedural concerns can be more at risk under a model where an investigator acts as both the fact-finder and decision-maker.

Yet, while troubled by aspects of the record, the court adhered to its conclusion that any such alleged or implied bias against a respondent is “simply not proscribed by Title IX, which only prohibits discrimination ‘on the basis of gender.’” The concerns do not alter the legal obligation of a Title IX plaintiff opposing summary judgment to proffer evidence raising material questions of fact from which a reasonable fact-finder could infer that the school’s proceeding *was motivated by considerations of gender*.

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