

December 22, 2020



Eighth Circuit rejects multi-pronged attack against university disciplinary process

By Steven M. Richard

In lawsuits challenging sexual misconduct disciplinary processes, respondents often plead several causes of action, in addition to gender discrimination claims under Title IX of the Education Amendments of 1972 (“Title IX”). A judicial complaint may seek relief under a combination of constitutional principles (if the case involves a public institution), federal and state anti-discrimination statutes, or state common law claims under contract, tort, and/or defamation theories. An institution’s defense strategy must access the interrelationship of all concurrently pled claims and each claim’s distinct legal elements.

The United States Court of Appeals for the Eighth Circuit recently addressed a respondent’s several grounds to challenge a disciplinary process that found him responsible for sexual misconduct and stalking charges. Affirming a judgment in a university’s favor, the Eighth Circuit held that the university’s conduct policy withstood First Amendment’s scrutiny and the respondent’s claims alleging racial and gender discrimination did not pass legal muster under Title VI of the Civil Rights Act of 1964 (“Title VI”) and Title IX respectively. *Rowles v. Curators of the University of Missouri*, No. 19-1946, 2020 WL 7409643 (8th Cir. Dec. 18, 2020).

Background

Jeremy Rowles, an African-American, was a Ph.D. candidate at the University of Missouri. In 2015, while Rowles worked as a teacher assistant, an undergraduate student filed a sexual harassment complaint against him. An investigation deemed the claim unsubstantiated, but an investigator allegedly told Rowles that he “looked like someone who might commit sexual assault.”

In September 2016, Rowles met A.B., a white female undergraduate student and repeatedly expressed his romantic interest in her. He conveyed his feelings to A.B. directly and through flirtatious social medial communications, which prompted A.B. to demand that he stop engaging in such outreaches. Rowles continued to appear in A.B.’s presence on campus, which led her to file a complaint against him. After an investigation, Rowles was found responsible for sexual harassment and stalking charges. The university suspended Rowles for four years and banned him permanently from campus facilities. Rowles filed an appeal under the university process, which resulted in the reduction of his suspension to two years.

Rowles sued the university and four individual defendants in the United States District Court for the Western District of Missouri, asserting nine causes of action: three First Amendment challenges—two of which attacked the university’s policies as substantially overbroad and vague and one contending retaliation against his exercise of free speech—as well as claims for violations of procedural due process, substantive due process, Title IX’s prohibition on sex discrimination, Title VI’s prohibition on race discrimination, and Missouri’s Human Rights Act’s prohibitions on race and sex discrimination in public accommodations. The district court granted the university’s motion to dismiss in part as to the First Amendment substantial overbreadth, Title IX, and Missouri statutory claims. The remaining claims proceeded to discovery, and the university later moved for summary judgment. The district court granted the summary judgment motion, entering a final judgment in the university defendants’ favor. Rowles appealed the judgment to the Eighth Circuit.

The Eighth Circuit’s Review

The motion to dismiss ruling

On the face of the Rowles’ complaint and accepting the truth of its factual allegations, the Eighth Circuit affirmed the district court’s holding that the university’s policies against sexual harassment and stalking on the basis of sex were not facially overbroad. Rowles failed to plausibly allege that the university’s policies have a real and substantial effect on protected speech. Particularly, the court noted that the university’s sexual harassment policy tracks nearly verbatim the Supreme Court’s definition of student-on-student sexual harassment under *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (holding that, if a school is faced with allegations of sexual harassment that is “so severe, pervasive, and objectively offensive that it denies its victims equal access to education that Title IX is designed to protect,” the school may be liable under Title IX if it remains deliberately indifferent to such allegations).

Rowles’ Title IX claim likewise failed to meet a “plausibility” standard to avoid dismissal at the pleadings stage. Rowles did not sufficiently plead that the investigation reached an outcome against the weight of the evidence or allege any facts suggesting bias based on his sex. The fact that an investigator made an alleged remark about him during a prior investigation had no relevance when such investigator was not alleged to have investigated the complaint that led to Rowles’ suspension. The court also rejected Rowles’ claim of “selective enforcement,” because his allegations protesting the university’s treatment of his accuser do not support any contention that any female comparator in similar circumstances—i.e., a female accused of sexual harassment or stalking—was treated more favorably. Because there was no plausibly pled Title IX violation, Rowles’ gender discrimination claim under the Missouri Human Rights Act was properly dismissed.

The challenge to a discovery ruling seeking comparators

During the discovery phase of the district court proceedings, Rowles sought the university’s production of information pertaining to all Title IX complaints received over a five-year period. In response, the university provided summary information relating to a total of sixty complaints over a three-year period, which the trial court found to be a reasonable time range. The university’s summary information listed the race and gender of the accused, the alleged violation, the identity of the investigator, and the sanction (if any). The responses revealed that, approximately one year prior to Rowles’ discipline, two white students were disciplined less harshly for violating the policies prohibiting sexual harassment and stalking. Seeking to gain more information on potential

similarly situated comparators, Rowles moved to compel the university's production of the actual Title IX complaints, investigative files, and findings pertaining to all sixty complaints. The district court concluded that the summary information was sufficient for discovery purposes and that the burden to the university in producing the requested records outweighed any likely benefit.

On appeal, Rowles argued that the discovery ruling prevented him from obtaining evidence necessary to prove that similarly situated comparators were treated differently. The Eighth Circuit found no abuse of discretion in the discovery ruling. Particularly, the university offered to provide more information on the two white students who committed the same violations as Rowles, but not the files of the sixty listed cases. This scope was sufficient to allow Rowles to explore his theories of alleged racial discrimination.

The summary judgment ruling

Based upon the record developed during discovery, the Eighth Circuit agreed with the district court's conclusion that Rowles' Title VI racial discrimination claim failed as a matter of law. Rowles failed to demonstrate that his proffered comparators—particularly the two white students accused of sexual harassment and stalking on the basis of sex—had engaged in sufficiently similar conduct. Specifically, he failed to present that his proffered comparators were *graduate students* accused by an undergraduate student and thus similarly situated in all relevant respects. For the same reason, Rowles' claim of racial discrimination under the Missouri Human Rights Act failed as a matter of law.

Similarly, the Eighth Circuit held that there were no genuine issues of material fact as to whether the university's policies are unconstitutionally vague because the terms provide adequate notice of prohibited conduct. Proscribed sexual harassment includes verbal conduct that is "sufficiently severe or pervasive and objectively offensive." Similarly, to constitute stalking, a person must engage in conduct "with no legitimate purpose that puts another person reasonably in fear for his or her safety or would cause a reasonable person under the circumstances to be frightened, intimidated, or emotionally distressed." Further, the mere fact that enforcement of these standards requires reasonable judgment evaluations by administrators does not make their terms impermissibly vague.

Finally, the Eighth Circuit rejected Rowles' First Amendment retaliation claim. Rowles asserted that his "amorous speech" was constitutionally protected and that factual questions existed as to whether he was wrongfully punished for engaging in such speech. The Eighth Circuit easily dispatched this characterization, especially because Rowles failed to present any clearly established law showing that a suspension based upon conduct deemed to be sexual harassment and stalking could give rise to a First Amendment challenge. Most of all, the university's administrators reasonably concluded that it was permissible under the First Amendment to discipline a student for violating university policies against harassment and stalking.¹

Takeaways

- As shown above, respondents often file "kitchen sink" judicial complaints with multiple causes of action and many allegations spanning several hundred paragraphs. When faced with such a

¹ Rowles did not appeal the district court's grant of summary judgment as to his procedural and substantive due process claims.

complaint asserting a multi-pronged attack against a disciplinary process, the defense strategy must evaluate whether to challenge counts at the outset in a motion to dismiss where the truth of many factual allegations are assumed or defer the challenge to a later summary judgment motion with the benefit of a developed record. College and university counsel should weigh precisely what may be gained through a motion to dismiss, under the best case scenario. If the chances for an outright dismissal seem slim (either based upon the extent of the allegations accepted as true or a judge's disposition to allow claims to proceed to discovery), then a motion to dismiss may actually prove to have less utility. In fact, judicial rulings expanding the scope of permissible claims under Title IX and other theories have often arisen at the motion to dismiss stage. Specifically, an assessment should be made whether "bad alleged facts" (assumed to be true) can lead to "bad law." In the case addressed above, the clear deficiencies in Rowles' allegations led to the dismissal of some of the pled claims, including his Title IX count, and the narrowing of the case heading into discovery. In other cases, at the pleading stage, the framework is not always as clear-cut and favorable, possibly making a better strategy to forego a motion to dismiss, answering the voluminous complaint with appropriate denials and affirmative defenses, and focusing early on the proper framing and narrowing of discovery.

- To the extent that a respondent seeks to explore in discovery and assert comparators in the litigation for purposes of racial and gender discrimination claims, university counsel should identify fully the applicable details of the respondent's status and define who would qualify as an appropriate comparator. For example, as noted above, the Eighth Circuit held that Rowles' status as a graduate student was a distinguishing factor that negated certain comparisons. Also, if a respondent has a prior disciplinary history, it would distinguish that person from another who did not and therefore should not be a suitable comparator. The assessment of comparators is vitally important to limit discovery and convince a court that requests to explore other disciplinary cases or files should not proceed on a blank slate. Further, the narrowing or elimination of comparators increases chances for success at the summary judgment stage.
- In addition to Title IX compliance, public institutions must not lose sight of applicable constitutional requirements and protections, which can present procedural or substantive due process or possibly even First Amendment concerns. Also, although contract claims were not pled in the Eighth Circuit case addressed above, courts have increasingly applied broad "fundamental fairness" standards to evaluate how public and private institutions have implemented their codes of conduct and grievance procedures. In sum, in the defense of the multi-pronged attack in litigation, the impact of one cause of action must not be viewed in isolation, but must be understood as to its full role and importance to the defense of all claims.

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