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Eighth Circuit rejects student's claim of retaliation following her participation in Title IX investigation

By Steven M. Richard

A student-athlete alleged that a university retaliated against her in violation of Title IX of the Education Amendments of 1972 ("Title IX"), after she participated in an investigation of a coach accused of sexual harassment and spoke in support of the coach. The United States Court of Appeals for the Eighth Circuit upheld the dismissal of the student's Title IX retaliation claim because her participation in the investigation was not a "protected activity."[1]

Background

The following facts are as alleged by Paige Du Bois in her complaint. Du Bois attended the University of Minnesota-Duluth for two years—from fall 2016 until September 2018—before she transferred to another school. She competed on the women's cross-country and track-and-field teams coached by Joanna Warmington. In March 2018, Warmington took an unexplained leave of absence.

The university told Du Bois and her teammates to carry on for the spring 2018 season without a coach. Du Bois met with the athletic department to ask about the coach's absence. An assistant director told Du Bois that she could redshirt for the spring season, but did not disclose the reason for the coach's leave. Du Bois chose to compete that spring season.

Du Bois and her teammates later learned that Warmington's leave of absence related to a sexual harassment investigation. The university encouraged Du Bois and her teammates to participate in the investigation. Du Bois was told that she could provide the investigator with information supporting the coach, and Du Bois did so and encouraged her teammates to do the same.

As Warmington's leave continued into the summer, Du Bois met several times with athletic department administrators to discuss her future as a student-athlete and the fate of her coach. At the same time, Du Bois assumed many tasks normally performed by the head coach, including collecting jerseys, setting up the locker room, assigning lockers and laundry duties, and ordering team apparel. During the summer, Du Bois suffered an injury that threatened her ability to compete

[1] *Du Bois v. The Board of Regents of the University of Minnesota*, No. 20-1544 (8th Cir. 2/16/21).

in the upcoming fall cross-country season. Du Bois considered redshirting, but did not ask anyone in the athletic department whether that would be possible.

When the women's cross-country team members started training for the fall season, the athletic department informed them that Warmington had resigned and that they would not have a coach for the foreseeable future. Du Bois was informed that she could not redshirt, which confused her because she was offered that option during the spring season. Du Bois asked whether she could approach other schools regarding a possible transfer, but was warned that she would need a release from the university and would not be allowed to use the cross-country team's facilities or practice with her teammates.

In August, the university appointed an interim coach of the women's cross-country team. Du Bois told her new coach about her injury, which would prevent her from running at the first meet of the fall season. The coach told Du Bois that she could either compete with the team and not redshirt, or leave the team. He made clear that redshirting was not an option.

In early September, Du Bois met with the athletic department staff and told them that she remained undecided if she wished to transfer. She was instructed that, until she decided, she should clear out her locker. She was given a deadline to decide if she would stay on the cross-county team and compete during the fall season. In response, Du Bois filed a complaint with the university's equal opportunity and affirmative action office. A few days later, she transferred to another school.

Du Bois sued the university, alleging that it violated Title IX by (1) retaliating against her and refusing to allow her to redshirt because she supported her coach during the investigation, (2) discriminating against her and other female athletes by allowing male athletes to redshirt while denying the opportunity to female athletes, and (3) engaging in insufficient funding of the women's cross-country and track-and-field teams. The university filed a motion to dismiss, which the district court granted. Du Bois appealed the judgment to the Eighth Circuit.

Analysis

Title IX's statutory language does not address retaliation. In *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), the United States Supreme Court held that retaliation against a person who complains about sex discrimination is itself a form of discrimination "on the basis of sex" forbidden by Title IX.

Regarding the proof to support a Title IX retaliation claim, the Eighth Circuit stated that it and several other circuits have adopted the elements supporting a retaliation claim under Title VII of the Civil Rights Act of 1964 ("Title VII"). A plaintiff must show that (1) she engaged in protected activity; (2) she suffered a materially adverse act; and (3) the adverse act was causally linked to the conduct.[2] The Eighth Circuit noted that, in Title IX retaliation claims, some circuits also require the plaintiff to demonstrate that the defendant institution knew of the protected activity.[3] The Eighth Circuit declined to address this circuit split, because Du Bois' Title IX retaliation claim lacked the first required element—engagement in a "protected activity."

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[2] The Third, Fourth Fifth, Seventh, and Ninth Circuits also rely on Title VII precedent to address Title IX retaliation claims.

[3] The First and Sixth Circuits require proof that the alleged retaliator knew of the protected conduct.

The Supreme Court's precedent in *Jackson* establishes that Title IX retaliation claims must arise from a protected activity, such as complaining of sex discrimination. Du Bois did not complain about sex discrimination. Rather, she participated in the university's investigation of her coach, reporting that no violation of Title IX had occurred. The Eighth Circuit distinguished Title IX's framework from Title VI's prohibition against discrimination because of participation in an investigation.

Du Bois contended that a Title IX retaliation claim should apply a "zone of interests" analysis. She cited to a Ninth Circuit precedent holding that students, who were within the "zone of interests" of Title IX, were retaliated against when the school fired their softball coach after they had complained of sex discrimination due to unequal treatment and benefits.[4] Du Bois claimed that she was similarly within the "zone of interests" protected by Title IX because she was denied the ability to redshirt after supporting her coach during the investigation. Rejecting Du Bois' analogy, the Eighth Circuit stated that another circuit's precedent is not controlling and nonetheless distinguishable. Du Bois did not allege that her retaliation claim arose from a discrimination complaint, but instead that she was retaliated against for *participating* in the university's investigation of a coach accused of sexual harassment.

Du Bois' other Title IX claim alleging discrimination because of her sex was easily dispatched. She generally alleged that the university should be held liable under Title IX for unequal funding and equipment for male and female cross country and track teams. She also contended broadly that the university allowed male athletes to redshirt, but denied her request. The Eighth Circuit found that her "threadbare recitals of the elements of a cause of action" were insufficient to support a plausible claim of gender discrimination.

Takeaways

Colleges and universities must remain aware of the risks of a Title IX retaliation claim, especially where there is a close temporal connection between an alleged protected activity and a subsequent adverse action. While Du Bois' complaint failed here, a plaintiff's burden to allege a plausible retaliation claim can often be met more easily compared to the pleading requirements in other Title IX private causes of action, such as the "deliberate indifference" standard in a sexual harassment claim.

Scenarios are foreseeable where the alleged facts will be more compelling or at least more plausible than pled by Du Bois, which could minimize a college or university's ability to obtain an early dismissal in litigation. For example, assume a scenario where a student offered statements during an investigation that conveyed mixed signals and information (i.e., offering some supportive words about an accused while also suggesting, perhaps reluctantly, that accused behaved inappropriately), and the cooperating student soon thereafter is the subject of an adverse action at the school. A court could conclude that there is a plausible connection to explore whether the student had "reported, complained, or otherwise opposed" gender discrimination and thereby engaged in a protected activity sufficient to support a Title IX retaliation claim.

Also, colleges and universities must adhere to the retaliation prohibitions stated in the Title IX regulations. 34 CFR § 106.71. The regulations expressly prohibit retaliation against an individual for exercising rights under Title IX, including participating in or refusing to participate in the filing of a complaint, the investigation, or any proceeding or hearing. Careful consideration must be given to a

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[4] *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 848, 865-66 (9th Cir. 2014).

full understanding of both the controlling Title IX judicial precedent in the school's jurisdiction and the Title IX regulatory requirements, which could have nuanced differences in their scope and application.

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