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Higher Education Alert

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Ninth Circuit holds that Title IX bars sexual harassment based on perceived sexual orientation

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The Ninth Circuit rules that U.S. Supreme Court's analysis in *Bostock* extends to Title IX.



What's the Impact

- / Title VII's framework, including claims of perceived discrimination, provides proper guidance to interpret Title IX.
- / Courts do not agree on *Bostock's* applicability to Title IX, likely leading to eventual Supreme Court review.
- / With the amended Title IX regulations impending, Title IX compliance and policies should address discrimination based on sexual orientation and gender identity.

In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Supreme Court held that Title VII of the Civil Rights Act of 1964 (Title VII) bars sexual-orientation discrimination within the workplace. Federal courts and the Department of Education have since addressed whether *Bostock's* analysis should apply to Title IX of the Education Amendments of 1972 (Title IX). Construing Title IX's protections consistently with those of Title VII, the United States Court of Appeals for the

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Ninth Circuit held that discrimination based on perceived sexual orientation is a form of sex-based discrimination under Title IX. *Grabowski v. Arizona Bd. of Regents*, No 22-15714, 2023 WL 3961123 (9th Cir. June 13, 2023). This alert addresses this significant ruling and its implications.

Background

Michael Grabowski attended the University of Arizona on an academic and athletic scholarship starting in 2017. During his first year as a member of the university's cross-country and track and field teams, Grabowski was subjected to sexual and homophobic slurs and bullying by his teammates. Grabowski and his parents reported the mistreatment to his coaches and a team psychologist. In response to his reporting, Grabowski alleges that the coaches embarked on a concerted effort to "demoralize him."

The coaches allegedly responded to Grabowski's reporting as if they lacked prior knowledge of the mistreatment. At one point, in response to his raising the harassment issue again, Grabowski alleges that one of the coaches "leapt out of his chair, ran up within a few inches of [Grabowski's] face, slammed his hands down hard on [Grabowski's] arms . . . and called [Grabowski] a 'white racist.'" The coach's actions scared Grabowski to the point that he had a spontaneous bloody nose and fainted. At the end of this meeting, the coaches dismissed Grabowski from the team resulting in the loss of his athletic scholarship.

Grabowski filed suit in federal court against the Arizona Board of Regents, the University of Arizona, and individuals associated with the track team. He alleged that he was unlawfully harassed because of his perceived sexual orientation. Further, he alleged that the university defendants responded with deliberate indifference to the "severe, pervasive, and objectively offensive" harassment in violation of Title IX. He also asserted a Title IX retaliation claim against the university defendants. Finally, he sought to hold the coaches liable individually under 42 U.S.C. § 1983 for constitutional violations.

Defendants moved to dismiss the claims on the pleadings, which the district court granted. Plaintiff timely appealed the judgment to the Ninth Circuit, which reversed the ruling as to the alleged Title IX violations by the university defendants and affirmed it as to the § 1983 claim against the coaches individually. The ruling allows the litigation to proceed forward past the pleadings and into discovery, and we address below the appellate court's analysis and its impacts.

Discrimination based on perceived sexual orientation under Title IX

Grabowski does not allege that he is gay; rather, he contends that his harassers **perceived** him to be gay. His Title IX claim asserts that the university defendants discriminated against him "on the basis of sex" because he was mistreated due to the harassers' perception that he is gay.

In *Bostock*, the Supreme Court held that discrimination "because of sexual orientation" is a form of sex discrimination under Title VII. Applying *Bostock*, the Ninth Circuit noted that it and other federal courts have construed Title IX with guidance from Title VII's protections. Expanding the analysis, the Ninth Circuit considered whether discrimination based on perceived sexual

orientation, as opposed to **actual** sexual orientation, is actionable under Title IX. The Ninth Circuit concluded that such a Title IX discrimination claim is actionable by citing to “two related branches of Title VII precedent.”

First, as *Bostock* holds, Title VII prohibits discrimination because of an individual’s sexual orientation; such discrimination occurs “in part because of sex.” Second, in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a plurality of the Supreme Court held that a Title VII discrimination claim could be brought under a theory that the harasser perceived the plaintiff as not conforming to traditional gender norms. Also, the Ninth Circuit relied upon the Supreme Court’s analysis in *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015), finding that discrimination because of perceived characteristics is a violation of Title VII (a case involving a Muslim plaintiff, who wore a headscarf to a job interview and was not hired due to a perceived need for a religious accommodation). Applying these Title VII precedents to Title IX, the Ninth Circuit held that the district court erred in dismissing Grabowski’s Title IX discrimination claim based on perceived sexual orientation. The Ninth Circuit next turned to whether the university could be held liable to Grabowski under Title IX for the harassing teammates’ conduct.

Applying *Davis’* Title IX framework

To analyze whether Grabowski sufficiently pled a plausible basis for Title IX institutional liability, the Ninth Circuit applied the requirements prescribed by *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999): (1) the school had substantial control over the harasser and the context of the harassment; (2) the plaintiff suffered harassment that was so severe that it deprived the plaintiff of access to educational opportunities or benefits; (3) a school official who had authority to address the issue and institute corrective measures had actual knowledge of the harassment; and (4) the school acted with “deliberate indifference” to the harassment, such that the indifference subjected the student to harassment. The Ninth Circuit held that Grabowski’s alleged facts plausibly met the first, third, and fourth elements. His pleading fell short on the second element, as Grabowski did not plead harms such as diminished grades or academic performance or absence from team-sponsored events because of the alleged bullying. While Grabowski pled that he experienced sadness, he did not plead how, if at all, his educational opportunities were diminished. Nonetheless, the Ninth Circuit afforded him with leave to amend during the remanded proceedings before the district court.

The Title IX retaliation claim

Grabowski alleged that the track coaches dismissed him from the track team and canceled his athletic scholarship in retaliation for reporting sex-based harassment. Grabowski’s reporting of the sex-based bullying to his coaches constituted a Title IX-protected activity. The temporal proximity between his final report of the bullying and the coaches’ dismissal of him from the team raised a plausible inference of a retaliatory action. Also, Grabowski’s identification of the teammates who harassed him prompted the coaches to “demoralize” him, which further supports a plausible Title IX retaliation claim. Accordingly, the Ninth Circuit reversed the district court’s dismissal of the retaliation claim.

The Section 1983 claim

Grabowski asserted a constitutionally protected property right to both his roster spot on the track team and its accompanying scholarship. The Ninth Circuit held that the coaches are entitled to qualified immunity individually as to the due process claim under § 1983. The court reached this determination because case law does not clearly establish either property right asserted by Grabowski.

Takeaways

The Biden administration has articulated its position that *Bostock's* analysis extends and applies to Title IX. In June 2021, the Department of Education issued its [interpretation](#) clarifying its enforcement authority over discrimination based on sexual orientation and discrimination based on gender identity under Title IX. Yet, a Tennessee federal district court judge entered a preliminary injunction in June 2022, restraining the Department from implementing the document in twenty "red" states, in a pending lawsuit by the states' attorney generals challenging its enforceability. Nationally, judges disagree on *Bostock's* applicability to Title IX, at times with differences within the same court. See, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020) (a split panel ruling with the majority concluding that *Bostock* guides the evaluation of claims under Title IX), *en banc pet. denied*, 976 F.3d 399 (2020) (a split among the full court in its denial), *cert. denied*, 141 S. Ct. 2878 (2021).

Currently, we await the Department of Education's amended Title IX regulations addressing sexual harassment and athletic participation opportunities, which the Department will issue in or about October 2023. We should expect that schools' Title IX obligations under the regulations will extend to actual and perceived discrimination based on sexual orientation or gender identity. As colleges and universities review their policies for the upcoming academic year and anticipate further amendments upon the issuance of the amended Title IX regulations, schools should pay close attention to the evolving landscape concerning *Bostock's* applicability to Title IX obligations.

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