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Sixth Circuit Loosens Pleading Standard for Title IX Wrongful Outcome Cases

Sexual assaults on college campuses are an issue to be taken seriously. Colleges and universities are well aware of their responsibility under Title IX to address and remediate sexual abuse; but with that responsibility comes an obligation to identify unsubstantiated claims. To fulfill these obligations, colleges have enacted comprehensive anti-harassment and sexual misconduct policies, conducted training and promulgated adjudicatory procedures that serve to provide protection and redress for victims of sexual assault, while ensuring that those accused of sexual assault are provided with fair protections from unsubstantiated allegations.

Recognizing the unique character of the academy and diversity among academic institutions, the U.S. Department of Education (DOE) affords colleges and universities discretion in many areas of Title IX compliance. Institutions are charged with responding to allegations of gender discrimination and harassment in an even-handed, principled and unbiased manner, without regard to the gender of a complainant or respondent. 34 C.F.R. § 106.45(a) "a recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX."

In accord with the DOE, the Sixth Circuit has historically limited its review of Title IX cases alleging wrongful outcome to those cases in which a plaintiff has pleaded facts sufficient 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 gender bias.'" *Doe v. Baum*, 903 F.3d 575, 585 (6th Cir. 2018) (quoting *Doe v. Miami Univ.*, 882 F.3d 579, 592 (6th Cir. 2018)).

However, in the June 29, 2020, decision, *Doe v. Oberlin College*, available here, a panel majority lowered the pleading standard, holding that "patterns of decision-making" in an institution's cases were sufficient to demonstrate gender bias in a particular case. This holding marks a significant departure from precedent and presents several challenges to higher education institutions:

The Decision Marks a Departure from the Judicial Deference Generally Afforded to Internal College and University Disciplinary Panels

Prior to this decision, federal courts were slow to second-guess determinations made by trained panel members in student disciplinary hearings. *See e.g., Al-Dabagh v. Case Western Reserve Univ.*, 777 F.3d 355, aff'd, 2015 U.S., App. LEXIS 4283, cert. denied, 135 S. Ct. 2817 (2015) (reasoning that the court can no more substitute its personal views for a committee's decision in a student's dismissal proceeding than a committee can substitute its views for a court when it comes to a judicial decision); *Doe. v. College of Wooster*, 243 F. Supp.3d 875, 984 (N.D. Ohio 2017) ("As for assessing the credibility of hearing witnesses, such determination is well within the discretion of the disciplinary board, and it is not for the courts to second guess"); *see also Z. J. v. Vanderbilt University*, 355 F. Supp. 3d 646 (M.D. Tenn. 2018) *citing Doe v. W. New England University*, 228 F. Supp. 3d (D. Mass. 2017) ("[I]t is not the business of lawyers and judges to tell universities what statements they may consider and what statements they must reject.")

Instead, courts generally involved themselves only when non-speculative facts support a plausible inference that the determination was the result of discrimination. They did not customarily view speculative averments in a Title IX wrongful outcome case as a license to wade into the thorny thicket of credibility findings. Nor did the courts engage in *de novo* review of a hearing panel's determination of responsibility in the absence of well-pleaded factual allegations that there was gender-based bias against the accused. Unfortunately, the holding in this case marks a departure from this well-reasoned precedent and could subject higher education institutions to exorbitant costs of discovery where there is only speculation as to the motives of the decision-makers.

The Panel Opinion Contradicts the Pleading Standard Set by the United States Supreme Court for Motions to Dismiss Under FRCP 12(b)(6)

Also, of great concern is the Sixth Circuit's ruling that the complaint was sufficient to state a Title IX wrongful outcome claim despite there being no well-pleaded facts to support actual gender bias in the hearing in Doe's case. Through the panel's opinion, the requirement of a "particularized" causal connection was effectively vitiated. Instead, the plaintiff needed only to claim that there were some sort of "patterns" of biased decision-making in order to obtain judicial review *de novo*.

The court held that gender bias could be inferred because it was pleaded that (a) there was a delay in completing the investigatory process, (b) because an Office for Civil Rights (OCR) investigation was pending and (c) because prior respondents in sexual assault disciplinary hearings were found responsible of at least one charge where "most if not all of the respondents were male." The court's decision to infer discrimination on these grounds where plausible alternative explanations exist marks a significant departure from Supreme Court precedent. *See Ashcroft v. Iqbal*, 556 U,S, 662, 682, 129 S. Ct. 1937 (2009) *see also 16630 Southfield Ltd. P'ship v. Flagstar Bank*, F.S.B., 727; F.3d 502 (6th Cir. 2013) ("Where, as here, the complaint alleges facts that are merely consistent with liability … the existence of obvious alternative explanations simply illustrates the unreasonableness of the inference sought and the implausibility of the claims made.")

The Panel Opinion Draws Adverse Inferences of Unlawful Discrimination Never Pleaded in the Complaint and Effectively Shifts the Burden of Proof to Institutions to Demonstrate That Their Processes do not Adversely Impact Men

Surprisingly, the court seemed to speculate that the existence of a pending OCR investigation was evidence that the College harbored bias against male students accused of sexual assault, even though the OCR complaint did not allege such bias. Cf., *Doe v. Univ. of Cinci.*, 173 F. Supp. 3d 586, 602 (W.D. Ohio 2016) ("[I]t is not reasonable to infer that [a university] has a practice of railroading students accused of sexual misconduct simply to appease the Department of Education and preserve its federal funding."), *aff'd, Doe v. Cummins*, 662 Fed. Appx. 437 (6th Cir. 2016); Z.J. *v. Vanderbilt Univ.*, 355 F. Supp. 3d 646, 682 (M.D. Tenn. 2018) ("[W]hen courts consider allegations of external pressure, they look to see if a plaintiff has alleged facts demonstrating that it was pressure[d] not only to 'aggressively pursue sexual assault cases, but to do so in a manner biased against males.'"), appeal dismissed, No. 19-5061, 2019 U.S. App. LEXIS 38959, 2019 WL 3202209 (6th Cir. Apr. 26, 2019) (citation omitted); *Doe v. Mich. State University*, 2019 U.S. Dist. LEXIS 212249, at *28 (W.D. Mich. 2019): ("outside pressure 'is not enough to state a claim,' but that it "provides a backdrop" to consider evidence of discrimination that occurred in the plaintiff's specific case.") Under this reasoning, if a college is subject to an OCR investigation – even if the underlying charge is specious – then any male found responsible for sexual assault in a hearing while that investigation is ongoing can defeat a Rule 12(b)(6) motion despite there being no evidence of gender bias in his hearing.

Equally troubling, under the court's holding every male found responsible in a student disciplinary hearing could stave off a Rule 12(b)(6) motion in a wrongful outcome case unless there is evidence in the hearing record that female students

have previously been found responsible for sexual assault (even if there has never been a complaint of sexual assault against a female student) or males have been found not responsible in prior hearings. Ironically, as much as the court was concerned about the pressure arising from an OCR investigation, through this opinion it unintentionally creates pressure for colleges and universities in the Sixth Circuit to find males not responsible, lest every finding of responsibility ripen into a federal claim with the doors of discovery permanently unlocked. *Cf. Iqbal, supra*.

The Opinion Exposes Colleges and Universities to Unnecessary Federal Litigation Expense Where Relief is Already Available in State Court

Notably, upholding the district court's decision granting the college's motion to dismiss would not have deprived the plaintiff-appellant of a forum in which to challenge the college's actions. The state courts in Ohio are fully equipped to adjudicate whether a college's panel's proceedings were somehow improper; s*ee A.M. v. Miami Univ.*, 88 N.E.3d 1013 (Ohio Ct. App. Ct. 2017) (recognizing a breach of contract claim for students challenging a university's disciplinary process per its own written rules and policies).

Oberlin College has petitioned for rehearing *en banc* to call the court's attention to these significant and likely unintended consequences of its decision. For institutions in the Sixth Circuit, this development adds an additional level of complexity to what is already a complex and dynamic area of law. For institutions in other circuits, this decision illustrates just one of many types of challenges they might face in the future.

If you would like assistance ensuring your institution's compliance with latest developments in Title IX, please contact Howard Miller, Monica Barrett, Sarah Luke or any member of the firm's Title IX Team.

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