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Third Circuit Endorses Title IX and Title VII Claims of Medical Resident

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By: John P. Barry and Edna D. Guerrasio

Should a medical resident alleging sexual harassment and retaliation be treated as: (i) an employee who can seek relief under Title VII; (ii) a student who can seek relief under Title IX; or (iii) both? And if the answer is "both," do the administrative prerequisites of Title VII and its well-established case law apply to Title IX claims? In a recent decision, the U.S. Court of Appeals for the Third Circuit answered "both" but left other important questions unanswered.

Doe v. Mercy Catholic Medical Center, No. 16-1247, 2017 WL 894455 (3d Cir. Mar. 7, 2017), is significant in four key respects:

- It is the first circuit court decision to determine that a private teaching hospital is subject to Title IX so long as its mission, "at least in part," is educational. *Id.* at *7.

- A first-of-its-kind list of factors that support classifying a program as a Title IX "education program or activity" was recognized. *Id.*at *6.

- Title IX rights were deemed independent of and not preempted by Title VII, ending the split within the district courts of the Third Circuit and joining the opinion of the First and Fourth Circuits. Notably, the Fifth and Seventh Circuits disagree. The issue, which had not been addressed at the circuit level in nearly 20 years, is now ripe for consideration by the U.S. Supreme Court.

- The administrative requirements associated with Title VII (e.g., the 180-day deadline for filing a Charge with the EEOC) were ruled as not applying to Title IX claims. However, the Third Circuit left open the possibility that well-established Title VII case law would apply to Title IX claims.

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Mercy Catholic Medical Center is a private teaching hospital in Philadelphia, Pennsylvania, that is affiliated with Drexel University's College of Medicine. Mercy has four accredited medical residency programs, one of which the plaintiff, proceeding anonymously as Jane Doe, was enrolled in as a graduate medical resident in 2011. According to Doe's motion papers, Mercy accepts federal funding for its program through Medicare.

In the complaint, Doe alleged that she was sexually harassed and then retaliated against by the director of the residency program, whom she called Dr. James Roe. Doe complained about Dr. Roe's advances to Mercy's Human Resources Department but, according to her complaint, nothing was done. Ultimately, Doe alleges that she was dismissed from the program at Dr. Roe's suggestion and in retaliation for rebuffing his advances.

Two years after her dismissal, Doe brought suit against Mercy alleging three claims under Title IX: *quid pro quo* harassment, hostile environment and retaliation. The United States District Court for the Eastern District of Pennsylvania dismissed Doe's complaint on the grounds that Title IX did not apply to Mercy as its residency program did not qualify as an "education program or activity" as required by 20 U.S.C. §1681(a). The court further held that even if Title IX did apply, Doe could not use Title IX to circumvent Title VII's administrative requirements – which Doe had not fulfilled – since Congress had intended Title VII to be the "exclusive avenue for relief" for employment discrimination claims. *Doe v. Mercy Catholic Med. Ctr.,* 158 F.Supp.3d 256, 261 (E.D. Pa. Jan. 26, 2016). Doe appealed the District Court's decision to the Third Circuit.

The first question the Third Circuit confronted was whether Mercy's residency program qualified as an "education program or activity" under Title IX. The Court started its analysis with the Civil Rights Restoration Act of 1987 (the "CRRA"), which amended Title IX and in which Congress defined the phrase "program or activity" to mean "*all* of the operations" of a number of different types of entities, including "private organizations … principally engaged in the business of providing education, health care, …" 20 U.S.C. § 1687(3)(A) (emphasis added). The Third Circuit ultimately adopted the definition created by the Second Circuit 20 years ago in *O'Conner v. Davis*, 126 F.3d 112, 117 (2d Cir. 1997), and held that a ***"program or activity under §1687" was educational "if it has features such that one could reasonably consider its mission to be, at least in part, educational."*** 2017 WL 894455 at *6.

The court further declared that whether a program or activity is sufficiently educational to qualify under Title IX is a mixed question of law and fact. However, when the facts are uncontested, the following guidelines support finding a "program or activity" an "education program or activity" under Title IX:

(a) the program is incrementally structured through a particular course of study or training, whether full- or part-time;

(b) the program allows participants to earn a degree or diploma, qualify for a certification or certification examination or pursue a specific occupation or trade beyond mere on-the-job training;

(c) the program provides instructors, examinations, an evaluation process or grades, or accepts tuition; and/or

(d) the entities offering, accrediting, or otherwise regulating a program hold it out as educational in nature.

(*Id.* at *6)

Applying this standard to the facts at hand, the Third Circuit rejected the lower court's reasoning that Mercy's program was not an "education program" because graduate residents already had a degree, didn't pay tuition and were paid for their services. Rather, the Third Circuit found persuasive the fact that Mercy is a private organization principally engaged in the business of providing health care; it is affiliated with Drexel Medicine, a medical graduate school; Mercy runs an accredited residency program in which residents are enrolled in a regulated program of study and training which requires students to learn and train under faculty members, present case presentations under supervision, attend lectures at Drexel and sit for annual examinations. Ultimately, residents become eligible to take board certification examinations, necessary to become practicing physicians. Furthermore, Mercy accepts Medicare payments to fund its programs.[1] Id. at *7.

Having determined that Mercy's program falls within the parameters of Title IX, the court next tackled the question of whether Doe has a private right of action under Title IX. Mercy argued that, as a resident, Doe was an employee and therefore had to bring her sexual harassment and discrimination claims under Title VII, which requires exhaustion of administrative remedies prior to seeking relief in court. Title IX, comparatively, has no administrative hurdles and, as Mercy argued, was therefore an "end-run" around Title VII's administrative scheme. At the time the *Mercy* case was heard by the Third Circuit, there was a split within the district courts in the circuit as to whether Title VII preempted employment discrimination claims under Title IX.

Relying upon six Supreme Court decisions regarding the intermingled and often inconsistent remedies available to Title VII and Title IX complainants, the Third Circuit held that Doe's potential concurrent "employee" status did not preclude her from bringing a private cause of action under Title IX. The Circuit's holding was based on the following four "guiding principles": (1) private-sector employees are not limited to Title VII as their only means of relief from workplace discrimination; (2) it is a matter of "policy" for Congress to determine whether it is undesirable to allow education-program employees to plead their way around Title VII's administrative requirements; (3) the provision in the statute, which implies Title IX's private cause of action, 20 U.S.C. §1681(a), encompasses employees, not just students; and (4) as the Supreme Court pronounced in *Jackson v. Birmingham Bd. Of Educ.,* Title IX's implied private cause of action extends to *employees* of federally funded education programs who allege sex-based retaliation claims. 544 U.S. at 171.

The Third Circuit's decision follows similar precedents in the First and Fourth Circuits. However, with the rapidly expanding body of case law in this area, there is now a definitive circuit split, as the Fifth and Seventh Circuits have concretely held that Title VII provides the "exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions" and "[a]llowing *any* private Title IX claim to proceed there … would 'disrupt' Title VII's 'carefully balanced remedial scheme for redressing employment discrimination.'" *Lakoski v. James,* 66 F.3d 751, 753-54 (5th Cir. 1995); *accord Waid v. Merrill Area Pub. Schs.,* 91 F.3d 857, 861-62 (7th Cir. 1996).

While the Third Circuit's precedential opinion in *Mercy* will undoubtedly expand Title IX's reach, the court declined to address whether the rights of Title IX plaintiffs are completely on par with the rights of those who seek protection under Title VII. For example, Doe argued that her hostile environment claim was not time-barred under the "continuing violation doctrine," which is an accepted theory under Title VII jurisprudence that allows a plaintiff to aggregate discriminatory acts that otherwise would not be individually actionable in order to successfully plead a Title VII hostile work environment claim. The Court found that even under the continuing violation doctrine Doe's claim would not be timely because no actionable discriminatory event happened within two years of the date she filed her Complaint, thereby dismissing the Title IX claim but leaving the door open to future Title IX claims based on this theory.

[1] On appeal, Mercy argued for the first time that it does not receive federal financial assistance under Title IX because it receives its Medicare payments from contracts of insurance. Since the argument was not raised below the court assumed, without deciding, that Mercy received federal financial assistance under Title IX, and left if for the lower court to address on remand.

Related Professionals

- **Paul Salvatore**
  Partner
- **Edna Guerrasio**
  Partner
- **Elise M. Bloom**
  Partner