

Insight

IN-DEPTH DISCUSSION

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Third Circuit Permits Teaching Hospital Resident to Bring Retaliation Suit under Title IX

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For the first time, the Third Circuit Court of Appeals found that Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, *et seq.*, applies to medical residency programs.¹ Relying on extensive Supreme Court precedent and statutory language, the appellate court on March 7, 2017, held that a hospital's residency program, affiliated with a medical school, is an educational program that falls within Title IX's ambit. This ruling allows the plaintiff, a former resident, to bring a private action for retaliation pursuant to Title IX after she first alleged harassment by the residency program director and was later dismissed from the program.

While the decision is the first of its kind in the Third Circuit, the issues addressed have been analyzed by other federal courts. And, to some extent, the outcomes have differed.

Residency Program is Covered by Title IX

Title IX states, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under an education program or activity receiving Federal financial assistance.” More traditional educational programs and institutions—schools, colleges, and universities—have grappled with Title IX's proscriptions and requirements for decades. To many, Title IX is known primarily for its impact on college athletics, requiring that women and men be provided equitable opportunities to participate in sports. Its reach, however, is much broader because it protects participants in all manner of educational programs from gender discrimination in all its forms. Recent attention about Title IX, for example, has focused on the law's application to cases of sexual assault and misconduct on college campuses.

¹ *Jane Doe v. Mercy Catholic Medical Center* (C.A. No. 16-1247).

Here, the court ruled that Title IX applies to the hospital's residency program because it constitutes an "education program or activity." To arrive at this conclusion, the court determined that it "must square Title IX's definition of a 'program or activity' codified at 20 U.S.C. 1687, with Section 1681(a)'s language 'education program or activity.'" Through a review of various amendments to Title IX and a careful parsing of the statutory language, the Third Circuit concluded that a program or activity is, in fact, an educational program or activity if "it has 'features such that one could reasonably consider its mission to be, at least in part, educational.'"²

Applying this standard to the residency program, the court relied upon two considerations. First, the court found that the hospital's sponsorship of a residency program accredited by the Accreditation Council for Graduate Medical Education (ACGME) meant that its mission was, at least in part, an educational mission. It noted that the hospital required that the residents participate in lectures and practical training and take exams; residents who successfully complete the program can sit for certification examinations. Further, the hospital "held out its residency programs as educational in nature."

Second, the fact that the medical college sponsored the hospital's residency program bolstered its status as an educational program or activity. Accordingly, the court found the residency program to be an educational program or activity covered by Title IX.

As an aside, the court noted that the scope of the word "educational" could be construed differently in different cases and identified four factors to consider when evaluating the "educational" nature of a particular program or activity:

(A) a program is incrementally structured through a particular course of study or training, whether full- or part-time; (B) a program allows participants to earn a degree or diploma, qualify for a certification or examination, or pursue a specific occupation or trade beyond mere on-the-job training; (C) a program provides instructors, examinations, an evaluation process or grades, or accepts tuition; or (D) the entities offering, accrediting, or otherwise regulating a program hold it out as educational in nature.

These four factors now provide guidance for programs trying to discern Title IX's application to their participants, although any such determination will involve issues of fact and law, thus necessitating submission of many of these questions to a trier of fact.

Title IX Rights Are Not Impacted by Title VII

After finding that the residency program was subject to Title IX, the court went on to analyze whether the plaintiff could file a private action and if her failure to file claims under Title VII of the Civil Rights Act of 1964 was fatal to her Title IX claims. The court started by limiting its decision to the facts this case, and found that most likely, the plaintiff was a hospital employee based on the common-law indicia of employment articulated by the Supreme Court in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). Thus, the plaintiff theoretically could have filed claims under Title VII. Despite this employee status, however, the court held that Title VII's "concurrent applicability does not bar [plaintiff's] private causes of action . . . under Title IX."

The court's finding in this regard relied heavily upon precedent that permits employment discrimination plaintiffs to file concurrent claims under various statutory schemes, even when those schemes do not involve the administrative filing requirements that are prerequisites to Title VII federal court litigation. Interestingly, the Third Circuit's decision in this regard contrasts with decisions in the Fifth and Seventh Circuits, which "have held explicitly that Title VII provides the 'exclusive remedy for individual alleging employment

² *Id.*, slip op. at 14-15, citing *O'Connor v. Davis*, 126 F.3d 112, 117 (2d Cir. 1997).

discrimination on the basis of sex in federally funded educational institutions.”³ The Third Circuit, however, explicitly rejected the analyses of its sister circuits, at least in part because those decisions preceded certain Supreme Court precedent upon which the Third Circuit relied.

Lessons for Newcomers to Title IX

Residency programs in teaching hospitals have long understood that they are legally bound to ensure working environments free from unlawful harassment and discrimination. The recent Third Circuit decision does not substantively alter that concept, except to make clear that the duty arises under, among other laws, Title VII and Title IX.

This decision, however, means that those same teaching hospitals within the Third Circuit’s jurisdiction must now come to terms with Title IX’s panoply of proscriptions, just as colleges and universities have done for years. Specifically, teaching hospitals should consider reviewing their policies that address issues of sexual misconduct to ensure they comply with the guidelines promulgated by the Department of Education, which are far more complex and restrictive than anything required or even recommended under Title VII and its case law. Teaching hospitals should consider whether to name Title IX coordinators; whether they should institute due process standards to investigate and remediate instances of sexual misconduct; and whether they should incorporate into their standard policies those requirements and suggestions made by the DOE’s Office of Civil Rights, which enforces Title IX. Over the coming weeks and months, all teaching hospitals should consider evaluating their current compliance level and prioritize any changes that need to be implemented to meet Title IX’s rigorous standards.

³ *Id.* at 29; citing *Laboski v. James*, 66 F.3d 751, 753 (5th Cir. 1995).