



Campuses and the Courts Column May 14, 2020

Doe v. University of South Alabama et al., U.S. Dist. Ct. S. Dist. Alabama, S. Div (February 14, 2020)

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Facts:

Plaintiff, John Doe, was a student at the university, on a full ROTC scholarship that included tuition, fees, money for textbooks and a monthly subsistence check. Doe was notified in October of 2016 that he had been “listed as the responsible person in a violation of the Student Code of Conduct, for engaging in sexual violence towards two individuals”. (Roe 1 & Roe 2).

Following the investigation in that case, the investigator made specific findings of fact and conclusions in favor of Roe 1 & 2 and presented those findings to the University Disciplinary Committee prior to any testimony at the hearing. Doe sought to include additional, relevant information, including providing a witness who (reportedly) had been wrongfully accused of assault by Roe 1, but was refused.

Banners and flyers hung by Victim Advocates were in the common area outside the hearing room with advocacy-based statements. The investigator served as an advisor for the hearing and participated in the deliberations. There was no recording of the hearing. Doe was found responsible, placed on conduct probation, given 100 hours of community service, termination of his housing contract, and banned from other campus facilities.

Doe appealed the decision. The decision was upheld but the sanction was modified to allow Doe to remain in university housing.

In November of 2016 Doe was notified that he was accused of off-campus sexual misconduct by Roe 3, based on Roe’s inability to consent due to incapacitation. Doe then filed a Title IX complaint against Roe 3 for transmitting a sexually transmitted disease. The university did not assist Doe in investigation of his claims. The assigned investigator was the same one in the cases involving Roe 1 & 2. The university assigned an advocate to Doe who did not reach out to him, nor appear at the hearing. Doe sought to have information on the previous case excluded in his hearing and for the investigator to recuse herself since she had exhibited animus and malice toward Doe in the prior hearing. The investigator recused herself.

During the hearing (in which the cross allegations were considered), Roe 3 mentioned details from the previous hearing, despite being admonished not to do so. Doe protested, but the hearing was allowed to proceed. Doe was found responsible for sexual violence, Roe 3 was found not responsible, but the Dean of Students ordered a new hearing for Doe, because of the statements made by Roe 3 during the hearing. He also placed the original investigator as the hearing chair. Doe objected to the investigator serving as the hearing chair and was informed by the Dean that the investigator did not have a conflict of interest related to this role. He also sought supportive measures; a specific allegation of the charge to be brought against Roe 3;

a list of witnesses. and to be accompanied by his advocate to review the investigation file. All of his requests were denied.

The hearing panel consisted of two faculty and four students, one of whom served on the previous panel that found Doe responsible. This student also selected the other three students to serve on the panel. Doe was again found responsible and suspended from the university for one year and trespassed from the campus during that time.

Doe brought suit based on denial of due process; breach of contract; Title IX (selective enforcement, erroneous outcome, deliberate indifference); failure to provide a fair and impartial hearing; failure to provide opportunity to confront or cross-examine witnesses; withholding information critical to Doe's defense; violation of the institution's own rules; and Sec. 1983 claims against multiple individuals at the university.

Holding & Commentary:

The court did not sustain Doe's erroneous outcome claim in spite of finding the facts presented cast doubt on the accuracy of the proceeding, because he was unable to establish a gender bias as the foundation for the claim. Further, the court asserted that "demonstrating that a university official is biased in favor of the alleged victims of sexual assault claims, and against perpetrators, is not the equivalent of demonstrating bias against male students." The court applied the Davis standard in assessing Doe's Title IX claim, with regard to deliberate indifference, and determined that although Doe presented many examples of "harm" that he experienced, the university's alleged actions did not constitute deliberate indifference on the part of the institution. Finally, the court upheld Doe's due process claims to enable him to present supported facts at trial that the named individuals were biased against him but denied Doe's other due process claims.

Takeaways:

- The facts in this case as presented send a strong message about conflicts of interest and bias in the investigation and proceedings. The investigator wore multiple hats and not only investigated the prior Doe case, but also served as the hearing officer in a subsequent case. The investigator also trained and supervised the hearing panel.
- Engaging in multiple roles in a single case is likely to raise a presumption of a conflict of interest sufficient for a court to allow a case to move forward and survive dismissal.
- We must carefully monitor any of the individuals involved in the intake, investigation, training or adjudication of a case to ensure there are no apparent or perceived conflicts of interest or bias.

***John Doe v. University of Maine System and David Fiacco*, U.S. Dist. Ct., Dist of Maine (February 20, 2020)**

- Doe had multiple complaints filed against him for various claims of sexual misconduct. The case in which he was found responsible for harassment/intimidation and stalking resulted in Doe being placed on deferred disciplinary probation. In the second case he was placed on interim suspension.
- During this time, Doe asserted that he was sexually assaulted by another student and reported it to the university, but the university failed to investigate or act on his complaint. As a result, Doe and the university entered into a settlement agreement.
- Doe argued that the university retaliated against him following the settlement agreement when the president made comments about him being guilty of assault.

- Doe claimed the university violated Title IX by creating a hostile educational environment; by engaging in selective enforcement of Title IX based on gender and for retaliating against him. He also claimed Fiacco (the Dir. of Community Standards) violated his procedural due process rights by suspending him without notice or hearing.
- Doe dismissed his claims related to the interim suspension.
- The university argued that the hostile educational environment selective enforcement claims should be dismissed because Doe released those claims in his settlement agreement. The court held that Doe's allegations against the university occurred after the settlement agreement and addressed new claims not incorporated in the agreement and thus denied the university's motion to dismiss.
- Additionally, the court denied the university's motion to dismiss the 1983 claims against Fiacco for failure to conduct a timely investigation and hearing.
- Finally, the court held Doe's claim of due process was ripe for consideration based on *Haidak* (a recent First Circuit decision) because Doe's due process claim stems from his interim suspension. Using the language from that case, the court noted, "While it lasts, a suspension more or less deprives a student of all the benefits of being enrolled at a university. The Supreme Court has held that a deprivation of this sort requires notice and a hearing."
- The court also held Doe's claims of retaliation was ripe because the school engaged in adverse action against Doe by barring him from his employment, making public statements about his Title IX case, and providing his case files to the press and others. That claim will also move forward.

Rebecca Stanford v. Fox College, U.S. Dist. Ct., N. Dist. of Ill., E Div. (February 19, 2020)

- Stanford, a physical therapy student at Fox College, informed the school of her pregnancy. This was during her last term which included placement in a clinical setting with hands-on training.
- She was granted additional time to complete the course, however the clinic to which she was assigned cancelled its participation and Stanford was dissatisfied with the alternative placement. She withdrew from the program for one term, returned at a later time and completed her degree, passed the state licensing exam, secured work and then filed a lawsuit claiming discrimination based on pregnancy under Title IX and §504 of the Rehabilitation Act and alleged infliction of emotional distress.
- Stanford would not accept the change in clinical assignments because the new assignment was 40 miles away. Fox stated there were no other options for a closer clinic. The college policy (that Stanford signed) stated that students could be placed in a clinic up to an hour away. Fox would not allow Stanford to find her own placement due to their requirement to vet clinics for required standards and the need to create an affiliation agreement.
- Fox waived the school's policy of requiring a student who withdrew to reapply to the program and allowed Stanford to automatically return to the program if she took a leave for one term. However, Stanford was out of school for more than the term and was required to re-apply and was placed at the bottom of the list of cohort students for clinical placement.
- The court applied the "shifting burden" standard of *McDonnell Douglas Corp. v. Green* (a Title VII case) to Stanford's case. Stanford asserted that she was pregnant, was subjected to adverse action and that there was a causal connection between the pregnancy and the adverse action. The court found she

failed to meet the “adverse action” standard and that even if she had, Fox’s response to her situation was plausible and not a pretext for discrimination.

- On the intentional infliction of emotional distress claim, the court found the school’s response failed to meet a “truly extreme and outrageous” standard.
- The court upheld Fox College’s Motion for Summary Judgment on all counts.

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