

Summary of Recent Case Law

Summarized by [Saundra K. Schuster, J.D.](#), Partner, TNG and ATIXA Advisory Board

Doe v. Central Connecticut State University, U.S. District Court, D Conn. (March 11, 2020)

- Claim brought by Jane Doe, an officer with the university's police department, alleging sexual harassment and retaliation in violation of Title VII, Title IX and various state law claims. Doe claimed department was a "good old boy's network" in which objectification and sexualization of women, including student workers, was second nature. Others observed the behavior she described, including the supervisor, but took no action to stop it. Doe repeatedly asked the harassers to stop. They didn't. Doe was raped by one of the officers and reported it to her supervisor but did not identify the respondent. The supervisor did not refer her to the Title IX coordinator nor provide any resources. There was no investigation. Harassment and retaliation of Doe increased following her report.
- Court held that Doe's supervisor violated her rights under the Equal Protection Clause to be free of sex discrimination, and thus claims against him would go forward. Further, the court held that both Title IX and Title VII employment discrimination claims could go forward against the university.

Kadel et al. v Folwell, et al., U.S. District Court, M D, North Carolina (March 10, 2020)

- This case was brought against several public universities and public employee health plans in North Carolina. Plaintiffs charged that the North Carolina health plan coverage excludes coverage for treatment sought in conjunction with proposed gender transformation or in connection with sex changes or modifications. Plaintiffs alleged the exclusion violated the Equal Protection Clause, the Affordable Care Act and Title IX.
- Defendants' argued that since the refusal to provide health coverage for trans-related medical support was for the minor children of the plaintiffs, the children were not in the "zone of interest" to support the claim. The court stated that Title IX is typically accorded "a sweep as broad as its language" so as best to fulfill its anti-discriminatory purpose, and thus denied the defendants' motion to dismiss or to stay the case, allowing the case to move forward.
- Particularly interesting is that the court noted that Title VII limits its scope to discrimination against an individual "because of such individual's....sex", whereas, Title IX reaches claims of discrimination "on the basis of sex". Thus, while a Title VII plaintiff may only allege discrimination due to their own sex, Title IX has no such limitations. The court noted, however, that the anticipated Supreme Court decision in *Harris Funeral Homes* could impact the viability of Title IX claims such as this one.

Doe v University of Denver, et al, U.S. Court of Appeals, 10th Cir. (March 9, 2020)

- Plaintiff, John Doe, asserted that the disciplinary proceedings brought by the university violated his rights under the 14th Amendment and Title IX. The court granted the university's motion for summary judgment and held that the 14th Amendment does not apply because the University of Denver is a private institution, and that plaintiff failed to show there was evidence of gender bias on the part of the university, and therefore Title IX would also not apply.

- Plaintiff sought to argue that since the university complied with the 2011 DCL, it would be subject to federal oversight via the OCR and therefore subject to a constitutional standard. It's important to note that the due process provisions of the 14th Amendment only proscribe the actions of a public entity and are not applicable to private colleges. The standard applied to private colleges is a common law concept of "fundamental fairness". It is not prescribed by the Constitution.
- Plaintiff was found responsible for violation of the university's sexual misconduct policy. The investigators stated it was a "he said she said" case with the preponderance of the evidence supporting that Doe violated the policy. No hearing was held. Doe was permanently dismissed. Failing on his appeal, he filed a legal action alleging that the university was biased against male students. His evidence to support this claim was based on the university's compliance with the 2011 DCL, the statistical disparity of gender makeup of sexual assault complainants and respondents and the appearance of pro-complainant bias based on the use of terms such as "survivor" in training materials.
- The court determined that in spite of the appearance of pressure exerted by the OCR via the 2011 DCL, that was insufficient to support the allegation that the university acted with bias against male students. Further, the court said that in order to be probative of discrimination, statistical evidence must eliminate non-discriminatory explanations for the disparity. The court stated that the gender disparity plaintiff presented was "almost completely beyond the control of the school" and therefore, absent other supporting documentation, did not support an inference of discrimination. Finally, the court stated that the university may have demonstrated a pro-complainant approach, but that was not based on an individual's gender.

Doe v. Rollins College, U.S. District Court, M.D. Fl., Orlando Div (March 9, 2020)

- John Doe was found responsible for violation of the college's sexual misconduct and harassment policy and was dismissed from the college and banned from commencement activities or events on campus as an alumni, although he was allowed to graduate. The investigator based her finding on the credibility of the complainant's actions following the alleged assault, including her reporting of the incident but unwillingness to participate in an investigation for nine months (after an anonymous allegation of several other individuals sexually assaulted by Doe).
- *Important practice tip for investigators:* The court did not note, but it should be considered that the investigator's view of "corroboration" could help to prove that the complainant believed she was sexually assaulted but does not provide empirical evidence of whether the behavior violated policy or not. Thus, it really isn't corroborative at all.
- Following the finding, Doe sued the college under a Title IX claim, alleging the college discriminated against him during the investigation and resolution, claiming selective enforcement, erroneous outcome, and breach of contract based on their failure to follow their Policy and a document entitled "Responding Party Bill of Rights".
- Similar to the *Denver* case, the court determined that the materials used in training and sent to the student body by the Title IX Coordinator reflected a "victim-centered approach" to the investigation but not evidence of bias motivated by gender.
- The court determined that the investigator's inquiry into Doe's prior sexual history and questioning previous girlfriends was questionable and may have represented a breach of contract, and therefore the court would not support the summary judgment motion on this matter brought by Rollins. Further, the court held that Rollins failed to follow its policy and published Respondent Bill of Rights, and thus would not support Rollins' summary judgment motion on this element.

- The court upheld the summary judgment motion regarding erroneous outcome and selective enforcement (applying the standard set forth in *Yusuf v. Vassar Coll.*, 35 F.3d 709 (2d Cir. 1994)).

Renee Thomas v. The Regents of the University of California, U.S. District Court, N.D. California, (March 9, 2020)

- Plaintiff brought this action following her release from the women’s soccer team at U.C. Berkeley. She claims that Berkeley discriminated against her based on her gender by releasing her and four other women from the women’s soccer team without warning, but only releasing one male student from the men’s team. The complaint, however, does not allege any connection between the two teams. Plaintiff alleged that she and the other women released from the team were treated unfairly compared with their male counterparts. She brought forth five causes of action, including Title IX, the focus of this review. Berkeley sought to dismiss all claims, arguing that plaintiff failed to provide facts to support her claim of discrimination based on gender.
- Berkeley sought and received judicial notice of the performance records of the team the year that plaintiff and the other four women played, which were very negative (“the worst season in the 37-year history of competitive soccer at Berkeley”) compared to the much improved record the following year.
- Plaintiff’s arguments of discrimination lie in the comparison of her average number of minutes played per game compared to men’s players with less playing time who were retained on their teams (the men’s team also had a losing season). She argued that although the teams were similarly situated, the women’s team was treated unequally.
- The court applied a Title VII disparate treatment framework to its Title IX analysis which requires plaintiff to show a prima facie case of disparate treatment by demonstrating that similarly situated individuals not in a protected class received more favorable treatment “in all material respects”. However, plaintiff only focused on one characteristic in making the comparison: playing time. The court held that plaintiff failed to make any plausible link of discrimination to the facts she presented. When assessing discrimination claims in athletics the courts will look to multiple factors including schedules, equipment, coaching, travel, locker rooms, housing, etc. Plaintiff failed to allege any of these elements.
- Plaintiff, however, sought an opportunity to amend her complaint to enable her to allege additional relevant facts. The court granted her leave to amend the Title IX claim of unequal treatment. The other claims were dismissed.