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Tenth Circuit Addresses Adequacy of Procedures for Sexual Misconduct Investigations at Colleges and Universities

The circuit court affirmed summary judgment for the University of Denver (DU), and in the process, rejected plaintiff's section 1983 and Title IX claims, but not without expressing some reservations.

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The U.S. Court of Appeals for the Tenth Circuit recently entered the debate on the fairness of sexual misconduct investigations at colleges and universities. *Doe v. Univ. of Denver*, — F.3d –, 2020 WL 1126638 (10th Cir. March 9, 2020). The circuit court affirmed summary judgment for the University of Denver (DU), and in the process, rejected plaintiff's section 1983 and Title IX claims, but not without expressing some reservations.

DU's Disciplinary Process

In the fall of 2014, plaintiff, a male freshman at DU, had a sexual encounter with Jane Doe, a female freshman, in his dorm room. Six months later, Jane's boyfriend reported the encounter to DU as a sexual assault. Jane Doe later filed a complaint of non-consensual sexual contact with DU's Office of Equal Opportunity (OEO). Two defendants, OEO's director and an investigator, interviewed both plaintiff and Jane twice, allowed plaintiff to list additional witnesses, and also interviewed plaintiff's roommate and Jane's boyfriend. Id. at *2.

In June 2015, the investigators issued a preliminary report that made no findings or conclusions, and they allowed plaintiff and Jane to correct their own statements. A month later, the investigators issued a final report where they found it more likely than not that the contact was non-consensual and violated DU's policies. There was no hearing. Instead, DU convened an outcome counsel to review the case and determine the sanction. The council dismissed plaintiff from DU. He appealed, but the appeal was denied. Id. at *3.

Plaintiff sued DU, its board of trustees, and the OEO director and investigator, alleging that the disciplinary process violated his rights under the Fourteenth Amendment due process clause and Title IX. The district court granted defendants summary judgment. It ruled that plaintiff presented insufficient evidence that DU was a state actor for Fourteenth Amendment purposes and that defendants' actions were motivated by

gender bias for Title IX purposes. Id. at *1, 3.

Section 1983 Claims Require State Action, Not Federal Action

Plaintiff first claimed that DU, a private school, violated his Fourteenth Amendment due process rights and was thus liable under 42 U.S.C. §1983. Because private schools aren't normally subject to due process requirements, he had the burden to show that DU should be deemed a "state actor" for purposes of this claim. Id. at *1.

At summary judgment, plaintiff attempted to meet his burden with evidence showing that the federal government was involved in DU's disciplinary process in two related respects. First, DU had complied with guidance from the Department of Education's Office for Civil Rights for Title IX's requirements after receiving a 2011 Dear Colleague Letter (DCL), which allegedly pressured DU to adopt policies that were biased against male students accused of sexual misconduct. Id. at *2. Second, DU was threatened with the loss of federal funding if it didn't comply with the DCL's guidance. Id.

The district court rejected this argument because it considered DU's compliance with Title IX and the DCL to be insufficient government involvement to transform DU into a state actor. *Doe v. Univ. of Denver*, No. 16-cv-00152-PAB-KMT, 2018 WL 1304530, at *5-7 (D. Colo. March 13, 2018). The Tenth Circuit affirmed "on somewhat different grounds[.]" Doe, 2020 WL 1126638, at *2. Relying on its precedent, the circuit court reasoned that "evidence regarding the federal government's involvement with a private school or its decision to discipline students has no bearing on whether the school is a state actor under the Fourteenth Amendment, which is concerned only with the actions of state governments." Id. (emphasis in original). Thus, plaintiff had failed to adduce "any relevant evidence" that DU was a state actor. Id.

Title IX Claim

Under Title IX, "[n]o person … shall, on the basis of [gender], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a). There was no dispute that Doe was excluded from participation in, or denied the benefits of, an educational program or that that program received federal assistance. The only issue was whether he was expelled from DU on the basis of gender. Id. at * 4.

Plaintiff contended that, in resolving this issue against him, the district court erred by failing to consider his proffered expert testimony and by concluding that his evidence was insufficient to support an inference that DU's decision was motivated by gender bias. *Id*. The circuit court made short work of the first contention, because plaintiff didn't rely on his expert's opinions in resisting summary judgment on the Title IX claim. Id. at *4-5. But the court had more to say about the second contention.

Plaintiff had "set the stage" for his claim by focusing on the DCL, "which

'ushered in a more rigorous approach to sexual misconduct allegations[.]'" Id. at *5 (quoting *Doe v. Purdue Univ.*, 928 F.3d 652, 668 (7th Cir. 2019)). But, agreeing with the majority of courts, the Tenth Circuit opined that, while the DCL—and evidence of pressure exerted on schools to follow its guidance—might tell a "story" about how a school had been motivated to discriminate against males accused of sexual assault in general, "something more" was needed to show such a motivation in a particular case. Id. at *6.

The court then addressed plaintiff's many attempts to provide "something more." *First*, plaintiff recited statistics showing an overwhelming gender disparity at DU, whereby nearly all complainants (35 of 36) were female and all respondents (36) were male. Id. But, again agreeing with courts that have considered such evidence, the circuit court concluded that there were obvious, non-discriminatory explanations for such a disparity. These included that male students committed more serious sexual assaults and that victims are more likely to be female or to report such assaults. Id. at *7.

Second, plaintiff pointed to anti-respondent bias in DU's training and its campus publicity concern sexual assault. But the court ruled that evidence of anti-respondent bias did not create a reasonable inference of anti-male bias. Classification as a sexual-assault respondent, the court reasoned, was not a classification based on gender, because both men and women could be respondents. Id. at *8-9.

Third, plaintiff insisted that the investigators exhibited anti-male bias by giving less weight to his version of events. But, given that there was evidence in favor of Jane's claim that the sexual encounter was non-consensual, the court ruled that it wasn't plausible to infer bias merely from the investigators' weighing of the evidence. Id. at *10.

Fourth, plaintiff argued that the severity of the sanction—expulsion—showed anti-male bias. Plaintiff provided evidence that in every case of non-consensual contact involving penetration, the respondent had been expelled. The court, however, noted that under DU's written policy, violation of the policy's non-consensual contact provision "typically result in a dismissal." Id. at *11 (quotation marks omitted). The court again added that evidence of bias against respondents in such cases would not be evidence of bias on account of gender. Id. at *12.

Finally, plaintiff, pointing to campus posters, alleged that DU encouraged the filing of sexual-misconduct complaints against males. But, aside from one poster—the source of which was unknown—the court ruled that the posters and other evidence suggested a bias only against respondents, not against males. Id. at *12-13.

Having said all this, the court ended by expressing reservations about its distinction between bias against respondents and bias against males:

> We are not unmindful that the combination of this statistical disparity and overt anti-respondent bias … raises palpable concerns that schools might be making a distinction without a real difference and

> that stereotypes and prejudices against a class protected by Title IX (males) are beginning to infect the enforcement of sexual-misconduct policies under the auspices of presumptions regarding an unprotected class (respondents).

Id. at *13. In a long footnote, which was not joined by the concurring judge, the majority listed a plethora of "colorable evidence" that DU exhibited anti-respondent bias both generally and in the case at bar, including what it called "[p]atterns of procedural irregularities." Id. at *13, n.18. Whether these reservations influence the results in future cases involving the fairness of collegiate sexual misconduct investigations remains to be seen.

Stephen Masciocchi and Jessica Smith are attorneys at Holland & Hart specializing in complex commercial litigation. Steve assists clients with federal and state appeals and class actions in high-stakes trial and appellate litigation. Jessica has substantial appellate experience and leads the firm's religious institutions and First Amendment practice.