

2-2020

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Recommended Citation

Thomas Campbell, *Suspended for Sexual Misconduct, Now What?--The Sixth Circuit Splits from the Second on a Pleading Standard for Reverse Title IX Actions*, 73 SMU L. REV. F. 17 (2020)
<https://doi.org/10.25172//slrf.73.1.3>

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SMU Law Review Forum

Volume 73

February 2020

17–22

SUSPENDED FOR SEXUAL MISCONDUCT, NOW WHAT?—THE SIXTH CIRCUIT SPLITS FROM THE SECOND ON A PLEADING STANDARD FOR REVERSE TITLE IX ACTIONS

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I. INTRODUCTION

It should not come as a surprise that sexual assault on college campuses has been a major area of concern in the past decade. In 2011, the Department of Education’s Office for Civil Rights (OCR) released the “Dear Colleague Letter” (the Letter) to all colleges and universities that receive federal aid.¹ The Letter laid out in detail OCR’s interpretation of Title IX and how universities should handle sexual misconduct allegations.² Title IX states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”³ Included as part of the Education Amendments of 1972, Title IX strengthened protections against sex discrimination in federally funded education programs and activities.⁴

The Letter proposed guidelines to university administrators for evidence standards, adjudication procedures, and notice requirements to the accused under Title IX for sexual misconduct allegations on campus.⁵ The Letter also repeatedly reminded universities that failure to comply with OCR’s interpretation of Title IX could result in forfeiture of federal financial aid assistance.⁶ In response to the Letter, some universities intensified their stance on sexual misconduct

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1. See Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP’T OF EDUC. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/9AVV-X34R>] [hereinafter *DCL*].

2. *Id.*

3. 20 U.S.C. § 1681(a) (2018).

4. See *id.*

5. See *DCL*, *supra* note 1, at 6–13.

6. See *id.* at 1, 6, 11, 14, 16, 19.

prevention at least in part out of fear of having their federal funding reduced or taken away completely.⁷ The culmination of the Letter, universities' responses to it, and a heightened societal intolerance for sexual misconduct have inadvertently increased "reverse discrimination" claims against universities in which male students claim they were unfairly suspended following sexual misconduct accusations by female students.⁸

II. TITLE IX CLAIM IN DOE V. MIAMI UNIVERSITY

In *Doe v. Miami University*, a suspended student filed a lawsuit against the university, claiming gender discrimination because he was a male accused of sexual assault.⁹ The allegations in *Doe v. Miami University* were stereotypical of this type of "reverse" Title IX claim. Two college students became intoxicated and, at the end of the night, engaged in some sort of sexual activity. In this particular case, the parties disputed as to when consensual sexual contact crossed the line to sexual assault.¹⁰ This led to a university adjudication hearing that ultimately found "John"¹¹ responsible for sexual assault and in violation of the university's code of conduct.¹² The panel sanctioned John "by suspending him for three terms—fall, winter, and spring."¹³ John twice appealed the hearing panel's decision to the Vice President of Student Affairs, who ultimately affirmed the panel's "finding of responsibility, but reduced his suspension period" to two semesters instead of three.¹⁴ After exhausting the university appeals process, John was out of options to attempt to clear his name. John brought a Title IX claim in the United States District Court for the Southern District of Ohio against the university and several campus administrators involved in his campus hearing.¹⁵ John's complaint alleged multiple theories of recovery under Title IX, including a university-created hostile environment in the adjudication process, a deliberate indifference to the gender discrimination he faced, and an erroneous outcome because of gender bias.¹⁶ The district court granted the university's motion to dismiss on all of John's claims under Federal Rule of Civil Procedure 12(b)(6).¹⁷ John then appealed the district court's judgment to the Sixth Circuit.¹⁸ The Sixth Circuit partially affirmed the lower court's ruling, splitting with the Second Circuit in refusing to adopt its sister

7. See *Colleges Slammed with Lawsuits from Men Accused of Sex Crimes*, CBS NEWS (last updated Mar. 23, 2016, 2:51 PM), <http://www.cbsnews.com/news/colleges-slammed-with-lawsuits-from-men-accused-of-sex-crimes/> [<https://perma.cc/S7XL-QYTV>].

8. *Id.*; see, e.g., *Doe v. Wash. Univ.*, No. 4:19 CV 300 (JMB), 2020 WL 353587 (E.D. Mo. Jan. 21, 2020).

9. *Doe v. Miami Univ.*, 882 F.3d 579, 584 (6th Cir. 2018).

10. *Id.* at 592.

11. The district court granted John's motion to allow the parties to use pseudonyms. *Id.* at 584 n.1.

12. *Id.* at 587.

13. *Id.*

14. *Id.* at 588.

15. *Id.* at 584.

16. *Id.* at 589–95.

17. *Id.* at 588 (citing *Doe v. Miami Univ.*, 247 F. Supp. 3d 875, 896–97 (S.D. Ohio 2017), *aff'd in part, rev'd in part*, 882 F.3d 579 (6th Cir. 2018)).

18. *Id.*

court's modified pleading standard for Title IX claims.¹⁹ The Sixth Circuit decision effectively resulted in dismissal of the majority of John's claims against the university because he could not meet the pleading standard.²⁰ Unfortunately, this situation is not uncommon. The general trend is for courts to dismiss reverse Title IX claims, like John's, at the pleading stage because the plaintiff fails or is unable to plead facial plausibility.²¹

III. REVIEW OF THE FEDERAL PLEADING STANDARD

In order to analyze this trend of dismissals, it is important to understand the standard most federal courts apply in reverse Title IX lawsuits. In 2007, the United States Supreme Court did away with what is commonly referred to as "notice pleading" and established a new framework of "plausibility pleading" in *Bell Atlantic Corp. v. Twombly*.²² The Court explained that a complaint requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."²³ In 2009, the Supreme Court took its pleading standard one step further in its *Iqbal* decision, stating "Rule 8 . . . does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."²⁴ The Court clarified its position at the motion-to-dismiss stage, declaring that, in order to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" and that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."²⁵ The process for applying this standard after *Twombly* and *Iqbal* is a two-pronged approach and, as the *Iqbal* Court put it, a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense."²⁶ First, a court must identify the conclusory statements in the pleadings because such statements "are not entitled to the assumption of truth."²⁷ Then a court must decide whether the factual allegations (essentially what is left over after the court strikes the conclusory statements) "plausibly give rise to an entitlement to relief," which must be taken as true in the light most favorable to the plaintiff.²⁸

Historically and in connection with the Letter, Title IX has been thought to be

19. Compare *id.* at 588-89 (refusing to analogize the pleading standard for Title VII claims with that of Title IX claims), with *Doe v. Columbia Univ.*, 831 F.3d 46, 54 (2d Cir. 2016) (modifying the Title IX pleading standard to the extent the Title VII standard is modified).

20. *Miami Univ.*, 882 F.3d at 604-05.

21. See Emily D. Safko, Note, *Are Campus Sexual Assault Tribunals Fair?: The Need for Judicial Review and Additional Due Process Protections in Light of New Case Law*, 84 *FORDHAM L. REV.* 2289, 2316-20 (2016).

22. 550 U.S. 544, 554-63 (2007).

23. *Id.* at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

24. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555).

25. *Id.* (first quoting *Twombly*, 550 U.S. at 570; and then citing *id.* at 555).

26. *Id.* at 679 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007), *rev'd sub nom. Iqbal*, 556 U.S. 662 (2009)).

27. *Id.*

28. *Id.*

a statute that protects victims of sexual misconduct.²⁹ However, in this context, alleged perpetrators of sexual misconduct who claim discrimination in their campus hearings invoke Title IX. In reverse Title IX cases, the post-*Iqbal* pleading standard grants universities a safety net at the pleading stage by requiring students to put forth factual allegations to survive a motion to dismiss.³⁰ This is because students are generally unable to support allegations of gender discrimination with facts that give rise to an entitlement of relief.³¹ One glaring cause of this procedural predicament that accused students, like John in *Doe v. Miami University*, face at the pleading stage is that the “best information for discerning whether alleged discrimination was based on the plaintiff’s gender as opposed to his status as an accused student is generally in the possession” of the university.³² Specifically, the outcomes of previous sexual assault allegations at the university in question and whether the accused was male or female are closely held by the university as confidential.³³ More generally, information indicating whether the university has developed a pattern of finding males disproportionately responsible for sexual misconduct is also kept confidential by universities.

IV. CIRCUIT SPLIT IN THE APPLICATION OF THE PLEADING STANDARD

In *Doe v. Miami University*, the Sixth Circuit took note of the Second Circuit’s modified pleading standard for reverse Title IX claims in *Doe v. Columbia University* but ultimately rationalized its decision with its own precedent in *Keys v. Humana, Inc.*³⁴ In *Keys*, the Sixth Circuit reversed a dismissal of a Title VII racial discrimination claim in which the district court held the plaintiff had “failed to allege plausibly that she was treated differently than similarly situated nonprotected employees.”³⁵ The court recognized that, at least in Title VII claims, “discovery may produce direct evidence of discrimination” that would otherwise not be available at the pleading stage.³⁶ The *Keys* Court went on to read the plaintiff’s pleadings to assert that her factual allegations of racial discrimination were “neither speculative nor conclusory.”³⁷ Specifically, the court reasoned that the alleged facts “easily state[d] a plausible claim” without the plaintiff offering actual evidentiary proof to substantiate her allegations.³⁸

The allegations of racial discrimination in *Keys* parallel the allegations of sex

29. See, e.g., Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 633–34 (2018) (“Title IX codifies the societal interest in protecting victims against certain types of discrimination and requires schools to provide an equal access to education. This mandate aims to redress the educational harms caused by sex discrimination . . .” (footnote omitted)).

30. See *Doe v. Miami Univ.*, 882 F.3d 579, 588–89 (6th Cir. 2018).

31. See *id.*

32. *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 187 (D.R.I. 2016).

33. *Id.*

34. See *Miami Univ.*, 882 F.3d at 588–89 (citing *Keys v. Humana, Inc.*, 684 F.3d 605, 609–10 (6th Cir. 2012)).

35. *Keys*, 684 F.3d at 608.

36. *Id.* at 609 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511–12 (2002)).

37. *Id.* at 610.

38. *Id.*

discrimination in *Doe v. Miami University*.³⁹ The Sixth Circuit failed to see the similarities in the evidentiary problems accused students face in gender discrimination claims against their universities and the problems the plaintiff in *Keys* faced when accusing her employer of racial discrimination.⁴⁰ The Second Circuit filled this gap in *Doe v. Columbia University* by identifying that the analysis of Title VII claims is similar in application to Title IX claims, asserting that “[a]llegations of a causal connection in the case of university disciplinary cases can be of the kind that are found in the familiar setting of Title VII cases.”⁴¹ The Second Circuit relied on the ruling in *McDonnell Douglas Corp. v. Green*,⁴² in which the Supreme Court established a temporary presumption requiring the defendant to show a nondiscriminatory motive before summary judgment.⁴³ Courts shift the burden to defendants because the nature of the claim invites a lack of evidence available to plaintiffs before discovery.⁴⁴ In applying this line of reasoning to reverse Title IX cases, the Second Circuit made clear their role is “not in any way to evaluate the truth as to what really happened, but merely to determine whether the plaintiff’s factual allegations are sufficient to allow the case to proceed.”⁴⁵ Again, the presumption only operates temporarily because “the facts may appear in a very different light once [the] [d]efendant . . . has had the opportunity to contest the [p]laintiff’s allegations and present its own version.”⁴⁶

The Second Circuit also drew upon its own earlier opinion in *Littlejohn v. City of New York*, which further explains that the temporary presumption “reduces the facts a plaintiff would need to show to defeat a motion for summary judgment prior to the defendant’s furnishing of a non-discriminatory motivation.”⁴⁷ The *Littlejohn* Court provided a template for courts to follow in order to protect plaintiffs from early-stage dismissal for lack of evidence when dealing with discrimination allegations.⁴⁸ Under *Littlejohn*, “in the first phase of the case, the prima facie requirements are relaxed” to allow the plaintiff to “establish a prima facie case without evidence sufficient to show discriminatory motivation.”⁴⁹ If the defendant gives a justification other than discrimination for the result complained of, then “the plaintiff must demonstrate that the proffered reason was not the true reason” for the complained-of injury.⁵⁰ If the Second Circuit’s standard was applied to the facts of *Doe v. Miami University*, the burden-shifting analysis might have granted John an opportunity to reach the merits of his claim against the university.

39. Compare *Keys*, 684 F.3d at 610, with *Miami Univ.*, 882 F.3d at 589-95.

40. *Miami Univ.*, 882 F.3d at 589.

41. *Doe v. Columbia Univ.*, 831 F.3d 46, 55 (2d Cir. 2016) (alteration in original) (quoting *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714-15 (2d Cir. 1994)).

42. See 411 U.S. 792, 802 (1973).

43. *Id.*

44. *Id.*

45. *Columbia Univ.*, 831 F.3d at 59.

46. *Id.*

47. *Id.* at 54 (emphasis and internal quotation marks omitted) (quoting *Littlejohn v. City of New York*, 795 F.3d 297, 310 (2d Cir. 2015)).

48. *Littlejohn*, 795 F.3d at 307.

49. *Id.*

50. *Id.*

V. FUTURE OF TITLE IX ON CAMPUS

It is important to note that universities may have the ability to correct course in the future. The Department of Education officially rescinded portions of the Letter in 2017.⁵¹ The Education Department released interim guidelines on how OCR will assess Title IX compliance in a “Q&A on Campus Sexual Misconduct” letter to universities.⁵² The new interim guidelines grant universities the flexibility to raise their standards for fact-finding in disciplinary hearings from preponderance of the evidence to clear and convincing evidence in order to produce a more equitable investigation.⁵³ Accusations of sexual assault must always be taken seriously, but these new guidelines may offer students in John’s situation the due process they deserve when accused of misconduct. Only time will tell if the Department of Education’s new stance on Title IX will reduce the number of reverse gender discrimination cases brought against universities.

VI. CONCLUSION

The Sixth Circuit in *Doe v. Miami University* erred in refusing to modify its pleading standard for reverse Title IX claims against universities.⁵⁴ The court’s failure to shift the burden to the university to provide some other, nondiscriminatory motive for John’s suspension effectively slams the door on accused plaintiffs in the Sixth Circuit that have possibly been “falsely convicted” by their university. In allowing students to pursue reverse Title IX claims by surviving a motion to dismiss, the Second Circuit curtailed this potential injustice.⁵⁵ As it stands, the federal pleading standard inevitability serves as a force field around universities, which have set up ad hoc courts in an attempt to appease OCR’s initiative to reduce sexual misconduct on campus.

While the intention of OCR and universities is to reduce sexual violence and gender discrimination on campus, the response to the Letter invites the opposite. A campus disciplinary hearing is not a criminal proceeding, and the decision-makers are not lawyers or judges. However, the effects are as damning as a guilty verdict. Obviously and without question, it is hard to imagine something more abhorrent than sexual assault, and those who are responsible should be prosecuted. However, without the ability to survive the motion-to-dismiss stage, it is more likely that innocent parties will be left without recourse. For these reasons, regardless of whether the Department of Education’s new guidelines provide better protection to all students, the responsibility rests with our judicial system in cases like *Doe v. Miami University* to allow students who believe they have been discriminated against to challenge their university proceeding.

51. See Office for Civil Rights, *Q&A on Campus Sexual Misconduct*, U.S. DEP’T OF EDUC. (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [<https://perma.cc/CAX5-TULW>].

52. *Id.*

53. *Id.*

54. *Doe v. Miami Univ.*, 882 F.3d 579, 588–89 (6th Cir. 2018).

55. See *Doe v. Columbia Univ.*, 831 F.3d 46, 56 (2d Cir. 2016).