

The Intersection of Title VII and Title IX in Investigations

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***North Haven
Board of
Education v.
Bell***
**456 U.S. 512
(1982)**

The Court upheld the ruling of the Court of Appeals that Title IX prohibited employment discrimination.

(nothing in the statute excludes employment)

Suing for employment discrimination

- However, there is a split of authorities about whether employees can *sue* under Title IX rather than Title VII.
- The Fifth Circuit has held that Title VII displaces Title IX for an employment discrimination private right of action. *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995).
- The Seventh Circuit has held similarly.
- The Third, Fourth, Sixth, and First Circuits have held the opposite.

***Jackson v.
Birmingham
Bd. of Educ.,
544 U.S. 167
(2005)***

Supreme Court found an employee/coach could sue for retaliation under Title IX where he experienced an adverse employment action after complaining about discrimination against girls' athletic program.

- In *Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 249 (5th Cir. 1997), the Fifth Circuit had already agreed that *Lakoski* did not preempt such a claim but noted that *Lakoski* still controlled the question about whether Title VII preempts claims that an employee was retaliated against for complaining about conditions of employment as opposed to educational disparities.
- Since *Jackson*, the Fifth Circuit continues to hold that Title VII preempts claims of employment discrimination under Title IX. See *Taylor-Travis v. Jackson State Univ.*, 984 F.3d 1107, 1118 (5th Cir. 2021).
- So, there is still a split of authorities to be decided by Supreme Court if the right case is teed up.

Why is this significant?

Title VII

- Title VII has an administrative scheme that must be followed.
- Title VII has damage caps.

Title IX

- No administrative remedies to exhaust
- No damage caps

What about claims of sexual harassment?

- Sexual harassment is just another form of discrimination on the basis of sex, so those claims should be treated the same by the courts.

What about OCR?

- US Department of Education's Office for Civil Rights has investigatory role in Title IX complaints.
- Nothing about who can sue for what impacts that authority.
- In 2020 Title IX regulations, OCR has asserted that the sexual harassment grievance procedures apply in the employment setting.
- "The Department acknowledges that Title VII and Title IX impose different requirements and that some recipients will need to comply with both Title VII and Title IX."

- “These final regulations require all recipients with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, to respond promptly in a manner that is not deliberately indifferent, irrespective of whether the complainant and respondent are students or employees.”
- “The grievance process in § 106.45 does not contradict Title VII or its implementing regulations in any manner and at most may provide more process than Title VII requires (such as specifying that a decision-maker must be a different person than the Title IX Coordinator or investigator).”

What about Policy?

DIA (LOCAL) includes:

Response to Sexual Harassment—Title IX

General Response

For purposes of the District’s response to reports of harassment prohibited by Title IX, definitions can be found in FFH(LEGAL).

When the District receives notice or an allegation of conduct that, if proved, would meet the definition of sexual harassment under Title IX, the Title IX coordinator shall promptly contact the complainant to:

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EMPLOYEE WELFARE
FREEDOM FROM DISCRIMINATION, HARASSMENT, AND RETALIATION

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(LOCAL)

- Discuss the availability of supportive measures and inform the complainant that they are available, with or without the filing of a formal complaint;
- Consider the complainant's wishes with respect to supportive measures; and
- Explain to the complainant the option and process for filing a formal complaint.

The District's response to sexual harassment shall treat complainants and respondents equitably by offering supportive measures to both parties, as appropriate, and by following the Title IX formal complaint process before imposing disciplinary sanctions or other actions that are not supportive measures against a respondent.

If a formal complaint is not filed, the District reserves the right to investigate and respond to prohibited conduct in accordance with Board policies and administrative procedures.

- So, treat a claim of sexual harassment by an employee as you would a claim by a student.
- Title IX coordinator should meet with complainant and offer supportive measures and determine whether the complainant wants to file a formal complaint.
- If a formal complaint is filed follow the grievance procedure.
- If not, follow DIA (LOCAL) procedure for investigations.

Questions?



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