

Management Alert



VII Before IX: Continuing Saga in Harassment Claim Preemption

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Seyfarth Synopsis: A recent decision by the U.S. District Court for the Eastern District of Texas, part of the Fifth Circuit Court of Appeals, reaffirmed a growing circuit split regarding whether Title VII of the Civil Rights Act of 1964 preempts concurrent claims raised under Title IX of the Education Amendments Act of 1972. In *Sara Slabisak v. Univ. of Tex. Health Sci. Ctr. at Tyler & Good Shepherd Med. Ctr.*, No. 4:17-cv-597, 2018 U.S. Dist. LEXIS 30884 (E.D. Tex., Feb. 27, 2018), Judge Amos Mazzant dismissed a former medical resident's Title IX claims of sexual harassment and retaliation against the University of Texas Health Science Center at Tyler on the grounds that Title VII is the exclusive remedy for claims of employment discrimination on the basis of sex in a federally funded educational institutions. While consistent with precedent in the Fifth and Seventh Circuits, the decision stands at odds with prior decisions in the First, Third and Fourth Circuits holding that employees of institutions subject to both Title VII and Title IX may raise such claims under whichever statutory scheme they choose.

Last March, we wrote about a watershed [decision in the U.S. Court of Appeals for the Third Circuit - Doe v. Mercy Catholic Medical Center](#), No. 16-1247 (3d Cir. 2017) - that held the nondiscrimination and anti-harassment protections of Title IX of the Education Amendment Act of 1972 apply to a private medical hospital's residency programs, even those that lack a formal affiliation to an educational institution where Title IX has historically applied. The decision was also notable for holding that the concurrent applicability of Title VII of the Civil Rights Act of 1964 to such institutions did not preclude the plaintiff in that matter, a former resident, from filing her Title IX claim. The Third Circuit's decision contributed to a growing split among the federal Circuits regarding whether Title VII and its extensive administrative pre-requisites preempt concurrent remedies under Title IX for those individuals employed by institutions subject to both statutes. In *Doe*, the Third Circuit joined the First and Fourth Circuits in holding that in a covered individual employed by such an institution may seek remedy under whichever statutory scheme he or she chooses. These decisions contradict case law in the Fifth and Seventh Circuits, which have affirmatively held that Title VII and its carefully crafted statutory administrative pre-requisites are the exclusive remedy for sex discrimination claims brought by employees of institutions covered by both Title VII and Title IX.

A recent decision by the U.S. District Court for the Eastern District of Texas - within the Fifth Circuit - put this precedent to the test. In *Sara Slabisak v. Univ. of Tex. Health Sci. Ctr. at Tyler & Good Shepherd Med. Ctr.*, No. 4:17-cv-597, 2018 U.S. Dist. LEXIS 30884 (E.D. Tex., Feb. 27, 2018), a former medical resident at the University of Texas Health Science Center ("UTHSC") and Good Shepherd Medical Center ("Good Shepherd"), alleged that her supervising resident subjected her to continuous verbal, physical and sexual harassment and that, when she reported his conduct, the hospital discriminated against her by failing to address the conduct and retaliated against her by suspending her indefinitely from the program. Slabisak asserted that, among other things, UTHSC and Good Shepherd violated her rights under both Title VII and Title IX. UTHSC moved to dismiss Slabisak's Title IX claims on the grounds that Title VII preempted any recovery under Title IX.

Judge Amos Mazzant of the Eastern District of Texas agreed. In a brief decision, Judge Mazzant re-affirmed Fifth Circuit precedent, noting “the basis for Plaintiff’s Title IX claims - deliberate indifference and retaliation - revolve around the allegations that Plaintiff was subjected to a hostile work environment, which UTHSC failed to address and correct; and moreover that UTHSC retaliated against Plaintiff when she informed them of said hostile work environment. Such claims fall within the exclusivity of Title VII - employment discrimination on the basis of sex in a federally funded educational institutions.” *Id.* at *7-8. Judge Mazzant accordingly dismissed Slabisak’s Title IX counts, but permitted the Title VII claims to move forward. Of note, none of the parties appeared to challenge the notion that Slabisak, as a resident, was an employee for purposes of Title VII.

What does this mean? Medical centers, hospitals, and other healthcare institutions providing accredited teaching and training programs, particularly programs formally affiliated with educational institutions, should be familiar with the precedent in the federal Circuits in which they operate. Though the substantive protections of Title VII and Title IX do not differ substantially, the process for redress, the standards of liability, and the remedies may differ. Most notably, Title VII requires exhaustion of administrative remedies. Employees seeking redress under Title VII must first file a complaint with the Equal Employment Opportunity Commission (“EEOC”) or similar state administrative agency prior to filing suit in state or federal court. Title IX includes no such prerequisite. Individuals subject to the protections of Title IX may file a complaint with the Department of Education Office for Civil Rights (the DOE version of the EEOC), but they may opt to forego this step and file suit directly in court. The statute of limitations for Title VII claims - within 180 or 300 days, depending on the state - is much shorter than the statute of limitations for Title IX claims. Title IX does not include its own statutory time limitation and typically follows state tort law limitations, which are usually two or more years. Finally, the type of individual remedies available under Title IX is subject to some murky case law, but generally Title IX plaintiffs may seek actual and compensatory damages, injunctive relief, and attorneys’ fees.

This decision further highlights the importance, particularly in the current climate, of responding effectively and expeditiously to all complaints of discrimination, harassment, and retaliation. Healthcare institutions can mitigate risks associated with such complaints - whether Title VII or Title IX applies - by:

- Maintaining wide-open, easily accessible and well-communicated procedures, using multiple avenues, for reporting, investigating, and resolving complaints of discrimination, harassment, and retaliation.
- Ensuring those physicians, administrators, managers, and faculty who are most likely to witness or hear of reports of risky behavior are well trained in not only what and how to report, but also how to empower bystanders and effectively and sensitively manage those situations and any reports they receive.
- Documenting the institution’s actions with respect to all reports of discrimination, harassment, and retaliation - from report through investigation and resolution - so that the institution’s good actions and consistent approach can be proven in the event of an administrative charge or lawsuit.

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