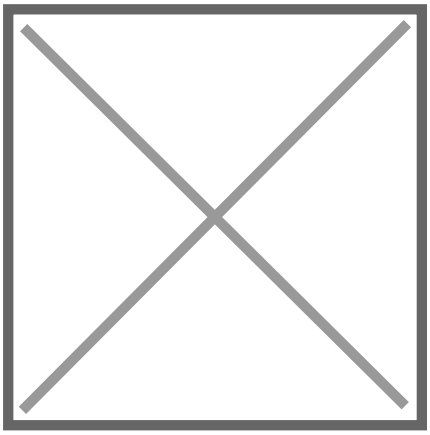

Second Circuit Revives Title IX Reverse Discrimination Suit against Columbia University

In a significant recent decision, the Second Circuit made it easier for college students punished for sexual assault to bring reverse discrimination claims under Title IX. In *Doe v. Columbia University*, 2016 WL 4056034 (July 29, 2016), the court reinstated a male student's lawsuit against Columbia University related to its handling of a sexual assault investigation. The student alleged that recent campus activism and allegations in the press about Columbia's handling of past sexual assaults had made the University concerned about appearing too lenient in handling his case. As a result, he claimed that Columbia had developed an anti-male bias that infected the University's investigation of his case and its subsequent decision to suspend him.

Clarifying the low bar that discrimination claims face at the motion to dismiss stage, the Second Circuit held that the plaintiff's theory was "plausible," overturning the district court's much-cited decision dismissing the male student's case. The Second Circuit made explicit what many had assumed – that the Title VII burden-shifting rubric for assessing employment discrimination applies to Title IX cases. But the decision also gives students found responsible for sexual assault a possible roadmap to survive a motion to dismiss, especially where there has been substantial campus activity related to the handling of sexual assault claims.

The Incident & Investigation

John Doe was accused of having nonconsensual sex with Jane Doe. According to the complaint, on the night in question, Jane allegedly suggested that she and John should have sex in her suite's bathroom. She retrieved a condom from her room, undressed, and had sex with John. John claims that over the next two weeks Jane fretted about how their friends would react because she had a prior romantic relationship with John's roommate.

At the start of the next school year, Jane filed a complaint against John, claiming that the encounter was not consensual. John denied the allegations, and Columbia conducted an investigation. According to John, the investigation had many flaws. Among other things, he contended that the Title IX investigator failed to interview multiple witnesses he had identified, failed to inform him that he could submit a written statement and that he was

entitled to a student advocate, and failed to reconcile conflicting accounts of what happened. John also claimed that the Title IX investigator treated Jane Doe with more "sensitivity" while questioning John in a manner akin to cross-examination.

While the investigation was pending, students and the press began to criticize Columbia's past handling of sexual assault on campus. Student groups claimed that the school had taken a lax approach to prior allegations, and the press picked up the story. Articles ran in the New York Post and Columbia's student newspaper, detailing the student-protestors' complaints. One article indicated that the University's Presidential Advisory Committee on Sexual Assault intended to schedule an open meeting to hear student concerns and explore next steps.

Meanwhile, the University concluded the investigation into John's conduct. Following John's review and objection to the investigator's report – which found him responsible for sexual assault – the University convened a panel and held a disciplinary hearing. John claimed that he was never informed that each party could present an opening statement at the hearing, leaving him unprepared. As a result, John only told the panel that he "did not do it." After hearing the statements and interviewing witnesses, the panel concluded that John had pressured Jane over a period of weeks to have sex with him and therefore the sexual activity that ultimately took place was non-consensual. The panel suspended him. John appealed the decision. Jane also appealed, asking the school to reduce the severity of the punishment. The University denied both appeals.

The Lawsuit

John sued, claiming that the University had reached an "erroneous outcome" and alleging that gender bias was the motivating factor behind the decision. Many students have brought these types of claims over the past few years, but courts have split on how to handle them at the motion to dismiss stage. The root of the problem is the U.S. Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which raised the federal pleading standard to require a plaintiff to allege facts sufficient to make out a "plausible" claim. Ever since, courts have struggled to determine whether claims "that schools are concerned about appearing too lenient on male students accused of sexual assault, and therefore those students are systematically found guilty regardless of the evidence" are "factual allegation[s]" that make a gender discrimination claim plausible, or whether this type of contention is merely a "conclusory legal allegation" that is inadequate to stave off dismissal. *Doe v. Brown University*, 2016 WL 715794 (D.R.I. Feb. 22, 2016).

The district court in *Doe* took the latter approach, dismissing John's claims after finding they rested on "wholly conclusory" allegations. *Doe v. Columbia University*, 101 F. Supp. 3d 356, 370 (S.D.N.Y. 2015). For example, John's complaint alleged, without support, that the Title IX investigator overlooked witnesses "to protect a false, anti-male biased narrative." He also made the unsupported allegation that men at Columbia "are invariably found guilty, regardless of the evidence or lack thereof." *Id.* The lack of non-conclusory allegations left a "fatal gap" that did not give rise to a "plausible inference" that the outcome was motivated by gender bias. *Id.* The district court dismissed the case because John's subjective belief that he was the victim of discrimination was not enough to satisfy his burden under federal pleading standards established in *Iqbal*.

The district court's opinion has been widely cited, with courts relying on its reasoning to dismiss student claims against institutions across the nation, ranging from Northwestern, to the University of Massachusetts-Amherst, to Appalachian State. *See, e.g., Ludlow v. Northwestern Univ.*, 125 F. Supp. 3d 783, 792 (N.D. Ill. 2015) (professor's reverse discrimination claim); *Doe v. Univ. of Massachusetts-Amherst*, 2015 WL 4306521 (D. Mass. July 14, 2015) (student claim); *Tanyi v. Appalachian State Univ.*, 2015 WL 4478853, at *9 (W.D.N.C. July 22, 2015) (student claim).

The Second Circuit Revives John's Claims

The Second Circuit reversed, holding that the district court had applied too high a standard under *Iqbal*. It held that Title IX claims should be evaluated under the familiar burden-shifting analysis used in Title VII employment discrimination cases. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that standard, at the initial stage of a case a plaintiff need only plead "facts supporting a minimal plausible inference of discriminatory intent." Meeting that minimal standard entitles a plaintiff to a temporary presumption of discriminatory intent until the defendant provides reasons for its actions against the plaintiff.

Applying this standard, the Second Circuit took a different view of the allegations in John's complaint. Rather than finding them "conclusory," the Second Circuit viewed the allegations as facts that supported minimal plausible inference of discriminatory intent. The court reasoned that the complaint alleged that the hearing panel (which imposed the discipline), the Dean (who rejected his appeal), and the Title IX investigator (who presented to the panel) were all motivated by anti-male bias, and that those biases "were, at least in part, adopted to refute criticisms circulating in the student body and in the public press that Columbia was turning a blind eye to . . . sexual assaults." *Id.* at *7. The Court noted that the concurrent criticism of the University, and the administration's response to that criticism, made it "plausible that the University's decision-makers . . . were motivated to favor the accusing female over the accused male." *Id.* at *8. Although other explanations may have been equally or more plausible (as the district court found), *Iqbal* only required the inference of discriminatory intent to be "plausible," and not the "most plausible" explanation. Therefore, the court held that John had sufficiently alleged that Columbia was motivated by sex bias and his complaint should not have been dismissed.

The Second Circuit also rejected the district court's suggestion that a desire to avoid bad publicity could be a "lawful motivation distinct from bias," including a "fear of negative publicity or of Title IX liability." In a footnote, the court stated, "A covered university that adopts, even temporarily, a policy of bias favoring one sex over the other in a disciplinary dispute, doing so in order to avoid liability or bad publicity, has practiced sex discrimination, notwithstanding that the motive for the discrimination did not come from ingrained or permanent bias against that particular sex."

The case is now headed back to the district court, and it remains to be seen whether John's claims can survive more rigorous scrutiny at summary judgment. The Second Circuit was careful to express no view on whether the facts that may emerge would support the plaintiff's position.

Takeaways

If the Second Circuit's decision stands and is followed by other circuits, it will be much more likely that educational institutions will have to fight reverse discrimination claims beyond the motion to dismiss stage. Until recently, male students had only seen success if they brought due process and breach of contract claims for violations of procedural rights. The Columbia decision, however, makes clear that a plaintiff only needs to plead "facts supporting a minimal plausible inference of discriminatory intent." The bias need not be explicit, but instead can be inferred from allegations about how the administration reacted to prevailing media attention and campus criticism about its handling of sexual assault claims. In Columbia's case, for example, the administration reacted by calling for an open meeting to address these public criticisms and concerns. This puts colleges in a difficult position – feeling pressured to address campus activism but potentially making it more difficult to handle reverse discrimination claims under Title IX if they do.

As with all Title IX investigations and disciplinary proceedings, institutions should rigorously adhere to their Title IX policies and procedures, ensuring that any procedural rights are offered equally to both parties. They should make sure to document their adherence to those policies and procedures. In addition, to the extent possible, colleges should take documented steps to insulate their Title IX investigations and hearings from campus debate or activities about sexual assault and the institution's response to those concerns. Finally, institutions increasingly should be prepared to litigate these Title IX claims beyond the motion to dismiss stage.