

UE on Appeal

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U.S. Court of Appeals for the Eleventh Circuit

Reverse Discrimination Argument Fails After Rejected Applicant Can't Show Decision-Makers Knew His Race

In a per curiam opinion — a decision the court made collectively — the Eleventh Circuit affirmed a district court's grant of summary judgment to Mercer University. The court held that although a rejected white applicant for a faculty position put forth evidence that race was a consideration in the hiring process, his discrimination claims failed because he couldn't show that decision-makers at Mercer ever knew his race.

White Candidate for Faculty Position Sues After Mercer Hired Black Candidate

In 2018, Mercer posted a tenure-track position for a professor of New Testament Studies at Mercer's McAfee School of Theology (McAfee) after the incumbent — one of the two Black professors among McAfee's 12 faculty members — retired. At the time, McAfee's student population was about 50% Black, and McAfee's accreditation agency urged the school to close the gap by adding greater racial diversity in faculty hiring.

McAfee's Interim Dean, Gregory DeLoach, appointed three faculty members to serve on a search committee. The committee established qualifications for the position and posted a formal job description on Mercer's Human Resources (HR) website.

One of the 109 candidates seeking the position was Dr. Harry W. Tolley Jr., who is white. Tolley called Dr. Loyd Allen, a McAfee faculty member who wasn't part of the search committee but who was an apparent distant family relation of Tolley's, to discuss the position. According to Tolley's notes, Allen assumed Tolley, who he hadn't met, was white, and advised "being female and a person of color" was advantageous and McAfee was intent on hiring a Black candidate to replace the retiring faculty member. At Tolley's request, Allen mentioned Tolley's application to a search committee member.

Each committee member reviewed the application files before convening as a group to discuss standouts. Application files didn't include demographic data Mercer's HR department collected, but the committee sometimes could discern race when a candidate self-identified in their cover letter or was personally familiar to a committee member. Tolley's application didn't mention race and, during the litigation, each member of the search committee affirmed under oath they were unaware of his race when evaluating his application.

Tolley was eliminated from consideration when the committee narrowed the pool to 14 applicants to interview. Committee members testified in the litigation that Tolley met formal qualifications for the position but, among other things, they didn't believe his research focus aligned with their pedagogical goals for the position.

After interviews, the committee invited three finalists to McAfee to deliver a guest lecture and meet with faculty and administration members. Ultimately two finalists — a Black woman and a white man — were presented to the full faculty for discussion and a vote.

Both impressed the faculty, and evidence showed some discussions of race occurred around the time of the selection, including:

- A faculty member emailed the Dean to urge him to “invest in radical change on the racial front at McAfee” by strategically maneuvering incumbent faculty into retirements so a “critical mass” of Black faculty could replace them. The Dean responded to that “impassioned and important note,” stating “all things being equal a person of color would be preferred” for the open position but the selection was complicated because students at McAfee, including some Black students, had circulated petitions supporting the white finalist.
- Faculty commented during the vote that the Black finalist’s “race is a plus,” that her being Black would help connect McAfee with local “Black churches,” and she would be a good complement to McAfee’s other Black faculty member.
- Faculty commented during the vote that students noted of the white finalist that he was a “white guy that gets it” and was “working on his whiteness” — while other students complained he was the “embodiment of white.”
- The accreditor recommended McAfee hire more Black faculty to better match its student body demographics.

After two votes, faculty selected the Black finalist. Tolley sued, alleging McAfee rejected his application for the faculty position because of his race — in violation of Title VII and 42 U.S.C. §1981. The district court granted summary judgment to Mercer. Tolley appealed.

Court Concludes Mercer Didn't Discriminate Against Tolley Since Committee Wasn't Aware of His Race

The parties focused on the issue of pretext during appellate arguments: Was Mercer's proffered explanation for Tolley's elimination from consideration — that Tolley's research agenda didn't fit McAfee's vision for the position — a pretext for unlawful discriminatory animus based on race?

As a threshold matter, to show the search committee acted with discriminatory intent, Tolley needed to show the committee knew his race when they decided not to hire him. The court noted Tolley didn't voluntarily disclose his race in his application materials and each committee member submitted sworn affidavits disclaiming knowledge of Tolley's race. Thus, Tolley's argument focused on his call with Allen, who had put in a good word for Tolley with a search committee member. Allen testified he “probably” mentioned to the committee member that Tolley was a distant family member, namely, he was Allen's cousin's niece's husband. From that, Tolley argued the committee member would have assumed Tolley, like Allen, was white.

The Eleventh Circuit rejected Tolley's argument for two reasons:

- Tolley only could speculate the committee member would have assumed Allen and Tolley were the same race because they were distantly related by marriage.
- Tolley had no evidence the committee member shared that suspicion with the committee's other decision-makers.

Tolley also pointed to circumstantial evidence of Mercer's focus on race in the McAfee faculty search.

The court stated “Tolley has aired evidence tending to show that Mercer's hiring process was infected with an invidious focus on the race of the candidates” and noted “We do not discount the evidence uncovered by Tolley during discovery of Mercer's relentless focus on race.” However, the court concluded “whether the committee racially discriminated against other white applicants — indeed, whether they *would have* racially discriminated against Tolley had they known he was White — does not bear on whether the committee *did* unlawfully discriminate against him here.”



In the wake of the U.S. Supreme Court’s decision last summer regarding the consideration of race in college student admissions, and amid reports of states that have passed laws or proposed legislation to ban or restrict diversity, equity, inclusion, and belonging (DEI&B) initiatives at public institutions, it isn’t surprising to see an uptick in reverse employment discrimination claims. Schools can minimize the risk of lawsuits by unsuccessful candidates by limiting

decision-makers’ access to information about race, at least in early rounds of the hiring process.

Tolley v. Mercer Univ., Case No. 22-13283 (11th Cir. Nov. 29, 2023).

Related UE Resource

- [Preventing Workplace Race Discrimination](#)

Court of Appeals of Tennessee

Court Upholds Dismissal of Suit As a Discovery Sanction

Getting a claim dismissed as a sanction for discovery violations is relatively rare, given the sanction’s severity. However, a party’s conduct is sometimes so egregious that dismissal is appropriate. The plaintiff’s conduct in this case illustrates circumstances in which appellate courts may find the ultimate sanction of dismissal to be warranted.

University Police Arrest Drunk Army Officer

Plaintiff Paul J. Plofchan Jr. met Madeleine Byrd while drinking at a Nashville bar during a bachelor party in May 2015. After they left together, a Vanderbilt University Police Department Officer confronted Plofchan, who was allegedly drunk and belligerent. When asked for his identification, Plofchan insulted the officers who arrived and became aggressive when they tried handcuffing him. He was arrested and charged with public intoxication, resisting arrest, and assault on a police officer.

Later that month, Plofchan asked Byrd via Facebook Messenger to describe what she recalled of the incident, stating he didn’t remember anything after leaving the bar. She said he tried fighting the officer, became “aggressive,” and was “extremely resistant” when handcuffed. Plofchan responded that he drank “way too much booze” that night.

In June 2015, Plofchan messaged Byrd again, asking for more specific details about their encounter with the police. Byrd reiterated that Plofchan “didn’t make it easy” when arrested.

Criminal charges against Plofchan were dismissed two weeks later and expunged from his record; however, as a First Lieutenant in the Army, he still faced an Army disciplinary investigation of his arrest.

In September 2015, Plofchan again reached out to Byrd via Facebook and asked whether she would speak with his attorney and prepare a statement for the Army. Byrd initially was willing to speak with his attorney but later told Plofchan she wanted to speak with an attorney before providing a statement. She blocked him on Facebook.

Plofchan subsequently sued, among others, Vanderbilt University, Vanderbilt’s police department, and the three arresting officers.

Plofchan alleged the officers (and Vanderbilt under the doctrine of *respondeat superior*, a tort law doctrine in which an employer may be held liable for negligence or wrongful conduct by an employee):

- Defamed him by fabricating and repeating the story about his conduct on the night of the arrest
- Were negligent *per se* because they disclosed records and information about his conduct and criminal charges to the Army, supposedly contrary to Tennessee law

During discovery, the defendants requested Plofchan produce documents that might substantiate the circumstances surrounding the arrest, including a specific request for any

and all emails, text messages, or other correspondence with Byrd. Plofchan responded there were “none.” He also claimed attorney-client privilege and work product protection in response to other discovery requests for relevant data stored on any mobile device and for other communications he sent or received related to the incident or supporting his claims.

When the court ordered Plofchan to comply with these discovery requests, excluding any communications with counsel, he maintained any such communications were privileged. Plofchan further testified during his first deposition that he didn’t have any correspondence with Byrd and didn’t recall communicating with her after the arrest.

Byrd, through her counsel, let the defendants review Plofchan’s messages with her. Plofchan’s wife then testified at her deposition that she remembered sitting with Plofchan when he and Byrd first communicated on Facebook after the arrest and saw, but didn’t read, the messages on his account the day before her deposition. Based on her testimony and the messages Byrd provided, the defendants demanded Plofchan supplement his discovery responses and produce the messages. Plofchan, however, only produced messages beginning in June 2015.

During his second deposition, Plofchan maintained he had performed a diligent search before responding to the discovery requests but forgot about the messages with Byrd until his wife reminded him, claiming “amnesia” due to the police officers’ “beating.” Though he initially testified he didn’t delete messages with Byrd, once confronted with the messages from May 2015, he said it was possible he or someone with access to his account did.

The defendants moved to dismiss Plofchan’s claims as a sanction for failing to comply with the court’s order compelling him to produce any nonprivileged information regarding the lawsuit. The court found Plofchan’s contention that he forgot about the messages “disingenuous,” finding he concealed evidence and failed to timely supplement his discovery responses after accessing the messages. The court concluded Plofchan’s “blatant prevarication and misconduct warranted the most severe sanctions” and dismissed the case.

The court also awarded the defendants their attorneys’ fees and costs.

Dismissal Warranted When Plaintiff Withholds Evidence and Flouts Court’s Order

On appeal, Plofchan argued the trial court erred in finding his explanation about forgetting the messages disingenuous and claimed the court couldn’t make such a finding without holding an evidentiary hearing.

The appellate court rejected this argument, noting Plofchan never requested an evidentiary hearing and the evidence supported the court’s findings. The appellate court further rejected Plofchan’s contention that the messages were protected work product because his attorney had asked him to reach out to Byrd to gather information about the arrest. It was Plofchan’s burden to prove the messages were protected work product, but his attorney never filed an affidavit stating the messages were prepared in anticipation of litigation.

As to the appropriateness of the sanction, Plofchan argued dismissal was too harsh and the defendants weren’t prejudiced by his failure to produce the messages because their counsel got them from Byrd. The court, however, rejected this argument, stating that a showing of prejudice isn’t required when a party repeatedly disobeys court orders and lies about the existence of evidence. In light of Plofchan’s conduct, the court determined dismissal was within the range of acceptable dispositions. The court further upheld monetary sanctions, stating that because Plofchan’s “deceit” forced the defendants to incur additional expenses, the imposition of fees and costs wasn’t an abuse of discretion.

The Bottom Line

Dismissal of a lawsuit is the most severe discovery sanction, but it’s still a potential outcome when a plaintiff’s conduct is sufficiently egregious. Remain dogged in pursuing evidence reasonably believed to be in a party’s possession and ensuring a complete record. Bear in mind, however, that discovery obligations and potential sanctions can cut both ways, and so institutions similarly must be mindful of their retention obligations. Always consult with counsel regarding potential discovery issues.

Plofchan v. Hughey, et al., Case No. M2021-00853-COA-R3-CV, (Tenn. App. Jan. 5, 2024).

No Deliberate Indifference, But Title IX Retaliation Claim Can Survive Based on Comments Athletic Staff Allegedly Made

The Second Circuit held that comments by an athletic administrator plausibly could be considered intimidating statements to dissuade a student-athlete from making a discrimination complaint and thereby could support a retaliation claim under Title IX.

Student-Athlete Reports Sexual Harassment and Later Reports Physical Assault By Ex-Boyfriend

Jane Doe, a student and women's lacrosse athlete at Syracuse University, alleged to the university her former boyfriend, John Roe, a student on the men's lacrosse team, sexually harassed and stalked her, culminating in a physical attack.

After Jane notified Syracuse of John's purported sexual harassment and threatening behavior in January 2021, the university issued a no-contact order (NCO). Within a few weeks, at Jane's request, the university lifted the NCO.

On April 17, 2021, John allegedly physically assaulted her. Jane later argued the university shouldn't have lifted the NCO, despite her request, because doing so made it easier for John to attack her. She made this allegation even though she decided not to pursue a formal Title IX complaint against John after meeting with the university's Title IX Coordinator after the incident.

In June 2021, Jane explored transferring and discussed this option with the then-Deputy Athletics Director, who allegedly told her the university rescinds scholarships when a student-athlete enters the transfer portal and leaves in a "nasty way" or "burn[s] bridges" with the school. The new women's Head Lacrosse Coach allegedly asked Jane if she planned to sue over the assault and to consider whether she was happy and felt safe at Syracuse before deciding whether to return, which Jane inferred to mean she was no longer welcome on the team.

Jane filed a lawsuit in the U.S. District Court in the Northern District of New York, asserting deliberate indifference, hostile environment, and retaliation claims under Title IX. Syracuse filed a motion to dismiss, which the district court granted in full. Jane appealed to the Second Circuit Court of Appeals.

University's Responses to Reports of Sexual Harassment and Assault Weren't "Clearly Unreasonable"

On appeal, the court conducted a *de novo* review and concluded the district court properly dismissed Jane's deliberate indifference and hostile environment claims under Title IX but erred in dismissing her retaliation claim.

In reviewing the deliberate indifference claim, the court examined facts alleged in the complaint before and after the alleged April 2021 assault to determine if the university's response to known discrimination was "clearly unreasonable in light of the known circumstances" or constituted "a lengthy and unjustified delay."

With respect to the pre-April 2021 assault allegations, the court concluded Jane failed to allege the university acted with deliberate indifference. After receiving her complaints in January 2021, the university notified Jane of all her Title IX rights and promptly acted. Specifically, the Title IX Office:

- Provided Jane with information about its policies, resources such as safety escorts and counseling, and the complaint process
- Sent follow-up emails to check in with Jane and offer further support
- Promptly entered an NCO, a remedy Jane selected

The court found that after Jane decided against pursuing a complaint, the university wasn't obligated to independently conduct an investigation and Jane didn't allege circumstances indicating the university's decision not to proceed under the circumstances was "clearly unreasonable."

Finally, Syracuse's dissolution of the NCO at Jane's request also wasn't "clearly unreasonable," particularly since a Title IX employee first spoke with her and confirmed Jane wanted the NCO removed and felt safe.

With respect to the post-April 2021 assault allegations, the court determined Jane also failed to allege deliberate indifference. The court concluded that a week’s delay between learning of the assault and notifying the city police and district attorney’s office wasn’t “lengthy and unjustified.” After notice of the alleged assault, the university’s Title IX office immediately re-issued the NCO, advised Jane how to proceed, and, after Jane declined to do so herself, independently issued a formal complaint. Notably, although Jane disagreed with the remedial measures the university put in place, she didn’t allege such corrective actions were ineffective or resulted in any subsequent harassment.

In reviewing the hostile work environment claim, the court noted a university is liable for a hostile environment under Title IX “if it provides no response or provides a response that amounts to deliberate indifference to discrimination.” Having already found Jane failed to establish deliberate indifference, the court concluded the district court didn’t err in dismissing her hostile environment claim.

Errant Comments Revive Title IX Retaliation Claim

The court did, however, determine the district court erred in dismissing Jane’s retaliation claim. The court found Jane established a *prima facie* case for retaliation under Title IX by adequately alleging:

- She engaged in a protected activity — here, reporting her sexual harassment and assault.
- The university knew about the protected activity.
- An adverse action occurred.
- A causal connection existed between the protected activity and the adverse action.

Based upon alleged comments from the then-Deputy Athletics Director and the new women’s Head Lacrosse Coach, the court found it was plausible the comments (if made as alleged) were both:

- Threats that could “dissuade a reasonable student from making or supporting a charge of discrimination”
- Made in retaliation for Jane reporting her sexual assault and/or her anticipated pursuit of legal action against the university

As such, this was a question of fact. The court vacated and remanded the retaliation claim to proceed in the district court.

The Bottom Line

The Second Circuit’s decision demonstrates the importance of following an institution’s Title IX policies and procedures to best protect the school from claims of deliberate indifference and hostile environment. Courts will examine whether an institution’s response was prompt and not “clearly unreasonable” based on facts and circumstances known to it, which can be especially important if a student is reluctant to fully disclose all pertinent information. Training for all staff on appropriate messaging to students is especially important to prevent exposure to retaliation claims.

Jane Doe v. Syracuse Univ. et al., Case No. 22-2674 (2d Cir. Nov. 8, 2023).

Related UE Resources

- [Higher Education Checklist: Title IX-Compliant Policies Against Sexual Harassment](#)
- [Higher Education Checklist: Title IX-Compliant Sexual Harassment Grievance Procedures](#)
- [Preventing Relationship Violence and Stalking](#)
- [“Escalation”: A Tool to Combat Relationship Violence](#)

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Former College Employee Failed to Create an Issue of Material Fact Regarding Motive for Termination

An Ohio appellate court determined a former college employee failed to defeat summary judgment because he provided no “evidentiary quality material” sufficient to create a genuine issue of material fact supporting his assertion of retaliatory termination.

Manager Fired for Engaging in Personal Dealings With College Vendors Alleges Breach of Contract, Retaliatory Discharge

Michael Underwood was Manager of Plant Operations at Cuyahoga Community College (“Tri-C”) in Ohio from 2004-20. His employment was subject to the terms of a series of annual letters of appointment.

On April 1, 2020, Tri-C placed Underwood on paid administrative leave pending an investigation of a whistleblower complaint alleging Underwood engaged in “inappropriate and fraudulent” personal deals with certain Tri-C vendors, in violation of college policies and procedures. The whistleblower alleged, and Tri-C’s investigation confirmed, that Underwood had a Tri-C vendor install kitchen cabinets in his vacation home in the U.S. Virgin Islands and Underwood secured a \$50,000 interest-free personal loan from a Tri-C painting contractor to buy a property in Chagrin Falls, Ohio.

On June 12, 2020, Tri-C notified Underwood he was being fired because he violated Ohio ethics laws and Tri-C’s employee code of conduct.

In April 2021, Underwood sued Tri-C in Ohio state court alleging, among other things, that:

- Tri-C breached his employment contract by acting in bad faith and investigating him for a legal, ethical personal loan from a Tri-C contractor.
- Tri-C wrongfully terminated him in violation of public policy because he reported a co-worker’s potential illegal activity (alleged stealing from Tri-C’s scrap metal recycling program).

Tri-C filed a motion for summary judgment, arguing Underwood couldn’t maintain a breach of contract claim because he was an at-will employee and that he failed to allege a proper wrongful termination claim.

The trial court granted Tri-C’s motion for summary judgment. Underwood appealed.

Trial Court Erred By Finding Plaintiff Was At-Will Employee

Reviewing the trial court’s decision *de novo*, the appellate court determined the trial court “reached the right conclusion” in granting summary judgment to Tri-C on Underwood’s wrongful termination claim “albeit for erroneous reasons.” The trial court had concluded Underwood was an at-will employee and had failed to establish elements of a wrongful termination claim.

As an initial matter, the appellate court noted that a claim for wrongful termination in violation of public policy is only available to at-will employees. In its review of the letter of appointment, the trial court had found that either Tri-C or Underwood could terminate the employee relationship for any reason under the letter of appointment, thus making Underwood an at-will employee. The appellate court concluded that while Underwood could end the relationship for any reason upon 14 days’ notice, Tri-C only could end the appointment “as part of a disciplinary action, reduction in force, or other rules or standard practices.”

Thus, the appellate court held the trial court erred in finding Underwood was an at-will employee, concluding instead he was hired under a series of non-renewable, fixed-term employment contracts. Nonetheless, the appellate court held summary judgment was appropriately granted on Underwood’s wrongful termination claim as such claims are only available to at-will employees.

Plaintiff Didn’t Submit Sufficient Evidence to Support Genuine Issue of Material Fact Regarding Retaliation

The appellate court then considered Underwood’s breach of contract claim that alleged Tri-C fired him for an improper motive — because he reported his suspicions that a co-worker was stealing scrap metal from a Tri-C recycling program. The appellate court noted that Underwood made this report to the college in 2018 but later withdrew his concerns. Moreover, Tri-C renewed Underwood’s employment contract in 2019, after he reported his suspicions, and he wasn’t fired until 2020 after the investigation into his illegal activities.

The appellate court determined Underwood failed to submit any “evidentiary quality materials” to raise a genuine issue of material fact to support his claim that his firing was retaliatory and/or improperly motivated or even that there was any theft or money missing from the recycling program to support his retaliation claim.

The appellate court also found Underwood failed to submit any evidentiary quality materials to rebut Tri-C’s evidence — including a “comprehensive investigative report” identifying the specific statutes and ethics laws he was found to have violated — supporting its termination of Underwood for cause for breaching terms of his letter of appointment. Accordingly, the appellate court affirmed summary judgment on Underwood’s breach of contract claim.

an improper purpose to retaliate against him for reporting suspicions of theft by a co-worker. It can be difficult to secure dismissal of retaliation claims at the summary judgment stage. The appellate court’s opinion here underscores the importance of challenging the soundness of evidence a plaintiff relies on to demonstrate a retaliatory motive. In addition, institutions should proceed carefully and maintain documentation to support any adverse employment action to best protect against claims of retaliatory motive.

Underwood v. Cuyahoga Comm. College, Case No. 2023-G-0012, 2023-Ohio-4180 (Ohio App. Nov. 20, 2023).

The Bottom Line

In this case, the premise of Underwood’s breach of contract claim was that Tri-C didn’t fire him for a reason his letter of appointment permitted, but the college instead acted with

Related UE Resources

- [Best Practices in Faculty Offer Letters](#)
- [Beware Retaliation Against Whistleblowers](#)

About UE’s Resolutions Process:

[Resolutions Philosophy](#)

[Claims Handling](#)

[How to Report a Claim](#)



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