

UE on Appeal

Significant appeals undertaken by United Educators (UE) on behalf of our members

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Warning: This newsletter contains references to graphic content related to harm of adults and minors.

Ohio Supreme Court

Ohio Supreme Court Declines to Review Decision Rejecting Oberlin's Challenge to Trial Court Rulings and Jury Verdict in Libel Case

In a split decision, the Ohio Supreme Court declines to review appeals of an Ohio appellate court decision by both sides, leaving standing a jury verdict and award of compensatory and punitive damages and attorney's fees against Oberlin College and its Dean of Students for their role in a student protest, student senate resolution, and boycott of a local bakery.

GIBSON'S BAKERY SUES COLLEGE AFTER STUDENTS PUBLISH DOCUMENTS ALLEGING RACISM AND RACIAL PROFILING

This highly publicized lawsuit arose following a Nov. 9, 2016, incident at Gibson's Bakery, a bakery/convenience store that is close to campus and owned by Allyn W. and David Gibson, a father and son. Allyn D. Gibson (David's son, described by the court as "young Allyn"), a Gibson's employee, told police that he believed a male Oberlin student was shoplifting wine and using a fake ID to buy more alcohol.

After young Allyn confronted him, the student fled, and young Allyn chased the student across to street to detain him. A police officer arrived on scene and saw a physical altercation between young Allyn, the male student, and two female students who also had been in the bakery. Police arrested all three students, who are Black, but not young Allyn, who is white.

Oberlin students who believed the students had been racially profiled by young Allyn announced a plan to hold a protest outside the bakery the next day. A flyer prepared to be distributed during the protests urged a boycott of the bakery, asserting the bakery was a "RACIST establishment with a LONG ACCOUNT OF RACIAL PROFILING and DISCRIMINATION," and that the male student had been racially profiled, improperly chased out of the store, and assaulted. The Dean of Students attended the protests, seeking to maintain the peace.

On the day the protests began, the Oberlin student senate passed a resolution, sent an “FYI” email to the Dean of Students and the college President, and emailed the resolution to the entire student body, before posting it in a glass display case in the student center, where it remained for almost a year.

Plaintiffs (the bakery and its owners) sued Oberlin and its Dean of Students. After an almost six-week jury trial, a separate trial on punitive damages, and numerous pre-trial and trial rulings by the judge, the jury found Oberlin liable to plaintiffs for libel and intentional infliction of emotional distress and the dean liable for tortious interference with business relationships. The jury awarded plaintiffs compensatory and emotional distress damages, which were later capped by the trial court pursuant to a state tort reform statute and attorney’s fees. Oberlin appealed many of the court rulings, as well as the verdict, and the plaintiffs cross-appealed, challenging the application of the tort caps.

APPELLATE COURT REJECTS APPEAL AND CROSS-APPEAL

On March 31, 2022, the Ohio Court of Appeals for the Ninth Judicial District issued a 49-page opinion affirming in all aspects the trial court verdict and rejecting the appeal by Oberlin and the dean and the cross-appeal by plaintiffs.

While Oberlin raised many issues on appeal, the part of the opinion of most relevance to the broader academic community, both in and out of Ohio, is the reasoning articulated by the appellate court in affirming the libel verdict against the Oberlin defendants based on the flyer and senate resolution drafted by Oberlin students.

To establish libel, Ohio, like many jurisdictions, requires a plaintiff to show each of the following:

- A false statement of fact was made.
- The statement was defamatory.
- The statement was published.
- The plaintiff suffered injury as a proximate result of the publication.
- The defendant acted with the requisite degree of fault in publishing the statement.

Oberlin challenged, among other things, the first and third factors, arguing that the statements in the flyer and resolution that plaintiffs were racists or engaged in racial profiling were not statements of fact, but were instead constitutionally

protected opinion and, further, that Oberlin could not be responsible for libel because it did not publish the statements.

IS CALLING SOMEONE A RACIST A FACT OR AN OPINION?

The trial court agreed with Oberlin that chants Oberlin students made about plaintiffs being racist were constitutionally protected opinion, but the court made a contrary finding regarding the statements in the flyer and senate resolution.

To determine whether an alleged libelous statement is fact or opinion, a court examines four factors:

- The specific language used
- Whether the statement is verifiable
- The general context of the statement
- The broader context in which the statement appeared

Examining the flyer language asserting that the bakery has a “long account of racial profiling and discrimination” and the resolution’s description of Gibson’s “history of racial profiling and discriminatory treatments of students and residents alike,” the appellate court found that these statements are capable of being verified as true or false by determining whether there is, in fact, a history or account of racial profiling or discriminatory events at the bakery.

Looking at the statements’ general and broader context, the appellate court stated that a reasonable reader likely would believe the statements were verifiable facts because of the public’s lack of knowledge of what happened at the bakery and because the statements were made at a time that Oberlin students were generally expressing ongoing dissatisfaction with racial injustice on campus and in the community at large. Accordingly, the appellate court rejected Oberlin’s argument that these were statements of opinion.

DID THE COLLEGE “PUBLISH” STUDENT SPEECH?

Oberlin also argued that plaintiffs did not prove Oberlin “published” either the flyer or senate resolution, the third requirement for libel. But the appellate court found that reasonable minds could have concluded that Oberlin published the libelous statements. In Ohio, publication is any act by which defamatory matter is communicated to a third party; people who “cause or participate” in the publication of libelous material are responsible, including someone who “aids and abets” another to publish.

With respect to the flyer, the appellate court noted that evidence at trial showed the Dean of Students handed at least one flyer to a local reporter who identified himself while taking photos at the protest. A bakery witness also testified the dean handed stacks of flyers to students to distribute and said they could make more copies in a campus office. The court also found significant that the college provided a room in a nearby building for students to take breaks during the protests, supplied coffee and pizza in that room, and the dean agreed to reimburse a student for \$75 to \$100 spent on gloves for protesters. The appellate court found this evidence sufficient to demonstrate the Oberlin acted to either directly publish and/or assist in publishing the flyer.

With respect to the resolution, the appellate court emphasized that Oberlin sanctioned the senate to govern its student body and provided assistance through:

- Financial support
- A faculty advisor (the dean)
- An office in the student center
- A glass display case to post announcements
- Authority to pass, distribute to students, and post senate resolutions

This evidence could support a jury conclusion that Oberlin facilitated the initial publication of the resolution, according to the court. And although the dean testified she didn't know the resolution remained in the display case for a year after it was published, the appellate court said a reasonable juror could conclude otherwise since she was the senate faculty advisor, her office was in the same building, and as the faculty advisor, she was authorized or obligated to remove it.

OHIO SUPREME COURT DENIES JURISDICTION OVER APPEALS

In its notice of appeal to the Ohio Supreme Court, Oberlin argued the case “raises substantial constitutional questions and is one of public and great general interest,” relevant criteria for the court to accept jurisdiction of a case. The college raised four propositions of law for the court to consider, including two related to the appellate court's libel analysis, stating that the decision will suppress free speech on college campuses.

In the first proposition, Oberlin argued that the constitutional protection of opinion speech applies equally to oral and

written statements during protests. So, if student chants were protected, the same statement in writing should be protected when the context is the same. Oberlin also argued that the appellate court should have considered that the written statements were made in the context of urging a boycott, which is a call to action easily assumed to be a persuasive piece of advocacy and would thus be viewed as opinions.

In the second proposition, Oberlin argued, among other things, that imposing liability on a college for “facilitating” student speech contravenes First Amendment principles. The broad facilitation rule the appellate court adopted would make colleges liable for student speech if they merely allow students to meet and pass resolutions, distribute speech by email, display speech in a student center, or take other steps that supposedly aid the distribution of written speech. Oberlin argued that rule of law would compel administrators to censor large swaths of additional speech across the political spectrum.

Three *amici curiae* briefs — filed by the NAACP and its Ohio Conference, National Coalition Against Censorship and Defending Rights & Dissent, and The Reporters Committee for Freedom of the Press and other media organizations — asserted additional reasons why the appellate court's libel analysis “raises substantial constitutional questions and is one of public and great general interest.” Ultimately, however, on Aug. 30, 2022, the Ohio Supreme Court declined to accept the case for review by a 4-3 vote, with three justices dissenting on, among others, the two propositions of law related to the libel count.

THE BOTTOM LINE

At the outset of its opinion, the appellate court stated that “the sole focus of this appeal is on the separate conduct of [the Oberlin defendants] that allegedly caused damage to the Gibsons, not on the First Amendment rights of individuals to voice opinions or protest.” While this decision is based on Ohio law, its reasoning — particularly with respect to facilitating or aiding and abetting student speech — has raised some concerns that in recognizing the rights of students to peaceably protest or by providing sanctioned student organizations with funding or other means of support, educational institutions may be held financially responsible for potentially libelous student speech.

Gibson Bros., Inc. v. Oberlin College et al., 2022-Ohio-1079 (Ohio App. March 31, 2022), appeal denied (Ohio Aug. 30, 2022).

Title IX Provides a Private Right of Action in Employment for Intentional Gender Discrimination

Joining several sister circuits, the Second Circuit holds that Title IX affords a private right of action for a university's intentional gender-based discrimination in employment, thereby reviving a former professor's claim that he was denied academic appointments at other institutions after a flawed investigation found he engaged in a sexual relationship with a student. As a result, Title VII is not the exclusive remedy for employees alleging sex-based discrimination.

GENDER BIAS ALLEGEDLY INFUSED INVESTIGATION PROCEDURES

Cornell University employed plaintiff, Dr. Mukund Vengalattore, as a tenure-track Assistant Professor of Physics beginning in 2009. In that position, plaintiff designed and conducted laboratory experiments with the aid of graduate students. One such graduate student lab assistant, Jane Roe, worked on an experiment with plaintiff from 2009 until November 2012, when she withdrew from the project. In Spring 2013, she told a professor that “if I have my way” plaintiff would have a hard time obtaining tenure.

After plaintiff's tenure review began in May 2014, Roe reported to the Physics department's tenure review committee that plaintiff had once angrily thrown a five-pound piece of equipment at her. In September 2014, two days after Roe learned the committee had recommended tenure be granted to plaintiff, Roe told another physics professor that plaintiff had engaged in sexual misconduct with her. The professor relayed this accusation to Cornell's Director of Workforce Policy and Labor Relations, who conducted numerous informal interviews with Roe. Dean Gretchen Ritter, responsible for approval of tenure decisions, also was informed of the accusation while she was reviewing plaintiff's tenure request. Plaintiff was not similarly informed.

Ritter denied plaintiff's request for tenure in mid-February 2015. Cornell's Title IX coordinator then conducted the first recorded interview with Roe during which Roe, for the first time, alleged that plaintiff raped her in 2010 and thereafter they engaged in a secret consensual relationship. Plaintiff did not learn of Roe's allegations until March 3, 2015, when he was summoned to the Title IX office. Plaintiff alleges the investigators refused to provide him details regarding the allegations, denied his request for the assistance of counsel, and

conducted the investigation in a manner that was designed to support Roe.

At the time, Cornell maintained a policy on “Romantic and Sexual Relationships Between Students and Staff” (“Romance Policy”) set out in the university's faculty handbook. It also had recently amended Policy 6.4 of the Campus Code to conform with Department of Education (ED) requirements. Plaintiff claimed that Policy 6.4 curtailed many of the rights that had been previously afforded to the accused. This policy contained a time limit for filing student complaints against a supervisory faculty member, which would have time-barred Roe's complaint. Plaintiff asserts, however, that Cornell employed a hybrid process by applying some of the standards permitted only by Policy 6.4 that were more favorable to Roe, even though they knew the policy was inapplicable.

The investigators' written report to Ritter recommended that plaintiff not be found to have raped Roe. However, the investigators concluded that Roe's allegation of a consensual sexual relationship was supported by a preponderance of the evidence. Ritter adopted the investigators' report without a hearing and determined that plaintiff had an inappropriate sexual relationship with Roe and lied to investigators. As plaintiff had appealed his tenure denial, Ritter advised that she intended to impose significant sanctions on plaintiff, but they would be postponed until the conclusion of his appeal. Plaintiff's appeal was subsequently denied. Ritter then suspended him for two weeks without pay in 2017, and his academic appointment at Cornell ended in 2018.

Cornell's decision to deny tenure was not at issue in the case before the Second Circuit because it was resolved in separate litigation. In this case, plaintiff alleged he was denied academic appointments or laboratory access at other universities as a result of defamatory statements made by Cornell relaying their “false findings that he had a sexual relationship with a student and lied about it.” He also contended that in disciplining him in response to Roe's allegations, Cornell discriminated against him on the basis of sex and national origin in violation of, respectively, Title IX and Title VI.

In support of his gender discrimination claim, plaintiff alleged that Cornell's investigation of Roe's claims was controlled by procedures skewed in her favor due to gender bias.

Plaintiff also claimed national origin discrimination based on allegations that Roe had made inappropriate comments to her colleagues “ranting about ‘Indians’” and the purported failure of investigators to give adequate weight to the testimony of witnesses they “perceived” were of the same national origin as plaintiff.

PROCEDURAL FLAWS IN TITLE IX INVESTIGATION MAY BE SUFFICIENT TO INFER GENDER DISCRIMINATION

The Second Circuit reversed the district court’s ruling that Title IX does not provide a private right of action for employment discrimination claims. Relying on *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), the Second Circuit concluded that Title IX’s directive that “no person” be discriminated against on the basis of gender also prohibits discrimination in employment. The court pointed to other Supreme Court precedent in support of its holding that there is an implied right of action under Title IX for a university’s intentional gender-based discrimination against a faculty member. It also noted that “[m]ost of our Sister Courts” that have considered the question reached the same conclusion.

Because the dismissal of plaintiff’s complaint was based on a motion for judgment on the pleadings, the court assumed the truth of his allegations for purposes of review.

Among the allegations the court found supportive of a plausible inference of gender-based discrimination was that Cornell used parts of a policy that was known to be inapplicable. The Second Circuit noted that Cornell applied certain standards favorable to Roe that were permitted only under Policy 6.4 of the Campus Code *despite* the fact that investigators acknowledged Roe’s complaint was time-barred under Policy 6.4. In particular, the investigators applied the “preponderance-of-the-evidence standard of proof” identified in Policy 6.4 and noted that under it, neither party has a burden of proof.

The Second Circuit also explained that the accuracy of the investigators’ recommended finding that plaintiff had a sexual

relationship with Roe was “plausibly called into question” not only by the investigators’ rejections of plaintiff’s request to pursue evidence that could have supported his denial, but also by the investigators’ questionable conclusion that a *lack of evidence* supporting the fact that the alleged year-long romantic relationship took place *actually supported* Roe’s allegations that such a relationship existed because it was likely to have been carried out in secret. The Second Circuit firmly rejected this notion and concluded that plaintiff’s allegations, taken together with additional contentions regarding pressures by ED and statements made by an administrator, made it plausible that the investigation’s outcome was the result of gender bias.

Consequently, the Second Circuit vacated the judgment of the district court to the extent it dismissed plaintiff’s Title IX claim and declined to exercise supplemental jurisdiction over plaintiff’s defamation claim. It upheld the lower court’s dismissal of plaintiff’s Title VI claim, finding insufficient factual allegations to permit a plausible inference that plaintiff was disciplined on the basis of his national origin, and due process claim because Cornell is not a state actor.

THE BOTTOM LINE

The Second Circuit joins several of its sister circuits in holding that Title IX allows for a private right of action for a university’s intentional gender-based discrimination against a faculty member. The First, Third, Fourth, Fifth, and Sixth circuits have similarly resolved this question, noting the applicability of Title VII principles in addressing procedural and overlapping substantive issues. Educational institutions that receive federal funding, as are the vast majority, should be mindful of their Title IX policies when investigating a complaint against an employee given that those individuals can assert Title IX gender-based discrimination claims in addition to employment-related discrimination and retaliation claims under Title VII.

Vengalattore v. Cornell Univ., 36 F.4th 87 (2d Cir. June 2, 2022).

RELATED UE RESOURCES

- [Checklist: Sexual Harassment Investigations](#)
- [Higher Education Checklist: Title IX-Compliant Policies Against Sexual Harassment](#)

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Court Affirms Dismissal of Faculty Gender Discrimination and Retaliation Claim

In a case involving a faculty pay disparity, the Eighth Circuit finds that considering different amounts of relevant prior experience when setting starting salaries is a “factor other than sex” sufficient to defeat an Equal Pay Act claim and affirms that even an extremely close temporal proximity between protected activity and an adverse action is not sufficient evidence, without more, to establish causation to support a retaliation claim.

FEMALE PROFESSOR COMPLAINS ABOUT MALE COLLEAGUE’S HIGHER STARTING SALARY

Ronicka Schottel was hired as a criminal justice instructor in the School of Professional Studies at Nebraska State College System’s Peru State College in 2012. The hiring committee considered criteria such as applicants’ education, field experience, teaching experience, interview performance, what they could “bring to the team,” and whether they had “diverse thought processes.”

The college selected Schottel over a male candidate, Daniel Hayes, who applied for the same position, largely based on her strong interview performance, unique background, and the diversity she would bring to the school. Soon thereafter, another criminal justice instructor position became available, and the college hired Hayes.

Although Schottel was selected first, Schottel initially earned \$1,500 less than Hayes. The administrator who set salaries explained that Hayes was paid more because he had “substantial adjunct teaching experience” with the college and “more professional experience that is directly related to the discipline taught.” The pay differential persisted until Schottel was promoted to assistant professor five years later and received a \$3,000 raise.

In April 2018, during a meeting with Vice President of Academic Affairs Timothy Borchers to discuss the tenure process, Schottel complained about comments, emails, and the physical demeanor of the dean, her direct supervisor. Schottel also told Borchers that Hayes’ starting salary was higher than hers prior to her promotion. Neither Borchers nor Schottel raised her concerns with the dean.

Early in May 2018, one of Schottel’s students complained to the dean that Schottel always dismissed the class quite early, had cancelled class four times during the semester, “barely taught

the class,” and didn’t follow the syllabus. The dean reached out to a trusted student who confirmed that Schottel dismissed every class session early. While he mentioned to the dean that another instructor regularly let class out early, he provided no further information. The dean shared the student complaint about Schottel with Borchers. Several weeks later, Borchers notified Schottel that the college was providing her with a terminal contract for the 2018-19 academic year that would not be renewed based on her practices of dismissing classes early, cancelling classes, and failing to follow the syllabus.

Schottel sued, alleging a claim under the Equal Pay Act, as well as Title VII claims for gender discrimination and retaliation. The federal district court granted the college’s motion for summary judgment on all claims, and Schottel appealed.

COLLEGE PROVES PAY DIFFERENTIAL BASED ON FACTOR OTHER THAN SEX

The appellate court examined the Equal Pay Act and gender discrimination claims together, since both were based solely on equal pay for equal work. The college didn’t dispute that Hayes was paid more for the same position from the time he was hired until 2017, when Schottel was promoted. Their disagreement centered on whether the college had satisfied its burden to prove that the pay differential was “based on a factor other than sex.” However, the Eighth Circuit found the college’s evidence showed that Hayes received a higher salary because he had significantly more experience than Schottel.

When he was hired, Hayes already had worked at the college for five years as a criminal justice adjunct faculty member, and he also had 10 years of experience as a correctional institute case worker/manager. Schottel, in contrast, had no formal teaching experience and only three years of relevant work experience as a probation officer. Moreover, a contemporaneous email sent by the administrator responsible for setting faculty salaries explained that Hayes was paid more because of his objectively more extensive experience, a legitimate factor other than sex permissible under the Equal Pay Act.

The Eighth Circuit rejected Schottel’s argument that because she was hired before Hayes, she had demonstrated she had superior experience. That assumption, the court said, conflated the college’s hiring decision with its salary decision.

The evidence showed that the hiring committee looked at both objective and subjective criteria, and it was the focus on the subjective criteria, including Schottel’s interview performance and the diversity that she would bring to the faculty, that supported the decision to hire her first. Likewise, the fact that Schottel was promoted in 2017 was not evidence of a superior resume when she was hired five years earlier. In the absence of intentional discrimination, the court reiterated that it had no authority to act as a “super-personnel department” and second-guess whether the college’s hiring and salary decisions were wise or fair.

THREE-WEEK PERIOD BETWEEN PROTECTED ACTIVITY AND ADVERSE ACTION IS INSUFFICIENT TO ESTABLISH UNLAWFUL RETALIATION

The Eighth Circuit also rejected Schottel’s argument that the college’s decision to issue her a terminal contract was unlawful retaliation for her complaints to Borchers about the dean and unequal pay.

To establish a retaliation claim under Title VII, Schottel needed to prove that her opposition to unlawful discrimination was the “but for” cause of the adverse employment action. Significantly, Schottel presented no evidence that the dean, as the decision-maker responsible for the investigation that led to her termination, was aware of Schottel’s complaints about him and her pay. Instead, evidence showed that the dean began his investigation because a student approached him with concerns about Schottel’s management of her class.

Likewise, the fact that her terminal contract was issued less than three weeks after her complaint, without more, fell short of establishing “but for” causation. As the appellate court explained, because the college presented a lawful, obvious alternative explanation — Schottel’s habitual early dismissal

and cancellation of class and her failure to follow the syllabus, in violation of school policy — Schottel’s theory of causation based on temporal proximity was rendered “implausible.”

The Eighth Circuit further found that Schottel presented no evidence that the college’s legitimate reason for issuing her a terminal contract was a pretext for discrimination. Again, the dean who initiated the investigation that led to her termination was unaware of her complaints. And although Schottel argued that Borchers did not terminate a male colleague who also dismissed class early, the evidence she submitted was “too vague” to establish that his violation of college policy was comparable to hers.

THE BOTTOM LINE

As demonstrated in this case, a pay differential based on faculty starting salaries set for legitimate reasons other than sex may persist even years later. Maintaining contemporaneous documentation of the reasons for starting salaries and subsequent pay increases can be critical. Many applicable factors that might not be obvious to a fact finder — such as a faculty member’s area of expertise, professional qualifications and skills, seniority, current or former administrative duties, and scholarship, service, and teaching — may explain legitimate pay disparities between faculty.

Schottel v. Nebraska St. College Sys., ___ F.4th ___, Case No. 21-2246 (8th Cir. Aug. 3, 2022).

RELATED UE RESOURCE

- [Avoid Sex-Based Faculty Pay Discrimination](#)

U.S. Court of Appeals for the Seventh Circuit

Student Must Comply With Suspension Since He Is Unlikely To Show Sex Bias in His Pending Title IX Claim

The Seventh Circuit clarifies that in deciding a preliminary injunction, if the plaintiff does not establish some likelihood of success on the merits of the underlying claim (here, Title IX), the denial of the preliminary injunction is proper on this basis alone.

MALE STUDENT SEEKS PRELIMINARY INJUNCTION OF THE SUSPENSION THE UNIVERSITY IMPOSED

An external Title IX committee at the University of Southern Indiana imposed a three-semester suspension on male student John Doe after finding by a preponderance of the evidence that

he sexually assaulted a female student, Jane Doe. Jane alleged that on the night of Nov. 13-14, 2020, she and John hung out in her room, drank alcohol, and at some point, John got in bed with Jane and began kissing her. Jane alleged she was drunk, and while she did not object to the kissing, she did not consent when John digitally penetrated her.

During the investigation, John alleged he was sober that evening, nothing sexual occurred, and he did not get into bed with Jane. However, at the Title IX hearing, John's story changed. He alleged that he digitally penetrated her a week before the alleged assault, when Jane was sober and consented.

In response to the finding and sanction, John filed a lawsuit in state court alleging the university violated Title IX and sought a preliminary injunction to prevent the university from implementing the suspension. The state court issued a temporary restraining order barring the university from imposing the suspension pending further proceedings. The university removed the case to federal court based on federal-question jurisdiction (Title IX).

The district court denied John's request for a preliminary injunction. In denying the request, the court noted that a preliminary injunction is an extraordinary remedy, and a plaintiff must establish some likelihood of success on the merits and that without relief, there will be irreparable harm. The court employed a sliding scale approach where the greater likelihood of success, the less harm the plaintiff needs to show. Because John did not show he was likely to succeed on his Title IX claim, the district court found he was not entitled to a preliminary injunction.

John then appealed the denial, but the Seventh Circuit agreed with the district court that John was not entitled to a preliminary injunction.

PUBLIC PRESSURE AND PROCEDURAL IRREGULARITIES ALONE ARE INSUFFICIENT TO SHOW SEX DISCRIMINATION

In reviewing the denial of a preliminary injunction under Title IX, the question presented to the Seventh Circuit was whether John would likely be able to show the university discriminated against him on the basis of sex in its underlying grievance process. In evaluating the preliminary injunction decision, the Seventh Circuit reviewed the district court's findings of fact for clear error, its legal conclusions *de novo*, and its balancing factors for a preliminary injunction for abuse of discretion.

The Seventh Circuit noted that the first step in the analysis, whether John's claim had some likelihood of success on the merits, is often decisive, as it was here. The court applied the circuit's "sliding scale" approach to preliminary injunctions: The more likely John was to win on the merits, the less the balance of harm needed to weigh in his favor.

John did not offer any direct evidence of sex discrimination; rather, he relied on three types of circumstantial evidence:

- Public pressure on the university to respond aggressively to complaints of sexual assault against male students
- "Procedural irregularities" in the university's grievance process
- The weight of the evidence regarding Jane's complaint

As evidence that the university, under public pressure and to avoid public criticism, acted with an anti-male bias against him, John pointed to social media posts, an online petition, a student newspaper article, and the university's statement that it takes sexual assault seriously. The court noted that although evidence of public pressure on a university can be relevant in assessing a Title IX claim, it is not enough on its own to support a claim of sex discrimination. Here, the university engaged independent contractors, who were not affiliated with the university, at each stage of the internal investigation. Because no school official was involved in deciding John's sanction, the court found it unconvincing that public pressure played a role in the decision.

Next, John argued that 12 procedural irregularities during the grievance process showed anti-male bias in the decision making. The Seventh Circuit noted that although appellate courts do not automatically infer that procedural errors show bias, if procedural errors are "sufficiently numerous, lopsided, and/or important, they can sometimes support an inference of sex discrimination." As the number of irregularities increase, or become more severe, it can look less like the errors were due to simple human error.

In looking at the alleged errors John put forth, the court concluded some were non-errors, others were errors he invited, and a few applied equally to both John and Jane. The remaining errors were not enough to persuade the court that John was likely to prove bias against him on the basis of sex.

Finally, John asserted the committee's decision was so clearly against the weight of the evidence (erroneous outcome) that its finding for Jane only could be based on discrimination against him because of his sex. The outcome

turned on whom the committee found more credible, and although both sides had some credibility issues, in applying the preponderance-of-the-evidence standard, the committee ultimately believed Jane’s account. It looked unfavorably on John’s story change from the investigation to the hearing and also found that Jane’s account was more consistent and corroborated by two witnesses.

The Seventh Circuit concluded that based on the record before it, the committee’s credibility determination appeared reasonable.

The Seventh Circuit noted that, just like few trials are perfect, the hearing in this case was not perfect. But John did not show that the imperfections or the final decision against him were likely based on sex bias. Although the sanction John sought to enjoin — a three-month suspension — is arguably a significant harm, John’s inability to demonstrate the merit of his Title IX claim ended the

inquiry and supported the district court’s denial of John’s preliminary injunction.

THE BOTTOM LINE



In upholding the denial of plaintiff’s request for preliminary injunction, the Seventh Circuit clarifies that in order to demonstrate a likelihood of success on a reverse Title IX claim, proffering circumstantial evidence of anti-male bias through public pressure to respond aggressively to claims of sexual assault lodged against male students and the presence of procedural irregularities in the university grievance process alone is not sufficient to demonstrate a likelihood of success on claims of sex discrimination.

Doe v. University of Southern Indiana, Case No. 22-1864 (7th Cir. Aug. 8, 2022).

RELATED UE RESOURCE

- [Checklist: Title IX Supportive Measures, Remedies, and Sanctions — After the Regulations](#)
- [Higher Education Checklist: Title IX-Compliant Sexual Harassment Grievance Procedures](#)

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