9-24-2018

# When Both Apply, Does Title VII displace Title IX in Employee-on-Employee Sexual Harassment Cases?

Ryan Butler

# When Both Apply, Does Title VII displace Title IX in Employee-on-Employee Sexual Harassment Cases?

**By Ryan Butler***

## Introduction

Sexual harassment can happen in any workplace. Sexual harassment is often thought of as a boss making sexual advances on an employee. However, employee-on-employee sexual harassment is also a likely scenario. An example of employee-on-employee sexual harassment could include one employee constantly asking out another employee, or an employee making sexual looks, gestures, or comments that make some other employee feel uncomfortable. An employee may not complain to their supervisor for many reasons, including the feeling that they could be punished for speaking up. In some instances, reporting sexual harassment does lead to adverse employment action for the one who has been sexually harassed. The adverse employment action includes termination and failure to be promoted. Employees are generally covered from employment discrimination including sexual harassment under Title VII. Title IX also covers discrimination on the basis of sex and comes into play for some institutions that are covered under Title VII. This means some sexual harassment is covered under both Title VII and Title IX. These institutions have to plan how to remedy sexual harassment, and those that file suit for sexual harassment may need to decide how they would like to pursue their claim.

Title IX applies to discrimination on the basis of sex, in any educational program or activity receiving federal funds.[1] Title IX applies to faculty and staff in addition to students in education programs receiving federal financial support.[2] Employment discrimination comes within the prohibition of Title IX.[3]

* J.D. Candidate, 2020, Saint Louis University School of Law

[1] 20 U.S.C. § 1681(a).

[2] North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 520-21 (1982).

[3] *Id.* at 530.

Title VII applies to employment discrimination against any individual with respect to their compensation, terms, conditions, or privileges of employment "because of … sex."[4] Sexual harassment is included under the language of Title VII prohibiting employment discrimination's "because of …sex."[5]

Currently, there seems to be a circuit split on whether Title VII displaces or "preempts"[6] Title IX for claims of employment discrimination.[7] Courts within the First, Third, Fourth, Sixth, and Tenth Circuits have all held that Title VII does not preempt Title IX in at least some fashion.[8] Courts within the Fifth, Seventh, and Eleventh Circuits have both found that Title VII preempts Title IX in employment discrimination claims.[9] Courts within the Second, and Eighth Circuits hold different ways on the issue.[10]
Courts That Say Title VII Does Not Displace Title IX.

A district court in the First Circuit held that Title VII does not preempt Title IX.[11] A teacher brought action under Title VII against a school for failure to remedy sexual harassment against her by students.[12] The court reasoned that because employment discrimination falls under the sex discrimination prohibition of Title IX, there is no way the plaintiff's sole recourse is a cause of action under Title IX.[13]

The Third Circuit found that Title VII does not preempt Title IX.[14] In *Mercy Catholic*, the plaintiff filed suit under Title IX claiming sexual harassment by her supervisor and subsequent retaliation.[15] The court reasoned that

[4] 42 U.S.C. § 2000e-2.
[5] 29 CFR 1604.11.
[6] I use the word "preempt" in the sense that it is often confused in cases to mean displace. I will use both interchangeably in the article.
[7] Kelly v. Iowa St. Univ. of Science & Tech., No. 4:17-cv-00397-JEG, 2018 WL 2308451 (S.D. Iowa May 22, 2018) at *8.
[8] Kim Turner, *The Right of School Employee-Coaches Under Title VII and Title IX in Educational Athletic Programs*, 32 ABA J. of Lab. & Emp. Law 229, 246-48 (Winter 2017).
[9] Kim Turner, 32 ABA J. of Lab. & Emp. Law at 248-50.
[10] *Id.* at 251-52.
[11] Plaza-Torress v. Rey, 376 F.Supp.2d 171, 179-80 (D.P.R., 2005).
[12] *Id.* at 175.
[13] *Id.* at 179-80.
[14] Doe v. Mercy Catholic Med. Center, 850 F.3d 545, 560 (3d. Cir. Ct. App. 2017).
[15] *Id.* at 550.

retaliation for employment discrimination can be pursued independently under Title VII and Title IX because the Third Circuit would not infer positive preference for Title VII without a more definite congressional expression.[16]

A Fourth Circuit district court said that the

> "Fourth Circuit has not squarely addressed whether Title VII preempts employment discrimination claims brought under Title IX. However, there is some authority within this circuit suggesting that Title VII and Title IX employment discrimination claims can proceed simultaneously, particularly where the plaintiff seeks equitable relief. The Fourth Circuit has noted that the implied right of action for enforcement of Title IX extends to employment discrimination on the basis of gender."[17]

A district court in the Tenth Circuit found that Title VII does not displace Title IX.[18] The plaintiff was subjected to sexual harassment.[19] The court held that Title VII does not displace Title IX and that there is a private right of action for employees under both Title VII and Title IX.[20] The court looked at prior Supreme Court decisions and reasoned that: (1) private employees are not limited to Title VII in search of relief, (2) Congress could have limited Title IX because it was written after Title VII, (3) Title IX encompasses employees, not just students, and (4) there is no Supreme Court precedent to narrow Title IX's implied private cause of action extending to employees.[21]

**Courts that say Title VII preempts Title IX**

The leading case on Title VII displacement is from the Fifth Circuit, *Lakoski v. James*. In *Lakoski*, the plaintiff brought suit for sex discrimination in

---

[16] *Id.* at 564.
[17] Jones-Davidson v. Prince George's County Comm. Col., No. 13-cv-02284-AW, 2013 WL 5964463 (D. Md. Nov. 7, 2013) at *2.
[18] Fox v. Pittsburg St. Univ., 257 F.Supp.3d 1112, 1122-23 (D. Kan. 2017).
[19] *Id.* at 1117-18.
[20] *Id.* at 1122-23.
[21] *Id.*

violation of Title IX.[22] The Fifth Circuit reviewed legislative history to reason that Congress did not intend Title IX to create a way for individuals to circumvent the pre-existing Title VII remedies.[23] The Fifth Circuit held that Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex.[24] This opinion was later limited finding retaliation is not displaced by Title VII.[25]

District courts within the Seventh Circuit have held similarly to *Lakoski*. In *Ludlow*, the students filed had two sexual harassment claims filed against the plaintiff.[26] The court allowed the plaintiff to pursue Title IX claim for sex discrimination.[27] However, the court also said "if [plaintiff] were alleging some form of employment discrimination, his claim would be preempted by Title VII."[28]

A district court in the Eleventh Circuit found that Title VII displaces Title IX.[29] In *Torres*, the plaintiff had unwanted sexual advances directed at her by another employee, and was retaliated against for complaining, in the form of a moved office, others not taking her phone calls, and being monitored on camera.[30] The court said that they,

> "can conceive of no reason why Congress would intend that a plaintiff-employee of a federally funded education institution be allowed to circumvent the unique legal and administrative requirements imposed on employees asserting identical employment discrimination claims under Title VII merely because the plaintiff is employed by a federally funded education institution."[31]

---

[22] Lakoski v. James, 66 F.3d 751, 753 (5th Cir. 1995).
[23] *Id.* at 757-58.
[24] *Id.* at 753.
[25] Lowrey v. Texas A & M Univ. System, 117 F.3d 242, 247 (5th Cir. 1997).
[26] Ludlow v. Northwestern Univ., 79 F.Supp.3d 824, 829-31 (N.D. Ill. E.D. 2015).
[27] *Id.* at 835.
[28] *Id.* at 834.
[29] Torres v. Sch. Dist. Of Manatee County, No. 8:14-cv-1021-T-33TBM, 2014 WL 4185364 (M.D. Fla. Aug. 22, 2014) at *6.
[30] *Id.* at *1-2.
[31] *Id.* at *6.

**The Eighth Circuit Cases**

The Eighth Circuit has not ruled on the question of whether Title VII preempts Title IX for claims of employment discrimination.[32] There is also a split in the Eight Circuit districts on the matter of employment discrimination preemption.[33]

The Southern District Court of Iowa, found that Title VII does not displace a claim for Title IX.[34] The plaintiff became increasingly concerned with the university's compliance with Title IX, voiced her concerns, and then had administration ignore, discourage, and prevent her from conducting Title IX investigations.[35] The court reasoned that Title VII does not provide the exclusive remedy for employment discrimination when Congress had made an alternative remedy available.[36] The court also looked at the history of the legislation and guiding Supreme Court cases and concluded that Congress intended to make both Title VII and Title IX remedial avenues available to plaintiffs employed at education programs that receive federal funding.[37]

Conversely, some Eighth Circuit districts have held that Title VII preempts Title IX in employment discrimination cases that are not retaliatory in nature. In one case, the plaintiff was subjected to sexual harassment and discrimination by various supervisors, and brought claims under Title VII and Title IX.[38] There the court reasoned that "under Title VII, cases of alleged employment discrimination are subject to a detailed administrative and judicial process designed to provide an opportunity for nonjudicial and nonadversary resolution claims" and other claims could bypass the administrative process vital to the Title VII scheme established by Congress.[39] Similarly in Vandiver, the court reasoned that Title VII is

[32] Kelly v. Iowa St. Univ. of Science & Tech., No. 4:17-cv-00397-JEG, 2018 WL 2308451 (S.D. Iowa May 22, 2018) at *8-9.
[33] *Id.* at *8 n.5.
[34] *Id.* at *10.
[35] *Id.* at *1.
[36] *Id.* at *9 (see also, Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975)).
[37] *Id.* at *10.
[38] Sterling Capone v. Univ. of Ark., CN 5:15-CV-5219, 2016 WL 3455385 (W.D. Ark June 20, 2016) at *1.
[39] *Id.* at *3.

comprehensive and carefully balanced in order to redress employment discrimination, and that a private cause of action in Title IX would disrupt this balance.[40]

**Conclusion**

At this point in time, Title VII does not displace Title IX in employment retaliation claims. However, plaintiffs might soon have a remedy under both Title VII and Title IX for employee-on-employee sexual harassment based upon court history and how the two laws have evolved over time.

Edited by Carter Gage

[40] Vandiver v. Littler Rock Sch. Dist., No. 4:03-CV-00834 GTE 2007 WL 2973463 (Oct. 9, 2007) at *12-13.