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BENDING THE GENDER RULES: A SURVEY OF FEDERAL CIRCUIT COURTS RECOGNIZING TITLE IX HARASSMENT CLAIMS BASED ON FAILURE TO CONFORM TO GENDER STEREOTYPES

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Introduction

It is now well-established that individuals harassed at work for failure to conform to traditional gender stereotypes are protected by Title VII of the Civil Rights Act of 1964. A growing number of courts have extended similar protection to gender nonconforming students under Title IX of the Education Amendments of 1972. Such claims may arise when coaches or teammates criticize a male football player for being a “pussy,” “sissy,” or for “playing like a girl” or when female victims of sexual assault are taunted as “sluts” or “whores.” See Stuart, Susan P., “Warriors, Machismo, and Jockstraps: Sexually Exploitative Athletic Hazing and Title IX in The Public School Locker Room,” 35 W. New Eng. L. Rev. 377 (2013). School district leaders and the lawyers who counsel them may benefit from a brief review of cases from the handful of Circuit courts which recognize that harassment for failure to conform to gender stereotypes may support a Title IX claim. (Alternative avenues of seeking relief may also be available through Equal Protection and Due Process claims under the Fourteenth Amendment or various state common law tort claims.)

Title IX

Title IX, 20 U.S.C. §1681, *et seq.*, provides, in pertinent part:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under

any education program or activity receiving Federal financial assistance,

Discrimination includes both quid pro quo and hostile educational environment sexual harassment. To prevail under Title IX based upon a hostile educational environment sexual harassment theory, a plaintiff must demonstrate that: (1) plaintiff is a member of a protected group; (2) plaintiff was subjected to



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Tom Antonini was born and raised in Toledo, Ohio, and has practiced there with Robison, Curphey & O'Connell since graduating from Notre Dame Law School in 1988. Tom has extensive experience as lead trial counsel, primarily in defense of Class I railways, school districts and their employees, local police departments and their officers, as well as casualty insurers and their insureds. He has argued before the Ohio Supreme Court on behalf of a multi-state manufacturer in a product liability case, and on behalf of a property owner in a toxic mold case, as well as before the Sixth Circuit on several occasions. Tom has defended a variety of commercial and private property owners, including fraternities and sororities, relative to premises liability claims, many arising out of third-party assault. Tom also regularly handles litigation involving non-competition provisions and other restrictive covenants contained within employment agreements.

unwelcome sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment was based on sex; (4) the harassment was sufficiently severe or pervasive and objectively offensive so as to alter the conditions of plaintiff's education and create an abusive educational environment; and (5) an official had actual knowledge of the discrimination, yet failed to adequately respond such that the response amounts to deliberate indifference. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). Title IX does not authorize suits against school officials, teachers, or other individuals. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009).

One of the more hotly contested issues concerns the third element above -- that is, whether or not the harassment was “on the basis of sex.” Recent federal court decisions recognize that harassment of students because they are perceived as gender nonconforming may qualify as harassment based “on sex.” The jurisprudence borrows heavily from case law under Title VII, wherein sex stereotyping claims first were recognized as legally cognizable in the employment setting. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-252 (1989); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81-82 (1998). Indeed, the majority of courts look to case law interpreting Title VII for guidance in evaluating claims brought under Title IX. *Davis*, 526 U.S. at 636, 647-648. Also keep in mind that the federal government has weighed in on this issue. For instance, the United States Department of Education Office for Civil Rights (“OCR”) Dear Colleague Letter dated October 26, 2010, provides:

Title IX... prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping. Thus, it can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity.

Id. at pp. 7-8, available at www2.ed.gov/about/officers/list/ocr/letters/colleague-201010.pdf.

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Beyond the threshold question of whether gender stereotyping claims are valid under Title IX, two additional themes have emerged. First, student bullies are often held to a lesser standard of behavior than are adults in the workplace. *Oncale, supra*, is frequently cited for the proposition that whether gender-oriented conduct rises to the level of actionable “harassment” thus depends on a constellation of surrounding circumstances, expectations, and relationships, such as the ages and number of individuals involved. *Id.* at 82. Second, because federal law currently does not prohibit discrimination based on sexual orientation, courts remain on the lookout for sexual orientation claims disguised as gender nonconformity claims. To date, only the Second, Fifth, and Eighth Circuits have explicitly recognized that harassment for failure to conform to gender stereotypes may support a Title IX claim.

Second Circuit

In *Doe v. East Haven Bd. of Educ.*, 200 Fed.Appx. 46 (2nd Cir. 2006), the Court recognized a Title IX cause of action based

on gender stereotyping, albeit in a decision with very little analysis. The Court affirmed a \$100,000 jury verdict for a student subjected to verbal abuse by other, primarily female, students who called her “...[a] slut, a liar, a bitch, a whore” after she reported that she had been the victim of an off-campus rape by two other students. *Id.* at 48. The school board argued that the harassment occurred because of the reported rape, not because of plaintiff’s sex. However, and although the Court recognized that name-calling which implicates a student’s sex does not in and of itself permit an inference of sex-based discrimination, “[a] reasonable fact-finder could conclude that, when a fourteen-year-old girl reports a rape and then is persistently subjected by other students to verbal abuse that reflects sex-based stereotypes and questions the veracity of her account, the harassment would not have occurred but for the girl’s sex.” *Id.* at 48 (italics in original).

A more recent lower court decision within the Second Circuit, *Estate of D.B. v. Thousand Islands Cent. Sch. Dist.*, 169 F.Supp.3d 320 (N.D.N.Y. 2016), arose out of a suit filed on behalf of the estate of a disabled student who committed suicide following pervasive harassment, including bullying by his football teammates. The decision addressed, in part, the plaintiff’s attempt to amend the pleadings to assert a gender discrimination claim under Title IX. The defendants argued that the plaintiff’s proposed amendment was an improper effort to “shoehorn” sexual orientation discrimination into gender discrimination protections.

The district court sided with the defense, at least to an extent, and explained:

Although the proposed Amended Complaint includes many references to “gender-related slurs,” the slurs alleged in the Amended Complaint do not plausibly suggest that the bullying was based on D.B.’s gender. For example, Plaintiff alleges, “[Another Student] called the Decedent a ‘pussy,’ and told him ‘You’re a pussy and you need the shit kicked out of you.’”... As shocking as this slur may be, the Court is not persuaded that it is related to gender under the circumstances. Rather, as Defendants point out, the slur “pussy” is more likely to mean “coward” than anything gender related.

Id. at 332. However, the court did find that the proposed amended complaint sufficiently stated a Title IX claim based on allegations of “homophobic slurs that constitute ‘gender stereotyping.’” *Id.* In doing so, the court succinctly summarized the developing jurisprudence in this regard, and noted a particular nuance involved therein:

The Second Circuit recognizes a fine line between gender stereotyping and bootstrapping protection for sexual orientation. Because a Title IX sex discrimination claim is treated in much the same way as a Title

VII sex discrimination claim, Title VII jurisprudence therefore applies. *Papelino v. Albany College of Pharmacy of Union Univ.*, 633 F.3d 81, 89 (2d Cir. 2011). Under the “gender stereotyping” theory of liability under Title VII, individuals who fail or refuse to comply with socially accepted gender roles are members of a protected class. See *Dawson*, 398 F.3d at 218. However, courts in the Second Circuit do not recognize sexual orientation as a protected classification under Title VII or Title IX. *Tyrrell v. Seaford Union Free Sch. Dist.*, 792 F.Supp.2d 601, 622 (E.D.N.Y.2011).

The critical fact under the circumstances is the actual sexual orientation of the harassed person. If the harassment consists of homophobic slurs directed at a homosexual, then a gender-stereotyping claim by that individual is improper bootstrapping. *Dawson*, 398 F.3d at 218. If, on the other hand, the harassment consists of homophobic slurs directed at a heterosexual, then a gender-stereotyping claim by that individual is possible. *Riccio v. New Haven Bd. of Educ.*, 467 F.Supp.2d 219, 226 (D.Conn. 2006) (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 82, 118 S.Ct. 998, 140 L.Ed2d 201 (1998)).

Id. at 332-333. Because the deceased victim was not alleged to have been a homosexual, the Title IX claim was based on gender stereotyping, as opposed to a bootstrapped claim of sexual orientation harassment, and thus survived the defendant’s motion to dismiss.

Notably, the United States filed an amicus brief which proposed that harassment based on non-conformity with sex stereotypes is a legally cognizable claim under Title IX.

The bootstrapped nuance was addressed earlier in *Pratt v. Indian River Cent. Sch. Dist.*, 803 F.Supp.2d. 135 (N.D.N.Y. 2011), a case brought on behalf of a homosexual student which included a Title IX claim based primarily on a hostile educational environment theory. Notably, the United States filed an amicus brief which proposed that harassment based on non-conformity with sex stereotypes is a legally cognizable claim under Title IX. The amicus brief also argued that allegations of harassment based on sexual orientation do not defeat a gender-stereotyping harassment claim. *Id.* at 143. The Court agreed, relying primarily on *Riccio v. New Haven Bd. of Educ.*, 467 F.Supp.2d 219 (D. Conn. 2006). “The language set forth in the OCR Guidance and the holding in *Oncale* clearly support the conclusion that a female student, subjected to pejorative, female homosexual names by other female students, can bring a claim of sexual harassment under Title IX.” *Riccio*, 467 F.Supp.2d at 226. Additionally, the Court rejected the idea that

allegations of harassment based on sexual orientation defeat a sex stereotyping harassment claim. In *Pratt*, the Court found that the plaintiff had alleged facts plausibly suggesting that he was harassed and discriminated against based on his sex, including non-conformity to sexist stereotypes. For example, the plaintiff alleged that *Pratt’s* expressive gestures and manner of speaking were of a nature stereotypically associated with females and, based on this nonconformity, *Pratt* was repeatedly called names like “pussy,” “sissy,” and “girl” and mocked with effeminate gestures.

Pratt was recently cited with approval in *J.R. v. New York City Dept. of Educ.*, 2015 WL 5007918 (E.D.N.Y. 2015), a case in which the Title IX claim was predicated on allegations that students bullied J.R. because he did not meet their stereotyped expectations of the manner in which a boy should behave: “The Court can reasonably infer that students bullied and harassed J.R. because of their manifested revulsion of his effeminate mannerisms and way of speaking, which is stereotypically gender based. Thus, the Court finds that the alleged bullying based on J.R.’s feminine mannerisms supports the Title IX claim.” *Id.* at *6.

Fifth Circuit

Carmichael v. Galbraith, 574 Fed.Appx. 286 (5th Cir. 2014), arose out of the all too familiar and tragic suicide of a middle school student who was bullied by fellow students. In one episode of bullying, members of the football team stripped the student nude, tied him up and placed him into a trash can, and all the while called him “fag,” “queer,” and “homo.” The Court reversed the district court’s dismissal of the estate’s Title IX claim; however, the Court declined to consider whether or not gender-based stereotype discrimination can provide the basis for a Title IX claim on the grounds that the issue had not been addressed by the lower court.

In a separate concurring opinion, the concurring judge adopted an additional basis for reversing the district court’s decision. The concurring opinion highlighted the “incessant bullying” in the school hallways, in class, and on the football field where the student was pushed onto the ground “on an almost-daily basis,” and explained the issue before the Court as follows:

This harassment is not alleged to have been “bas[ed] on sex,” in the sense that it involved bodily contact “of a sexual character.” It is, however, alleged to have been harassment that was “bas[ed] on sex” because it was motivated by Jon’s perceived failure to satisfy “gender-based stereotypes,” specifically, that he was not sufficiently “masculine.” Thus, the question is, when harassment against a student is motivated by that student’s perceived failure to satisfy gender-based stereotypes, is such harassment “bas[ed] on sex” under Title IX?

Id. at 292 (internal citations omitted). The concurring opinion identified the two sister circuits which have adopted the theory that such harassment is indeed “bas[ed] on sex” when motivated by the victim’s failure to satisfy his peers pre-conceived gender stereotypes. *Id.* (citing *Doe, supra*, and *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860 (8th Cir. 2011)). The concurring opinion concluded with an eloquent argument for granting students the same protections as adults bullied in the workplace:

For the same reasons Title VII prohibits harassment based on gender stereotypes at work, ..., I think Title IX does the same for children at school. Title VII’s prohibition on harassment because of sex is aimed at affording equal opportunity for workers to thrive in the marketplace based on their abilities and without respect to gender identity. Similarly, Title IX aims for equal educational opportunity. In both the workplace and school, tolerance of harassment for failure to satisfy gender stereotypes stifles the opportunity for success based on merit rather than gender identity characteristics unrelated to ability. I see no rational reason why severe harassment motivated by a failure to satisfy gender stereotypes should be unlawful when carried out against adult workers but permitted when targeted against children.

Carmichael, 574 Fed. Appx. at 294.

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Eighth Circuit

The United States District Court for the District of Minnesota’s decision in *Montgomery v. Independent Sch. Dist. No. 709*, 109 F.Supp.2d 1081 (D. Minn. 2000), was the early leading decision that recognized the validity of gender stereotyping claims, and remains oft-cited. The male student victim in *Montgomery* experienced frequent and continual teasing from other students beginning in kindergarten and continuing through the tenth grade when he transferred to another school district. The verbal taunts included the usual slurs directed at a person because of his perceived sexual orientation. The taunting turned to physical violence, including incidents in which offending students deliberately tripped the victim on the ice during hockey drills. Eventually, the victim no longer participated in intramural sports and undertook other evasive maneuvers to avoid the harassment. In ruling on the school district’s motion to dismiss the Title IX claims, the court held, “...to the extent that plaintiff asserts Title IX claims based on discrimination due to his sexual orientation

or perceived sexual orientation, these claims are not actionable and must be dismissed.” *Id.* at 1090. However, plaintiff argued that the offensive conduct occurred not only because the bullies believed him to be gay, but also because he did not meet their stereotyped expectations of masculinity. In a matter of first impression, the court agreed and explained:

[N]o logical rationale appears to exist for distinguishing Title VII and Title IX in connection with the issue raised here regarding the circumstances under which abusive or offensive conduct amounts to harassment “based on sex.” The Court accordingly applies Title VII precedents in analyzing plaintiff’s Title IX claim.

Id. at 1091. After discussing cases on both sides of the issue in the Title VII context, the *Montgomery* court ultimately sided in favor of plaintiff and concluded that, by pleading facts from which a reasonable fact-finder could infer that the student suffered harassment due to his failure to meet masculine stereotypes, the plaintiff stated a cognizable claim under Title IX. *Id.* at 1092.

Although the school district ultimately prevailed, the Eighth Circuit, in *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860 (8th Cir. 2011), formally recognized that Title IX harassment may be based on a victim’s failure to satisfy his peers’ preconceived gender stereotypes. The misconduct at issue in this case fell into the typical pattern of verbal taunting combined with physical assaults, one of which was captured on video and ultimately garnered considerable national media attention. The jury ultimately returned a verdict in favor of the school district. On appeal, the Court found that the jury had been properly instructed as to the cause of action:

Ultimately, based on our reading of *Oncale*, *Davis*, and Title IX, we are convinced to recover on his Title IX deliberate indifference claim, *Wolfe* had to prove the harassment complained of amounted to more than mere name-calling; he was legally required to show the harasser intended to discriminate against him “on the basis of sex,” meaning the harassment was motivated by either *Wolfe*’s gender or failure to conform with gender stereotypes. Thus, we conclude the district court did not err when it instructed the jury “the harasser must be motivated by *Wolfe*’s gender or his failure to conform to stereotypical male characteristics.” This instruction is consistent with applicable law.

Id. at 867.

Conclusion

Although federal law is far from settled, there is growing momentum among and within the Circuits to accept that discrimination based on nonconformance with gender stereotypes supports a Title IX discrimination claim. Certain rules of thumb have also



developed which guide the analysis and defense of these claims. Transgender individuals are not yet part of a protected class, nor does discrimination based on sexual orientation alone support a valid Title IX claim. A heterosexual male student who acts effeminately is entitled to more protection under Title IX than a homosexual male student who portrays traditional characteristics of manliness. Courts are reluctant to recognize as valid a gender stereotyping claim which is no more than a discrimination claim based on the victim's sexual orientation alone. Moreover, mere name calling amongst students, who are held to a lesser standard of behavior than are adults in the workplace, does not necessarily constitute sexual discrimination based on sex merely because the verbal taunts are laced with sexual slurs.