



TITLE VII V. TITLE IX

Handling Employee Complaints of Sexual Harassment



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Title VII Protections

- Title VII protects against discrimination and harassment based on race, color, national origin, and religion, as well as sex.
- As to sex, since *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), we know that sex includes sexual orientation and transgender status.

Title IX Protections

- Title IX protects only against sex discrimination, including sexual harassment.
- Does that include sexual orientation and transgender status?
 - OCR has issued an interpretation indicating that it is not a given that *Bostock* applies to Title IX.
 - In any event, they state that *Bostock* does not prohibit the assignment to sports teams based on biological sex.
 - But the preamble to the regulations indicates there is protection for those in the LGBTQ community: the final regulations will help protect against sex discrimination regardless of a person's race or ethnicity, age, sexual orientation, or gender identity

Title VII Enforcement

- Equal Employment Opportunity Commission (EEOC) is the federal agency that enforces Title VII.
- EEOC can sue an employer directly
- Private parties can enforce through civil lawsuit after they have exhausted administrative remedies through EEOC.

Title IX Enforcement

- U.S. Department of Education's Office of Civil Rights (OCR) is the federal agency that enforces Title IX through an administrative process – funding at stake.
- Private parties can enforce through civil lawsuit without having to exhaust administrative remedies through OCR.

Title VII Definition of Sexual Harassment

Unwelcome verbal or physical conduct based on sex that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

Title IX Definition of Sexual Harassment – 34 C.F.R. § 106.30

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

quid pro quo

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

Schools are unlike the adult workplace and ... children may regularly interact in a manner that would be unacceptable among adults.

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v)[Clery Act], "dating violence" as defined in 34 U.S.C. 12291(a)(10)[VAWA], "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

Title IX Definition

"Sexual assault" - an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation. From the 2019 UCR:

Sex Offenses (previously forcible) —Any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.

- Rape—(Except Statutory Rape) The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
- Sodomy—Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
- Sexual Assault With An Object—To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
- Fondling—The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Title IX Definition

Sex Offenses, Non-Forcible - Unlawful, non-forcible sexual intercourse

- Incest - Non-Forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law
- Statutory Rape - Non-Forcible sexual intercourse with a person who is under the statutory age of consent

Title IX Definition

“Dating violence” means violence committed by a person--

- (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - (i) The length of the relationship.
 - (ii) The type of relationship.
 - (iii) The frequency of interaction between the persons involved in the relationship.

Title IX Definition

“Domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.

Title IX Definition

“Stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to--

- (A) fear for his or her safety or the safety of others; or
- (B) suffer substantial emotional distress.

**Title VII Liability –
Depends on who the harasser is**

- If employer’s alter ego, i.e., sufficiently high enough to speak for the district, e.g., the superintendent, then it’s strict liability
- If it’s a supervisor and there’s a tangible employment action, then there is liability
- If it is a supervisor and no tangible employment action, there is liability unless the employer can prove an affirmative defense:
 - that the employer took reasonable steps to prevent and promptly correct sexual harassment in the workplace AND
 - the aggrieved employee unreasonably failed to take advantage of the employer’s preventive or corrective measures
- If it’s a coworker, if the employer should have known and failed to take prompt, remedial action

Title IX Liability

- Liable for deliberate indifference to known harassment
- Regulations state that actual knowledge = knowledge of sexual harassment or allegations of sexual harassment by any school employee
- Deliberate indifference = a response that is clearly unreasonable in the light of known circumstances
- OCR will find fault if fail to follow grievance process for addressing formal complaints because they can enforce the regulations

Title VII Remedies

- Back pay
- Reinstatement or front pay
- Punitive damages not available against governmental entity
- Compensatory damages are capped:
 - \$50,000 for employers with 15-100 employees;
 - \$100,000 for employers with 101-200 employees;
 - \$200,000 for employers with 201-500 employees; and
 - \$300,000 for employers with 501 or more employees.
- Attorney’s fees

**Title IX Remedies –
Depends if court or OCR**

- Injunctions
- Compensatory damages
- Punitive damages should not be available but there is not a definitive case from the Supreme Court saying they are not.
- Attorney’s fees
- Loss of federal funding by OCR action

Can Employees Sue Under Title IX?

Some courts, including the Fifth Circuit, have said that Title VII preempts a judicial cause of action for discrimination or harassment under Title IX

Do the new regulations and grievance process apply to employees being harassed?

- Clearly, they are focused on harassment of students.
- But, OCR states multiple times that they are not carving out employees.



Language from the 2,000 pages of preamble and commentary provides some guidance

“the definitions of ‘complainant’ and ‘respondent’ do not restrict either party to being a student or employee” p. 167

“administrative enforcement of Title IX obligations is vital to the protection of students’ **and** employees’ civil rights” p. 168 (emphasis added)

“proceedings to investigate and adjudicate a formal complaint of sexual harassment under these final regulations are designed to reach accurate determinations regarding responsibility so that students **and** employees are protected from sex discrimination in the form of sexual harassment” p. 288 (emphasis added)

“These final regulations require all recipients with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, to respond promptly in a manner that is not deliberately indifferent, irrespective of whether the complainant and respondent are students or employees.” p. 1261

“For respondents (whether students or employees) and for complainants (whether students or employees), it is important for a Title IX grievance process to reach a reliable outcome.” p. 1284

“The Department appreciates support for its final regulations, which apply to employees.” p. 1510

“These final regulations may apply to reports and formal complaints by employees against students and other employees, and also may apply to third-party complaints against students.”

“The Department’s longstanding position is that its Office for Civil Rights (OCR) addresses, under Title IX, sex discrimination in the form of sexual harassment, including by or against employees.” p. 1512

"employers must fulfill both their obligations under Title VII and Title IX, and there is no inherent conflict between Title VII and Title IX" p. 1514

"These regulations do not preclude a recipient from enforcing a code of conduct that is separate and apart from what Title IX requires, such as a code of conduct that may address what Title VII requires." p. 1516



- This language sounds like the regulations apply across the board to employees
- But some other language qualifies that.

“Title IX, thus, applies to any person in the United States who experiences discrimination on the basis of sex in any education program or activity receiving Federal financial assistance. Similarly, these final regulations, which address sexual harassment, apply to any person, including employees, **in an education program or activity** receiving Federal financial assistance.”

“The Department notes, however, that employment status may not always be the most relevant determination as a complainant must be participating in or attempting to participate in an **education program or activity** of the recipient at the time of filing a formal complaint as explained in the definition of ‘formal complaint’ in § 106.30.”

Plus, what about the definition of sexual harassment other than sexual assault, dating violence, and stalking: “Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it **effectively denies a person equal access to the recipient’s education program or activity**.”



- So, inclination might be to interpret this as requiring an employee to be trying to get an education
- But some of the commentary indicates that is not required, that working in an education program or activity is accessing it.

“The Department will interpret a recipient’s education ‘program or activity’ in accordance with the Title IX statute and its implementing regulations, which generally provide that an educational institution’s program or activity includes ‘all of the operations of’ a postsecondary institution or elementary and secondary school.” p. 250

“an education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs” p. 587

"A complainant may be 'attempting to participate' in the recipient's education program or activity in a broad variety of circumstances that do not depend on a complainant being, for instance, enrolled as a student or employed as an employee." p. 709

The notification of policy "must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) **and employment**, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both. 34 C.F.R. § 106.8(b)

So . . .

- The most conservative approach is that if conduct that is reported meets the definition of sexual harassment under Title IX, then the regulations apply.
- Meaning that, if an employee wants to file a formal complaint, following the grievance process will be required.
- Also, remember that supportive measures are available to any complainant or respondent, including employee-complainants and employee-respondents.

But . . .

- If conduct does not meet the definition of sexual harassment under Title IX, but does under Title VII, take the usual steps you would take to investigate harassment under Title VII.
- The regulations expressly provide that nothing in them may be read in derogation of an individual's rights, including an employee's rights, under Title VII.
- So, even though Title IX may not be implicated, the employee still has all the rights under Title VII.



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QUESTIONS?
