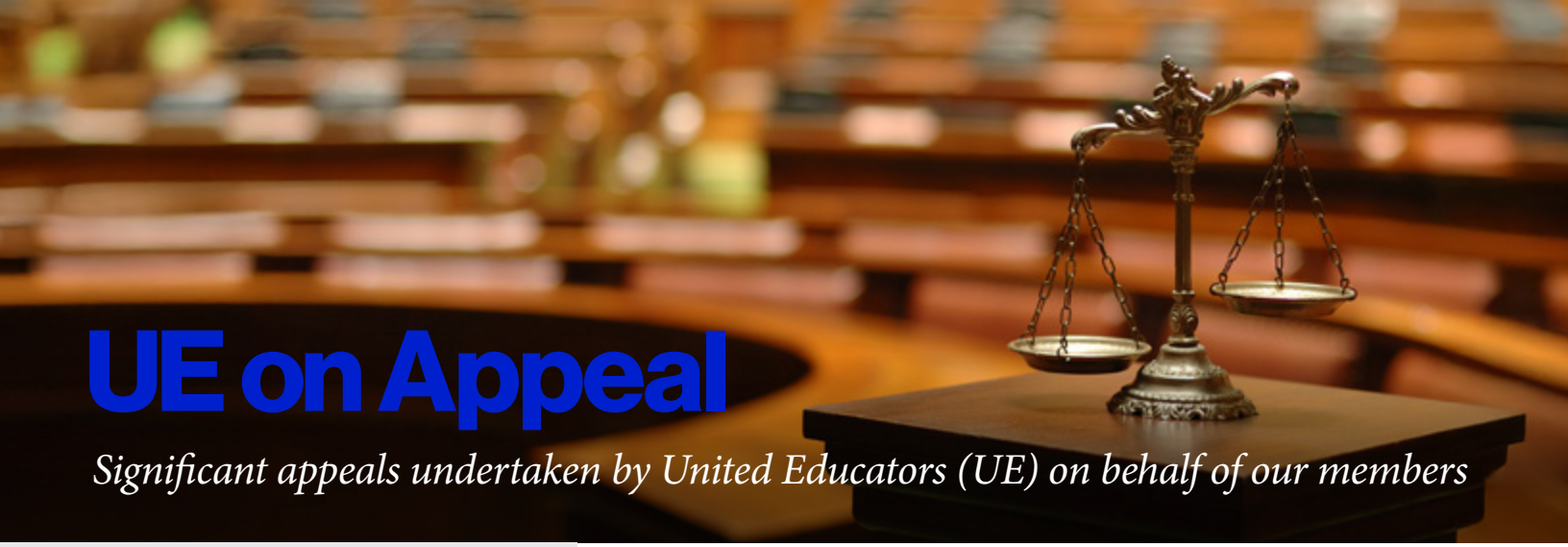

UE on Appeal

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

December 2024

Decisions Featured in This Issue:

United Educators

U.S. Court of Appeals for the Seventh Circuit

Professor's Request for a Second Chance to Apply for Tenure Isn't a Reasonable Accommodation Under the ADA

In this case, the Seventh Circuit analyzes a university's denial of tenure to an injured tenure-track faculty member whose disability, at least temporarily, adversely impacted her trajectory to meet the criteria for tenure.

Professor With a Traumatic Brain Injury Alleges Failure to Accommodate and Disability Discrimination in Her Tenure Denial

On Jan. 6, 2015, Sarah Schoper, a tenure-track assistant professor in the Department of Educational Studies at Western Illinois University, experienced a life-threatening pulmonary embolism that caused a traumatic brain injury. The injury caused her to develop high-functioning mild aphasia, difficulty retrieving words, and other physical disabilities; she spent 46 days in the hospital.

Based on her neurologist's suggestion that complex intellectual activities would hasten her recovery, Schoper sought to return to the university as soon as possible.

On May 28, 2015, when her doctor approved her return to work, the university gave Schoper physical accommodations and granted her doctor's recommendations to let her teach the same courses she had taught previously and to excuse her from service on university committees.

When Schoper returned, she was in her fifth year at the university and approaching eligibility to apply for tenure in January 2017, during her sixth year.

The general tenure process was set forth in a collective bargaining agreement between the faculty union and the university and was supplemented by specific departmental criteria. The collective bargaining agreement required reviewers, in a multistep process, to analyze a candidate's contributions in three categories:

- Teaching and primary duties
- Professional activities, including published scholarship
- Service, such as committee assignments

The process also contained a "stop-the-clock" provision, which let a faculty

member request an extra year to apply for tenure due to significant illness if the extension request was made before the original tenure application deadline.

Schoper's department listed the criteria for evaluating a candidate's teaching, including peer and chair evaluations and student evaluations. Students completed anonymous evaluations at the end of each course, which contained two parts:

- Part A was a numeric evaluation on a scale of 1 to 5 (with 5 being the best). Scores were averaged for each course.
- Part B included qualitative feedback provided in students' written comments.

The department's Part A threshold was 4.0 for tenure candidates, although reviewers were to consider more than just numeric scores.

Schoper met with a member of her department tenure committee in fall 2015, and the member asked if she had considered taking time off. Upset by the comment, which Schoper believed was inconsistent with her neurologist's recommendation to return to work, she reported the interaction to her department chair, who told her to follow her neurologist's advice.

In January 2016, Schoper received her Part A scores for fall 2015, her first semester teaching in-person after her injury.

Her average Part A score fell from 4.6 in fall 2014 to 3.8 in fall 2015. For the first time in her career, Schoper's students also left some negative comments in Part B of their course evaluations, including that she was a "weed that needed to be plucked" and she had the abilities of a preschooler.

Schoper told her new interim department chair that she believed the students were reacting poorly to her disabilities and making potentially discriminatory remarks. The interim chair told Schoper to make some adjustments in response to the student feedback.

Schoper didn't raise the issue of student comments again, and at no point did she ask to stop her tenure clock.

In January 2017, Schoper applied for tenure. The department tenure committee, in the process' first step, recommended against tenure due to Schoper's teaching scores, noting the average student score for seven of her most recent courses fell well below the recommended 4.0 threshold, averaging between 3.14 and 3.78.

The committee also noted they were troubled by some representative student comments in Part B of the evaluations, such as:

- She had favorites in class and graded based on personal preference.
- She focused too much on getting students to like her.
- She didn't know how to take feedback.
- She made class feel like a waste of time.
- She regularly complained about not having tenure and bad-mouthed other teachers.

Schoper requested reconsideration, pointing out her average Part A score over the prior five years was 4.26. She also submitted a letter from her neurologist recommending she be reconsidered for tenure and allowed to continue to work.

However, the department committee unanimously affirmed its recommendation against tenure.

Schoper's department chair recommended against tenure because Schoper fell short of the required criteria. After the chair reaffirmed his decision on reconsideration, Schoper asked for more time to achieve tenure. The chair said he didn't have the power to grant her request under the collective bargaining agreement and suggested she investigate long-term disability benefits.

Schoper's tenure application largely met a similar fate at subsequent steps of the evaluation process, and the President agreed with the overwhelming recommendations against tenure.

In accordance with the collective bargaining agreement, after the President made a final decision against tenure, the university issued Schoper a terminal year contract.

Schoper filed suit in federal court, arguing the university didn't provide reasonable accommodations and engaged in disability discrimination under the Americans with Disabilities Act (ADA).

The district court granted summary judgment to the university on both counts.

Schoper appealed.

Second Chance to Apply for Tenure Isn't a Reasonable Accommodation Under the ADA

To establish a failure-to-accommodate claim, Schoper needed to show three things:

- She was a qualified individual with a disability.
- The university was aware of her disability.
- The university failed to reasonably accommodate her disability.

The Seventh Circuit held that Schoper couldn't establish she was a qualified individual, and even if she could, she couldn't establish the university failed to reasonably accommodate her.

To determine whether a person is qualified, a court must first evaluate whether the person can satisfy the position's "necessary prerequisites." Then the court must consider whether the person can perform the position's essential functions with or without a reasonable accommodation.

Schoper didn't dispute average scores for her recent classes were well below the recommended Part A scores of above 4.0. The court stated the ADA didn't require the university to change those requirements for Schoper, even if her inability to perform the job was due to a disability.

Even if Schoper were a qualified individual, the court rejected her contention that the university failed to reasonably accommodate her by denying her additional time to satisfy the tenure criteria for teaching. The court noted that Schoper didn't try to pause her tenure clock until after she submitted her application for tenure and received her first two negative recommendations in the process, characterizing her as requesting a "do-over."

While it was possible, given more time, Schoper would have met the teaching requirements for tenure, she couldn't identify any legal authority requiring the university to "insulate her from her chosen strategy" of returning to work quickly, taking the risk that her teaching scores could suffer until she fully recovered.

University Didn't Engage in Disability Discrimination in its Decision

The court further held Schoper couldn't show evidence that her traumatic brain injury was the "determinative factor" in the university's decision against tenure. While the Part A scores' significance was undisputed, it also was clear her tenure reviewers didn't focus on the scores in isolation. Reviewers considered the scores alongside student comments in Part B.

Comments the reviewers highlighted didn't concern Schoper's disability. They identified other shortcomings in her teaching of courses.

The court noted it would be speculative to assume discriminatory intent from isolated student comments comparing Schoper to a weed or a preschooler. More importantly, there was no evidence the reviewers relied on those two student comments when making their recommendations against tenure.

Schoper similarly failed to causally connect the two faculty comments about her disability to the adverse tenure decision. The department tenure committee member's comment took place more than a year before she applied for tenure. And the department chair's suggestion that Schoper consider long-term disability was one statement by a single reviewer in a multistep process in which the President made the final decision.

The Bottom Line

This decision is a firm reminder that a university need not change or ignore its established tenure criteria when a professor's disability impacts their ability to meet those criteria. And while a request for additional time can be a reasonable accommodation (as evidenced by the presence of "stop-the-clock" provisions in many promotion and tenure processes), the Seventh Circuit makes clear the timing of the request is crucial. It isn't a reasonable accommodation for a candidate to request additional time to meet the tenure criteria midway through the tenure review process in what would amount to a "do-over" or second bite at the apple.

Schoper v. Bd. of Trs. of Western Ill. Univ., 119 F.4th 527 (7th Cir. Oct. 17, 2024).

Related UE Resource

- Problems Arising From Tenure Denials: A Review of Recent Claims

University Employee Can't Establish Title VII Retaliation Claim Absent Proof Decision-Makers Knew of Her Protected Conduct

In this decision, the First Circuit clarifies the appropriate test for Title VII retaliation claims, deferring to a lower standard of proof than Title VII discrimination claims while also requiring proof of causation.

University Employee Alleges She was Forced to Resign Due to Supervisor Harassment

Former Bentley University employee Lupe Stratton served as Executive Program Director at its User Experience Center (the Center) from August 2016 to July 2018, reporting to two supervisors. In her role, Stratton provided marketing, recruitment, program development, and business development support for the Center's two functions, its professional development program and its consulting services.

When Stratton was hired, her supervisors and her predecessors warned her of the position's demanding nature. Within months, her supervisors exchanged emails about Stratton's less-than-satisfactory performance and lack of productivity.

Although Stratton received some positive feedback during her tenure, her supervisors provided increasingly negative feedback.

They complained she:

- Did not respond to emails
- Wasn't receptive to constructive criticism
- Spent double the marketing budget from the prior year yet achieved only lackluster enrollment

In April 2018, Stratton contacted the Human Resources (HR) department to discuss complaints she had about the workplace, including her supervisors' management styles, her workload, and what she described as a discriminatory work environment.

She provided examples of her supervisors' alleged discriminatory comments based on race and gender, such as referring to a female employee as a "dinosaur," calling administrative work stereotypically "female responsibilities," and questioning whether the school a former Black female employee's children attended had an "actual" school district. She also said her supervisors spoke to her in a demeaning manner, reprimanded her for minor issues, and treated her differently than other employees.

Stratton never, however, lodged a written complaint of discrimination.

Still dissatisfied with Stratton's performance, on May 22, 2018, her supervisors placed her on a performance improvement plan (PIP). In her June 2018 performance review, they outlined where Stratton performed well and where she failed to achieve certain goals her PIP outlined, including responding to constructive criticism.

Stratton resigned July 9, 2018, stating in her exit interview that she felt discriminated against based on her gender, national origin, and religion but declining to provide specific examples.

After exhausting her administrative remedies, Stratton filed a complaint against the university in the U.S. District Court for the District of Massachusetts. She alleged various causes of action, including violations of Title VII for discrimination and retaliation, resulting in her constructive discharge from her position.

The district court granted summary judgment to the university on all of Stratton's claims.

She appealed.

Plaintiff Failed to Provide Evidence of Intolerable Working Conditions Compelling Her to Resign

On appeal, the First Circuit conducted a *de novo* review focused on the purpose of Title VII. In its "substantive provision," Title VII prohibits workplace discrimination based on a protected classification such as race, ethnicity, religion, or gender, and makes it unlawful for an employer to adversely affect an employee's status based on these protected clarifications.

In its "retaliation provision," Title VII also prohibits retaliation of an employee who opposes any discriminatory practices of the employer.

To succeed on her discrimination claim, without direct proof,

Stratton was required to satisfy the burden-shifting framework of *McDonnell Douglas* and make *a prima facie* showing:

- She was a member of a protected class.
- She was qualified for the position from which she alleged she was constructively discharged.
- She suffered an adverse employment action.
- There was a causal connection between her membership in a protected class and the adverse employment action.

The First Circuit focused its analysis on the third element of Stratton's discrimination claim, an "adverse employment action." It noted a resignation only constitutes such an action where the employee's working conditions were so intolerable that a reasonable person in her position "would have felt compelled to resign."

The district court held that Stratton couldn't prove constructive discharge because she only cited a handful of specific comments by her supervisors about other employees without explaining how those comments created an objectively intolerable workplace.

The appellate court agreed, finding her supervisors' remarks (even if "insensitive, unfair, or unreasonable"), her fear of a PIP, and her experience of diminished mental health didn't show Stratton's experience was so intolerable that a reasonable person in her place would have felt a need to resign.

Noting Title VII doesn't shield an employee from "ordinary slings and arrows that workers routinely encounter in a hard, cold world," the First Circuit affirmed the district court's grant of summary judgment on Stratton's discrimination claim.

Burlington Northern Test Is the Appropriate Standard for a Retaliation Claim

To succeed on her retaliation claim, Stratton needed to show:

- She engaged in protected activity.
- She suffered some materially adverse action.
- The adverse action was causally linked to her protected activity.

As in the discrimination context, the *McDonnell Douglas* burden-shifting framework also applies to retaliation claims.

The district court granted summary judgment for the university on the retaliation claim because it found Stratton didn't suffer a materially adverse employment action and couldn't establish a "but-for" causal connection between her complaints to HR and the alleged retaliatory act of being placed on a PIP.

In reviewing the retaliation claim, the First Circuit looked to the U.S. Supreme Court's 2006 ruling in *Burlington Northern & Santa Fe Ry. Co. v. White*, which clarified that the retaliation provision of Title VII isn't limited to discriminatory actions affecting terms and conditions of employment, but rather any materially adverse action, whether or not directly related to an employee's job, that "could well dissuade a reasonable worker from making or supporting a charge of discrimination."

The First Circuit determined the district court incorrectly applied *Burlington Northern* by concluding Stratton didn't show a level of harassment so severe or pervasive that it materially altered terms and conditions of her employment, such as being docked pay, benefits, or decreased job responsibilities.

Instead, the district court should have applied the "might-have-dissuaded" standard, even if Stratton was alleging a "retaliatory hostile work environment" claim. As the First Circuit explained, an "intensification of [preexisting] harassment" that could dissuade a reasonable employee from engaging in protected activity is actionable retaliation under Title VII.

The appellate court didn't opine whether Stratton provided enough evidence to meet this standard, however, because it determined her retaliation claim ultimately failed for lack of causation. Retaliation claims under Title VII require proof that the protected activity was a "but-for cause" of the alleged adverse action, a standard protecting against a poor-performing employee shielding themselves from termination by making an unfounded charge of discrimination.

Stratton was required to show the university wouldn't have taken the adverse action but for a desire to retaliate, which is dependent on proof that decision-makers knew of her protected conduct when they undertook the adverse action.

In looking to the evidence presented:

- Stratton didn't complain of discrimination directly to her supervisors.
- There was no evidence anyone in HR told her supervisors about her discrimination complaints.
- No one in HR came up with the idea to place her on a PIP.

While Stratton's supervisors knew she complained about her

workload and their management styles, Title VII's retaliation provision doesn't protect against run-of-the-mill complaints about a supervisor. Because Stratton's supervisors didn't know of her complaints of discrimination when they allegedly increased their harassment of her, Stratton couldn't meet her burden to establish "but-for" causation.

The Bottom Line

The First Circuit's decision demonstrates the importance of documenting performance issues and employee complaints of discrimination or harassment, and treating complaining employees the same as non-complaining employees.

The decision clarifies the proper standard for evaluating retaliation claims under Title VII and notes the changing landscape for evaluating discrimination claims under Title VII. In a footnote, the First Circuit references the U.S. Supreme Court's 2024 decision in *Muldrow v. City of St. Louis*, which held in an employee reassignment case that a plaintiff doesn't need to show a "significant" change in terms or conditions of employment, but rather "some harm" respecting an identifiable term or condition of employment" to establish a Title VII discrimination claim. The First Circuit held, however, that *Muldrow* wasn't relevant to Stratton's discrimination claim because she resigned from her position. We expect to see more discussion of *Muldrow* in future Title VII discrimination decisions.

Stratton v. Bentley Univ., 113 F.4th 25 (1st Cir. Aug. 15, 2024).
See also *Muldrow v. City of St. Louis*, 601 U.S. 314 (April 17, 2004).

Related UE Resources

- Guide to Preventing Retaliation on Campus
- Training Supervisors to Prevent Workplace Harassment

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U.S. Court of Appeals for the Eleventh Circuit

Pro-Complainant — But Not Sex-Based — Bias Is Insufficient to Support a Title IX Claim

The Eleventh Circuit Court of Appeals upheld a decision dismissing a respondent's complaint that a university's Title IX investigation into claims he sexually assaulted a fellow female student was biased. The appellate court emphasized a Title IX claim must allege facts showing plausible bias on the basis of sex; claims that have an alternative lawful explanation, including pro-complainant bias, aren't enough.

Alleged Sexual Assault Prompts Title IX Complaint

Jane Roe alleged John Doe sexually assaulted her at a fraternity party at Emory University in April 2019.

She alleged she and "ER" left the party with John and "IK" to go to John's room to smoke marijuana. ER and IK left after learning John didn't have marijuana. Jane and John kissed and engaged in oral sex.

John alleged he asked Jane if she wanted to have sex and she agreed. Six months later, Jane filed a Title IX complaint alleging John engaged in nonconsensual intercourse and choked her with her belt.

An Emory Title IX investigator began the investigation by taking statements from John and Jane.

In April 2020, a new investigator, Kristyne Seidenberg, took over and conducted a second round of questioning. Jane changed her story during the second round of questioning, asserting for the first time she was drunk during her encounter with John and recanting her allegation that he choked her.

Seidenberg issued a report, which John alleged was filled with "numerous inaccuracies," including that he was "the biggest stoner at Emory" and that "a lot of girls" were "scared" of him.

Although John submitted a 25-page response attacking Seidenberg's report, he was formally charged with nonconsensual sexual contact and nonconsensual sexual intercourse in November 2020.

Following a February 2021 hearing, Emory found John responsible and suspended him for a semester. His internal appeal was denied.

Male Respondent Alleges Investigation Favored Female Complainant

John filed suit in federal district court alleging, among other things, that Emory violated Title IX by discriminating against him "on the basis of sex." Specifically, he alleged his Title IX hearing was unfair because:

- Jane was allowed to cross-examine him but he wasn't permitted to cross-examine her.
- Jane and other female witnesses were treated with more kindness, presumed to be truthful, and given deference not afforded to John or his male witnesses.
- John was allowed fewer advisors at the counsel table than Jane.
- The hearing panel grilled John, asked Jane and her female witnesses softball questions, and refused to ask them any of the probing questions he submitted.
- Members of the disciplinary panel that decided his case made statements indicating anti-male bias.
- The university caved to overwhelming public pressure to credit female accusers over male suspects.

Emory filed a motion to dismiss John's suit for failure to state a claim, which the district court granted. The district court held that John's Title IX claim failed because his allegations reflected mere pro-*complainant* bias and didn't plausibly allege pro-*female* bias.

John appealed.

Eleventh Circuit Affirms Dismissal of Title IX Claim

The Eleventh Circuit affirmed the district court's dismissal of John's Title IX claim in a thorough opinion. The court noted the relevant part of Title IX prohibits educational institutions that receive federal funds from discriminating "on the basis of sex."

The court confirmed, consistent with Eleventh Circuit precedent, that a university's process for investigating sexual misconduct may violate Title IX where the plaintiff alleges facts that, if true, permit a reasonable inference the university discriminated on the basis of sex. The court further confirmed allegations *merely consistent* with such discrimination aren't sufficient to state a claim because allegations mustn't demonstrate only a *possibility* of such discrimination but instead must show sex-based discrimination is *plausible*.

Critically, the court confirmed allegations won't survive a motion to dismiss where there is an "obvious alternative explanation" for the challenged practice that suggests lawful conduct. The court further explained ineptitude, inexperience, and *pro-complainant bias* are alternative explanations that suggest lawful conduct. Therefore, it isn't enough for a Title IX plaintiff to allege plausible bias in favor of an accuser or against the accused. Instead, the plaintiff must allege plausible bias in favor of one sex or against the other.

Examining John's allegations of procedural bias at his hearing, the court found although they were perhaps *consistent* with sex-based bias, they weren't necessarily *indicative* of it.

Regarding John's allegation that statements panel members made reflected anti-male bias, the court noted John's complaint alleged only that the hearing panel's chair warmly stated that Jane would testify first, then "changed his tone and stated [that John] would testify as to 'what he thinks went on.'"

The court found nothing about this alleged statement implied bias on the basis of sex as opposed to possible bias against an alleged perpetrator.

Regarding John's allegation that a history of public pressure on Emory to improve its response to alleged sexual misconduct suggested sex-based discrimination, the court found most of the events John cited were remote in time from John's hearing, and even if they hadn't been, the allegations didn't give rise to a reasonable inference of sex discrimination.

In sum, the court found all of John's allegations about sex bias left ample room for the obvious alternative explanation that Emory harbored a bias against people accused of sexual assault. While that bias may not be just or fair, it doesn't violate Title IX.

The Bottom Line

In the Eleventh Circuit, a plaintiff complaining a Title IX disciplinary process was riddled with sex bias must allege facts supporting a reasonable inference of sex bias. Allegations that can be attributed to an obvious alternative explanation, including bias against people accused of sexual assault, standing alone, won't suffice.

Doe v. Emory University, 110 F.4th 1254 (11th Cir. Aug. 1, 2024).

A College's Response That Isn't Clearly Unreasonable Under the Known Circumstances Doesn't Constitute Deliberate Indifference

Despite a college's delay in completing a Title IX investigation, the Third Circuit Court of Appeals affirmed the district court's grant of summary judgment in favor of the college as the student failed to produce sufficient evidence that the college acted with deliberate indifference.

Student Claims College's Response and Investigation of Her Sexual Assault Claim Was Untimely and Inadequate

In 2017, Rose McAvoy, an undergraduate at Dickinson College, became friends with incoming student T.S., who shared her interests in a cappella singing and theater. On Oct. 30, 2017, McAvoy and T.S. went for a walk after leaving a school event together and ended up in an empty room on campus, where they began kissing and "making out."

McAvoy initially reciprocated but began feeling nervous, so she asked T.S. to stop. He did. They continued lying on the floor, cuddling and talking, and at some point, started making out again.

T.S. moved on top of her and placed his hand in her shirt. McAvoy tried to move his hand away, but he lifted her shirt anyway. McAvoy told him to stop again, which he eventually did, and McAvoy left.

McAvoy reported the incident the next day to a Dickinson professor without disclosing T.S.'s name. The professor immediately reported the incident to the Title IX office.

A Dickinson dean emailed McAvoy and:

- Advised her about available resources
- Offered to meet with her
- Provided a link to Dickinson's sexual harassment and misconduct policy

A week later, McAvoy met with Joyce Bylander, Dickinson's interim Title IX Coordinator, and again declined to disclose T.S.'s name. Nonetheless, Bylander offered McAvoy options, including academic support and resources for victims of sexual assault.

Bylander followed up in writing over the next several days and sent McAvoy a more formal letter, offering to meet her again and providing a list of rights and resources and a link to Dickinson's policy.

On Dec. 6, 2017, McAvoy met with Bylander again along with Dickinson employee Josh Eisenberg, who McAvoy designated as her Title IX advisor. For the first time, McAvoy disclosed T.S.'s name and requested a formal Title IX investigation into the assault.

The next day, Dickinson sent McAvoy a letter about the investigation. The letter stated that, in accordance with its policy, Dickinson would "make every effort [to] complete the investigation and resolution process within 60 days but [would] balance this objective against the principles of thoroughness and fundamental fairness." The letter "anticipate[d] that there may [be] some delay in meeting the 60-day objective given that the beginning of this investigation comes just as we are about to close for winter break" but assured McAvoy she would be kept informed about the investigation's progress.

Dickinson sent T.S. a similar letter and issued a no-contact directive to T.S. and McAvoy, which she had previously requested, with the stated purpose of minimizing contact between them.

While the investigation was pending, Dickinson offered, and McAvoy accepted, various accommodations, including:

- Frequent mental health services from the Wellness Center
- Academic accommodations from her professors
- Other course-scheduling and enrollment accommodations

Despite the no-contact directive, McAvoy had several unintended encounters with T.S., although they didn't speak during such times. McAvoy didn't report these incidents to Dickinson security, but she did inform Eisenberg, who told her about additional measures Dickinson could take (such as setting separate times for her and T.S. to use the dining hall).

McAvoy didn't, however, request those measures be put in place.

Eisenberg also told McAvoy that Dickinson could establish theater accommodations to help minimize the chances of encounters with T.S. When McAvoy participated in a one-day student-run drama club event in the spring, student organizers complied with her request that T.S. not be placed in the same group as her. However, T.S. attended the event; this caused McAvoy anxiety and discomfort, although they didn't speak to one another. She didn't tell Dickinson employees about her anxiety from his presence.

When the following year's housing assignments were made that spring, McAvoy and T.S. applied for and were approved to live in the theater special interest house. After McAvoy reported the situation, Bylander intervened on her behalf and T.S. decided to live elsewhere.

Meanwhile, Dickinson hired two outside investigators to conduct the Title IX investigation, which began Dec. 8, 2017, and continued through May 2018.

Investigators first met with McAvoy and Eisenberg two days after she disclosed T.S.'s name. McAvoy also met with the investigators twice in February.

In March, Bylander wrote to her, stating, "Sorry this process is taking so long." In April, the investigators issued their initial report to McAvoy and T.S., who each submitted their own written responses.

On May 11, 2018, they issued a 40-page final report, finding T.S. responsible for sexual assault by sexually touching McAvoy after she withdrew her consent. They advised McAvoy that the report would be submitted to a review panel for its determination and consideration of sanctions.

On May 30, 2018, McAvoy was advised the determination was anticipated within the next 10 days. However, the outcome letter wasn't issued until June 20, when McAvoy learned the panel unanimously concluded the investigation had been fair, impartial, and reliable, and a preponderance of the evidence supported the investigators' conclusion T.S. had engaged in sexual assault in violation of Dickinson's policies.

McAvoy submitted additional materials for the panel to consider in determining sanctions. On July 3, 2018, Dickinson issued its sanction letter, which subjected T.S. to probation for a semester and rescinded the no-contact directive.

McAvoy and T.S. each appealed, but on July 31, 2018, the appeal officer affirmed the review panel's decision.

T.S., however, decided not to return to Dickinson in fall 2018, so the sanction ultimately became moot.

McAvoy graduated in spring 2020 and then filed a federal lawsuit against Dickinson asserting, among other causes of action, claims for hostile environment, and gender discrimination due to deliberate indifference to sexual assault in violation of Title IX.

After the close of discovery, the court granted summary judgment to Dickinson.

McAvoy appealed.

Court Determines College Acted Reasonably in Light of Known Circumstances

McAvoy argued Dickinson acted clearly unreasonably in light of known circumstances and thus was deliberately indifferent to her sexual assault in violation of Title IX by, among other things:

- Unreasonably delaying resolution of her claim
- Failing to keep her apprised in writing about the delay
- Failing to proactively enact additional, unrequested accommodations in response to her reported concerns

McAvoy argued the process took three times longer than the 60-day resolution target and Dickinson failed to adequately explain what caused the delay. The court noted, however, that Dickinson explicitly cautioned her at the investigation's onset of the likelihood of delay due to the upcoming holidays.

In the meantime, she was informed about available resources and information and, in fact, Bylander and Eisenberg:

- Made themselves readily available to her at all times
- Helped her get accommodations approved whenever she asked
- Responded to her inquiries when she reached out
- Intervened on her behalf any time it was needed
- Updated her with information each time she asked

Moreover, McAvoy remained engaged at every step of the Title IX process. She had the opportunity to, and did, request and receive various accommodations, review and respond to the initial investigation results, and participate in the review panel process and sanction stages.

Finding nothing to suggest "any effort to sabotage the orderly resolution of McAvoy's complaint or other similarly improper motivation that would render the time frame unreasonable," the Third Circuit held that Dickinson's delay didn't constitute deliberate indifference.

McAvoy also claimed Dickinson should have done more and acted on its own initiative even when she didn't request further accommodations. Specifically, she alleged Dickinson failed to:

- Provide appropriate theater accommodations.
- Ensure she and T.S. were assigned to different dorms for fall 2018.
- Properly enforce the no-contact directive or amend its terms to better prevent McAvoy and T.S. from running into each other on campus.

The court rejected these contentions, concluding:

- She received her requested theater accommodations and never requested T.S. be prevented from attending the theater event she chose to join.
- When McAvoy complained about the housing assignment, Dickinson intervened and resolved the situation in her favor.
- She had chosen not to pursue additional accommodations offered to prevent chance encounters.

As to the encounters, the court noted it was appropriate for Dickinson to consider input from McAvoy, a young adult attending college, on how they should be handled.

Accordingly, reviewing the evidence as a whole, the Third Circuit found Dickinson's efforts to manage the situation weren't clearly unreasonable simply because Dickinson didn't prevent any and all encounters between McAvoy and T.S. and any claimed failure to do more didn't amount to deliberate indifference.

In short, Dickinson:

- Provided McAvoy with mental health and academic support
- Responded to her affirmative requests for accommodations
- Expended resources in conducting a thorough investigation of the assault
- Didn't attempt to dissuade her from pursuing Title IX relief

Under those circumstances, the Third Circuit held that McAvoy hadn't shown that Dickinson's actions reflected an official decision not to remedy the Title IX violation and affirmed the district court's decision.

The Bottom Line

A student must meet a high bar to establish an educational institution acted with deliberate indifference to their sexual assault. Even if the institution "could have done more, communicated more frequently, and acted more quickly," so long as its response wasn't clearly unreasonable under the known circumstances, a plaintiff will be unable to establish a Title IX violation.

McAvoy v. Dickinson College, 115 F.4th 220 (3rd Cir. Aug. 16, 2024).

Related UE Resource

- Confronting Campus Sexual Assault: An Examination of Higher Education Claims

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