REVERSE GENDER DISCRIMINATION UNDER TITLE IX

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U.S. Higher Education Institutions Alert

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Issues of student sexual misconduct on university campuses continue to be of great concern for universities nationwide. Even when a university has implemented thoughtfully constructed grievance procedures it may have to defend a Title IX reverse discrimination claim brought by a student who was disciplined by the university.

In the July 2016 case of *Doe v. Columbia University*, [1] the Second Circuit reversed the dismissal of a Title IX reverse discrimination claim — i.e., a claim by a student alleging that the university's investigation of an alleged sexual assault was flawed as a result of gender-based bias in favor of the complainant. The most remarkable aspect of the case was the Second Circuit's adoption of a burden-shifting framework at the pleading stage that arguably made it easier for Title IX reverse discrimination cases to survive motions to dismiss. After the decision, many observers predicted that considerably more Title IX reverse gender discrimination claims against universities would proceed past a Rule 12(b)(6) motion to dismiss, leading to increased litigation and settlements. Over a year later, this prediction appears to be incorrect. [2] Very few courts outside the Second Circuit have employed *Columbia's* burden-shifting framework to Title IX reverse discrimination claims, and many such claims continue to be dismissed. Most recently, the Middle District of Pennsylvania allowed a Title IX reverse discrimination claim to proceed past a motion to dismiss, but it did so without relying on *Columbia's* burden-shifting framework. [3]

Of the 19 publicly reported Title IX reverse discrimination decisions at the motion-to-dismiss stage that cite *Columbia*, only four have allowed the claim to proceed while employing *Columbia's* pleading standards. Other claims have proceeded under a *Twombly* and *Iqbal* [4] pleading standard that did not employ a burden-shifting framework, and others did not cite *Columbia* at all. [5]

THE DECISION IN *COLUMBIA*

Columbia sets out a fact pattern that appears in a "wave of lawsuits from students accused of sexual assault," [6] usually involving a male student and a female student who engage in sexual activity that the male student alleges to have been consensual. After that encounter, sometimes considerably after, the female student reports that she was sexually assaulted, and a disciplinary case ensues. If the male student is later expelled or subjected to other serious discipline, he most often alleges that, in violation of Title IX: (1) the investigation or the adjudication was flawed, (2) the flaws were the result of a gender bias, and (3) the university erroneously concluded that he was responsible for student-on-student sexual violence. Having been the subject of what he believes to have been a flawed investigation, and having lost the opportunity to continue his education at the

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university, the student sues the university for damages, reinstatement, and/or expungement of negative information from his record. [7]

In *Columbia*, the plaintiff alleged that "both the investigator and the panel declined to seek out potential witnesses Plaintiff had identified as sources of information favorable to him"; "[t]he investigator and the panel failed to act in accordance with University procedures designed to protect accused students"; and "[t]he investigator, the panel, and the reviewing Dean . . . reached conclusions that were incorrect and contrary to the weight of the evidence." [8] The court held that "[w]hen the evidence substantially favors one party's version of a disputed matter, but an evaluator forms a conclusion in favor of the other side (without an apparent reason based in the evidence), it is plausible to infer . . . that the evaluator has been influenced by bias." [9] To find that the bias was sex-related, the court focused on the allegations of "substantial criticism of the University, both in the student body and in the public media, accusing the University of not taking seriously complaints of female students alleging sexual assault by male students," [10] and that the "University's administration was cognizant of, and sensitive to, these criticisms." [11]

The Second Circuit in *Columbia* adopted a burden-shifting framework [12] in which "the plaintiff needs to present only minimal evidence supporting an inference of discrimination in order to prevail [on a motion to dismiss.]" [13] The court held that "the temporary presumption afforded to plaintiffs in employment discrimination cases under Title VII applies to sex discrimination plaintiffs under Title IX as well." [14] The court reasoned that Title IX claims have so much in common with Title VII claims that on "certain sorts of facts, rules the Supreme Court established for Title VII litigation appear to apply also to such similar claims of sex discrimination under Title IX." [15]

DECISIONS AFTER *COLUMBIA*

Since the Second Circuit's decision over a year ago, courts outside of the Second Circuit have not regularly followed it and continue to dismiss Title IX reverse discrimination lawsuits. Examples include:

- *Ruff v. Board of Regents of University of New Mexico*, No. 16-cv-1140, 2017 WL 4402420, at *7–9 (D.N.M. Sept. 20, 2017), dismissing the plaintiff's Title IX claim and holding that "[p]laintiffs must allege some fact or facts demonstrating that outside pressure actually influenced UNM, not just to aggressively pursue sexual assault cases, but to do so in a manner biased against males"; [16]
- *Doe v. University of Colorado, Boulder*, 255 F. Supp. 3d 1064, 1076–79 (D. Colo. 2017), applying traditional *Twombly* and *Iqbal* pleading standard and dismissing a reverse discrimination claim; [17]
- *Plummer v. University of Houston*, 860 F.3d 767, 778 (5th Cir. 2017), expressly declining to follow *Columbia*, relying on the traditional *Twombly* and *Iqbal* pleading standard, and affirming the dismissal of the Title IX claims; [18] and
- *Austin v. University of Oregon*, 205 F. Supp. 3d 1214, 1226–27 (D. Or. 2016), declining to follow *Columbia* because the plaintiff did not allege an "atmosphere of scrutiny"; there was no plausible inference that an "aggressive response to allegations of sexual misconduct is evidence of gender discrimination" and accepting *Columbia* would place universities in a "double bind" where they would

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> "come under public fire for not responding to allegations of sexual assault aggressively enough or . . . open themselves to Title IX claims simply by enforcing rules against alleged perpetrators."

One court of appeals acknowledged *Columbia*, but affirmed the dismissal of the plaintiff's Title IX claims nonetheless:

- *Doe v. Cummins*, 662 F. App'x 437, 453 (6th Cir. 2016), holding that plaintiff "failed to create a plausible inference of gender discrimination" because — unlike the plaintiff in *Columbia* — the plaintiff here had not alleged that "officials had faced public criticism for their handling of Title IX investigations," or alleged that the university was under investigation for potential Title IX violations.

Since the Second Circuit's decision, courts outside of the Second Circuit have declined to follow *Columbia* and permitted Title IX claims to proceed past motions to dismiss. Examples include:

- *Doe v. The Pennsylvania State University*, No. 4:17-cv-01315, 2018 WL 317934, at *6 (M.D. Pa Jan. 8, 2018), relying on the *Twombly* and *Iqbal* standards to allow a Title IX claim because the plaintiff alleged that "all students that have been suspended or expelled from [PSU] for sexual misconduct have been male" and that male respondents in sexual misconduct cases at the university are "invariably found guilty." The *PSU* court rejected *Columbia* deciding that the mere existence of federal pressure to crack down on campus sexual assault "does not supply the necessary inference of gender bias."
- *Doe v. Case Western Reserve University*, No. 1:17-cv-414, 2017 WL 3840418, at *4–7 (N.D. Ohio Sep. 1, 2017), relying on pleading standards requiring "a particularized . . . causal connection between the flawed outcome and gender bias," and finding that the plaintiff alleged a plausible gender bias without applying a burden-shifting framework.
- *Neal v. Colorado State University-Pueblo*, No. 16-cv-873, 2017 WL 633045, *13 (D. Colo. Feb. 16, 2017), relying on the *Twombly* and *Iqbal* standards to allow a Title IX claim because the plaintiff had alleged "statements by the CSU-Pueblo investigator that amply support that gender bias infected the proceeding." *Neal* did not adopt *Columbia* because the plaintiff's allegations went "well beyond 'facts supporting a minimal plausible inference of discriminatory intent,'" [19] but the court noted that *Columbia's* pleading standard was consistent with an earlier second circuit decision. [20]
- *Collick v. William Paterson University*, No. 16-471, 2016 WL 6824374, *10 (D.N.J. Nov. 17, 2016), stating that "[w]hether under the off-the-rack *Iqbal* standard or a tailored *McDonnell Douglas* standard, I would find that gender-based discrimination in Defendants' treatment of Collick and Williams is adequately pled" because "an allegation that the process was one-sided, irregular, and unsupported by evidence may give rise to an inference of bias." In rejecting *Columbia*, the *Collick* court stated that the "Third Circuit has yet to directly address the application of *McDonnell Douglas* to the pleading burden for Title IX claims in the context of a motion to dismiss" and the court left the issue to "be addressed, in a proper case, by the Third Circuit." [21]

Of the cases citing *Columbia*, only four cases, *Rolph v. Hobart and William Smith Colleges, Doe v. Regents of The University of California, Doe v. Lynn University, and Doe v. Ohio State University* follow *Columbia's* reasoning and deny a university's motion to dismiss a Title IX reverse discrimination claim.

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- *Rolph v. Hobart and William Smith Colleges*, No. 16-06515, 2017 WL 4174933, *10–12 (W.D.N.Y. Sept. 20, 2017), holding that "Plaintiff has adequately alleged facts that plausibly support at least a minimal inference of gender bias on the part of HWS" where a prior HWS sexual assault investigation generated criticism in *The New York Times* and a *Huffington Post* blog, and investigation deficiencies such as failure "to review or preserve electronic evidence or conduct any follow-up interviews to resolve inconsistencies between witnesses' statements" were alleged.
- *Doe v. Regents of University of California*, No. 15-cv-02478, 2017 WL 4618591, at *15 (C.D. Cal. June 8, 2017), granting a motion to reconsider the dismissal of a Title IX claim and then holding a plausible Title IX claim was stated under the *Columbia* standard where the plaintiff alleged specific instances of public pressure on the university for its handling of a Title IX complaint: "Although this Court previously held that the Plaintiff's allegations failed to give rise to a plausible inference of gender bias under *Iqbal* and *Twombly*, the Court now finds that the Plaintiff has satisfied the minimal burden necessary to give rise to a temporary presumption of discriminatory intent as outlined in *Columbia*."
- *Doe v. Lynn University*, 235 F. Supp. 3d 1336, 1338–40 (S.D. Fla. 2017), holding that plaintiff had sufficiently alleged that the university proceedings were procedurally flawed as a result of a gender bias because public criticisms of how the university dealt with sexually harassed female students and the university's acknowledgment of the public criticism [22] were sufficiently alleged to establish a plausible inference "of a causal connection between the flawed outcome and gender bias."
- *Doe v. The Ohio State University*, 239 F. Supp. 3d 1048, 1073 (S.D. Ohio 2017), holding that the plaintiff pled a reasonable inference of a causal connection between the flawed outcome and gender bias by alleging, among other things, that two prior lawsuits publicizing "a sexualized environment on campus" affected the disciplinary process, and "OSU's training materials regarding consent and sexual assault . . . illustrat[ed] gender bias against male students." [23]

Courts have referenced *Columbia* in opinions deciding motions for summary judgment. [24] These courts have recognized that, unlike a motion to dismiss where the court "accepts as true all 'plausible, non-conclusory, and non-speculative' facts alleged in the plaintiff's complaint," [25] in a motion for summary judgment the plaintiff must show a genuine dispute of material fact based on evidentiary material of record such as depositions, affidavits, admissions, and the like, and may not rely on mere allegations in the complaint. [26] Plaintiffs were unable to raise a genuine dispute of material fact that outside pressure on the university to address issues of campus sexual assault led to a gender bias in two cases:

- In *Doe v. Trustees of Boston College*, No. 15-cv-10790, 2016 WL 5799297, at *25, (D. Mass Sept. 10, 2016), appeal docketed, 16-2290 (1st Cir. Oct. 26, 2016), the court held that the plaintiff's allegations that "outside pressures with respect to sexual assault on campus" instills a disciplinary bias was insufficient at the summary judgment stage, which requires evidence to "show how these outside pressures have influenced the disciplinary proceedings."
- The U.S. District Court for the Northern District of New York referenced *Columbia* when analyzing the plaintiff's allegations regarding the university's "sexual climate" as evidence of "outside pressure" on the university's administration that may have led to adopting a gender bias. *Doe v. Colgate Univ.*, No. 5:15-cv-1069, 2017 WL 4990629, at *12 (N.D.N.Y. Oct. 31, 2017), *appeal docketed*, 17-3594 (2d Cir. Nov. 3,

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2017). The court then stated, "[u]nlike in *Columbia*, 'the parties [here] have reached the summary judgment stage and [Plaintiff] must demonstrate a genuine issue of material fact, not merely allegations of a plausible inference of gender bias.'" [27]

CONCLUSION

It appears that expelled students who bring reverse discrimination claims against a university will continue to experience an uphill battle. Outside the Second Circuit, courts continue to dismiss these claims. Either courts are reluctant to adopt *Columbia's* burden-shifting framework or they are inclined to avoid placing universities in a "double bind," as expressly noted in *Austin*. [28] Even if a court purports to follow *Columbia*, courts require a causal connection between a flawed outcome and a pro-female/anti-male bias. Moreover, summary judgment remains a significant hurdle for plaintiffs because plaintiffs must provide evidence to show that outside pressure on a university led to a gender bias.

Between June 1, 2009 and August 31, 2016, 29 % of Title IX reverse discrimination claims survived a motion to dismiss. [29] Although a higher number of Title IX claims in cases citing *Columbia* survive a motion to dismiss, only 21 % of those Title IX reverse discrimination claims survived a motion to dismiss pursuant to *Columbia's* burden-shifting framework. If *Columbia* is going to change the landscape of reverse discrimination suits, it has yet to do so.

The ever-increasing amount of Title IX litigation serves as a reminder that thoughtfully constructed and implemented grievance procedures and Title IX training programs are essential. Such procedures and training programs have the potential to mitigate the likelihood of future Title IX litigation.

UPDATE TO *REVERSE GENDER DISCRIMINATION UNDER TITLE IX: OVER A YEAR AFTER DOE V. COLUMBIA UNIVERSITY, COURTS CONTINUE TO DISMISS REVERSE DISCRIMINATION CLAIMS*

After K&L Gates published the above alert, the U.S. Court of Appeals for the Sixth Circuit decided *Doe v. Miami University,* No. 17-3396, 2018 WL 797451 (6th Cir. Feb. 9, 2018). In *Miami University,* the court rejected the *Columbia University* pleading standard as contrary to its "binding precedent" requiring a plaintiff to "meet the requirements of *Twombly* and *Iqbal* for each of his claims in order to survive a Rule 12(b)(6) motion to dismiss." *Id*. at *5.

The Sixth Circuit nonetheless reversed the district court's grant of a motion to dismiss, considering among other things "external pressure from the federal government and lawsuits brought by private parties that [allegedly] caused it to discriminate against men." *Id.* at *10. The court stated that "[c]onsidering all of these factual allegations relating to Miami University's pattern of activity respecting sexual-assault matters and the asserted pressures placed on the University, John has pleaded sufficient specific facts to support a reasonable inference of gender discrimination." *Id*.

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[1] Doe v. Columbia University, 831 F.3d 46 (2d Cir. 2016).
[2] Many of the reverse discrimination cases decided with written opinions since *Columbia* are from outside the Second Circuit. This may reflect that defendants within the Second Circuit are more readily settling reverse discrimination lawsuits. *Rolph v. Hobart and William Smith Colleges* from within the Second Circuit is discussed below.
[3] Doe v. The Penn. State Univ., No. 4:17-cv-01315, 2018 WL 317934, at *6 (M.D. Pa. Jan. 8, 2018).
[4] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level.").
[5] *See*, e.g., Doe v. Amherst Coll., 238 F. Supp. 3d 195 (D. Mass 2017); Doe v. Miami Univ., 247 F. Supp. 3d 875 (S.D. Ohio 2017), *appeal docketed*, No. 17-3396 (6th Cir. April 20, 2017); Saravanan v. Drexel Univ., No. 17-cv-3409, 2017 WL 5659821 (E.D. Pa. Nov. 24, 2017).
[6] Eric Kelderman, *College Lawyers Welcome New Clarity of Education Department's Office for Civil Rights*, THE CHRON. OF HIGHER EDUC. (June 28, 2017), http://www.chronicle.com/article/College-Lawyers-Welcome-New/240456. *See also* TITLE IX FOR ALL: INFORMING, CONNECTING, EMPOWERING, http://www.titleixforall.com/ (last visited September 18, 2017) (listing 186 cases against higher education institutions in which the institution allegedly violated the student's rights in investigating and adjudicating sexual assault allegations).
[7] *See, e.g.*, Am. Comp'l. at 42, Doe v. Univ. of Colorado, Boulder, 255 F. Supp. 3d 1064 (D. Col. 2017) (No. 16-01789). Other causes of action that are frequently included in reverse discrimination lawsuits include due process violations, breach of contract, negligence, and promissory estoppel.
[8] *Columbia Univ.*, 831 F.3d at 57–58.
[9] *Id*. at 57.
[10] *Id*.
[11] *Id*.
[12] This framework follows the Title VII case McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
[13] *Columbia Univ.*, 831 F.3d at 54. The court held that "a complaint under Title IX, alleging that the plaintiff was subjected to discrimination on account of sex in the imposition of university discipline, is sufficient with respect to the element of discriminatory intent . . . if it pleads specific facts that support a minimal plausible inference of such discrimination." *Id*. at 56.
[14] *Id*. at 54.
[15] *Id*. at 55.
[16] *Compare Ruff*, 2017 WL 4402420, at *7–9 ("The Court concludes that to allege that gender bias affected the outcome of their proceeding, Plaintiffs must allege some fact or facts demonstrating that outside pressure *actually influenced* UNM, not just to aggressively pursue sexual assault cases, but to do so in a manner biased against males.") (emphasis added), *with Columbia Univ*., 831 F.3d at 56 ("Plaintiff's Complaint pleads sufficient specific facts giving at least the necessary *minimal support to a plausible inference* of sex discrimination to survive a Rule 12(b)(6) motion to dismiss.") (emphasis added).
[17] *Univ. of Colorado, Boulder*, 255 F. Supp. 3d 1064, 1076 (D. Colo. 2017) ("The Court basically agrees with the Second Circuit that Plaintiff needs no more than a 'minimally plausible inference' to satisfy the *Twombly/Iqbal* pleading standard, but the Court does not read this as some sort of weakening of *Twombly* and *Iqbal*. Either the

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complaint states a plausible claim or it does not . . . .") (citations omitted).
[18] *Plummer*, 860 F.3d at 778 (5th Cir. 2017) (stating—immediately following a discussion of *Columbia*—"[The parties] each rely on the theories adopted in *Yusuf*, so we need not speculate on any other possible theories of Title IX liability.").
[19] *Neal*, 2017 WL 633045, *13 (quoting *Columbia*, 831 F. 3d at 55).
[20] Yusuf v. Vassar College, 35 F.3d 709, 714 (2d Cir. 1994). *Yusuf* established the legal standard for reverse gender discrimination cases.
[21] *Collick*, 2016 WL 6824374 at *10.
[22] According to the complaint, the university "curated a sexual assault awareness month that included 'dedicated demonstrations to honor a female who was raped by a male instructor[,] who was found not guilty because of her choices in clothing.'" *Id*. at *4.
[23] The court references *Columbia* in a footnote noting that the inference of a "bias on account of sex" may also be a bias in favor of alleged victims, but that such a distinction was difficult to make at an early stage in litigation. *Id*. at 1073 n.11.
[24] *See also*, Pacheco v. St. Mary's Univ., No. 15-cv-1131, 2017 WL 2670758, at *13 (W.D. Tex. June 20, 2017) (applying the burden-shifting framework to assess Title IX claims on a motion for summary judgment and holding that the plaintiff did not present sufficient evidence that gender was a "motivating factor" in the disciplinary proceedings).
[25] *Ruff*, 2017 WL 4402420, at *5 (quoting Shrader v. A1 Biddinger, 633 F.3d 1235, 1239 (10th Cir. 2011)).
[26] *See The Penn. State Univ.*, 2018 WL 317934, at *6 ("It goes without saying . . . that Mr. Doe's allegations are *just that*—allegations—and that Mr. Doe's claim of gender bias will ultimately need to be supported by evidence in order to survive.").
[27] *Colgate Univ.*, 2017 WL 4990629, at *12 (quoting *Trustees of Boston Coll.*, 2016 WL 5799297, at *25, n. 7).
[28] *Austin*, 205 F. Supp. 3d, at 1226. *But see Regents of the Univ. of Cal.*, 2017 WL 4618591, at *16, n.7; Neal, 2017 WL 633045, at *15.
[29] *See* Bethany A. Corbin, *Riding the Wave or Drowning?*: *An Analysis of Gender Bias and Twombly/Iqbal in Title IX Accused Student Lawsuits*, 85 FORDHAM L. REV. 2665, 2697 (2017).

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