THIRD CIRCUIT RULES THAT MEDICAL RESIDENTS, AS BOTH EMPLOYEES AND STUDENTS, MAY BRING INDEPENDENT CLAIMS UNDER TITLE IX NOT SUBJECT TO TITLE VII'S ADMINISTRATIVE REQUIREMENTS

BACKGROUND ON TITLE IX

On June 23, 1972, President Nixon signed Title IX of the Education Amendments of 1972 into law. Title IX provides that "[n]o 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."

The principal objective of Title IX is to avoid the use of federal money to support sex discrimination in education programs. In addition to traditional educational institutions such as colleges, universities and elementary and secondary schools, Title IX applies to "any education program or activity" operated by a recipient of federal financial assistance.

The Civil Rights Restoration Act of 1987 amended Title IX to define "education program or activity" as "all of the operations" of certain kinds of entities, "any part of which" is extended federal funding. These entities include not only (i) colleges and universities but also (ii) entire organizations to which assistance is extended as a whole or that are principally engaged in the business of providing education, health care, housing, social services or parks and recreation, as well as (iii) joint ventures between such entities.

Notice that in amending Title IX, Congress retained the modifier "education" before "program or activity" but left the term "education" undefined.

Recent Federal Court Decision[1]

Recently, the Third Circuit Court of Appeals issued a decision that makes the path to damages far easier for medical residents than for other employees. Specifically, the court was asked to determine if a medical residency program was an "education program or activity" as contemplated by Title IX and, if so, whether a medical resident working for a Medical Center, through its affiliation with a University, could pursue a claim under Title IX for alleged sexual harassment and retaliation within the medical residency program. The district court had said no: residents are employees, not students, and thus Doe's exclusive recourse was through the traditional route of Title VII of the Civil Rights Act and the associated administrative exhaustion process that generally requires filing an administrative complaint (with the EEOC or corresponding state agency) and allowing that agency to rule on the complaint prior to any court action but without filing fees, the need for counsel, etc. Even if residents were employees *and* students, the district court said Doe could not use Title IX to "circumvent" the administrative requirements under Title VII.

On March 7, 2017, the Third Circuit found that although medical residents are employees (*see, e.g., Mayo Found. For Med. Educ. & Research v. U.S.*, 562 U.S. 44, 44 (2011) (finding residents employees for purposes of FICA taxation)), they are also students and thus have recourse under Title IX and thus, direct access to the courts without the requirement of administrative exhaustion, for sexual harassment, discrimination and retaliation. Noting the U.S. Supreme Court's instruction that Title IX be interpreted broadly and finding no express exemption by Congress for these programs, the court concluded that the Medical Center's operation of a residency program makes its mission, at least in part, educational as contemplated by Title IX.[2]

The Third Circuit noted that its holding in *Doe* is consistent with decisions of the First, Second, Eighth and Ninth Circuits and with the interpretation of the 21 federal agencies that enforce Title IX, including the Departments of Education and of Health and Human Services.

The Third Circuit also noted that its holding ran against decisions by the Fifth and Seventh Circuits. When addressing the intersection of Title VII and Title IX discrimination claims in the mid-1990s, the Fifth and Seventh Circuits found that Title VII provides the "exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions." *Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995); *see also Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 861-62 (7th Cir. 1996). These Circuits found that allowing a

private Title IX claim to proceed would "disrupt" Title VII's "carefully balanced remedial scheme for redressing employment discrimination." *Lakoski*,66 F.3d at 754; *see also Waid*, 91 F.3d at 861-62.

While we cannot predict how the Fifth and Seventh Circuit Courts might respond to similar claims today, we will note that *Lakoski* and *Waid* were decided a decade before the Supreme Court explicitly recognized a school employee's right to bring a private retaliation claim under Title IX in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005). Therefore, despite circuit precedent, medical residency programs in these jurisdictions will not want to ignore the guidance of *Doe* or expect that the agency/administrative process will present the opportunity to resolve.

PRACTICAL TAKEAWAYS

Medical residency programs can protect themselves from the turnover, disruption, expense and reputational harms of sexual harassment, discrimination and/or retaliation claims, whether under Title IX, Title VII or state fair employment laws by:

- **Preparing, communicating and enforcing policies and procedures prohibiting the conduct proscribed by Title IX, Title VII and state fair employment laws**. Federal law, and sometimes state law, requires posting of non-discrimination laws; some states also require the distribution of specific literature to employees on the topics. It is important to set forth clear reporting alternatives for resident concerns and investigation of all complaints. Consider, for example, the U.S. Department of Education guidance to its covered schools.
    - *A school has a responsibility to respond promptly and effectively. If a school knows or reasonably should know about sexual harassment or sexual violence that creates a hostile environment, the school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence and address its effects (regardless of whether a student has filed or wants to file a complaint).*
    - *Every school must designate at least one employee who is responsible for coordinating the school's compliance with Title IX. This person is sometimes referred to as the Title IX coordinator. Schools must notify all students and employees of the name or title and contact information of the Title IX coordinator.*
- **Training faculty, supervisors, program directors and residents to ensure they understand the laws and their responsibilities under the laws**. Training is not only beneficial for the work environment, but it can play a significant role in defending against discrimination and harassment claims. Some states (*e.g.*, California) require formal sexual harassment training for all supervisors every two years. The U.S. Supreme Court has found that employers who establish and enforce appropriate policies, and who train their staff accordingly, have made a good faith effort to comply with Title VII and may avoid punitive damage awards. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 545-46 (1999).
- **Immediately taking steps to ensure the integrity of the investigation and protect the Resident**. Separate adverse parties immediately. The Office for Civil Rights has stated that Title IX requires that a school take interim measure before the final outcome of an investigation, including, for example, providing support services to the student, changing living arrangements and course schedules, assignments or tests, providing increased monitoring and supervision, etc.
- **Upon conclusion of the investigation, immediately taking remedial action designed to effectively end prohibited conduct**. Such remedial action can include: discharge, discipline, additional training, counseling, re-assignment of supervisors, etc.

For additional information on best practices to prevent sexual harassment, discrimination and/or retaliation, graduate medical education or for questions regarding this topic, contact:

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[1] *Doe v. Mercy Catholic Med. Ctr.,* --- F.3d --- (3rd Cir.,Mar. 7, 2017).

[2] The Third Circuit assumed without deciding that the Medical Center's receipt of Medicare dollars satisfied the "federal financial assistance" requirement for application of Title IX.