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MEDICAL RESIDENCY PROGRAMS POTENTIALLY LIABLE UNDER TITLE IX—FOR RESIDENT AND NON-RESIDENT EMPLOYEES!

As we reported in a previous article, the Third Circuit recently decided in *Doe v. Mercy*[1] that: 1) the medical residency program of the facility being sued in that case was an "educational program or activity" under Title IX; and 2) the medical resident had standing to sue under Title IX even though the resident was also an employee and could have sued under Title VII. Most residency programs would qualify as an "educational program or activity" under the court's reasoning. This means that most or all residency programs (and any other educational program or activity receiving federal funding) may be subject to liability for sex discrimination under both Title IX and/or Title VII.

The Third Circuit's decision is consistent with decisions in the First, Second, Eighth, Ninth and Tenth Circuits, but the Fifth and Seventh Circuits have held that Title VII is the exclusive remedy for employees seeking redress for discrimination or retaliation by their employers. However, because these Fifth and Seventh Circuit decisions are both more than 20 years old, they may not provide much protection for employers today.

Title IX is far more plaintiff-friendly than Title VII. There is no administrative exhaustion requirement—a plaintiff need not go through the EEOC before filing in court. Plaintiffs suing under Title IX also carry a bigger stick, since a finding of a Title IX violation poses the risk of losing federal funding for the particular program found to be in violation. And, while Title VII provides a cap on damages depending upon employer size, there is no cap under Title IX. Therefore, in any jurisdiction where the Third Circuit's reasoning is adopted, plaintiffs may be able to more easily, and more successfully, bring more costly claims against medical residency programs for sexual discrimination.

Unfortunately, medical residents are not the only plaintiffs with an easier path to damages. *Fox v. Pittsburg*[2], a recent decision from a federal district court sitting in Kansas, arguably extended the scope of Title IX within that jurisdiction. According to this decision (which is now on appeal to the Tenth Circuit), even non-student and non-teacher employees of "educational programs or activities" have a private cause of action under Title IX. The plaintiff in that case was a custodian who allegedly suffered harassment. Unlike Title IX employee-plaintiffs approved by the Supreme Court in the past, such as teachers and coaches, the institution's treatment of a custodian had little to no effect on its *educational* programs and activities—yet the court found that Title IX was an appropriate vehicle for the plaintiff's case.

PRACTICAL TAKEAWAYS FOR MEDICAL RESIDENCY PROGRAMS AND OTHERS

- Prepare, communicate and enforce policies in acknowledgement of Title VII and Title IX as well as state and local fair employment laws.
- Consider whether to appoint a specific Title IX coordinator in accordance with guidance from the Department of Education.
- Implement procedures for promptly reporting, investigating and responding to sexual harassment and discrimination in accordance with Title VII and Title IX requirements, including that the adverse parties be immediately separated (so long as appropriately implemented) and that interim measures be taken to protect the complainant prior to completion of the investigation.
- Train faculty, supervisors, program directors and residents to ensure everyone is aware of prospective liability, available resources and their respective responsibilities under Title VII and Title IX.

If you have any questions or would like additional information about this topic, please contact:

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[1] *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545 (3d Cir. 2017).

[2] *Fox v. Pittsburg State Univ.*, 214 F. Supp. 3d 1022 (D. Kan 2016).