

# TITLE VII, TITLE IX, OR BOTH?

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*Currently, there is a circuit split regarding whether to apply Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, or both, when an individual alleges discrimination and is an employee and a student at a federally funded institution. After the recent case, Doe v. Mercy Catholic Medical Center, the First, Third, and Fourth Circuits correctly held that both Title VII of the Civil Right Act of 1964 and Title IX of the Education Amendments of 1972 apply, but the Fifth and Seventh Circuits found Title VII to preempt Title IX. Title IX varies considerably from Title VII. Title IX does not require a claimant to exhaust the administrative remedies first and there is no damages cap. Also, if a violation of Title IX is found, federal agencies have a right to withdraw federal funding to the educational institution. Therefore, an individual should not be denied the right to bring an independent claim under both statutes. In order to end the circuit split, the Supreme Court of the United States should resolve the issue by allowing a plaintiff to bring a discrimination claim with employment and educational attributes under both Title VII and Title IX.*

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## I. INTRODUCTION

Imagine working on your medical residency and being sexually harassed by the director of the residency program at a federally funded hospital. In this situation, you are both an employee of the hospital and a student completing your education. Does Title VII of the Civil Rights Act of 1964 (Title VII) apply, does Title IX of the Education Amendments of 1972 (Title IX) apply, or do both apply?<sup>1</sup>

Many individuals bring only Title IX claims because they hope to surpass Title VII.<sup>2</sup> Title VII was created with more of a compensatory purpose in mind, whereas Title IX was created with the goal to prevent federal funding of discriminatory institutions.<sup>3</sup> Title VII contains “an express cause of action, provides for [specific] compensatory damages, and does not rely on a contractual framework.”<sup>4</sup> Title VII also requires an individual to exhaust all the administrative remedies in an administrative forum first before seeking judicial relief.<sup>5</sup> Conversely, Title IX does not require a claimant to exhaust the administrative remedies first, there is no damages cap, and if a violation of Title IX is found, federal agencies have a right to withdraw their federal funding to the educational institution.<sup>6</sup> For many years, there has been a circuit split on this issue.<sup>7</sup> The Court of Appeals for the Fifth and Seventh Circuits held that Title VII provides the exclusive remedy for employees alleging discrimination on the basis of sex in federally funded educational institutions.<sup>8</sup> However, the First, Fourth, and Third Circuits found that Title IX rights were deemed independent of and not preempted by Title VII.<sup>9</sup>

In Part II, Title VII and Title IX are examined. Section “a” discusses Title VII, Section “b” analyzes Title IX, and Section “c” explains the differences between the statutes. In Part III, the circuit split is depicted through the Fifth and Seventh Circuit’s *Lakoski v. James* and *Waid v.*

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<sup>1</sup> 20 U.S.C. § 1681 (2012); 42 U.S.C.A. § 2000e-2 (2012).

<sup>2</sup> See *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857 (7th Cir. 1996); *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995).

<sup>3</sup> Hayley Macon, Lisa Mottet, Julia Mujal, & Lara Cartwright-Smith, *Introduction to Title IX*, 1 GEO. J. GENDER & L. 424 (2000).

<sup>4</sup> *Id.*

<sup>5</sup> See *Waid*, 91 F.3d at 857; *Lakoski*, 66 F.3d at 751.

<sup>6</sup> See *Doe v. Mercy Catholic Medical Center*, 850 F.3d 545 (3d Cir. 2017). The ability for a federal agency to withdraw their funding under Title IX is seen as a contract. It is understood from the statute that when an educational institution accepts federal funding, any violation of Title IX will result in a loss of the funding.

<sup>7</sup> See *Waid*, 91 F.3d at 857; *Lakoski*, 66 F.3d at 751; *Preston v. Com. of Va. Ex Rel. New River Com. Col.*, 31 F.3d 203 (4th Cir. 1994); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988).

<sup>8</sup> *Waid*, 91 F.3d at 857; *Lakoski*, 66 F.3d at 751.

<sup>9</sup> *Doe*, 850 F.3d at 545; *Preston*, 31 F.3d at 203; *Lipsett*, 864 F.2d at 881.

*Merrill Area Pub. Schs.*, as well as the First, Third and Fourth Circuit's *Lipsett v. University of Puerto Rico*, *Doe v. Mercy Catholic Medical Center*, and *Preston v. Com. of Va. ex rel. New River Com. Col.*<sup>10</sup> Finally, Part IV is the conclusion, which discusses the issue and where the courts should go from here.

## II. TITLE VII AND TITLE IX GENERALLY

Title VII and Title IX are laws used to combat discrimination.<sup>11</sup> Title VII protects individuals in the workplace and Title IX covers educational activities and institutions.<sup>12</sup> Below, is a discussion of both Title VII and Title IX in the context of this circuit split.

### A. Title VII History and Rule of Law

Title VII, or 42 U.S.C.A. § 2000e, was introduced following racial oppression and discrimination.<sup>13</sup> Because skilled African Americans threatened the economic well-being of Caucasians, many regulations, including “Black Codes,” were implemented to eliminate opportunities for African Americans to use their skills or acquire new ones.<sup>14</sup> Even as late as 1961, African Americans were trained for jobs that were specifically regulated for a segregated employment market.<sup>15</sup> The purpose of Title VII is to “achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”<sup>16</sup> Specifically, Section 703 of the Civil Rights Act of 1964, which is amended by Section 107 in 1991, states, “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice.”<sup>17</sup>

To further reinforce the purpose of Title VII, the Supreme Court in *Griggs v. Duke Power Co.* declared that the objective was to achieve equal employment opportunities by eliminating barriers that favor white

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<sup>10</sup> *Doe*, 850 F.3d at 545; *Waid*, 91 F.3d at 857; *Lakoski*, 66 F.3d at 751; *Preston*, 31 F.3d at 203; *Lipsett*, 864 F.2d at 881.

<sup>11</sup> 20 U.S.C. § 1681; 42 U.S.C.A. § 2000e-2 (2012).

<sup>12</sup> *Id.*

<sup>13</sup> Julius L. Chambers & Barry Goldstein, *Title VII: The Continuing Challenge of Establishing Fair Employment Practice*, 49 LAW & CONTEMP. PROBS. 9, 10 (1986).

<sup>14</sup> *Id.* at 11.

<sup>15</sup> *Id.*

<sup>16</sup> Douglas P. Ruth, *Title VII & Title IX=?: Is Title IX the Exclusive Remedy for Employment Discrimination in the Educational Sector?*, 5 CORNELL J. L. & PUB. POL'Y 185, 188 (1996).

<sup>17</sup> The Civil Rights Act of 1964, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (1991).

employees.<sup>18</sup> This is known as disparate impact, which occurs if “neutral policies or practices ha[ve] a disproportionate, adverse impact on any protected class, usually minorities or women,” and that impact cannot be justified by a legitimate business consideration.<sup>19</sup> Unlike disparate impact, disparate treatment is when “an employer impermissibly differentiates among employees or applicants based on their race, color, religion, sex, or national origin.”<sup>20</sup> Disparate treatment requires intent, but disparate impact does not.<sup>21</sup> Under Title VII, “practices, procedures, or tests neutral on their face and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”<sup>22</sup> Congress directed the thrust of the act “to the consequences of employment practices, not simply the motivation.”<sup>23</sup> Moreover, Congress has placed the burden on the employer to show “that any given requirement must have a manifest relationship to the employment in question.”<sup>24</sup> This disparate impact cause of action that the Supreme Court established, and which was codified in Title VII, eliminated unnecessary non-job-related barriers to equal employment opportunity.<sup>25</sup> Congress intended “to ensure equal employment opportunities for all people by prohibiting policies and practices that are prejudicial to historically mistreated groups.”<sup>26</sup>

A prerequisite to filing a Title VII claim in federal district court is the exhaustion of administrative remedies.<sup>27</sup> Proceedings can be initiated by either “‘a person claiming to be aggrieved’ or by a member of the Equal Employment Opportunity Commission (“EEOC”).”<sup>28</sup> A “claimant may pursue federal remedies by filing a complaint with the [EEOC].”<sup>29</sup> The EEOC investigates the claim and “if the EEOC finds reasonable cause to believe the complaint is true it must pursue informal efforts to resolve the

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<sup>18</sup> Chambers & Goldstein, *supra* note 13 at 16.

<sup>19</sup> *Shaping Employment Discrimination Law*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/history/35th/1965-71/shaping.html>.

<sup>20</sup> Gerald S. Hartman & Richard H. Schnadig, 1 *Personnel Handbook* 36 (1989).

<sup>21</sup> *See id.*

<sup>22</sup> Chambers & Goldstein, *supra* note 13 at 16 (internal citation omitted).

<sup>23</sup> Hartman & Schnadig, *supra* note 20 at 37 (internal citation omitted).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Mark R. Bandsuch, *Dressing Up Title VII’s Analysis of Workplace Appearance Policies*, 40 COLUM. HUM. RTS. L. REV. 287, 288 (2008–09).

<sup>27</sup> *See* Donald W. Nierling, *The Role of Preclusion Rules in Title VII: An Analysis of Congressional Intent Notes*, 71 IOWA L. REV. 1473 (1986).

<sup>28</sup> George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 691 (1980) (internal citation omitted).

<sup>29</sup> Nierling, *supra* note 27 at 1473 (discussing EEOC procedure to investigate Title VII claims).

complaint.”<sup>30</sup> The “investigation of an EEOC charge should be reasonable and seek the root source of discrimination.”<sup>31</sup> If no resolution is reached, the EEOC may bring a civil action to have the court enforce its ruling.<sup>32</sup> “If the EEOC fails to find probable cause to believe the complaint is true or decides not to bring an action to enforce its judgment, the EEOC must issue a right-to-sue letter, entitling the claimant to bring a civil action in federal district court.”<sup>33</sup> If the EEOC fails “to resolve the complaint under its administrative procedures, or if no action is taken by the EEOC within 180 days of filing, the individual may bring suit in federal district court.”<sup>34</sup>

Alternatively, a person may bring a discrimination claim with a state or local authority.<sup>35</sup> If an individual is denied relief, he or she may bring a claim under Title VII.<sup>36</sup> “[T]he Supreme Court held that a state administrative finding of non-discrimination does not preclude a Title VII suit on the claim where the claimant does not appeal the administrative body’s decisions through the state court system.”<sup>37</sup> Therefore, in both situations, a claimant may bring suit in federal court to obtain damages and equitable relief.

#### *B. Title IX Rule of Law*

Furthermore, Congress enacted Title IX, or 20 U.S.C. § 1681(a), as a reaction to sex discrimination in educational programs.<sup>38</sup> Title IX is enforced primarily by the Department of Education’s Office for Civil Rights (“OCR”).<sup>39</sup> “It was passed as part of the Education Laws in 1972 after a thorough investigation showed a distinct pattern of sex discrimination.”<sup>40</sup> Title IX states, “No 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.”<sup>41</sup> The law covers “pre-school, elementary and secondary schools, colleges and universities, vocational and technical schools, community and junior colleges, and

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<sup>30</sup> *Id.*

<sup>31</sup> Bradley M. Jones, *The Permissible Scope of Title VII Actions*, 8 SETON HALL L. REV. 493, 502 (1977) (internal quotations omitted).

<sup>32</sup> Nierling, *supra* note 27 at 1473.

<sup>33</sup> *Id.* (internal citation omitted).

<sup>34</sup> Hartman & Schnadig, *supra* note 20 at 40–41.

<sup>35</sup> *Id.* at 41.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> 20 U.S.C. §§ 1681–88 (2012).

<sup>39</sup> Macon, et al., *supra* note 3 at 417.

<sup>40</sup> Clark C. Griffith, *Comments on Title IX*, 14 MARQ. SPORTS L. REV. 57 (2003).

<sup>41</sup> 20 U.S.C. §1681(a) (2012).

graduate and professional schools.”<sup>42</sup> Furthermore, “Individuals who wish to bring a claim under Title IX must prove that they were subjected to exclusion from participation in, denial of educational benefits of, or discrimination ‘under any education program or activity receiving Federal financial assistance.’”<sup>43</sup> Three elements to establish jurisdiction under Title IX include: “(1) allegations of discrimination based on sex, (2) within an education program, (3) which ‘receiv[ed] Federal financial assistance.’”<sup>44</sup> The second and third issues have raised a number of legal issues.<sup>45</sup> For example, some individuals argue how broad “an education program” may extend and, also, whether being a “[recipient of] Federal financial ‘assistance’ means that the presence of a dollar of Federal money anywhere . . . is sufficient to trigger Title IX jurisdiction.”<sup>46</sup> Three methods of enforcing Title IX are making an in-house complaint, filing a complaint within 180 days of the alleged discrimination with the OCR, or pursuing a lawsuit in federal district court.<sup>47</sup>

Both public and private enforcement is available to remedy a situation. “Within Title IX, Congress created a public remedy that permits the termination of federal funds when an institution providing educational programs discriminates against an individual on the basis of sex.”<sup>48</sup> Title IX is thought of as a contract, where federal agencies agree to fund an educational institution so long as the institution does not violate the statute.<sup>49</sup> If the institution does violate the statute, the agency may revoke its funding.<sup>50</sup> After Title IX’s creation, the Supreme Court created a private right of action in *Cannon v. University of Chicago*.<sup>51</sup> In 1992, “[T]he U.S. Supreme Court ruled that schools that failed to comply with Title IX could be sued for compensatory and punitive damages.”<sup>52</sup>

### C. Differences Between Title VII and Title IX

Title VII and Title IX are similar, yet different from each other. As seen in this circuit split, courts have ruled Title VII preempts Title IX.<sup>53</sup> Courts have decided that Title VII guides Title IX claims because it

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<sup>42</sup> Katherine Levitan, *Interrogatories*, 25 NASSAU LAW 376 (1978).

<sup>43</sup> Macon, et al., *supra* note 3 at 420.

<sup>44</sup> Linda Jean Carpenter & R. Vivian Acosta, *Title IX- Two for One: A Starter Kit of the Law and a Snapshot of Title IX’s Impact*, 55 CLEV. ST. L. REV. 503 (2007).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 504.

<sup>47</sup> *Id.* at 505–06.

<sup>48</sup> Macon, et al., *supra* note 3 at 419.

<sup>49</sup> *See Doe*, 850 F.3d at 545.

<sup>50</sup> *See id.*

<sup>51</sup> *Id.*; *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979).

<sup>52</sup> Florencio Ramirez, *Title IX*, 27 GPSOLO 16, 18 (2010).

<sup>53</sup> Macon, et al., *supra* note 3 at 423–24.

provides case law dictating the prohibition of sex discrimination.<sup>54</sup> Unlike “Title IX[, which] was enacted to prevent federal funding of discriminatory actions pursuant to Congress’s spending power, Title VII was enacted with a compensatory scheme in mind.”<sup>55</sup> Even though individuals employed by educational institutions are covered by the terms of Title IX, many claims have been filed under Title VII.<sup>56</sup> This is because “Title VII contains an express cause of action, provides for [specific] compensatory damages, and does not rely on a contractual framework.”<sup>57</sup> On the other hand, certain features make an action under Title IX more attractive. Plaintiffs under Title IX need not exhaust administrative remedies or receive a “right to sue” letter from an administrative agency.<sup>58</sup> Also, Title IX damages vary from Title VII’s. Unlike Title VII, Title IX has no damages cap.<sup>59</sup> Lastly, federal agencies may withdraw their federal funding under Title IX, but this is not the case under Title VII.<sup>60</sup> Title IX was enacted under the Spending Clause powers, “making it in the nature of a contract: In accepting federal funds, States agree to comply with its mandate.”<sup>61</sup> Therefore, if an entity agrees to accept federal funds for its educational program or activity, the federal funds may be revoked if there is a violation of Title IX.<sup>62</sup> Consequently, advantages and disadvantages exist within both statutes, so an individual should not be barred from bringing a Title IX claim independently from a Title VII.

### III. CIRCUIT SPLIT REGARDING TITLE VII AND TITLE IX IN EDUCATIONAL SETTINGS THAT ARE PRIVATE INSTITUTIONS

For years, there has been a circuit split concerning when an individual wanted to bring both a Title VII and Title IX claim.<sup>63</sup> The Fifth and Seventh Circuits held that Title VII and Title IX claims were not independent and Title VII preempted Title IX.<sup>64</sup> In March 2017, the Third Circuit joined the First and Fourth Circuits in holding that “Title IX rights

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 424.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 424–25.

<sup>59</sup> Macon, et al., *supra* note 3 at 425.

<sup>60</sup> *See Doe*, 850 F.3d at 552.

<sup>61</sup> *Id.* (explaining that the nature of Title IX is contractual because federal agencies may withdraw federal funding if there is a violation).

<sup>62</sup> *Id.*

<sup>63</sup> John P. Barry & Edna D. Guerrasio, *Third Circuit Endorses Title IX and Title VII Claims of Medical Resident*, *Publications*, PROSKAUER (Mar. 21, 2017), <http://www.proskauer.com/publications/client-alert/third-circuit-recognizes-title-ix-and-title-vii-claims-of-medical-resident/>.

<sup>64</sup> *Id.*

[are] deemed independent of and not preempted by Title VII.”<sup>65</sup> Now, the issue is ripe for consideration by the Supreme Court.<sup>66</sup>

In the Fifth Circuit case, *Lakoski v. James*, Professor Dr. Joan Lakoski, brought a sex discrimination action against the University of Texas Medical Branch (“the University”) under Title IX when she was denied tenure.<sup>67</sup> Dr. Lakoski was hired as a tenure-track assistant professor, in the Department of Pharmacology, where she subsequently sought and was denied a promotion three times.<sup>68</sup> The department’s tenure committee recommended that she not be considered for tenure in the future. The departmental chairman informed her that the upcoming appointment would be her last.<sup>69</sup> Dr. Lakoski sued the University and three University officials “alleging that the denial of tenure and her termination constituted intentional sex discrimination in violation of Title IX[.]”<sup>70</sup>

The court held that “Title IX did not provide [the] direct private right of action to individuals seeking money damages for alleged sex discrimination by federally funded educational institution[s].”<sup>71</sup> The court explained that Title VII is the exclusive remedy for individuals seeking employment discrimination on the basis of sex in federally funded educational institutions.<sup>72</sup> The Fifth Circuit emphasized its unwillingness to find an implied private right of action for damages under Title IX for employment discrimination because “doing so would disrupt a carefully balanced remedial scheme for redressing employment discrimination by employers” under Title VII.<sup>73</sup> The court limited its holding to only individuals seeking money damages under Title IX and held that Title IX does not offer a remedial bypass of Title VII.<sup>74</sup> Therefore, because Ms. Lakoski did not bring a Title VII claim, she was precluded from bring a Title IX claim.<sup>75</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Lakoski*, 66 F.3d at 751 (discussing claims where Title VII preempts Title IX when there is strong Title VII claim).

<sup>68</sup> *Id.* at 752.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 751.

<sup>71</sup> *Id.* at 758 (explaining Fifth Circuit’s viewpoint that Title VII preempts Title IX when there is alleged discrimination for federally funded educational institutions).

<sup>72</sup> *Lakoski*, 66 F.3d at 753.

<sup>73</sup> *Id.* at 754 (describing court’s viewpoint of bringing a claim under Title IX as “violence” that would create a disruption to a “carefully balanced remedial scheme”).

<sup>74</sup> *Id.* at 754 (discussing Fifth Circuit’s opinion that Title VII preempts Title IX in educational employment discrimination cases).

<sup>75</sup> *Id.*

Similarly, in the Seventh Circuit's *Waid v. Merrill Area Pub. Schs.*, Tana Waid, a long-term substitute junior high school teacher, alleged Merrill Area Public Schools denied her a full-time teaching position because of her sex in violation of Title IX.<sup>76</sup> After Ms. Waid was appointed, a member of the faculty died and Ms. Waid assumed his duties for the rest of the school year.<sup>77</sup> Subsequently, the school sought a permanent replacement for the deceased teacher.<sup>78</sup> Ms. Waid applied for the position, but Richard Bonnell was hired instead.<sup>79</sup>

As a result, Ms. Waid brought an employment discrimination claim with a state agency charged with the exclusive power to enforce Wisconsin's fair employment law.<sup>80</sup> The agency ruled in her favor and granted her all the remedies available under state law.<sup>81</sup> However, these remedies are not as extensive as those under federal law.<sup>82</sup> She sought these additional remedies and filed a lawsuit in federal court.<sup>83</sup> The federal district court concluded that Ms. "Waid's pursuit of administrative relief under state law prevented her from pursuing any of the federal claims."<sup>84</sup> On appeal, the Seventh Circuit reviewed the district court's ruling and believed the legal ground for the ruling was unclear.<sup>85</sup> It stated that the "essence of the [district court's] holding seems to be that Waid's choice of a state administrative forum was, in effect, an election of remedies and that her success in that forum precluded her pursuit of compensatory and punitive damages under federal law in federal court."<sup>86</sup> The decision related primarily to issue preclusion and issue preemption.<sup>87</sup>

The court recognized that the Wisconsin state law provided a statutory right against sex discrimination in employment, which ran parallel to the federal statute, Title VII.<sup>88</sup> Title VII requires a claimant to first seek administrative remedies in an administrative forum before pursuing the rights in court.<sup>89</sup> The EEOC may provide this administrative

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<sup>76</sup> *Waid*, 91 F.3d at 857 (holding Title VII preempts Title IX and are dependent claims where individuals are in workplace and educational environment).

<sup>77</sup> *Id.* at 859.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 860.

<sup>80</sup> *Id.* at 859 (state agency is referred to as the Equal Rights Division in this case).

<sup>81</sup> *Id.*

<sup>82</sup> *Waid*, 91 F.3d at 859.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 759.

<sup>85</sup> *Id.* at 860.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (discussing district court's decision referencing issue preclusion but appellate court believed district court's reasoning implied claim preclusion too).

<sup>88</sup> *Waid*, 91 F.3d at 861.

<sup>89</sup> *Id.*

forum, but if a state agency stands as the local equivalent, a plaintiff with Title VII claims may have to first seek relief from state administrators who act under state law.<sup>90</sup> Thus, Title VII is a remedy for “victims of employment discrimination who cannot obtain complete redress for their injuries in an administrative forum, whether the agency providing administrative redress is a creature of state or federal government.”<sup>91</sup> Additionally, Title IX provides that an educational institution or activity may lose funds provided by federal agencies if there is a violation of Title IX.<sup>92</sup> The court recognized that Ms. Waid was an employee of an educational institution receiving federal funds, which gave her a private right of action under Title IX.<sup>93</sup>

However, the Seventh Circuit examined “whether Waid’s choice to bring claims in a state administrative forum that could not consider Title IX claims preclude[d] her from raising those claims in a judicial forum.”<sup>94</sup> The court believed, according to the Second Restatement of Judgments, the plaintiff must assert her “claims initially in the forum with the broadest possible jurisdiction.”<sup>95</sup> If a plaintiff has an unconstrained choice to bring all her claims in a forum of limited or broad jurisdiction and she chooses the limited venue, this “precludes her from bringing the unlitigated claims in a subsequent proceeding.”<sup>96</sup> However, the Equal Rights Division’s exclusive jurisdiction over Waid’s state claims made it evident that she could not have consolidated her claims in a single lawsuit.<sup>97</sup> Therefore, “the decision of her state administrative proceeding does not [alone] preclude her claims arising under federal law.”<sup>98</sup> The court further noted that “Wisconsin requires that its courts consider a variety of factors when determining whether to give issue preclusion effect to the unreviewed decision of a state administrative agency.”<sup>99</sup>

Those factors include the following: (1) the ability of the party against whom preclusion is sought to obtain judicial review of the decision; (2) differences in the quality or extensiveness of the procedures followed by the agency and the court; (3) differences in the standards of

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (discussing purpose of bringing Title VII claims in federal court).

<sup>92</sup> *Id.* at 862. (“The creation of this incentive indicates that Congress intended to place the burden of compliance with civil rights law on the educational institutions themselves, not on the individual officials associated with those institutions.”).

<sup>93</sup> *Id.* at 861.

<sup>94</sup> *Waid*, 91 F.3d at 863.

<sup>95</sup> *Id.* at 865 (explaining plaintiff must initially bring all claims in broad forum when she has a choice).

<sup>96</sup> *Id.* at 864–65.

<sup>97</sup> *Id.* at 865.

<sup>98</sup> *Id.* at 866.

<sup>99</sup> *Id.*

proof required by the agency and the court; (4) policy considerations that would make the application of issue preclusion fundamentally unfair.<sup>100</sup>

After the court evaluated these factors, it found that the “Equal Rights Division’s factfinding on the issue of discrimination should preclude the relitigation of the issue, [whether Ms. Waid was discriminated against,] because the school system had the opportunity to seek judicial review of the agency’s decision, but it declined to do so.”<sup>101</sup> Subsequently, the Seventh Circuit held that the Equal Rights Division’s decision precluded the question of whether there was discrimination, but not whether it intended to discriminate against Ms. Waid.<sup>102</sup> It also believed that Congress intended Title VII to be the exclusive way to vindicate a right and, therefore, Title VII preempted Title IX.<sup>103</sup>

Conversely, in the Fourth Circuit case, *Preston v. Com. of Va. ex rel. New River Com. Col.*, Susan Preston, the community college student support services counselor, brought action against New River Community College alleging that it violated Title VII and Title IX because it retaliated against her for filing an employment discrimination claim based on gender and race.<sup>104</sup> She alleged the college failed to award her the positions of counselor for student development and activities counselor due to her previous discrimination charge with the EEOC.<sup>105</sup> However, a jury had concluded that “Preston would not have received the position even if the college had not discriminated against her.”<sup>106</sup> The Fourth Circuit held that the determination by the jury that she would not have been awarded the position of activities counselor in the absence of the College’s retaliation did not foreclose Preston from being entitled to pursue relief under Title IX.<sup>107</sup> Subsequently, the court examined “whether [it] should construe Title IX as Title VII was construed at the time the events underlying this action occurred or whether [it] should construe [Title IX] in accordance with the way Title VII has been amended by Congress in the interim.”<sup>108</sup> The Fourth Circuit found that “applying an interpretation of Title IX in

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<sup>100</sup> *Waid*, 91 F.3d at 866 (declaring Wisconsin rules for determining whether issue preclusion should give effect to unreviewed decision of state administrative agency).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 867.

<sup>103</sup> *Id.* at 862. This case was abrogated, but is still used for the Title VII and Title IX circuit split.

<sup>104</sup> *Preston*, 31 F.3d at 203–04 (discussing discrimination claims where Title VII does not preempt Title IX because the claims are independent).

<sup>105</sup> *Id.* (discussing alleged retaliatory discrimination when College failed to hire Ms. Preston because of her previous discrimination claims).

<sup>106</sup> *Id.* at 205.

<sup>107</sup> *Id.* at 208–09.

<sup>108</sup> *Id.* at 207 (discussing whether Title IX should be construed according to VII at the time of the events or by the way Title VII has been amended by Congress in interim).

accordance with Title VII as amended by the [Civil Rights Act of 1991] (“CRA”) to conduct occurring before the effective date of the amendment would amount to an impermissible retroactive application.”<sup>109</sup> Therefore, even though there was not a settled interpretation by the Supreme Court at the time the conduct occurred, the court of appeals believed that a Title IX employment discrimination claim should be interpreted in accordance with the principles governing Title VII.<sup>110</sup> However, the court noted that these claims are still independent from each other.<sup>111</sup> Nevertheless, the court concluded that since Ms. Preston would not have received the position of activities counselor even if she had not filed the discrimination claim in 1984, the college did not ultimately violate Title IX.<sup>112</sup>

Additionally, in *Lipsett v. University of Puerto Rico*, the First Circuit found that Annabelle Lipsett, a resident in the General Surgery Residency Training Program, made a *prima facie* case of hostile work environment, *quid pro quo* sexual harassment, and discriminatory discharge.<sup>113</sup> The residency program integrated the surgical training programs of San Juan Veterans Administration Hospital and the Hospital at the University of Puerto Rico.<sup>114</sup> Ms. Lipsett claimed “that the predominant professional view of surgery [was] . . . a medical field appropriate only for men[, which] made it difficult, and at times impossible, for her to gain acceptance and respect in the [p]rogram.”<sup>115</sup> Also, the residents made sexual comments towards Ms. Lipsett, and nicknamed her “Selastraga,” meaning “she swallows them.”<sup>116</sup> Two supervisory residents filed complaints against Ms. Lipsett, accusing her of admitting patients to her ward without first consulting the senior resident, creating friction among the residents, failing to inform her superiors of the results of analyses performed on patients, being late, and having unauthorized absences.<sup>117</sup> Shortly after, Ms. Lipsett was dismissed from the program.<sup>118</sup>

The First Circuit analyzed whether “the Title VII standard [of disparate treatment, which proves discrimination,] . . . should apply as

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<sup>109</sup> *Id.* at 208.

<sup>110</sup> *Preston*, 31 F.3d at 206.

<sup>111</sup> *Id.* at 205 (holding Title IX is independent from Title VII and Title VII does not preempt Title IX).

<sup>112</sup> *Id.* at 208.

<sup>113</sup> *Lipsett*, 864 F.2d at 881.

<sup>114</sup> *Id.* at 886. This case discusses the court’s decision that Title VII does not preempt Title IX. The court found the claims to be independent.

<sup>115</sup> *Id.* (illustrating sex discrimination under Title VII and Title IX when women were treated inferior and threatened with dismissal).

<sup>116</sup> *Id.* at 888 (discussing sexual harassment and hostile work environment under Title VII and Title IX when Ms. Lipsett was sexually harassed during her residency).

<sup>117</sup> *Id.* at 891.

<sup>118</sup> *Id.* at 892.

well to claims of sex discrimination arising under Title IX.”<sup>119</sup> The court agreed with the Tenth Circuit that since “‘Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination,’ it would regard Title VII ‘as the most appropriate analogue when defining Title IX’s substantive standards.’”<sup>120</sup> Therefore, Title VII case law may be used for Title IX claims.<sup>121</sup> A prima facie case of quid pro quo harassment under Title IX consists of a showing that “(1) [the plaintiff] was subject to unwelcome sexual advances by a supervisor or teacher and (2) that his or her reaction to these advances affected tangible aspects of his or her compensation, terms, conditions, or privileges of employment or educational training.”<sup>122</sup> Additionally, to make out a prima facie case of hostile environment, the plaintiff must show that he or she was subjected to unwelcome sexual advances “sufficiently ‘severe or pervasive’ that [they] altered his or her working or educational environment.”<sup>123</sup> To have a cause of action for sexual harassment under Title IX, “an educational institution is liable upon a finding of hostile environment sexual harassment perpetrated by its supervisors upon employees *if* an official representing that institution knew, or in the exercise of reasonable care, should have known, of the harassment’s occurrence, *unless* that official can show that he or she took appropriate steps to halt it.”<sup>124</sup>

The First Circuit found that surgery residents, who were not named as defendants, committed most, if not all, of the alleged acts of harassment and discrimination.<sup>125</sup> Consequently, the court examined to what extent may the named defendants be held liable for the acts of others under 42 U.S.C. § 1983.<sup>126</sup> The First Circuit rejected the district court’s finding that no affirmative link existed among the participants in the alleged wrongdoing and the defendants who did not partake in the incident.<sup>127</sup> First, the doctors’ failure to “investigate and put a stop to the harassment directed against the plaintiff[,] constituted ‘gross negligence amounting to

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<sup>119</sup> *Lipsett*, 864 F.2d at 896.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 897 (discussing their reliance on the EEOC’s guideline called the “Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance”).

<sup>122</sup> *Id.* at 898.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 901 (finding employer liable for hostile environment sexual harassment under Title IX “if the employer knew or should have known of the harassment, and took no effectual action to correct the situation”).

<sup>125</sup> *Lipsett*, 864 F.2d at 899.

<sup>126</sup> 42 U.S.C. § 1983 (2012).

<sup>127</sup> *Lipsett*, 864 F.2d at 902.

deliberate indifference.”<sup>128</sup> Second, it found “that the complaints directed against the plaintiff by the male residents were so infused with discriminatory bias as to render them pretextual,” and that the doctors had reason to “suspect this pretext but[,] nevertheless[,] used these complaints as a basis for discharging her from the [p]rogram.”<sup>129</sup>

The appellate court found “that there was sufficient evidence in the record from which it could be inferred that the atmosphere described by the plaintiff was so blatant as to put the defendants on constructive notice that sex discrimination permeated the [p]rogram.”<sup>130</sup> One of the doctors admitted in his deposition that he heard residents and attendings make remarks that “women should not be general surgeons.”<sup>131</sup> Also, the plaintiff spoke with the lead doctors about the dynamics of the program including hostility from the male residents toward the women becoming doctors.<sup>132</sup> Ms. Lipsett further described that the male residents treated her with animosity due to her refusal to succumb to their sexual advances.<sup>133</sup> Additionally, Ms. Lipsett told the lead doctor about the harassment.<sup>134</sup> When she was dismissed, this lead doctor even stated that “there was some type of behavior that made . . . [Ms. Lipsett] uncomfortable.”<sup>135</sup>

The court reasoned that “[b]elittling comments about a person’s ability to perform on the basis of that person’s sex, are not funny.”<sup>136</sup> Despite the plaintiff’s allegations, the doctors did not take any steps to investigate the allegations or resolve them.<sup>137</sup> The doctors’ “reliance could be characterized as an act of complicity amounting to the ‘supervisory encouragement or condonation of or acquiescence in the residents’ discriminatory behavior.”<sup>138</sup> Therefore, the First Circuit found that these facts were true and that the defendants failed to stop or investigate the sexual harassment against the plaintiff.<sup>139</sup> Ultimately, the First Circuit held that there was a prima facie case of a hostile work environment, quid

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<sup>128</sup> *Id.* at 903 (discussing sexual harassment including threats, sexual advances, degrading pinups, and hostile behavior where the doctors failed to investigate or stop these occurrences).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 906.

<sup>131</sup> *Id.* (explaining offensive atmosphere where male residents attacked plaintiff on her capabilities because she was a woman) (internal quotations omitted).

<sup>132</sup> *Id.* at 907.

<sup>133</sup> *Lipsett*, 864 F.2d at 907.

<sup>134</sup> *Id.* (discussing instance where Ms. Lipsett told lead doctor she was experiencing harassment and lead doctor did not resolve or investigate situation).

<sup>135</sup> *Id.* at 906 (internal quotations omitted).

<sup>136</sup> *Id.* at 907 (displaying First Circuit’s strong opinion regarding Ms. Lipsett’s sexual harassment claims).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 911 (internal quotation marks omitted).

<sup>139</sup> *Lipsett*, 864 F.2d at 914.

pro quo sexual harassment, actual and constructive knowledge of the plaintiff's allegation of harassment, and a claim of discriminatory discharge that could be viewed independently under both Title VII and Title IX.<sup>140</sup>

The Third Circuit ended the even split and ruled, along with the First and Fourth Circuits, that rights under Title VII and Title IX are independent from each other and Title IX is not preempted by Title VII.<sup>141</sup> In the Third Circuit, “the [district] courts held conflicting decisions.<sup>142</sup> *Doe v. Mercy Catholic Medical Center*, which discussed whether a medical resident alleging sexual harassment and retaliation should be treated as: “(i) an employee who can seek relief under Title VII; (ii) a student who can seek relief under Title IX; or (iii) both,” resolved the conflict.<sup>143</sup> Aligning the Third Circuit with the First and Fourth Circuits, the court in *Doe* decided that sexual harassment and retaliation should be viewed separately through both Title VII and Title IX.<sup>144</sup>

In *Doe v. Mercy Catholic Med. Ctr.*, the court decided “whether an ex-resident . . . can bring private causes of action for sex discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, against Mercy Catholic Medical Center, a private teaching hospital operating a residency program.”<sup>145</sup> A residency program is “a period of clinical didactic and clinical instruction in a medical specialty during which physicians prepare for independent practice after graduating from medical school.”<sup>146</sup> *Doe* alleged that the director of Mercy's residency program, Dr. James Roe, sexually harassed her and retaliated against her because she complained about his behavior, which resulted in her dismissal.<sup>147</sup> *Doe* sued Mercy in the district court under Title IX for retaliation, quid pro quo harassment, and hostile environment.<sup>148</sup> She conceded she never filed a charge under Title VII of the Civil Rights Act of 1964 with the EEOC.<sup>149</sup> The district court held that Title IX does not apply to Mercy because it is not an educational program or activity under

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<sup>140</sup> *Id.* at 914–15.

<sup>141</sup> Barry & Guerrasio, *supra* note 63.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Doe*, 850 F.3d at 545 (discussing resident who is employed for educational program where Title VII does not preempt Title IX and the issues are independent claims).

<sup>146</sup> *Id.* at 550 (illustrating *Doe* is both student and employee because she is working at a hospital for her education).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 552.

<sup>149</sup> *Id.*

20 U.S.C. § 1681(a).<sup>150</sup> Even if Title IX did apply, the court did not believe it could use Title IX to circumvent Title VII's administrative requirements.<sup>151</sup>

On appeal, the Third Circuit examined “whether Title IX applies to Mercy [and] whether Doe’s private causes of action are cognizable under Title IX.”<sup>152</sup> First, the Third Circuit considered whether Mercy’s resident program made the hospital an “‘educational program or activity’ under Title IX.”<sup>153</sup> The court discussed that Title IX was enacted under the Spending Clause and, therefore, operates like a contract. Specifically, when states accept federal funds, they agree to comply with Title IX’s mandate.<sup>154</sup> Consequently, if an entity agrees to accept federal funds for its educational program or activity, the federal funds may be revoked if there is a violation of Title IX.<sup>155</sup> The court explained that “Title IX’s . . . (express) enforcement mechanism is through agencies’ regulation of federal funding.”<sup>156</sup> Unlike the district court which differentiated Mercy from an educational program or activity because “residents already have a degree, don’t pay tuition, and are paid for their services and protected by labor laws,” the court of appeals believed Mercy did qualify.<sup>157</sup> Because Congress “expressly exempted specific kinds of programs from Title IX’s reach[,] . . . [the court was] hesitant to impose further restrictions without strong justification from Title IX’s text.”<sup>158</sup> An entity qualifies for federal funding so long as “one can reasonably consider its mission to be, at least in part, educational.”<sup>159</sup> Because Mercy’s residence program was affiliated with Drexel Medicine, a university program, the court found it reasonable that Mercy’s mission was educational under Title IX.<sup>160</sup>

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<sup>150</sup> *Id.* The district court used the Federal Rule of Civil Procedure 12(b)(6) to dismiss this claim.

<sup>151</sup> *Doe*, 850 F.3d at 552. Regardless, the district court had dismissed all of Ms. Doe’s Title IX claims.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* (explaining requirement to seek relief under Title IX where Mercy must be educational program or activity).

<sup>154</sup> *Id.* (discussing Title IX where the nature of statute is contract because federal agencies may withdraw federal funding if there is a violation).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Doe*, 850 F.3d at 554 (discussing district court’s belief that Mercy is not an educational program or activity where residents have degree, do not pay tuition, and are paid for services and protected by labor laws).

<sup>158</sup> *Id.* at 555.

<sup>159</sup> *Id.* at 557; *See, e.g.*, 15 U.S.C. § 37b(b)(1)(B)(i) (“A ‘graduate medical education program’ is a ‘residency program’ for ‘medical education and training.’”).

<sup>160</sup> *Id.* at 556.

Furthermore, the court considered whether Doe's private causes of action were cognizable under Title IX. "Title VII's concurrent applicability does not bar Doe's private causes of action for retaliation and *quid pro quo* harassment under Title IX."<sup>161</sup> The court of appeals derived four guiding principles including (1) "private-sector employees aren't 'limited to Title VII' in their search for relief from workplace discrimination;" (2) "it is a matter of 'policy' left for Congress's constitutional purview whether an alternative avenue of relief from employment discrimination might undesirably allow circumvention of Title VII's administrative requirements;" (3) "the provision implying Title IX's private cause of action, 20 U.S.C. § 1681(a), encompasses employees, not just students;" and (4) "Title IX's implied private cause of action extends explicitly to *employees* of federally-funded education programs who allege sex-based *retaliation* claims under Title IX."<sup>162</sup> Therefore, Doe has a private retaliation claim under Title IX because a federal funded recipient, an employee of the residency program, retaliated against her for making accusations of sex discrimination.<sup>163</sup> "Whether . . . [Doe] could also proceed under Title VII is of no moment" because Congress created different remedies that overlap to eradicate private sector employment discrimination.<sup>164</sup> Therefore, Doe could have also proceeded under Title IX for her *quid pro quo* sexual harassment claim.<sup>165</sup>

The court ultimately held that Doe's medical residency program at the Mercy Catholic Medical Center hospital, which accepted federal funding through Medicare and was affiliated with Drexel University Medical Center, qualified as an educational program or activity under Title IX.<sup>166</sup> Additionally, Doe's concurrent employee status, which fell under Title VII, did not preclude her from bringing a private cause of action under Title IX.<sup>167</sup> Therefore, the Third Circuit's holding aligns with the First and Fourth Circuit's decisions that Title VII does not preempt Title IX and these claims may be considered independently.

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<sup>161</sup> *Id.* at 560.

<sup>162</sup> *Id.* at 562.

<sup>163</sup> *See Doe*, 850 F.3d at 563–64. The court discusses the definition of intentional discrimination where a "funding recipient retaliates against a 'person,' including an employee, because she complains of sex discrimination."

<sup>164</sup> *Id.* at 564 (discussing plaintiff's right to bring Title VII and Title IX claim independently where Congress intentionally created different remedies).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 549.

<sup>167</sup> *Id.*

## IV. CONCLUSION

For decades, there has been a circuit split when a situation with alleged discrimination involves education and employment. After *Doe v. Mercy Catholic Medical Center*, the First, Third, and Fourth Circuits correctly held that both Title VII of the Civil Right Act of 1964 and Title IX of the Education Amendments of 1972 apply, but the Fifth and Seventh Circuits found Title VII to preempt Title IX.<sup>168</sup> Title IX is substantially different from Title VII.<sup>169</sup> Title IX does not require a claimant to exhaust the administrative remedies first, there is no damages cap, and if a violation of Title IX is found, federal agencies have a right to withdraw their federal funding to the educational institution.<sup>170</sup> Consequently, an individual should not be denied the right to bring an independent claim under both statutes.<sup>171</sup> In order to end the circuit split, the Supreme Court of the United States should resolve the issue by allowing a plaintiff to bring a discrimination claim with employment and educational attributes under both Title VII and Title IX.<sup>172</sup> Hopefully, the recent *Doe* ruling is indicative of a new trend and will foster enough conversation to bring this issue to the Supreme Court.<sup>173</sup>

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<sup>168</sup> *Doe*, 850 F.3d at 545; *Waid*, 91 F.3d at 857; *Lakoski*, 66 F.3d at 751; *Preston*, 31 F.3d at 203; *Lipsett*, 864 F.2d at 881.

<sup>169</sup> *See Doe*, 850 F.3d at 545.

<sup>170</sup> *Id.* (discussing differences between Title VII and Title IX where an individual should have a right to bring both claims separately).

<sup>171</sup> *See id.*

<sup>172</sup> 20 U.S.C. § 1681; 42 U.S.C.A. § 2000e-2.

<sup>173</sup> *Doe*, 850 F.3d at 545.