

LEGAL UPDATES

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# Ninth Circuit Holds that Title IX Covers Peer Harassment Based on the Victim's Perceived Sexual Orientation

In *Grabowski v. Arizona Board of Regents*, the U.S. Court of Appeals for the Ninth Circuit held that harassment of a student-athlete by teammates, based on the victim's perceived sexual orientation as a gay man, is covered by Title IX as a form of sex discrimination. The court reasoned that harassment based on a victim's perceived sexual orientation necessarily implicates sex, similar to the reasoning adopted by the U.S. Supreme Court in construing Title VII in *Bostock v. Clayton County*, and that such harassment is a form of gender stereotyping. However, because the plaintiff failed to allege the harassment caused a drop in his grades or otherwise limited his access to educational opportunities at the university, the court held that the plaintiff failed to state a viable claim for money damages against the institution. The court separately held that the institution could be liable for retaliation if coaches dismissed the plaintiff from his sports team and stripped him of his scholarship because he complained of the harassment. *Grabowski* follows a trend in some circuits of construing Title IX broadly and in a manner similar to Title VII, despite other recent cases that have been cautious in extending *Bostock's* reasoning to Title IX, given important differences between it and Title VII.

In *Grabowski*, the plaintiff was a male student-athlete who joined the University of Arizona's cross-country and track and field teams. The plaintiff alleged<sup>[1]</sup> he experienced repeated sexual harassment and bullying from teammates who perceived he was gay, including the repeated use of anti-gay slurs and posting harassing information about the plaintiff's sexual orientation on a public chat group. The plaintiff alleged that he reported the harassment to coaches who failed to intervene and, according to the plaintiff, eventually kicked him off the team and stripped him of his scholarship to protect the top two runners, who plaintiff alleged were involved in the harassment. The

plaintiff brought Title IX claims against the university for its failure to address the harassment and for alleged retaliation arising from the plaintiff's dismissal from the team and loss of scholarship. The district court dismissed the plaintiff's claims, and the plaintiff appealed.

On appeal, the Ninth Circuit first considered whether Title IX's prohibition on sex discrimination includes a prohibition on discrimination based on perceived sexual orientation. Relying primarily on the Supreme Court's reasoning in *Bostock*, the Ninth Circuit held that harassment of a man based on perceived sexual orientation as gay (even if the perception is inaccurate) necessarily implicates sex because the harasser would not similarly harass a woman for being sexually attracted to men; therefore, the victim's status as male is integral to the perceived sexual orientation harassment. Additionally, the court held that harassment based on perceived sexual orientation constitutes a form of gender stereotyping—long recognized as a species of sex discrimination—insofar as it is tantamount to harassment based on the victim's failure to conform to the harasser's stereotype of what is or is not “masculine” behavior.

As the court explained: “Here, the harassment allegedly stemmed from the belief that the male Plaintiff was attracted to men instead of women. That harassment is motivated by the stereotype that men should be attracted only to women.”

Despite concluding that perceived sexual orientation harassment is covered by Title IX as a form of sex discrimination, the court nonetheless held that the plaintiff failed to state a viable claim against the university for its alleged deliberate indifference to the harassment. Applying the elements of the Title IX deliberate indifference framework established by the Supreme Court in the 1999 decision *Davis v. Monroe County Board of Education*, the court held that, to recover money damages against the university, the plaintiff also had to plead and eventually prove that the harassment deprived him of educational opportunities or benefits. Importantly, the plaintiff did not plead that the harassment affected his grades (to the contrary, the plaintiff pleaded that his grades were excellent) nor did the plaintiff plead that the harassment stopped him from attending practice, events, or other opportunities at the school; therefore, the court held that plaintiff failed to plead the necessary connection between the harassment and a deprivation of access to educational opportunities. As a result, the court upheld the dismissal of plaintiff's claim against the university for its alleged deliberate indifference to the harassment.

With regard to the plaintiff's Title IX retaliation claim, however, the court reversed the district court's dismissal and reinstated the claim. The court held that because perceived sexual orientation harassment is covered by Title IX, the plaintiff engaged in protected activity when he reported the harassment to his coaches. The court also concluded that the relatively short temporal proximity (three weeks) between plaintiff's last report of harassment and the coaches' decision to dismiss him

from the team and remove his scholarship could give rise to an inference the coaches were retaliating against the plaintiff in an attempt to protect the harassers from getting in trouble.

### **What this means more broadly**

*Grabowski* is consistent with recent decisions from some federal courts that have construed Title IX broadly as a remedial law, often applying the reasoning from *Bostock* and other Title VII cases in the Title IX context, without meaningful distinction. See, e.g., *Grimm v. Gloucester County School Board* (4th Cir. 2020). On the other hand, *Grabowski* is in tension with recent decisions from other federal courts that have been cautious in applying *Bostock's* reasoning in the Title IX context because of important differences in the statutes' language and Title IX's status as Spending Clause legislation. See, e.g., *Adams by and Through Kasper v. School Board of St. John's County* (11th Cir. 2022). Supreme Court resolution will eventually be necessary to address the differences in these lines of authority.

### **What this means to you**

*Grabowski* is controlling for, and will have an immediate impact on, colleges and universities located in the states of the Ninth Circuit: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. To the extent they have not already done so, such institutions (unless they are religious in nature and claim a Title IX religious exemption) should make clear that perceived sexual orientation discrimination is a form of sex discrimination covered by applicable sexual harassment policies and should investigate and adjudicate reports of perceived sexual orientation in the same way as other forms of sexual harassment. Institutions should also be mindful that any adverse action taken against a student in proximity to a report of sexual harassment could give rise to a reasonable inference of retaliation, especially if the adverse action is not strongly supported by non-retaliatory reasons. Additional training may be merited for coaches and advisors of other extracurricular activities on how to escalate reports of student-on-student sexual harassment to Title IX Coordinators and other institutional officials with authority to take corrective action.

### **Contact us**

For more information about the implications of this ruling for your institution, please contact Derek Teeter, Michael Raupp, or your Husch Blackwell attorney. Husch Blackwell regularly publishes updates on industry trends and new developments in the law for our clients and friends. Please fill out this quick form if you would like to receive electronic updates and newsletters.

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[1] *Grabowski* was decided at the initial pleading stage where courts are required to accept the plaintiff's factual allegations as true. At that stage, the university and coaches did not yet have an opportunity to directly refute the plaintiff's allegations.