PULLMAN &COMLEY

Making Bad Choices: TITLE IX, TITLE VII AND LUDLOW V. NORTHWESTERN UNIVERSITY

Education Law Notes

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A prior post considered the case of Ha v. Northwestern University, in which the plaintiff claimed that Northwestern had violated Title IX by insufficiently disciplining one of its professors, Peter Ludlow, despite concluding that he had gotten Ha, a freshman, too intoxicated to offer "meaningful consent" and had then made inappropriate sexual advances. Surprisingly, despite its findings, the University did not seek to terminate Ludlow. Equally surprising, rather than thanking providence, or at least his attorney, for keeping his job, Ludlow filed suit against Northwestern for allegedly violating Title IX.

Playing the pot to Ha's kettle, Ludlow characterized himself as the victim, claiming that Ha's lawsuit was part of an attempt to secure "academic advantages," money, and "free tuition." He also blamed her lawsuit for encouraging "'radical feminist and women's groups'" to call for his discharge, which groups "'assisted in planning actions against'" him, including disrupting his classes. In response to this outcry, Northwestern requested that Ludlow not teach any classes during the Spring 2014 quarter, with the understanding that he could continue his research, writing, and advising and would be paid. Ludlow agreed, on the condition that Northwestern make no comment other than that he was "not teaching spring quarter." The school accepted this condition, then promptly announced that it had placed Ludlow on a leave of absence.

Complicating matters for Ludlow, soon after Ha's lawsuit was filed, a graduate student with whom he had had "a consensual, romantic relationship for approximately three months," claimed that "Ludlow had non-consensual sex with her on one occasion while they were dating." Northwestern responded by retaining an investigator, whose objectivity Ludlow subsequently derided. Although the investigator ultimately found insufficient evidence of the non-consensual sex -- Ludlow having produced an alibi for the night on which it purportedly occurred -- she then expanded the scope of the investigation.

In the course of doing so, the investigator also absolved Ludlow of violating Northwestern's prohibition against professors dating students because he neither taught nor evaluated his accuser. In a peculiar twist, however, she concluded that although the relationship was consensual, and despite the fact that Ludlow had no supervisory authority over the student, he had nonetheless violated Northwestern's sexual harassment policy because "he had unequal power in the relationship based on his purchase of expensive dinners . . . and the exercise of his 'charm.'"

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Although one might interpret such reasoning as an end in search of a means, on August 28, 2015, a federal judge sided with Northwestern. [Link to decision] The court rejected Ludlow's reliance upon Title IX, which prohibits gender bias against students or retaliation against non-students for opposing such bias. The court held that his claim was actually one for *employment* discrimination and thus preempted by Title VII, which proscribes gender-based animus in the workplace. The court reasoned that both the investigation and its outcome were predicated upon Ludlow's "status as a professor," and it cited Ludlow's assertions that he had suffered "a materially adverse employment action," "'changes to [his] work conditions,'" and a diminution of his "'future career prospects.'"

Even in the absence of preemption, the court faulted Ludlow's failure to establish "a causal connection between his treatment and gender bias." For example, nothing suggested that Ludlow's gender, rather than the allegations of sexual misconduct, triggered Northwestern's investigation, and there was no claim that a female employee would have been treated more favorably under similar circumstances. The court further held that Title IX does not create a private, disparate-impact cause of action. Thus, even if males bore the brunt of adverse disciplinary determinations, it was legally irrelevant.

So What Does It Mean?

Ludlow serves as an ironic counterpoint to Ha. The two cases shared both a defendant, Northwestern, and a factual nexus; they both arose from the University's questionable decisions; they both alleged violations of Title IX; and although Ludlow claimed Northwestern had gone too far, while Ha complained it had not gone far enough, they both succumbed to pretrial motions. As such, they join a growing line of cases that underscore the difficulty of perfecting Title IX claims against educational institutions.

Ludlow, of course, had a greater legal burden, for unlike Ha, he had to deal with the specter of Title VII preemption, an impediment he was unable to overcome. The dismissal of his case, then, reflects the importance of educational institutions determining whether an employee has chosen correctly between Title VII and Title IX when challenging what he or she perceives to be a school's gender bias, particularly given that as we have previously discussed, in certain circumstances, relying upon Title VII rather than Title IX can prove equally fatal to an employee's claim.

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