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The Proactive Approach to Title IX Retaliation Claims

Jeffrey Douglas Jones
Barran Liebman LLP

Title IX of the Education Amendments of 1972 provides: "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." To enforce Title IX, the United States Department of Education maintains an Office for Civil Rights (OCR), with 12 enforcement offices throughout the country and a headquarters in Washington, D.C. Title IX covers approximately 16,000 local school districts; 3,200 colleges and universities; and 5,000 for-profit schools as well as libraries and museums.

Like other antidiscrimination laws, Title IX also prohibits retaliation. Recipients of Title IX funds "may not retaliate against any person because he or she opposed an unlawful educational practice or policy, or made charges, testified or participated in any complaint action under Title IX."[1] But while the basic idea of retaliation is simple—don't punish individuals for complaining of or opposing discrimination—in educational contexts, retaliatory behavior and routine academic evaluation often look the same.

To make out a prima facie case of retaliation, a plaintiff must show that (a) he or she was engaged in protected activity, (b) he or she suffered an adverse action, and (c) there was a causal link between the two. In the employment context, retaliation involves an employee who suffers an adverse action, such as demotion or termination, by a supervisor. In educational contexts, retaliation might also involve two faculty members, a teacher and a student, or even two students. And the "adverse action" might come in a much "softer" form, for example, in negative academic or scholarly evaluation, perceived neglect, or an uneven distribution of departmental resources.

This article takes a close look at Title IX retaliation claims and offers guidance on how educational institutions can protect faculty, students, and staff.

Emeldi v. University of Oregon

Emeldi v. University of Oregon, 698 F.3d 715 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1997 (2013), illustrates how difficult it can be to spot retaliation claims in the context of education.

Monica Emeldi alleged that the University of Oregon prevented her from completing her Ph.D. in education after she had complained about the lack of support for female Ph.D. candidates. In addition, Emeldi had given the dean of the college a memo summarizing students' concerns about the absence of female tenure-track faculty. Emeldi claimed that copies of the memo were distributed to the faculty, and as a result, her dissatisfaction with the department was "common knowledge."

Meanwhile, Emeldi's progress in the dissertation program stumbled. First, Emeldi's original dissertation advisor went on sabbatical. Emeldi felt that her new dissertation advisor, Dr. Horner, treated his male students more favorably than her and other female students. In particular, Emeldi alleged "that Horner often ignored her and did not make eye contact with her; that, when Emeldi attended Horner's group meetings with his graduate students, either she was not on the agenda, or no substantial or meaningful work of hers was discussed; and that Horner's male students had opportunities that were not available to his female students, such as access to more and better resources, including more office space and better technology for collecting data."

Dr. Horner had a different explanation for Emeldi's troubles: she had refused to follow his instructions regarding the changes needed to her dissertation. A few weeks after she refused to make the changes, Horner resigned as Emeldi's dissertation advisor.

The *Emeldi* case illustrates how ordinary academic conduct can be seen as retaliation. Horner's choice to resign as Emeldi's advisor seems like

CONTINUED ON PAGE 4

✦ In This Issue

CONTINUED FROM PAGE 1

an obvious, rational one. The close supervision required to earn a Ph.D. is difficult when the faculty-student relationship itself has failed. Forcing Emeldi or Horner to continue the relationship would have made matters worse. Indeed, requiring Emeldi to continue to work with Horner after she accused him of discrimination would look even more strange in a court of law.

Nonetheless, the facts fit the basic pattern of retaliation. Emeldi suffered an adverse action (loss of an advisor) that was causally related to something she had done. The only question is whether that "something" was the failure to heed Horner's dissertation advice or the fact that she had complained about the lack of female faculty and the lack of support for female students. Refusing to accept Horner's advice is not protected activity. Complaining about the lack of female faculty, it turns out, is protected activity.

Emeldi sought a new dissertation chair, but did not find one. She asked 15 other faculty members to serve as chair, but all of them declined. They either said they were too busy or claimed to lack the qualifications needed to supervise her research. Emeldi would not be the first Ph.D. candidate who failed to advance due to a communications breakdown with faculty. But the faculty's awareness of her complaints and her allegations against Horner permits what looks like ordinary evaluation to be interpreted as retaliation. Here, what can be explained as academic misfitting can also serve as additional evidence: retaliation squared, in the form of departmental blackballing.

The Ninth Circuit Court of Appeals ultimately determined that Emeldi had provided sufficient evidence to survive the University of Oregon's motion for summary judgment. The court cited the proximity in time between Emeldi's complaints of unequal treatment and Horner's resignation as Emeldi's dissertation chair; Horner's resignation without providing assistance in securing a replacement chair; and Emeldi's inability to secure a replacement dissertation chair.

Whatever the true motives of Horner and the University of Oregon's Education Department, the university failed to meet a different obligation of anti-retaliation law: to openly protect individuals who have come forward with complaints of discrimination. As the OCR writes its guidance on Title IX retaliation, "[i]ndividuals should be commended when they raise concerns about compliance with Federal civil rights laws, not punished for doing so."[2]

The OCR's emphasis on the duty to protect individuals who complain of discrimination—not just not retaliate against them—highlights that non-retaliation requires actions, not simply omissions. Here are three actions that, had they been taken, might have spared both Emeldi and the University of Oregon at least some of their troubles.

Hear Protected Activity

It's possible that neither Horner nor the UO Education Department connected the academic evaluation of Emeldi with her expressed concerns about gender equity. Even if they forced Emeldi from the program through deliberate neglect, the faculty might have thought they had the right to do so—perhaps even an obligation to do so, as part of their duty to honestly evaluate Emeldi's academic performance. In lots of other circumstances, the department's treatment of Emeldi would be routine. Students sometimes fail at school, and they have to be told.

But this situation also shows that the University of Oregon had a "hearing" problem. While faculty at large may not be expected to immediately identify protected activity or to know when civil rights obligations have been triggered, someone should have heard Emeldi and understood the significance of her complaints.

In overturning the lower court, the Ninth Circuit said, "It is a protected activity to 'protest or other wise oppose unlawful . . . discrimination.'"

Hearing protected activity is particularly complicated in academic settings. Indeed, the lower court in the *Emeldi* case granted summary judgment to the University of Oregon because it determined that Emeldi *had not engaged in any protected activity*. In overturning the lower court, the Ninth Circuit said, "It is a protected activity to 'protest or other wise oppose unlawful . . . discrimination.' In the Title IX context, 'speak[ing] out against sex discrimination'—precisely what Emeldi says that she did—is protected activity."

Had Emeldi limited her complaints to the absence of female tenured faculty in her department, the court probably still would have found the complaints to be protected activity. But the University of Oregon should have heard alarm bells when Emeldi began to make specific allegations of sex discrimination against Horner, as he took adverse actions against her in the form of negative evaluation.

Detecting possible violations is what clear complaint procedures are for. In its guidance, the OCR reiterates a key element of retaliation law 101: adopt a communications strategy for ensuring that information concerning retaliation is continually being conveyed to employees (and students and parents), including incorporation of the prohibition into relevant policies and procedures. "Hearing" protected activity begins with ensuring that everyone within the academic community knows how to report indications of potential problems.

CONTINUED ON PAGE 5

CONTINUED FROM PAGE 4

Protect, Don't Isolate

But hearing protected activity isn't the sole or even the most troublesome aspect of preventing retaliation. Whatever the motives of Horner and the UO Education Department, they chose to isolate rather than protect. Horner resigned as Emeldi's chair, and the rest of the faculty refused to work with her. These actions might ultimately be proved to be acceptable academic behavior motivated by reasons other than discrimination or retaliation. But because these decisions were made in close proximity to Emeldi's complaints, the University of Oregon made it nearly impossible to win on summary judgment.

The Education Department also should not have been expected to be the first line of defense in carrying out its Title IX obligations. Emeldi's concerns should have reached the school's Title IX coordinator, who in turn would have reminded the faculty of its non-retaliation duties.

So far this discussion has addressed only the "don't retaliate" prong of non-retaliation. To adequately protect Emeldi, the university needed to tell her three things: (1) her complaint had been heard; (2) the school absolutely prohibits retaliation for coming forward with discrimination complaints; and (3) what the school would do to address her complaint.

The "protection" prong of non-retaliation is harder to implement for several reasons. First, it calls upon institutions to put aside the adversarialism that is natural when the prospect of litigation looms, and to make safe a community member who, in all likelihood, will sue you later. Second, adequately protecting individuals who complain of discrimination is the beginning of a process that is supposed to be transparent. Recall that Title IX requires not just protection of victims of discrimination and retaliation, but also protection of the entire academic community. A transparent process for addressing discrimination and retaliation often requires sharing proper information with the entire academic community—even when the truth that comes out is unflattering.

Distinguish Evaluation from Civil Rights Process

Suppose that the University of Oregon had immediately heard and followed up on Emeldi's complaints. Should the school have advised Horner not to resign as Emeldi's chair? Should it have required Horner or another faculty member to work with Emeldi to complete her degree? Should it have taken perhaps more drastic action, such as making sure Emeldi matriculated in due course?

Discrimination complaints always put pressure on evaluative processes and the people charged with evaluation. This is true whether those involved are faculty and student, tenured faculty and untenured faculty, or supervisor and supervisee. Institutions may be tempted to use discretion within the evaluative process as a bargaining chip to resolve complaints or to avoid litigation: withdraw or withhold discipline, alter grades, provide a new or additional process.

Sometimes this can be the right decision, only because under the circumstances it is the right thing to do. But in general, processes of evaluation, such as the informal adverse actions experienced by Emeldi, should continue because they have to continue.

Distinguishing Emeldi's negative evaluations from her civil rights process would have helped both parties. Maintaining the distinction would have given greater context to Emeldi's "constructive discharge" from the university. The University of Oregon may have to explain how a student in a Ph.D. program with acceptable grades can be left without an advisor and therefore must leave without a degree. Academicians will recognize this as a common occurrence. A jury may not, giving legs to suspicions of retaliation.

Now is the time for Title IX recipients to review their policies and procedures to prevent Title IX retaliation.

Conclusion

Now is the time for Title IX recipients to review their policies and procedures to prevent Title IX retaliation. On April 24, 2013, the OCR issued its first public guidance on Title IX retaliation—a signal that OCR is concerned.[2]

The OCR uses a range of tools to encourage compliance. The OCR prefers that offending institutions make voluntary commitments to take specific measures to remedy noncompliance. These commitments often come in the form of resolution agreements that are later made public. But the OCR can also require institutions to train or retrain employees, improve communications regarding non-retaliation rights, and undertake a public outreach strategy to reassure the public of its non-retaliation commitments. Of course, for intransigent recipients, the OCR has other options: it may initiate an administrative enforcement action to suspend, terminate, or refuse to grant financial assistance from the U.S. Department of Education. ✦

Jeff Jones, an associate professor of law at Lewis & Clark Law School, is of counsel at Barran Liebman LLP, which represents employers in labor and employment law matters.

Endnotes

1. http://extension.usu.edu/diversity/files/uploads/10ATitleIX.pdf. See also http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201304.html.

2. http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201304.html.

3. http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201304.html.

Back to page 1