Catholic University Law Review

Volume 68
Issue 2 *Spring 2019*

Article 10

5-5-2019

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IS VII > IX?: DOES TITLE VII PREEMPT TITLE IX SEX DISCRIMINATION CLAIMS IN HIGHER ED EMPLOYMENT?

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"The higher, the fewer."[1] In 1970, testifying before the Subcommittee on Education, Dr. Ann Sutherland Harris of Columbia University summarized the state of female professors in higher education: "The higher, the fewer. The higher in terms of level of education, the higher in terms of faculty rank, the higher in terms of recognized responsibility, the higher in terms of salary, prestige and status, the fewer are the women."[2]

Across all job sectors, women working full-time earned about 80 percent of what men earned in 2016.[3] Within higher education this gender gap persists in salary, hiring, promotions, and other aspects of academic employment.[4] In 2015, male professors at four-year nonprofit colleges earned an average of $18,200 more than female professors, and those that were full professors outnumbered

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1. *Discrimination Against Women, Hearing on Section 805 of H.R. 16098 Before the Spec. Subcomm. on Educ. of the H. Comm. on Educ. & Labor*, 91st Cong. 238 (1970) (statement of Dr. Ann Sutherland Harris, Assistant Professor of Art History, Columbia University).

2. *Id.*

3. JESSICA L. SEMEGA ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2016 2 (Sept. 2017), https://census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf. In 2016, the average American woman working full-time earned $41,554; her male counterpart earned $51,640. *Id.* at 6. If the average rate of change between 1960 and 2016 continues, women will not reach pay equity until 2059. AAUW, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 5 (Spring 2018), https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The-Simple-Truth. However, if the slowed rate of change from 2001 to 2017 persists, women will not reach pay equity until 2106. *Id.*

4. Alison Coil, *Why Men Don't Believe the Data on Gender Bias in Science*, WIRED (Aug. 25, 2017), https://www.wired.com/story/why-men-dont-believe-the-data-on-gender-bias-in-science/. The gender gap is especially prevalent in the STEM academia fields:

> A vast literature of sociology research shows time after time, women in science are deemed to be inferior to men and are evaluated as less capable when performing similar or even identical work. This systemic devaluation of women results in an array of real consequences: shorter, less praise-worthy letters of recommendation; fewer research grants, awards, and invitations to speak at conferences; and lower citation rates for their research. Such wide-ranging devaluation of women's work makes it harder for them to progress in the field.

Id.

their female counterparts more than two-to-one.[5] If a female professor sought to sue her university for sex discrimination, she could seemingly do so under Title VII of the Civil Rights Act[6] or Title IX of the Education Amendments,[7] both of which prohibit sex discrimination in higher education.[8]

Title VII of the Civil Rights Act is often lauded as the seminal legislative weapon in combatting sex discrimination.[9] Passed in 1964,[10] Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.[11] Its history, however, is unclear. According to some accounts, its drafters may not have initially contemplated sex as a protected class under the Act at all.[12]

In response to heightening racial tensions and public protests, then-President Kennedy called on Congress to enact legislation that would preempt states' Jim Crow laws and prohibit racial discrimination in public accommodations.[13] Neither the Kennedy Administration's proposed bill nor Congress's markups referenced women as a protected class; rather, they focused solely on protecting racial minorities.[14] In fact, the addition of "sex" as a protected category was,

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5. Joshua Hatch, *Gender Pay Gap Persists Across Faculty Ranks*, THE CHRONICLE OF HIGHER EDUC. (Mar. 22, 2017), http://www.chronicle.com/article/Gender-Pay-Gap-Persists-Across/239553. Conversely, "a majority of assistant professors, instructors, and lecturers are women." *Id.* Although the average female professor's salary increased by 3.1 percent in 2015—which was higher than the 2.8 percent increase for men—the gender pay gap in academia widened because male professors start with a higher average salary:

> For example, in 2014, male full professors earned $113,766. Their 2.8-percent increase added nearly $3,200 to that figure. For female full professors, who earned an average of $95,692, their 3.1-percent increase resulted in a pay increase of less than $3,000. As a result, the pay gap for full professors widened by more than $200.

Id.

6. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 241 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2012)).

7. Title IX, Education Amendments of 1972, 20 U.S.C. § 1681 (2012).

8. The Equal Pay Act also prohibits sex-based discrimination, but only in compensation. 29 U.S.C. § 206(d) (2012). This statute "provides that employers may not pay unequal wages to men and women who perform jobs that require substantially equal skill, effort and responsibility, and that are performed under similar working conditions within the same establishment." *Facts About Equal Pay and Compensation Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/publications/fs-epa.cfm (last visited Nov. 12, 2018). This Comment does not discuss or analyze the Equal Pay Act.

9. Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713, 723–24 (2015).

10. Civil Rights Act of 1964, §§ 2000e–2000e-17.

11. *Id.* § 2000e-2(a).

12. *See, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 278 (1992) (explaining that "[s]ex discrimination was almost an afterthought").

13. Thomas H. Barnard & Adrienne L. Rapp, *Pregnant Employees, Working Mothers and the Workplace—Legislation, Social Change and Where We Are Today*, 22 J.L. & HEALTH 197, 205–06 (2009).

14. *Id.*

according to some historians, a political maneuver gone amiss.[15] By this account, two days before the bill left the House of Representatives for Senate review, a staunch opponent of the then-controversial legislation proposed that the Act not only prohibit racial discrimination but also sex discrimination, hoping that this addition would prove too much for his fellow representatives to support.[16] And yet, 168 members of the House voted for this amendment,[17] which eventually formed the cornerstone of employment sex discrimination actions.

Although Title VII was expanded to proscribe sex discrimination in the workplace, its provisions expressly did not apply to female educators.[18] Eight years later, Congress manifestly reversed this educational exclusion, evincing its intent to shield women in the educational sector from discrimination.[19] In 1972, Congress passed the Equal Employment Opportunity Act to extend Title VII's protections to educational institutions.[20] Shortly thereafter, Congress passed Title IX of the Education Amendments, thereby prohibiting any educational program or activity receiving federal funding from discriminating on the basis of sex.[21] The Supreme Court expanded Title IX's enforcement in 1979, finding that Title IX also contained an implicit private right of action for damages.[22] Although Title IX was not initially read to apply to employees in higher

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15. *Compare* Catharine A. MacKinnon, *Reflections on Sex Equality under Law*, 100 YALE L.J. 1281, 1283 (1991) (arguing that "sex discrimination in private employment was forbidden under federal law only in a last minute joking 'us boys' attempt to defeat Title VII's prohibition on racial discrimination") *with* Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 460–61 (1980) (arguing that the Congressman genuinely proposed the inclusion of sex to strengthen the Act's protection of minority Americans).

16. Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1090 (5th Cir. 1975) (noting that "[i]ronically, the amendment was introduced by Representative Howard Smith of Virginia, who had opposed the Civil Rights Act, and was accused by some of wishing to sabotage its passage by his proposal of the 'sex' amendment"); EPSTEIN, *supra* note 12, at 278. Indeed,

> [O]n February 8, 1964, just two days before the bill that would later become Title VII of the Civil Rights Act moved from the House to the Senate, Representative Howard W. Smith, a vocal opponent of the Civil Rights Act, proposed that discrimination on the basis of 'sex' be added to the bill. If killing the bill was his goal, however, Representative Smith failed.

Barnard & Rapp, *supra* note 13, at 206.

17. 110 CONG. REC. 2584 (1964).

18. Civil Rights Act of 1964, §§ 2000e–2000e-17. The initial statute read "[t]his Title shall not apply to . . . an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution." *Id.*

19. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 103, 104 (1972) (codified as amended at 42 U.S.C. §§2000e–2000e-17 (2012)).

20. *Id.*

21. Title IX, Education Amendments of 1972, § 1681.

22. Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979).

education, it also did not contain any carve-out employment exceptions,[23] leading the Supreme Court to conclude eventually that Title IX also prohibited federally funded colleges from discriminating against employees on the basis of sex.[24]

Title VII and Title IX are quite similar: both seek to eliminate sex discrimination in higher education and both confer a private cause of action to complainants. However, the two Acts differ in a few aspects in their shared quest to remedy sex discrimination. And those differences are significant. For example, Title VII requires plaintiffs to file charges with the Equal Employment Opportunity Commission (EEOC) within 300 days of the alleged discriminatory act,[25] and to exhaust those administrative remedies first before filing suit.[26] In contrast, Title IX imposes no administrative exhaustion requirement,[27] allowing plaintiffs to sue directly their universities, typically within two years of the alleged discriminatory act.[28]

Employees in the education sector, therefore, can seemingly circumvent the strict filing deadlines and mandatory conciliation procedures imposed by Title VII entirely, taking a more direct route to the courthouse under Title IX. Courts, however, are split on whether plaintiffs can sue under Title IX for judicial ease. The Third Circuit recently revived this twenty-year split in *Doe v. Mercy Catholic Medical Center*,[29] and joined the First and Fourth Circuits in holding that employees in the education sector can pursue sex discrimination claims under either Title VII or Title IX.[30] The Fifth and Seventh Circuits, in contrast, have determined that Title VII preempts Title IX,[31] and "provides the exclusive

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23. *See* Title IX, Education Amendments of 1972, § 1681. *See also* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (internal citation omitted) (noting that "Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to restrict the scope of [Title IX]" solely to students). Furthermore, the "postenactment [legislative] history of Title IX . . . confirms Congress's desire to ban employment discrimination in federally financed education programs." *Id.* at 530–31.

24. *N. Haven Bd. of Educ.*, 456 U.S. at 535–36.

25. Civil Rights Act of 1964, § 2000e-5(e)(1).

26. *What You Should Know: The EEOC, Conciliation, and Litigation*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www1.eeoc.gov//eeoc/newsroom/wysk/conciliation_litigation.cfm?renderforprint=1 (last visited Mar. 11, 2018). *See also* Civil Rights Act of 1964, § 2000e-5(b)–(f).

27. *Cannon*, 441 U.S. at 706–08.

28. *Statutes of Limitation for All 50 States*, MATTHIESEN, WICKERT & LEHRER, S.C., https://www.mwl-law.com/wp-content/uploads/2013/03/statute-of-limitations-for-all-50-states.pdf (last updated Aug. 15, 2018) (showing that most states impose a two-year statute of limitation on personal injury claims).

29. 850 F.3d 545 (3d Cir. 2017).

30. *Id.* at 563–64; Preston v. Virginia *ex rel.* New River Cmty. Coll., 31 F.3d 203, 205–07 (4th Cir. 1994); Lipsett v. Univ. of P.R., 864 F.2d 881, 897 (1st Cir. 1988).

31. Waid v. Merrill Area Pub. Sch., 91 F.3d 857, 861–62 (7th Cir. 1996), *rev'd in part on other grounds*, Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009). *See also* Lakoski v. James, 66 F.3d 751, 753 (5th Cir. 1995).

remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions."[32]

This Comment explores the various considerations implicated in determining whether Title VII preempts Title IX in employment sex discrimination claims. Part I examines the statutory backgrounds of Title VII and Title IX, and compares their relative advantages and disadvantages regarding procedural requirements and remedies. Part II discusses the Supreme Court cases that have been instrumental in expanding Title IX's scope and application. Part III examines how federal circuit courts have decided whether Title VII preempts Title IX. Finally, Part IV demonstrates that, despite Title IX's ambiguity, it patently provides employee-plaintiffs a right of action to sue their universities for sex discrimination without Title VII preemption, allowing plaintiffs the opportunity to choose under which statute they would like to pursue their claims for relief.

I. STATUTORY AND PROCEDURAL BACKGROUNDS OF TITLE VII AND TITLE IX

A. Title VII

Title VII of the Civil Rights Act makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[33] Discrimination "because of sex" includes, but is not limited to, discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions[.]"[34] In 2016, there were 26,934 sex discrimination charges filed with the EEOC, constituting 29.4 percent of all charges filed with the Commission.[35]

The Supreme Court has held that employers can be vicariously liable for the discriminatory acts of their employees,[36] and that "a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer."[37] The Supreme Court has also held that "a tangible employment

32. *Id.* at 753.

33. Civil Rights Act of 1964, § 2000e-2(a)(1). Title VII also makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2(a)(2).

34. *Id.* § 2000e(k).

35. *Charge Statistics (Charges filed with EEOC)*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Mar. 11, 2018). Of the 91,503 charges filed with the EEOC in 2016, 32,309 alleged race discrimination, 9,840 alleged national origin discrimination, 3,852 alleged religion discrimination, and 3,102 alleged discrimination based on color. *Id.*

36. Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998).

37. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762 (1998).

action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[38] Any employee who believes he or she has been subjected to sex discrimination must follow strict procedures to pursue a remedy.

1. Title VII Requires Plaintiffs to Exhaust Administrative Remedies First

Title VII created the EEOC to enforce and administer its anti-discrimination provisions.[39] To enforce one's rights under Title VII, an employee cannot sue her employer directly, but must exhaust administrative remedies first.[40]

Although Title VII is federal law, its procedural requirements vary among jurisdictions depending upon the existence of a state or local agency tasked with enforcing state or local laws prohibiting employment discrimination.[41] If such Fair Employment Practice agency (FEP agency) and laws exist within the jurisdiction in which an employee intends to file suit, she must first file charges with that agency within the time limit prescribed by local law, which is at least 180 days.[42] The FEP agency then has 60 days to consider and investigate the charges; should it waive its jurisdiction over the charges, or should the 60 days expire, the employee can then file charges with the EEOC.[43] If an employee's charges are not concurrently filed with the EEOC, she has 300 days from the date of the alleged discriminatory act to submit them to the EEOC.[44]

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38. *Id.* at 761.

39. *See* Civil Rights Act of 1964, §§ 2000e-4(a), (g). "The Commission is empowered . . . to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title." *Id.* § 2000e-5(a). "The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter." *Id.* § 2000e-12(a).

40. *See id.* §§ 2000e-5(c), (e).

41. *Id.* § 2000e-5(c).

42. *Id.*; 29 C.F.R. § 1601.13 (2016). *See also Time Limits for Filing a Charge*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/employees/timeliness.cfm (last visited Feb. 4, 2019).

43. Civil Rights Act of 1964, § 2000e-5(c). Many FEP agencies allow cross-filing, wherein the agencies automatically share the charges with the EEOC upon initial filing; when the sixty days expire or the agency's proceedings conclude, the charges are already filed with the EEOC. 29 C.F.R. § 1601.13(b)(1).

44. 29 C.F.R. § 1601.13(b)(1). "If the FEP agency proceedings have terminated, the charge may be timely filed with the Commission within 30 days of receipt of notice that the FEP agency proceedings have been terminated or within 300 days from the date of the alleged violation, whichever is earlier." *Id.* § 1601.13(b)(2)(ii). If the FEP agency has not concluded its proceedings,

> [T]he charge may be presented to the Commission within 300 days from the date of the alleged violation. Once presented, such a charge will be deemed to be filed with the Commission upon expiration of 60 . . . days after [the FEP received the charges] or upon the termination of the FEP agency proceedings, or upon waiver of the FEP agency's right to exclusively process the charge, whichever is earliest. To be timely, however, such filing must be effected within 300 days from the date of the alleged violation.

Id. § 1601.13(b)(2)(iii).

If an employee seeks to file suit in a jurisdiction without an FEP agency, she must file charges directly with the EEOC within 180 days of the alleged discriminatory act.[45] Within ten days of the EEOC's receipt of the charges, it will serve the respondent a copy of the charges.[46] For 180 days following the filing of charges, the EEOC exercises exclusive jurisdiction to investigate their validity.[47]

"If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action."[48] The employee will receive a Notice of Dismissal and Notice of Rights informing her that she can file a complaint in federal court within 90 days.[49]

If, however, following its investigation the EEOC determines "that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[50] Alternatively, if the EEOC determines that judicial action is required, it is authorized to bring suit against the employer, and the employee may choose to intervene.[51]

If, at the end of the 180-day period, the EEOC has not successfully concluded its investigation, conciliation process, or suit on behalf of the employee, it may continue working on the employee's case;[52] however, the EEOC will no longer have exclusive jurisdiction over the matter and, if the employee demands, it must issue her a right-to-sue letter.[53]

Once the EEOC issues the employee a right-to-sue letter, she has 90 days to file a Title VII action in court.[54] The employee's claims are then entitled to *de novo* review, even if the EEOC failed to conclude there was reasonable cause to believe the discriminatory act occurred.[55] However, she must affirmatively state

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45. Civil Rights Act of 1964, § 2000e-5(e)(1).

46. 29 C.F.R. § 1601.14(a).

47. Civil Rights Act of 1964, §§ 2000e-5(b), (e).

48. *Id.* § 2000e-5(b).

49. *What You Can Expect After a Charge is Filed*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/employers/process.cfm (last visited Mar. 11, 2018).

50. Civil Rights Act of 1964, § 2000e-5(b). The EEOC encourages employees and employers to cooperate throughout the informal conciliation process, and to make offers and counter-offers to avoid formal, costly litigation. *Resolving a Charge*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/employers/resolving.cfm (last visited Mar. 11, 2018).

51. Civil Rights Act of 1964, § 2000e-5(f)(1).

52. *See* Martini v. Fed. Nat'l Mortg. Ass'n, 178 F.3d 1336, 1346 (D.C. Cir. 1999) (finding that "Congress well understood that the EEOC's limited resources preclude it from investigating every charge within 180 days").

53. *Filing a Lawsuit*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/employees/lawsuit.cfm (last visited Mar. 11, 2018).

54. Civil Rights Act of 1964, § 2000e-5(f)(1).

55. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 799 (1973). The Court explained that:

in her complaint that she exhausted administrative remedies with the EEOC before filing an action in court.[56]

2. Title VII's Burden-Shifting Framework

Plaintiffs can prove sex discrimination by presenting direct evidence of employers' discriminatory motive and actions.[57] The Supreme Court, however, has recognized that it can be difficult for an employee to establish that an employer acted with a subjective, discriminatory intent toward an employee.[58] Therefore, in *McDonnell Douglas Corp. v. Green*,[59] the Court created the burden-shifting framework for courts to apply in Title VII disparate treatment cases.[60] Under the *McDonnell Douglas* framework, plaintiffs lacking direct evidence of employers' sex-based discriminatory intent can still prevail by presenting circumstantial evidence sufficient for the fact-finder to infer discriminatory intent.[61] Thus, plaintiffs must prove by a preponderance of the evidence, through either direct evidence or circumstantial evidence under the

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> The Act does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause, and we will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts. The Commission itself does not consider the absence of a "reasonable cause" determination as providing employer immunity from similar charges in a federal court [under] 29 CFR § 1601.30.

Id. at 798–99.

56. *Federal EEO Complaint Processing Procedures*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/publications/fedprocess.cfm (last visited Mar. 11, 2018). The American Association of University Women, an advocacy nonprofit that "help[s] students, faculty, staff, and administrators in higher education challenge discriminatory practices—practices such as sexual harassment, denial of tenure or promotion, pay inequality, and inequality in women's athletic programs," counsels female faculty to be aware of these strict timetables to avoid dismissal for lack of administrative exhaustion. *Legal Advocacy Fund*, AAUW-CABRILLO-DIEGO (CA) BRANCH, http://www.aauwcabrillo-diego.org/index.php/advocacy-2/legal-advocacy-fund (last visited Jan. 28, 2019).

57. *See* Wagner v. Gallup, Inc., 788 F.3d 877, 883 (8th Cir. 2015) (calling this the "[d]irect method").

58. *See generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–07 (1973).

59. *Id.*

60. *Id.* at 801–05. In *McDonnell*, an African American mechanic and lab technician was laid off in a general reduction-in-force. *Id.* at 794. Working with other civil rights activists, he staged a "lock-in," in which five teams of four cars strategically blocked major intersections and entrances to the employer, causing significant traffic and delay. *Id.* at 794–95. Three weeks later, the employer advertised that it was looking to hire new mechanics, so the former employee reapplied. *Id.* at 796. When the employer refused to rehire him, citing the "lock-in" incident, he filed a formal charge with the EEOC, "claiming that [the employer] had refused to rehire him because of his race and persistent involvement in the civil rights movement, in violation of §§ 703 (a)(1) and 704 (a) of the Civil Rights Act of 1964." *Id.*

61. *See* McCoy v. City of Shreveport, 492 F.3d 551, 556 (5th Cir. 2007) (applying the *McDonnell Douglas* burden-shifting analysis). Circumstantial evidence, the Court explained, "is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 508 n.17 (1957).

McDonnell Douglas framework, that they were discriminated against on the basis of sex.[62]

Under the burden-shifting framework, an employee-plaintiff must first make a prima facie case of discriminatory motive. She can do so by demonstrating that "she (1) is a member of a protected class, (2) was qualified, (3) suffered an adverse employment action, and (4) can provide facts that give rise to an inference of unlawful sex . . . discrimination."[63] To create the inference of sex discrimination, an employee-plaintiff need only demonstrate that sex was a "motivating factor" for the employer's action.[64] This prima facie case creates a rebuttable presumption that the employer engaged in sex discrimination.[65]

To rebut this presumption, the employer has the opportunity to "articulate a legitimate, nondiscriminatory reason for its adverse employment action."[66] Such reasons might include failure to meet company performance standards, poor supervisor reviews, or inability to work with coworkers.[67]

If the employer can demonstrate a nondiscriminatory motive, "the plaintiff must then put forward sufficient evidence to demonstrate that the employer's proffered explanation was a pretext for discrimination."[68] If a jury finds the

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62. Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003).

63. Butler v. Crittenden Cty., 708 F.3d 1044, 1050 (8th Cir. 2013). Adverse employment action can include firing, demoting, reducing compensation, or denying promotion to an employee. *Retaliation Claims on the Rise: What is an Adverse Employment Action?*, KAUFF MCGUIRE & MARGOLIS, LLP, https://www.kmm.com/articles-256.html (Dec. 31, 2002).

64. Civil Rights Act of 1964, § 2000e-2(m) (providing that "[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice"). Any consideration of sex, or sex-related characteristics, such as pregnancy or motherhood, constitutes a motivating factor under Title VII, regardless of the relative weight afforded to sex as compared to other factors considered in the employment decision. *Id.* § 2000e(k).

65. *See* Fatemi v. White, 775 F.3d 1022, 1040 (8th Cir. 2015).

66. Wagner v. Gallup, Inc., 788 F.3d 877, 885 (8th Cir. 2015) (quoting Goins v. West Grp., 635 N.W.2d 717, 724 (Minn. 2001)).

67. *See, e.g.*, *id.* at 886 (finding that an employer-defendant "met its burden of offering legitimate, nondiscriminatory reasons for" the employee-plaintiff's dismissal because he "was not meeting its reasonable expectations . . . as evidenced by his diminished internal ratings, his low utilization rate, and . . . reputation for being self-oriented, [and] difficult to work with").

68. *Id.* at 885. In other words, the employee-plaintiff must show that she was the victim of sex discrimination "by showing that the employer's proffered explanation is unworthy of credence." Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981). In *Reeves v. Sanderson Plumbing Products, Inc.*, the Supreme Court explained that:

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt."

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (quoting Wright v. West, 505 U.S. 277, 296 (1992)).

employer's purported reasoning implausible, "discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision."[69]

In totality, under the *McDonnell Douglas* structure, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[70] Although the burden of production jumps from plaintiff to defendant to plaintiff, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." [71] This shifting framework "allows a plaintiff to prove [her] case by way of process of elimination, 'disprov[ing] the most obvious legitimate bases for the employment decision, thereby allowing the inference that the decision was motivated by discrimination.'"[72]

3. Title VII Remedies

Under Title VII, courts are given broad discretion to award appropriate remedies for instances of intentional sex discrimination.[73] For example, courts may grant employees equitable remedies, such as:

> enjoin[ing] the respondent from engaging in such unlawful employment practice, and order[ing] such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.[74]

Prior to the passage of the Civil Rights Act of 1991,[75] courts could only grant Title VII claimants equitable remedies.[76] Now, however, victims of intentional sex discrimination can receive both compensatory and punitive damages in addition to the equitable remedies discussed above.[77] As amended, Title VII allows an employee to request a jury trial when seeking monetary damages.[78]

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69. *Id.*

70. *Id.* at 148.

71. *Id.* at 143 (quoting *Tex. Dep't of Cmty. Affairs*, 450 U.S. at 253).

72. Wagner v. Gallup, Inc., 788 F.3d 877, 885–86 (8th Cir. 2015) (quoting Friend v. Gopher Co., 771 N.W.2d 33, 37 (Minn. Ct. App. 2009)).

73. *See* Civil Rights Act of 1964, § 2000e-5(g).

74. *Id.* Courts will only grant equitable remedies if a plaintiff is currently employed by or expects to return to the employer. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 103 (1983).

75. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981 (2012)).

76. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 533–34 (1999).

77. *See* Civil Rights Act of 1991, § 1981a(a). These monetary damages are available even when the discrimination complained of did not cause any monetary loss, such as discharge or differential pay. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 254 (1994).

78. *See* Civil Rights Act of 1991, § 1981a(c).

Available compensatory damages include damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses[.]"[79] Although punitive damages are also available, they are more difficult to attain because an employee-plaintiff must demonstrate an employer's state of mind. Specifically, she must show that her employer subjectively acted "with malice or with reckless indifference" towards her Title VII rights.[80]

Employee-plaintiffs must be aware that compensatory and punitive damages under Title VII are statutorily capped on a sliding scale, where the award depends on the size of the employer-defendant.[81] For employers with 15 to 100 employees, aggregated compensatory and punitive damages are capped at $50,000.[82] For employers with 101 to 200 employees, aggregated compensatory and punitive damages are capped at $100,000.[83] Employers with 201 to 500 employees can only pay up to $200,000, and employers with 500 or more can only pay up to $300,000 in compensatory and punitive damages.[84]

B. Title IX

Title IX of the Education Amendments provides that "[n]o 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[.]"[85] Title IX filled the void left by Title VII of the Civil Rights Act. Intended to simultaneously remedy and prevent employment discrimination, Title VII explicitly exempted educational institutions, denying its protection to female professionals in academia.[86]

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79. *Id.* § 1981a(b)(3).

80. *Kolstad*, 527 U.S. at 533–34. Punitive damages are not available for plaintiffs suing federal, state, or local governments. Civil Rights Act of 1991, § 1981a(b)(1). This means that faculty members at public universities cannot receive punitive damages.

81. *Id.* § 1981a(b)(3).

82. *Id.* § 1981a(b)(3)(A).

83. *Id.* § 1981a(b)(3)(B).

84. *Id.* § 1981a(b)(3)(C)–(D). Equitable damages such as front- and back-pay are excluded from the calculation of compensatory and punitive damages when determining the applicable damages cap. *Id.* § 1981a(b)(2). In a Title VII jury trial, a court cannot inform the jury of the statutory cap on damages. *Id.* § 1981a(c)(2). If the jury concludes that the plaintiff is entitled to compensatory and punitive damages in excess of the applicable limit, the court can reduce them to satisfy the statutory cap. *See generally id.* § 1981a(b)(3).

85. Title IX, Education Amendments of 1972, § 1681(a).

86. *See* Civil Rights Act of 1964, § 701(i). The initial statute read "[t]his Title shall not apply to . . . an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution." *Id. See also*, 118 CONG. REC. 5807 (1972). Senator Bayh, author of Title IX, emphasized that it was intended to "close the loophole" left in the Civil Rights Act of 1964, which "unfortunately . . . does not apply to discrimination on the basis of sex." *Id.* On his website, Senator Bayh recalls that he was inspired to add Title IX to the Higher Education Act because his wife "educated [him] about discrimination against women in

Title IX is "patterned after Title VI of the Civil Rights Act of 1964 . . . ."[87] Both Title IX and Title VI "condition an offer of federal funding on a promise by the recipient not to discriminate, in what is essentially a contract between the government and the recipient of funds."[88] Title IX's purpose therefore, like that of Title VI, is to "avoid the use of federal resources to support discriminatory practices . . . [and] to provide individual citizens effective protection against those practices."[89] As a conditional spending statute, Title IX's only express remedy is to terminate federal funding to any education program or activity that violates its terms.[90] However, once the Supreme Court clarified that Title IX also provides an implicit private right of action,[91] it has become more and more like Title VII of the Civil Rights Act, with a few key exceptions.

1. Unlike Title VII, Title IX Does Not Require Employees to Exhaust Administrative Remedies

In *Cannon v. United States*,[92] the Supreme Court clarified that employees seeking to sue their employers under Title IX for sex discrimination do not need to exhaust administrative remedies before commencing private action.[93] When the Court heard *Cannon*, the Department of Health, Education, and Welfare (HEW) was tasked with enforcing compliance with Title IX by investigating complaints and threatening violators with loss of federal funding; however, HEW's procedures did "not assure those persons the ability to activate and

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higher education after her experience being told by the University of Virginia that 'women need not apply.'" Birch Bayh, *Title IX—A Brief Legislative History*, BIRCH BAYH, http://www.birchbayh.com/id8.html (last visited Mar. 11, 2018).

87. Cannon v. Univ. of Chi., 441 U.S. 677, 684–85 (1979). Title VI, another conditional spending statute, provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2012).

88. *Title IX Legal Manual*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/crt/title-ix#I.%20Overview%20of%20Title%20IX:%20Interplay%20with%20Title%20VI,%20Section%20504,%20Title%20VII,%20and%20the%20Fourteenth%20Amendment (last visited Mar. 11, 2018). Therefore, "[b]ecause of this close connection between the statutes, Title VI legal precedent provides some important guidance for the application of Title IX." *Id*; *see, e.g.*, *Cannon*, 441 U.S. at 694–98.

89. *Cannon*, 441 U.S. at 704.

90. Title IX, Education Amendments of 1972, § 1682. *See also*, 117 CONG. REC. 39252 (1971). When discussing Title IX, Representative Mink explained:

> Any college or university which has [a] . . . policy which discriminates against women applicants . . . is free to do so under [Title IX] but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access.

Id.

91. *Cannon*, 441 U.S. at 717.

92. *Id.* at 677.

93. *See id.* at 705–08.

participate in the administrative process contemplated by the statute."[94] Therefore, the Court found that "[b]ecause the individual complainants cannot assure themselves that the administrative process will reach a decision on their complaints within a reasonable time, it makes little sense to require exhaustion."[95]

Furthermore, the statute of limitations for Title IX actions is, in most cases, *considerably* longer than the 180 days afforded to employee-plaintiffs to file a charge with the EEOC.[96] Though Title IX does not specify a filing deadline, courts have held that Title IX claims are governed by states' respective statutes of limitation for personal injury actions.[97] Most states have at least a two year statute of limitations for personal injury,[98] thereby granting Title IX claimants a significantly longer period of time to decide whether to bring charges and, if they so choose, to collect the requisite resources for court.

2. Title IX Follows Title VII's Exact Burden-Shifting Framework

Because both statutes seek to remedy sex discrimination in employment, several circuit courts have held that Title VII's judicially-developed *McDonnell Douglas* framework applies to Title IX claims as well.[99] Therefore, claimants need not consider burdens of proof when deciding under which statute to bring their sex discrimination claims.

3. Title IX Remedies

Remedies granted under Title IX differ from those of Title VII in two distinct, notable ways. First, while Title VII claimants can pursue punitive damages for intentional sex discrimination, punitive damages are not available under Title IX.[100] This distinction arises because Title IX is a conditional spending statute

94. *Id.* at 706 n.41. Specifically, "the complaint procedure adopted by HEW [did] not allow the complainant to participate in the investigation or subsequent enforcement proceedings. Moreover, even if those proceedings result[ed] in a finding of a violation, a resulting voluntary compliance agreement need not include relief for the complainant." *Id.* In addition, HEW could decline to investigate certain employee complaints altogether, thereby forcing employees to bring "suit under the Administrative Procedure Act to compel the agency to investigate and cut off funds." *Id.*

95. *Id.*

96. Civil Rights Act of 1964, § 2000e-5(e)(1).

97. *See, e.g.*, Stanley v. Trs. of Cal. State Univ., 433 F.3d 1129, 1135–36 (9th Cir. 2006).

98. *Statutes of Limitation for All 50 States*, *supra* note 28.

99. *See* Doe v. Columbia Univ., 831 F.3d 46, 56 (2d Cir. 2016); Johnson v. Baptist Med. Ctr., 97 F.3d 1070, 1072 (8th Cir. 1996); Preston v. Virginia *ex rel* New River Cmty. Coll., 31 F.3d 203, 207 (4th Cir. 1994); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 832–33 (10th Cir. 1993); Lipsett v. Univ. of P.R., 846 F.2d 881, 899 (1st Cir. 1988) (applying the *McDonnell Douglas* burden shifting test without explicitly naming such).

100. Civil Rights Act of 1991, § 1981a(a)(1). *See also* Mercer v. Duke Univ., 50 F. App'x 643, 644 (4th Cir. 2002) (finding that "the Supreme Court's conclusion in *Barnes* that punitive damages are not available under Title VI compels the conclusion that punitive damages are not available for private actions brought to enforce Title IX").

like Title VI, but Title VII is not.[101] While Title VII requires punitive damages to "punish" violators, the government under Title VI and Title IX can punish violators by threatening to or actually terminating federal funding to violators' institutions.[102] Specifically, "[w]hen a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and that wrong is 'made good' when the recipient compensates the Federal Government or a third-party beneficiary . . . for the loss caused by that failure."[103]

Second, compensatory damages under Title IX, unlike those under Title VII, are not subject to a statutory cap. Therefore, employee-plaintiffs suing under Title IX can pursue damages exceeding the $300,000 maximum allowed under Title VII.[104]

II. JUDICIAL EXPANSION OF TITLE IX

While Title IX is most often associated with women's collegiate athletics and campus sexual assault procedures, it can also serve as a potent weapon against employment discrimination. Title IX's statutory language contains neither a direct mention of a private cause of action[105] nor a reference to employment; however, since 1979, the Supreme Court has gradually expanded the statute's scope and application to combat sex discrimination in the workplace through private litigation, providing both monetary and injunctive relief.[106]

A. Cannon v. University of Chicago

Seven years after Congress enacted Title IX, the Supreme Court clarified in *Cannon* that, despite the statute's silence on the issue, Title IX contains an implied private cause of action for plaintiffs to sue universities directly.[107] The district and appellate courts had granted the schools' motions to dismiss for failure to state a claim, finding that Title IX contained no express private right of action, and no such right should be inferred.[108]

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101. Barnes v. Gorman, 536 U.S. 181, 185–86 (2002).

102. Cannon v. Univ. of Chi., 441 U.S. 677, 683–85 (1979).

103. *Barnes*, 536 U.S. at 189 (emphasis omitted). Furthermore, institutions might not accept federal funding if they will be subject to forfeiture of funds *and* both compensatory and punitive damages to plaintiffs. *Id.* at 188.

104. Civil Rights Act of 1991, § 1981a(b)(3)(D).

105. *Cannon*, 441 U.S. at 683.

106. *Barnes*, 536 U.S. at 185.

107. *Cannon*, 441 U.S. at 709. Plaintiff Cannon, rejected by two medical schools for which she claimed she was fully qualified, argued that she was denied admission based on her sex. *Id.* at 681 n.2. When HEW failed to adequately investigate her claims, she filed a private lawsuit against the schools alleging violations of § 901(a) of Title IX. *Id.*

108. *Id.* at 683–85.

On review however, the Supreme Court noted that Title IX was patterned almost identically after Title VI,[109] which also does not contain an express private remedy;[110] however, at that time, most courts already agreed that Title VI contained an implied private right of action.[111] Furthermore, the Court recognized that "Congress enacted Title IX against a backdrop of three recently issued implied-cause-of-action decisions of this Court involving civil rights statutes with language similar to that in Title IX. In all three, a cause of action was found."[112] Therefore, the Court concluded that Congress, when drafting Title IX in the image of Title VI, was likely aware of these recent interpretations and intended the same to be applied to Title IX.[113] Finally, the Court determined that a private right of action would satisfy Title IX's legislative purpose to "provide individual citizens effective protection against [discriminatory] practices."[114]

B. North Haven Board of Education v. Bell[115]

In *North Haven*, the Supreme Court resolved a five-court circuit split regarding whether Title IX applied to employment sex discrimination cases.[116] The Court concluded that Title IX did in fact cover employment discrimination claims based on Title IX's scant yet informative legislative history.[117]

In determining whether Title IX's provisional protections covered employees at educational institutions, the Court granted much deference to the floor comments of bill sponsor Senator Bayh, who stated that the "heart of this

109. *Id.* at 694.

110. *Id.* at 694, 696.

111. *Id.* at 696.

112. *Id.* at 698 n.22.

113. *Id.* at 696–98.

114. *Id.* at 704.

115. N. Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982).

116. *Id.* at 539–40. Only the Fifth Circuit held that Title IX covered employment discrimination. *See* Dougherty Cty. Sch. Sys. v. Harris, 622 F.2d 735, 738 (5th Cir. 1980). Four courts, in contrast, held that Title IX did not apply to employment discrimination. Seattle Univ. v. Dep't of Health, Ed. & Welfare, 621 F.2d 992, 993–94 (9th Cir. 1980); Romeo Cmty. Sch. v. Dep't of Health, Ed. & Welfare, 600 F.2d 581, 585 (6th Cir. 1979); Junior Coll. Dist. of St. Louis v. Califano, 597 F.2d 119, 119–21 (8th Cir. 1979); Islesboro Sch. Comm. v. Califano, 593 F.2d 424, 428–29 (1st Cir. 1979).

117. *N. Haven*, 456 U.S. at 539. In 1975, three years after Congress enacted Title IX, HEW issued compliance regulations for federally funded institutions. *Id.* at 515–16. HEW interpreted Title IX's prohibition that no "person" shall be subject to sex discrimination to be broad enough to include both students and employees. *Id.* at 516. It therefore issued regulations specifically concerning employment, such as job classification and pregnancy leave. *Id.* When HEW notified two Connecticut school boards that it was conducting investigations into employment discrimination complaints it received from a teacher and a guidance counselor from each respective institution, the school boards challenged HEW's authority to regulate employment under Title IX. *Id.* at 517–18. Primarily, they asserted that Title IX did not extend its protection to employment in educational institutions. *Id.* at 517.

amendment is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and *faculty employment*, with limited exceptions."[118] The Senator further explained that the amendment would cover "discrimination in all areas where abuse has been mentioned—*employment practices for faculty and administrators*, scholarship aid, admissions, access to programs within the institution such as vocational education classes, and so forth."[119]

The Court therefore held that Title IX's prohibition on sex discrimination in the education sector also extended to employees.[120] However, the Court did not specify if employees could pursue relief only by filing charges with the administrative agency to terminate violating institutions' funding, as the employees did in *North Haven*, or if employees could also pursue direct relief through the private right of action created in *Cannon*.

C. Franklin v. Gwinnett County Public Schools[121]

In *Franklin*, the Supreme Court held that plaintiffs bringing claims for sex discrimination under Title IX could receive both damages and injunctive relief.[122] While *Cannon* held that Title IX contained an implied private right of action,[123] it did not specify what types of remedies were available. In response, some circuits had refused to award monetary damages altogether.[124]

In determining whether Title IX granted plaintiffs compensatory damages for intentional sex discrimination, the Court relied on the general rule that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."[125] Specifically, the Court noted that "[i]n the years before and after Congress enacted this statute, the Court 'followed a common-law tradition [and] regarded the denial of a remedy as the exception rather than the rule.'"[126]

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118. *Id.* at 524 (quoting 118 CONG. REC. 5803 (1972)) (emphasis in original).

119. *Id.* at 524–25 (quoting 118 CONG. REC. 5807 (1972)) (emphasis in original).

120. *Id.* at 540.

121. Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60 (1992).

122. *Id.* at 70–71. Plaintiff Franklin was a student at North Gwinnett High School, operated by the Gwinnett County School District. *Id.* at 63. In her complaint, she alleged that a sports coach who was also a teacher at the high school continually harassed her and ultimately forced her to have sex with him during school hours. *Id.* She further alleged that the school was aware of this teacher's sexual harassment, but failed to address it, in violation of Title IX. *Id.* at 63–64.

123. Cannon v. Univ. of Chi., 441 U.S. 677, 710–11 (1979).

124. *See, e.g.*, Franklin v. Gwinnett Cty. Pub. Sch., 911 F.2d 617, 622 (11th Cir. 1990), *rev'd and remanded*, *Franklin*, 503 U.S. at 60.

125. *Franklin*, 503 U.S. at 70–71.

126. *Id.* at 71. (quoting Merrill Lynch v. Curran, 456 U.S. 353, 375 (1982)) (brackets in original).

Legislating with this general rule in mind, Congress, the Court reasoned, intended to provide victims of sex discrimination compensatory damages.[127]

Though this case definitively held that successful student-plaintiffs suing under Title IX for sex discrimination can receive compensatory damages, it left unanswered whether employee-plaintiffs could receive compensatory damages for intentional sex discrimination.

D. Jackson v. Birmingham Board of Education[128]

In *Jackson*, the Supreme Court further expanded the scope of protection afforded to employee-plaintiffs. It considered "whether the private right of action implied by Title IX encompasses claims of retaliation[,]" and held that "it does where the funding recipient retaliates against an individual because he has complained about sex discrimination."[129]

The Supreme Court, in a 5-4 opinion by Justice O'Connor, held that "when a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional 'discrimination' 'on the basis of sex,' in violation of Title IX."[130] The Court reasoned that "[r]eporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel."[131]

III. Circuits Split on Title VII Preemption of Title IX in Employment Sex Discrimination Cases

When two or more laws conflict or perhaps overlap, courts must determine which law controls. Statutory language and congressional intent are key to this determination: "[w]hen Congress is unclear about its intent to preempt, the courts must then decide whether or not preemption was intended and, if so, to what extent."[132] As applied to employment discrimination on the basis of sex,

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127. *Id.* at 70–73. Furthermore, Congress had amended Title IX twice since *Cannon* created a private right of action, but declined to take either of those opportunities to restrict this right of action by limiting the damages available for successful employee-plaintiffs. *Id.* at 72.

128. 544 U.S. 167 (2005).

129. *Id.* at 171. Jackson, a physical education teacher and girls' basketball coach in the Birmingham school district, complained "to his supervisors about the unequal treatment of the girls' basketball team," including its "lack of adequate funding, equipment, and facilities" as compared to the boys' athletic teams. *Id.* at 171. Soon thereafter, he received poor work evaluations and was eventually terminated from his position as the girls' coach. *Id.* at 172. He sued the school district, alleging that it violated Title IX by retaliating against him for complaining about the sex discrimination his female players received. *Id.* However, the district and appellate courts dismissed his suits for failure to state a claim, finding that Title IX did not cover retaliation claims. *Id.*

130. *Id.* at 174.

131. *Id.* at 180.

132. Sen. Carl Levin, Introductory Remarks on S. 1214 (1999), available on the Library of Congress Website, https://www.congress.gov/congressional-record/1996/4/17/senate-section/article/S3487-4.

both Title VII and Title IX statutorily prohibit this type of discrimination, but do so by different procedures and with different remedies.[133] When determining if Title VII, created before Title IX and broader in coverage, preempts Title IX in the university employment context, courts have greatly diverged.

A. Courts Finding that Title VII Does Not Preempt Title IX Actions

Both the First and Fourth Circuits previously allowed plaintiffs to proceed with sex discrimination claims under Title IX; however, neither provided detailed explanations for their reasoning.[134] The Third Circuit, in *Doe v. Mercy Catholic Medical Center*, followed the First and Fourth Circuits' scant guidance, but expounded to provide thorough reasoning for holding that employee-plaintiffs can bring employment sex discrimination claims under Title VII or Title IX.[135]

Unlike its predecessors, the Third Circuit expressly acknowledged the issue of Title VII preemption,[136] and ultimately held that Title VII does not preempt Title IX for employee-plaintiffs seeking to sue their employers for sex discrimination.[137]

First, the Third Circuit considered other statutes that seek to remedy employment discrimination also covered by Title VII that are not preempted. Specifically, the court first considered actions under 42 U.S.C. § 1981, which grants "[a]ll persons within the jurisdiction of the United States . . . the same right . . . to [have] the full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens."[138] When a plaintiff sued his employer for racial

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133. Douglas P. Ruth, *Title VII & IX: Is Title IX the Exclusive Remedy for Employment Discrimination in the Education Sector?*, 5 CORNELL J.L. & PUB. POL'Y 185, 185 (1996).

134. Preston v. Virginia *ex rel* New River Cmty. Coll., 31 F.3d 203, 205–06 (4th Cir. 1994) (summarily stating that "[a]n implied private right of action exists for enforcement of Title IX. . . . This implied right extends to employment discrimination on the basis of gender by educational institutions receiving federal funds[,]" thereby allowing an employee-plaintiff to bring a retaliation suit for filing employment discrimination claims under either Title VII or Title IX); Lipsett v. Univ. of P.R., 864 F.2d 881, 897–98 (1st Cir. 1988) (holding that a plaintiff alleging sex discrimination under Title IX can follow the burden-shifting framework applied in Title VII cases, which implies that the court did not think Title VII preempted Title IX actions for sex discrimination in employment).

135. Doe v. Mercy Catholic Med. Ctr., 850 F.3d 545, 563 (3d Cir. 2017).

136. *Id.* at 559–60.

137. *Id.* at 563–64. Jane Doe, a former resident at a teaching hospital, claimed she was sexually harassed and assaulted by a male doctor serving as her supervisor. *Id.* at 550–51. When she resisted his advances, he gave her poor evaluations, and when she complained to the hospital about his behavior, she was eventually terminated. *Id.* at 551. Following that, she was not accepted to another residency program. *Id.* at 552. Doe sued the hospital for retaliation, quid pro quo harassment, and hostile environment under Title IX, seeking damages and equitable remedies. *Id.* The district court dismissed Doe's complaint for failure to state a claim, finding that "Doe [could not] use Title IX to 'circumvent' Title VII's administrative requirements, as Congress intended Title VII as the 'exclusive avenue for relief' for employment discrimination." *Id.*

138. Civil Rights Act of 1991, § 1981(a).

employment discrimination under both Title VII and § 1981 in *Johnson v. Railway Express Agency, Inc.*,[139] the Supreme Court held that "remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent."[140] It specifically rejected the employer's argument that allowing actions under § 1981, thereby circumventing Title VII's administrative requirements, would transgress Congress's intent. The Supreme Court explained:

> Conciliation and persuasion through the [EEOC's] administrative process [under Title VII], to be sure, often constitute a desirable approach to settlement of disputes based on sensitive and emotional charges of invidious employment discrimination. We recognize, too, that the filing of a lawsuit [under § 1981] might tend to deter efforts at conciliation, that lack of success in the legal action could weaken the [EEOC's] efforts to induce voluntary compliance, and that a suit is privately oriented and narrow, rather than broad, in application, as successful conciliation tends to be. But these are the natural effects of the choice Congress has made available to the claimant by its conferring upon him independent administrative and judicial remedies. The choice is a valuable one. Under some circumstances, the administrative route may be highly preferred over the litigatory; under others the reverse may be true.[141]

The Third Circuit then considered the line of Supreme Court cases discussed in Part II that judicially expanded Title IX's scope.[142] From these cases, the Third Circuit synthesized its four-part holding: (1) employees subject to discrimination in the workplace can sue under Title VII as well as other statutory forms of relief, such as Title IX and § 1981;[143] (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[;]"[144] (3) the private right of action created under *Cannon* extends not only to students but also employees;[145] and (4) Title IX's private right of action extends to employees for claims of retaliation as well as quid pro quo, despite concurrent applicability of Title VII.[146]

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139. 421 U.S. 454 (1975).

140. *Id.* at 461.

141. *Id.*

142. Doe v. Mercy Catholic Med. Ctr., 850 F.3d 545, 562 (3d Cir. 2017) (briefly detailing the facts and holdings of *North Haven*, *Franklin*, and *Jackson*).

143. *Id.* at 562.

144. *Id.*

145. *Id.*

146. *Id.* at 562–63.

B. Courts Finding that Title VII Does Preempt Title IX Actions

In 1995, the Fifth Circuit unequivocally held that "Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions."[147] In *Lakoski v. James*,[148] a female professor at a medical school applied for and was denied tenure three times, and then was terminated.[149] The professor sued the school, alleging that its decisions to deny her tenure and ultimately terminate her employment were grounded in intentional sex discrimination.[150] She brought her sex discrimination claims under Title IX alone.[151]

On appeal, the Fifth Circuit held that, to bring her employment sex discrimination claim, the professor should have filed under Title VII.[152] The court explained that:

> Critical to our resolution of this case is the fact that, although Dr. Lakoski possessed a colorable claim of employment discrimination in violation of Title VII, she chose not to pursue the remedy made available by Title VII. Title VII provides an administrative procedure in which an aggrieved individual must first pursue administrative remedies before seeking judicial relief. Dr. Lakoski chose to circumvent this procedure and immediately assert her rights under Title IX both directly and derivatively through 42 U.S.C. § 1983. We are not persuaded that Congress intended that Title IX offer a bypass of the remedial process of Title VII.[153]

In holding that Title VII does preempt Title IX in these cases, the Fifth Circuit placed heavy importance on following Title VII's administrative procedures. Circumventing the administrative process and exhaustion requirement with the EEOC, it reasoned, "would disrupt a carefully balanced remedial scheme for redressing employment discrimination by employers . . . . We are unwilling to do such violence to the congressionally mandated procedures of Title VII."[154]

In 1996, the Seventh Circuit followed suit and found that Title VII preempted a plaintiff's claim for equitable relief under Title IX, explaining that Title VII's "comprehensive remedial scheme" to protect employees from sex discrimination was the exclusive means of achieving relief for employment discrimination.[155]

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147. Lakoski v. James, 66 F.3d 751, 753 (5th Cir. 1995).
148. *Id.*
149. *Id.* at 752–53.
150. *Id.* at 752.
151. *Id.* at 752–53.
152. *Id.* at 753.
153. *Id.* (internal citations omitted).
154. *Id.* at 754.
155. Waid v. Merrill Area Pub. Schs., 91 F.3d 857, 861–63 (1996).

IV. TITLE VII DOES NOT PREEMPT RECOVERY UNDER TITLE IX FOR SEX DISCRIMINATION IN EDUCATION EMPLOYMENT

Guided by the Third Circuit's reasoning in *Doe*, plaintiffs alleging employment discrimination on the basis of sex can pursue claims under either Title VII or Title IX, granting them the opportunity to choose under which statute their claim will be more successful and better remedied. Though perhaps unintentionally, the Supreme Court, through its string of Title IX decisions, created a syllogism to solve this preemption question.

In *Cannon*, the Supreme Court provided for a private right of action for victims of sex discrimination to sue under Title IX; however, it did not specify if this private right of action extended only to students, like the plaintiff in that case, or to employees as well.[156] Next, in *North Haven*, the Court clarified that Title IX also covers employees, but did not answer whether those employees can only file charges with HEW for relief, as the plaintiffs did in that case, or if they can also pursue personal relief under the private cause of action created in *Cannon*.[157] In *Franklin*, the Court held that victims of sex discrimination can receive compensatory damages under Title IX, but, again, it did not specify if this applied only to students, like the plaintiff in that case, or if Title IX's private cause of action and compensatory damages also extended to employees.[158] Next, the Supreme Court, in *Jackson*, held that an employee could sue for damages under Title IX for retaliation suffered after complaining about sex discrimination.[159] While this case confirmed that employees can bring private actions under Title IX for retaliation, it did not address whether employees can bring private actions for employment discrimination.

Johnson, though unrelated to Title IX, is instructive to answer this final question. The Supreme Court held that § 1981 claims are not preempted by Title VII because, though they both aim to eradicate racial discrimination, they do so differently, through different procedures and with different remedies.[160] This, the Court stated, grants plaintiffs the opportunity to choose under which method to litigate their claims.[161]

Like § 1981 claims, Title IX claims follow a different procedure and provide different remedies than Title VII claims. Claimants pursuing employment sex discrimination claims under Title IX can avoid the strict filing deadlines imposed by Title VII as well as the lengthy administrative process required before filing suit.[162] While the Fifth Circuit held that this "circumvention" allows plaintiffs to surreptitiously cheat a purposely instituted remedial system,

156. Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979).
157. N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 548 (1982).
158. Franklin v. Gwinnet Cty. Pub. Sch., 503 U.S. 60, 76 (1992).
159. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 171 (2005).
160. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975).
161. *Id.* at 460–61.
162. Ruth, *supra* note 133, at 197–98.

the option to bypass these lengthy procedures serves Congress's purpose in passing Title IX: to provide citizens effective protection against discriminatory practices.[163] While Title VII's administrative exhaustion requirement might frustrate plaintiffs' ability to obtain relief, Title IX affords plaintiffs a more direct route to court to obtain meaningful relief.

Critics of this view, who believe Title VII fully preempts recovery under Title IX, argue that Title IX's statutory construction precludes it from offering an additional private right of action to plaintiffs claiming sex discrimination in education employment. Specifically, these critics argue that Title IX's language only prescribes loss of funding as its enforcement mechanism:

> [I]ts provisions simply proscribe certain conduct and authorize federal fund termination for those institutions which ignore that proscription. The only solid indication of Congressional intent is Congress' desire to rid public education of sex based discrimination. The statute gives no indication of the degree of the courts authority to enforce the act, the precise scope of the title's reach, or whether the title's focus is purely remedial or also compensatory.[164]

Given that Congress took the time and effort to set forth extensive procedures for plaintiffs to follow under Title VII, it is unlikely that Congress intended Title IX to carry an implied cause of action without setting forth similarly precise steps to track.[165] "Congress," these critics say, "would have provided some acknowledgement if it wanted to bypass these considerations."[166]

This analysis, based solely on statutory language, is flawed because it overlooks Congress's intent to pattern and implement Title IX after Title VI.[167] Title VI, another conditional spending statute, does not include a private right of action either; however, "[i]n 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy."[168] Therefore, the lack of express Congressional intent to create a private cause of action does not necessarily indicate that Title IX should be enforced only by threat of terminated funding; rather, Congress's assumption that Title IX be interpreted like Title VI evinces its understanding that Title IX *would* carry an implied cause of action.

Critics also argue that victims of employment discrimination in the educational sector do not need a private right of action under Title IX because "Title VII already provides plaintiffs with effective protection against

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163. *Id.* at 230.

164. *Id.* at 211.

165. *Id.* at 227.

166. *Id.*

167. Cannon v. Univ. of Chi., 441 U.S. 677, 684–85 (1979). "Neither statute expressly mentions a private remedy for the person excluded from participation in a federally funded program. The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years." *Id.* at 696.

168. *Id.*

employment discrimination that they may have suffered."[169] Title IX, therefore, provides "redundant relief."[170]

Neither Title IX's relief nor its procedures are redundant. While both statutes intend to eliminate employment discrimination on the basis of sex, they effect this goal by different methods and enforcement mechanisms. Title VII imposes strict deadlines and requires full exhaustion of administrative remedies; Title IX, on the other hand, allows employee-plaintiffs to directly sue their employers for faster relief. Titles VII and IX further differ in what remedies they can provide. While Title VII offers punitive damages for intentional violations and Title IX does not, Title IX offers compensatory damages that are not subject to Title VII's $300,000 cap. These seemingly inconsequential distinctions can amount to substantial differences in plaintiffs' recoveries. Plaintiffs, therefore, should strategically choose under which statute to pursue charges against their employers based on their timetables, their desire for conciliation versus adversary proceedings, how long they are willing to wait for recovery, and how they can maximize their potential damages. If Title VII and Title IX are "redundant," it would not matter which route plaintiffs chose.

V. CONCLUSION

Due to the pervasive nature of sex discrimination in academia, several federal courts have had the opportunity to determine whether employee-plaintiffs can pursue relief under Title VII and Title IX. The Supreme Court's decisions expanding the scope of Title IX provide a syllogism for its applicability to employees, leading the Third Circuit to conclude correctly that Title VII does not preempt Title IX in these actions. Should the Supreme Court resolve this circuit split, a determination that Title VII does not provide the exclusive remedy for employment sex discrimination claims is critical, as Title VII forecloses several employee-plaintiffs' the opportunity to obtain relief through its burdensome and lengthy administrative process. Granting plaintiffs the opportunity to decide whether to bring claims under Title VII or Title IX lets them choose which method best serves their specific circumstances, and allows them to pursue whichever remedy will best relieve and restore their interests.

169. Ruth, *supra* note 133, at 236.
170. *Id.* at 214.