National Association of College and University Attorneys
Presents:

Sexual Misconduct Concerns Involving Patient Care at Academic Medical Centers, Healthcare-Related Schools, Student Health Centers, and Athletic Training Services

Webinar

May 19, 2022

12:00 PM – 2 :00 PM Eastern
11:00 AM – 1:00 PM Central
10:00 AM – 12:00 PM Mountain
9:00 AM – 11:00 AM Pacific

Presenters:

Sonya Sanchez
University of California

Catherine Spear
University of Southern California

Farnaz Thompson
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Sexual Misconduct Concerns Involving Patient Care at Academic Medical Centers, Healthcare-Related Schools, Student Health Centers, and Athletic Training Services

Sonya Sanchez is a member of the Education Affairs and Governance Practice. She routinely advise on UC system-wide policies and procedures for addressing sexual misconduct in the student, faculty, staff, and clinical care contexts and is a Key advisor to highest levels of UC leadership on sexual misconduct, race discrimination, and undocumented students. In addition, Sonya advises senior leaders concerning regulatory and litigation risk assessment, crisis management, investigations and policy development in the sexual misconduct, race discrimination and international and undocumented student arenas.

Sonya also served as a key team member in the Regents of the Univ. of Cal., et al. v. U.S. Dep't of Homeland Sec., et al. litigation at the federal district, appellate and U.S. Supreme Court levels.

Catherine Spear joined the University of Southern California (USC) in late August 2020 to serve in the new role of Vice President for the Office of Equity, Equal Opportunity, and Title IX (EEO-TIX). She also serves as the Title IX Coordinator. She is responsible for managing the University's response to all forms of discrimination, harassment, and retaliation involving faculty, staff, and students related to a protected characteristic. She also leads related proactive education and outreach programs that promote a safe and inclusive environment for all University community members, and leads USC's Affirmative Action and other equity programs.

Prior to USC, Spear served in a similar role as Associate Vice President for the Office for Equal Opportunity and Civil Rights at the University of Virginia and was Stanford University's first full-time Title IX Coordinator. Prior to higher education, Spear worked for 19 years at the Cleveland office for the U.S. Department of Education, Office for Civil Rights, including as Chief Attorney and the last five years as Director. She started her legal career at a litigation firm before switching her focus to public service and higher education. She has a Juris Doctorate degree from Case Western Reserve University School of Law and a Bachelor of Arts degree in English from the University of Dayton.

Farnaz Thompson is Partner at McGuireWoods LLP and is a skilled litigator with extensive experience in representing employers and institutions of higher education, including academic medical centers, in breach of contract, constitutional, discrimination, and tort litigation. She has conducted investigations, advised clients on employment and education laws, and represented them before federal agencies, including the U.S. Department of Labor and U.S. Department of Education.

Farnaz successfully has defended employers, state agencies, government officials, and institutions of higher education in over 30 civil actions as first chair before federal and state courts as well as trial and appellate courts. Farnaz also has advised clients on investigations under civil rights laws such as Title VI of the Civil Rights Act of 1964, Title VII of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972. Her deep knowledge of education laws and regulations includes the Higher Education Act of 1965, as amended; accreditation; borrower defense to repayment; gainful employment; financial responsibility standards; FERPA and other privacy laws; the Clery Act; and the Violence Against Women Act (VAWA).

Prior to joining McGuireWoods, Farnaz served as the Deputy General Counsel for Postsecondary Education at the U.S. Department of Education and also as in-house counsel at the University of Virginia. She advised the U.S. Department of Education on litigation strategy and worked closely with the U.S. Department of Justice in cases arising under federal antidiscrimination laws and the Administrative Procedure Act. Government officials also relied on her close counsel in preparation for congressional investigations and hearings. At the University of Virginia, she advised University officials on federal education and employment laws and represented the University and its academic medical center in litigation. She also drafted the University's antidiscrimination and conduct policies, including free speech policies.

She began her legal career as a law clerk to the Honorable Eric G. Bruggink, Senior Judge, U.S. Court of Federal Claims, and later as a law clerk to the Honorable Leroy Rountree Hassell, Sr., the former Chief Justice, Supreme Court of Virginia.

Materials

U.S. Department of Education Title IX Regulations and Enforcement Actions

- "Summary of the Resolution of the Directed Investigation by the U.S. Department of Education's Office for Civil Rights" (U.S. Department of Education Office for Civil Rights) (provides an overview of OCR's findings during the Dr. George Tyndall investigation)
- "Full Resolution Letter" (U.S. Department of Education Office for Civil Rights) (provides the entire resolution letter from the Dr. George Tyndall investigation)
- "Full Resolution Agreement" (U.S. Department of Education Office for Civil Rights) (provides the entire resolution agreement from the Dr. George Tyndall investigation)
- Zachary Kizitaff and Joshua Richards, "Rivisting Title IX's Applicability to Academic Medical Centers" (JDSupra and Saul Ewing Arnstein Lehr LLP) (this article was not in our database but it is publicly available; provides a good overview of how Title IX applies to academic medical centers and what criteria must be met for Title IX to apply)
- Nicole M. Merhill and Marjory D. Fisher, "Title IX 3.0, 2021: Title IX Under Biden's DOE" (NACUA Fall 2021 Virtual CLE Workshop) (see pages 2-5 for an overview of resources on Title IX)
- Suzanne Goldberg, "A Conversation with Suzanne Goldberg" (NACUA Fall 2021 Virtual CLE Workshop) (whole document not specifically related to Title IX and medical centers, see pages 16-19 for a general overview of Title IX)
- Anne D. Cartwright, Danielle E. Hermanny, Thomas F. Hutchinson, and Phyllis Karasov, "Navigating Blurred Lines: Sexual Misconduct Matters Involving Employees" (NACUA April 2019 CLE Workshop) (provides an overview of Title IX regulations but see pages 8-18 for a discussion on reporting, policies, and responses to complaints)

U.S. Department of Health and Human Services Guidance on Preventing Sexual Harassment, Title IX regulations in the Affordable Care Act

- "Voluntary Resolution Agreement Between the U.S. Department of Health and Human Services Office for Civil Rights and Michigan State University" (U.S. Department of Health and Human Services Office for Civil Rights) (provides an overview of the resolution agreement after the Larry Nassar investigation)
- "Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972" (Department of Health and Human Services) (discusses HHS' interpretation of Title IX and the Affordable Care Act after the Bostock decision)
- "Sex-Based Harassment" (Department of Health and Human Services) (provides a description of prohibited sex-based discrimination under Title IX and Section 1557 of the Affordable Care Act)
- "Effective Practices for Preventing Sexual Harassment" (Department of Health and Human Services) (the entire document provides good information about preventing sexual harassment and conduct investigations for sexual harassment but see page 5 for a small discussion on effective practices specific to University Health and Medical settings)

HIPAA/FERPA as a Threshold Matter and Litigation

- "Joint Guidance on the Application of the *Family Educational Rights and Privacy Act (FERPA)* and the *Health Insurance Portability and Accountability Act of 1996 (HIPAA)* to Student Health Records" (Department of Health and Human Services and the Department of Education (provides an overview of when HIPAA and FERPA apply and how both laws work together)
- "FERPA and HIPAA" (Department of Health and Human Services) (provides a FAQ section on FERPA and HIPAA, it might be helpful if you have any specific questions)
- Doug Welch, Elizabeth C. Rogers, and Rainier Elias, "How to Establish and Implement the Model Privacy and Cybersecurity Compliance Program for Higher Education in 2021" (NACUA 2021 Virtual Conference) (provides an overview of privacy programs in general and how to implement an effective privacy program)
- Wendi W. Wright and Jennifer A. Zimbroff, "What's FERPA Got to Do with it? Best Practices for Handling Confidential Student Information" (NACUA Winter 2020 CLE Workshop) (provides an overview of FERPA and what records can and cannot be disclosed)

Crisis Communications, Offers for Free Counseling, Incident Response Teams

- Joel Buckman, Sherita D. Harrison, Elizabeth Martin, and Omar A. Syed, "Are the 'Kids' Alright? Practical Responses to Student Mental Health Challenges" (NACUA Spring 2021 Virtual CLE Workshop) (the entire document provides good information about mental health services on campus for any situation but see page 8 for a small discussion of how the institution can pay for counseling services)
- "Recognizing and Responding to Sexual Harassment Complaints" (Penn State University) (this is a sample document that discusses PSU's approach and handling sexual harassment complaints, while not directly related to our topic it could provide some useful background)

Athletic Trainer/Student Health Center and Sexual Harassment, Title VI, or ADA/503

- "NCAA Board of Governors Policy on Campus Sexual Violence" (NCAA) (provides an overview of the NCAA' policy on preventing sexual violence and what each university must annually attest to)
- Derin Dickerson and Becca Gose, "Dual Pandemics: The Impact of COVID and Racial Unrest on Mental Health in Higher Education" (NACUA Winter 2021 Virtual CLE Workshop) (see page 8 for a small discussion on the ADA/Section 504 concerns related to mental health)
- Cole, Jr. Erica McKinley, and Mick Terrell, "Conducting Investigations into Coach and Athletic Staff Misconduct" (NACUA 2019 Annual Conference) (see pages 2-16 for an overview of the best practices for conducting investigations of athletic staff)

518 F.Supp.3d 593
United States District Court, D. Connecticut.

Mia CASTRO, M.D., Heidi Boules, M.D., Ashley Eltorai, M.D., Jodi-Ann Oliver, M.D., Lori-Ann Oliver, M.D. and Elizabeth Reinhart, M.D., Plaintiffs,
v.
YALE UNIVERSITY, Yale New Haven Hospital, Inc. and Manuel Lopes Fontes, M.D, in his individual and professional capacities, Defendants,

Civil No. 3:20cv330 (JBA)
|
Signed 02/09/2021

Synopsis

Background: Female residents at university's teaching hospital brought action against university, hospital, and their residency supervisor, asserting claims for discrimination and retaliation under Title VII and Title IX. Defendants moved to dismiss.

Holdings: The District Court, Janet Bond Arterton, J., held that:

[1] residents sufficiently alleged that hospital was educational program or activity, as required to bring sex-based discrimination claims against hospital under Title IX;

[2] residents could bring suit under Title IX against hospital for sex-based employment discrimination, even though they could also seek remedy by suit under Title VII;

[3] residents timely filed administrative claims;

[4] residents stated claims for hostile work environment;

[5] residents sufficiently alleged that university and hospital had notice of sex-based harassment by residency supervisor;

[6] residents stated claims for retaliation; and

[7] resident stated claim for pregnancy discrimination under Title VII.

Motions granted in part and denied in part.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim.

West Headnotes (24)

[1] Civil Rights Sex Discrimination

For purposes of determining whether a program or activity is an "educational program or activity" under Title IX, courts apply a series of factors to determine the educational nature of the program or activity, including: (1) the structure of the program, including the involvement of instructors and inclusion of examinations or formal evaluations, (2) whether tuition is required, (3) the benefits conferred through the program, such as degrees, diplomas, or other certifications, (4) the primary purpose of the program, and (5) whether regulators accrediting the institution hold it out as educational in nature.

Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a).

1 Cases that cite this headnote

[2] Civil Rights Sex Discrimination

Female residents at university's teaching hospital sufficiently alleged that teaching hospital was educational program or activity, as required to bring sex-based discrimination claims against hospital under Title IX; contractual arrangement formally integrating hospital with university to share both staff and resources, instructors at hospital were employed by both university and hospital, hospital received federal funding because of its status as teaching hospital, participation in residency program prepared residents and fellows to sit for examinations necessary for board certification, and hospital website stated that it was primary teaching hospital of university's school of medicine, thereby affiliating itself with university and holding itself out as educational institution.

Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a).

[3] **Civil Rights** Education

Title IX's private right of action is enforcement tool used to hold educational institutions accountable for their actions. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681.

[4] **Civil Rights** Employment practices

Educational nature of employer, not position of litigant, determines applicability of Title IX's private right of action. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681.

[5] **Civil Rights** Employment practices

Female residents at university's federally funded teaching hospital could bring suit under Title IX against hospital for sex-based employment discrimination, even though they could also seek remedy by suit under Title VII. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[6] **Civil Rights** Periods applicable

As an administrative prerequisite to filing suit under Title VII, a complainant must file claim with the Equal Employment Opportunity Commission (EEOC) within 180 days after the alleged discriminatory act occurred, or if he has already filed the charge with a state or local agency, he must file his EEOC charge within 300 days of the alleged discriminatory act. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[7] **Civil Rights** Waiver and estoppel

Civil Rights Tolling

Requirement that Title VII plaintiff must have filed claim with the Equal Employment Opportunity Commission (EEOC) within 180 or 300 days of the allegedly discriminatory act prior to filing suit is not a jurisdictional prerequisite, and therefore is subject to waiver, estoppel, and equitable tolling. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[8] **Civil Rights** Employment practices

Civil Rights Operation; accrual and computation

Civil Rights Particular cases

Female residents at university's federally funded teaching hospital who alleged series of allegations against male residency supervisor timely filed administrative claims, as required to exhaust administrative remedies prior to bringing hostile work environment claim under Title VII and Title IX, where residents alleged at least one discriminatory event within 300-day time period prior to filing claims with Equal Employment Opportunity Commission (EEOC). Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[9] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

Female residents at university's federally funded teaching hospital stated claim against university, hospital, and male residency supervisor for hostile work environment in violation of Title VII and Title IX, where residents alleged that their employment was altered for worse by supervisor's harassment, including forcible touching and kissing, and that they subjectively suffered from their experiences. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[10] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

To succeed on a hostile environment claim under either Title VII or Title IX, plaintiffs must show that they subjectively perceived the environment to be hostile or abusive, and that the environment objectively was hostile or abusive. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[11] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

Although individual incidents typically do not rise to the level of severe and pervasive, for purposes of a Title VII or Title IX hostile work environment claim, even a single act can meet the threshold if, by itself, it can and does work a transformation of the plaintiff's workplace. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[12] **Civil Rights** Employment practices

Civil Rights Pleading

At motion to dismiss stage of a claim for hostile environment claim under either Title VII or Title IX, a plaintiff need only plead facts sufficient to support the conclusion that she was faced with harassment of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse, and that she subjectively perceived the environment to be hostile. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[13] **Civil Rights** Employment practices

Civil Rights Questions of law or fact

Due to the fact-specific nature of hostile environment claim under Title VII or Title IX, evaluation of a plaintiff's claims is best able to be made at the trial or summary judgment stage. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

1 Cases that cite this headnote

[14] **Civil Rights** Sexual harassment; sexually hostile environment

In addition to alleging hostile environment, plaintiffs suing under Title IX must also demonstrate that educational program or activity was deliberately indifferent to alleged discrimination, meaning that school official with authority to address alleged discrimination and to institute corrective measures had actual knowledge of discrimination and failed to adequately respond. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681.

1 Cases that cite this headnote

[15] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

Female residents at university's federally funded teaching hospital sufficiently alleged that university and hospital had notice of sex-based harassment by residency supervisor, as required to state claim for sex-based employment discrimination under Title IX, where residents alleged that they each reported supervisor's behavior to persons of authority at both institutions. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681.

[16] **Civil Rights** Vicarious liability; respondeat superior

Under Title VII, employer is subject to vicarious liability to victimized employee for actionable hostile environment created by supervisor with immediate or successively higher authority over employee. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[17] **Civil Rights** Practices prohibited or required in general; elements

Under Title VII and IX, a plaintiff claiming retaliation must establish a prima facie case by showing: (1) protected activity by the plaintiff, (2) knowledge by the defendant of the protected activity, (3) adverse action, and (4) a causal connection between the protected activity and the adverse action. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[18] **Civil Rights** Activities protected

A "protected activity," for purposes of retaliation claims under Title VII and Title IX, refers to action taken to protest or oppose statutorily prohibited discrimination, and includes a wide range of activities, such as reporting discrimination, testifying in a proceeding, or otherwise participating in an investigation about discrimination. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[19] **Civil Rights** Adverse actions in general

In the context of a retaliation claim under Title VII and Title IX, an "adverse action" may be any action that could well dissuade a reasonable worker from making or supporting a charge of discrimination, and is not limited to those which materially alter the employee's position. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

1 Cases that cite this headnote

[20] **Civil Rights** Causal connection; temporal proximity

At the motion-to-dismiss stage of a retaliation claim under Title VII and Title IX, temporal proximity, often no more than a few months, between the protected activity and the adverse action may suffice for a prima facie showing of discrimination. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[21] **Civil Rights** Activities protected

Civil Rights Particular cases

Civil Rights Causal connection; temporal proximity

Health Adverse employment action; wrongful discharge

Female residents at university's federally funded teaching hospital alleged adverse employment actions sufficient to prove retaliation in violation of Titles VII and Title IX by university and hospital; residents alleged that they made formal complaints about sexual harassment by residency supervisor, and that soon afterward they were denied assignments or credits related to their residencies. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[22] **Civil Rights** Pleading

At the motion-to-dismiss stage of a Title VII discrimination action, a plaintiff must allege two elements: (1) the employer discriminated against her (2) because of her race, color, religion, sex, including pregnancy, or national origin. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[23] **Civil Rights** Presumptions, Inferences, and Burden of Proof

Civil Rights Effect of prima facie case; shifting burden

Title VII plaintiffs may prove discrimination indirectly either by meeting the requirements of *McDonnell Douglas*, or by otherwise creating a mosaic of intentional discrimination by identifying bits and pieces of evidence that together give rise to an inference of

discrimination. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[24] **Civil Rights** Pregnancy; maternity

Female resident at university's federally funded teaching hospital stated claim for pregnancy discrimination under Title VII, against university, hospital, and residency supervisor; resident alleged that, shortly after learning about resident's pregnancy, supervisor refused to assist her with scheduling her research, failed to notify her that she had insufficient credits to qualify for her full annual salary, and suggested that she had performance issues. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(k).

Attorneys and Law Firms

***597** Douglas Holden Wigdor, Michael J. Willemin, Tanvir H. Rahman, Wigdor LLP, New York, NY, Todd D. Steigman, Madsen, Prestley & Parenteau, LLC, Hartford, CT, Parisis G. Filippatos, Filippatos PLLC, Pleasantville, NY, for Plaintiffs.

Patrick M. Noonan, Donahue, Durham & Noonan, Guilford, CT, Sarah R. Skubas, Jackson Lewis - P.C., Hartford, CT, for Defendant Yale University.

Kasia M. Preneta, Sarah R. Skubas, Jackson Lewis PC, Hartford, CT, for Defendant Yale New Haven Hospital Inc.

Aimee Jennifer Wood, Margaret M. Sheahan, Reese Burdette Mitchell, Robert Burdette Mitchell, Mitchell & Sheahan, P.C., Stratford, CT, for Defendant Manuel Lopes Fontes.

Manuel Lopes Fontes, Madison, CT, pro se.

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTIONS TO DISMISS

JANET BOND ARTERTON, United States District Judge

Plaintiffs Heidi Boules, M.D., Mia Castro, M.D., Ashley Eltorai, M.D., Jodi-Ann Oliver, M.D., Lori-Ann Oliver, M.D., and Elizabeth Reinhart, M.D., bring suit against Yale University ("Yale"), Yale New Haven Hospital, Inc. ("YNNH"), and Manuel Lopes Fontes, M.D. claiming sex discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and Title IX of the Education Amendment Act of 1972, 20 U.S.C. § 1681, and sex discrimination in violation of the Connecticut Fair Employment Practices Act (CFEPA), Conn. Gen Stat. 46a-60, against Yale and YNNH, retaliation in violation of the CFEPA against all three Defendants, aiding and abetting in violation of the CFEPA against Dr. Fontes, and state tort claims of assault, battery, and invasion of privacy against Dr. Fontes under the Court's supplemental jurisdiction. (Second Amended Compl. ***598** (SAC) [Doc. # 102] at 53-63.) Defendants Yale, YNNH, and Dr. Fontes move to dismiss. (Fontes Mot. to Dismiss [Doc. # 50]; YNNH's Mot. to Dismiss [Doc. # 51]; Yale's Mot. to Dismiss [Doc. # 53].) Plaintiffs oppose all motions. (Pls.' Omnibus Mem. of Law in Opp. to All Defs.' Mot. to Dismiss [Doc. # 61] at 13-14.) For the reasons that follow, Defendants' Motions to Dismiss are DENIED in part and GRANTED in part. [1]

I. Background Allegations about Dr. Fontes

Plaintiffs Mia Castro, M.D., Heidi Boules, M.D., Ashley Eltorai, M.D., Jodi-Ann Oliver, M.D., Lori-Ann Oliver, M.D. and Elizabeth Reinhart, M.D., all female doctors in the Yale Department of Anesthesiology and involved with the residency program of YNNH, allege that Dr. Fontes, their supervisor at YNNH and Yale, sexually harassed them by making inappropriate and sexualized comments, forcibly touching and kissing them, and professionally punishing them for speaking out. They allege that Yale and YNNH turned a blind eye to Fontes's actions by allowing him to harass his female subordinates with impunity and perpetuated a hostile environment by elevating Dr. Fontes to be Vice Chair of Diversity, Equity, and Inclusion for the Department of Anesthesiology despite repeated complaints about his behavior.

i. Dr. Jodi-Ann Oliver – Attending Physician at YNNH and Faculty Member at Yale

Dr. Jodi-Ann Oliver alleges her harassment began in 2016 when Dr. Fontes repeatedly "touch[ed] her lower back, slipp[ed] his hand down to her backside, and unwantedly and inappropriately hugg[ed] her" at a pediatric anesthesiology retreat. (SAC ¶ 173.) When she reported the misconduct to

the Division Chief, he told her that Dr. Fontes was "handsy" and "affectionate" because of his heritage. The next year, when Dr. Oliver requested an accommodation for an injured wrist, "Dr. Fontes called her a 'malingerer,' told her to 'shut up' and 'shut the f--k up,' and that he would 'fire her if she kept talking.' " (*Id.* ¶ 176.) Dr. Fontes also opposed her appointment to a position on the Pediatric Anesthesiologist Fellowship committee because she was a "malingerer." She again reported the mistreatment to both the Division Chief and Dr. Roberta Hines, the Chair of the Department of Anesthesiology, but neither followed up.

Dr. Oliver's next incident with Dr. Fontes was at a colleague's' going-away party in mid-2018 when Dr. Fontes repeatedly rubbed her arms and back and made whispered sexual advances in her ear, commenting on her figure and calling her his "island girl." In April 2019, at another professional dinner, Dr. Fontes again rubbed Dr. Oliver's arms, neck, back, and shoulders, commented on her figure, and made whispered sexual advances to her throughout the dinner. At the end of the dinner, while inebriated, Dr. Fontes "gave her an unsolicited hug, put his hands all over her body, and proceeded to forcibly kiss her on the lips." (*Id.* ¶ 186.) Considering the lack of response to her prior reports, Dr. Oliver did not report the inappropriate touching, unwanted hug, or forcible kissing. As a result of Dr. Fontes's actions, Dr. Oliver was "deeply offended and deeply devasted." (*Id.* ¶ 192.)

ii. Dr. Lori-Ann Oliver - Attending Physician at YNNH and Faculty Member at Yale

Dr. Lori-Ann Oliver, sister of Jodi-Ann, describes her experience with Dr. Fontes's ***599** inappropriate comments about her figure and that he would "unwantedly grab her and rub her shoulders, touch her lower back, hug her, grab her by the waist and pull her towards him, and put his face close to hers, violating her personal space" when she would see him in the hallways. (*Id.* ¶ 188.) She informed the Division Chief of the Pain Management section of the Department of Anesthesiology about Dr. Fontes's behavior in fall of 2018, but no follow up occurred. Dr. Lori-Ann Oliver was also at the April 2019 dinner where Dr. Fontes forcibly kissed her sister Dr. Jodi-Ann Oliver and, after forcing himself on her sister, Dr. Fontes "grabbed [Dr. Lori-Ann Oliver] by her arms, pulled her towards him, and forced his tongue down her mouth and kissed her on the lips as well." (*Id.* ¶ 187.) Following this interaction, Dr. Fontes continued harassing Dr. Oliver, coming up to squeeze her shoulders and "put his hand on her back and around her waist" at an anesthesiology conference in October 2019. (*Id.* ¶ 190.) Dr. Lori-Ann Oliver reports feeling "mortified" by and fearful of Dr. Fontes and was "deeply offended and deeply devasted" by Dr. Fontes's actions. (*Id.* ¶¶ 191-92.)

iii. Dr. Heidi Boules – Attending Physician at YNNH and Assistant Professor at Yale

Dr. Boules alleges Dr. Fontes began harassing her as early as her interview dinner in late 2017 when he sat and spoke so closely next to her that another doctor switched seats with her because she looked uncomfortable. Later, in mid-2018, Dr. Fontes "repeatedly touched and groped [her] arm, leg and thigh as he sat next to her" at a going-away dinner. (*Id.* ¶ 103.) After the dinner, Dr. Fontes solicited one-on-one meetings with Dr. Boules, sending messages with emojis of alcoholic beverages in them to imply that the meeting would not be professional, and eventually succeeded in securing a meeting with Dr. Boules and a male colleague, where Dr. Fontes "made repeated overtly sexist, sexual and inappropriate comments" that made Dr. Boules feel uncomfortable. (*Id.* ¶ 104.) Then, at a one-on-one professional meeting at a café in October 2018, Dr. Fontes proceeded to "grab Dr. Boules's face, pull her face close to his and forcibly and unwantedly kiss her on the lips" three or four times, despite Dr. Boules's repeated objections. (*Id.* ¶ 108.) Just a few days later, Dr. Fontes again attempted to "forcibly and unwantedly kiss [her] on the lips" while at the hospital. (*Id.* ¶ 109.) The physical touching continued in July 2019, when Dr. Fontes unwantedly hugged Dr. Boules, and in September 2019, when Dr. Fontes snuck up behind Dr. Boules in the operating room, "leaned the front of his body into her backside, put his cheek against her cheek, [ ] whispered into her ear about how quiet the operating room was," and asked her on a date. (*Id.* ¶ 110.)

In addition to the unwanted touching, Dr. Fontes failed to discipline a male surgeon at the hospital who told a third male colleague of Dr. Boules to "get your bitch under control, she's a cunt." (*Id.* ¶ 111.) Despite others witnessing the behavior and Dr. Boules reporting the male surgeon's actions, when Dr. Boules spoke to Dr. Hines, Dr. Hines "referred to the male surgeon, in sum and substance, as a 'bad boy', [ ] that 'everyone knows [is] crazy' and instructed Dr. Boules to not 'let it get to you.' " (*Id.*) When Dr. Boules reached out to Dr. Friedman, Chief Medical Experience Officer at YNNH, about the harassment, she did not receive a response. As result of Dr. Fontes's actions, Dr. Boules reports "feeling demeaned,

traumatized, and afraid to be left alone with Dr. Fontes." (*Id.* ¶ 113.)

iv. Dr. Elizabeth Reinhart – Anesthesiology Resident at Yale and YNNH

Dr. Reinhart alleges that Dr. Fontes's harassment of her began in May 2019 ***600** when, at the end of a professional dinner with pharmaceutical representatives, Dr. Fontes "attempted to unwantedly kiss her on the lips" and then, after she avoided his advance by turning her face, followed her out of the restaurant and insisted on driving her home. (*Id.* ¶ 197-98.) The following month at a graduation ceremony, Dr. Fontes asked if she was going out later and tried to entice her by saying, "I have misbehaved in the past at Barcelona after graduation, so what happens there stays there." (*Id.* ¶ 201.) He later "wrapped his arm around and hugged her by the waist" and told her that he would see her at the bar later. (*Id.* ¶ 203.) Dr. Reinhart was so shaken up by the encounter that she spent the night at another physician's home, who then reported the incident to the Residency Coordinator. A few weeks later, Dr. Fontes came up behind Dr. Reinhart and began to unwantedly massage her shoulders. Dr. Reinhart reported his advances to the Residency Program Director and Assistant Clinical Director, received no follow up, and instead was informed by department-wide email that Dr. Fontes would be appointed as the Vice Chair of Diversity, Equity, and Inclusion of the Department.

In response to Dr. Fontes's appointment, Dr. Reinhart, along with Dr. Castro, complained to the Yale University Graduate Medical Education Department, which assigned their complaints to Dr. Rosemarie Fisher, Director of Resident/Fellow Well-Being within the Office of the Provost at Yale. They also spoke with Attorney Aley Menon, the Secretary of the University-Wide Committee on Sexual Harassment, who instructed them to contact Dr. Friedman, in addition to pursuing their complaints within Yale. Dr. Friedman offered to work with Yale to address the complaints, but informed Dr. Reinhart and Dr. Castro that the claims of physical sexual harassment and assault were outside the scope of YNNH's established mechanism for dealing with complaints. In response to Dr. Reinhart's complaints, at a conference in October 2019, Dr. Fontes linked his arm with Dr. Reinhart and asked her where her "partner in crime" was, referring to Dr. Eltorai, who had also made formal complaints. (*Id.* ¶ 215.) As a result of Dr. Fontes's actions and the lack of response from Yale and YNNH, Dr. Reinhart reports "feeling offended and traumatized" and fearful of being alone with Dr. Fontes. (*Id.* ¶ 218.)

v. Dr. Mia Castro – Pediatric Anesthesiology Resident and Fellow at Yale and YNNH

Dr. Castro describes how Dr. Fontes repeatedly came up behind her and "unwantedly put his arms on and/or around her shoulders and waist" in the operating room throughout the summer and fall of 2018. (*Id.* ¶ 115.) In one specific incident in mid-August 2018, Dr. Fontes placed his hand on her shoulder and "came up behind her and put his arm around her waist as he p[ee]ked over" her shoulder. (*Id.* ¶ 117.) When she rebuffed his advances, Dr. Fontes retaliated against her by "yell[ing] at [her] and command[ing] Dr. Castro to degradingly pick up a syringe cap that had fallen on the ground rather than tend to a patient who was severely hypotensive." (*Id.* ¶ 120.) After this episode, Dr. Castro submitted an anonymous evaluation complaining about Dr. Fontes's conduct in the operating room.

In July and August 2019, Dr. Fontes retaliated against her for submitting the evaluation by declining to permit Dr. Castro to go on a mission trip to Peru unless she used her vacation time. Even after the American Board of Anesthesiology agreed to approve and accredit the trip upon receipt of the relevant application, Dr. Fontes refused to support Dr. Castro's ***601** application. He "derisively winked at her" on August 31, 2020 as a form of intimidation and hostility. (*Id.* ¶ 127.) Dr. Castro went on the trip but is uncertain if she will receive credits for it without Dr. Fontes's support. Dr. Castro reports "feeling belittled and traumatized, afraid to be left alone with [Dr. Fontes,] unable to, at times, focus on work," and avoiding educational opportunities where she knows he will be present. (*Id.* ¶ 128.)

vi. Dr. Ashley Eltorai - Attending Physician at YNNH and Assistant Professor at Yale

Dr. Eltorai describes how, in September 2018, she informed Dr. Fontes of her pregnancy, and he made an inappropriate comment about her "flat stomach" and refused to facilitate her research, writing to her in October 2018 that it "[d]oesn't look like you'll get any patients and with your leave coming up this spring – I don't see this project getting started let alone completed." (*Id.* ¶ 135.) Dr. Eltorai reported his comment to Dr. Hines on October 25, but was told that he was

"just being a boy." (*Id.* ¶ 136.) Although Dr. Eltorai was assured by the Department of Anesthesiology, through email correspondence that included Dr. Fontes, that she would meet the requirements necessary to receive her full annual salary despite her maternity leave, Dr. Fontes told her that she would not meet her requirements or receive her full salary. Dr. Eltorai complained to the Faculty Affairs department that she felt she was being punished for taking maternity leave.

In response to her report, Dr. Eltorai recalls that she was called into a meeting with Dr. Fontes and the director of the Intensive Care Unit (ICU) to discuss her performance in the ICU. Despite only working three days in the unit over the past several months, Dr. Fontes and the ICU Director gave her "vague criticisms about her performance, referencing outdated performance evaluations, and told her that nurses and mid-level practitioners had complained about her." (*Id.* ¶ 144.) When Dr. Eltorai asked for more details, none were provided. When she offered to speak to the nurses directly to understand their concerns, she was told to "wait a few days because we want to speak with them first." (*Id.* ¶ 145.) Upon speaking with the practitioners, Dr. Eltorai recalls that they appeared confused and did not communicate any concerns about her performance.

After returning from maternity leave, Dr. Eltorai attended a graduation dinner for anesthesiology fellows where Dr. Fontes made multiple comments about her body and marital status, and tried to spoon-feed her from across the table. Dr. Fontes also admitted that he had stymied her research efforts and offered to help more in the future. When Dr. Eltorai went to his office to discuss the project, Dr. Fontes pulled his chair around the desk to sit right next to her while they talked and then gave her a full body hug during which he "pressed his pelvis against her pelvis" as she tried to leave. (*Id.* ¶ 160.) After the office incident, he unwantedly massaged her shoulders and touched her unwantedly and in a flirtatious manner while she was speaking with a patient's family.

In August 2019, Dr. Eltorai, reported Dr. Fontes's behavior to Attorney Menon with the Yale Committee on Sexual Misconduct. A week after making the report, on August 15th, she was again asked to meet with Dr. Fontes and the ICU Director to discuss a performance issue that had purportedly occurred in the ICU in April 2019, before she went on maternity leave. She was told that the case had been flagged by the YNNH peer review committee and that an investigation would be conducted that could result in discipline. However, when she asked for documentation ***602** about the investigation, she was told that there was none. When Dr. Eltorai asked member of YNNH if that was typical, she was told that it was "absolutely not the way clinical investigations are handled at our institution" and that it "sounds suspicious." (*Id.* ¶ 150.) She was then informed that she would no longer be permitted to work in the ICU.

After Dr. Eltorai filed this lawsuit in March 2020, she faced further retaliation. She had been permitted back into the ICU to work during the COVID-19 pandemic. However, on April 14, 2020, she received a call from the ICU leadership team chastising her for blocking a transfer patient, even though the refusal had happened during another physician's shift. On May 17, 2020, she was told that she could no longer volunteer for the virtual Tele-ICU that the Department of Medicine was hosting unless she received approval from Dr. Hines, even though Dr. Hines had already informed the faculty that they were permitted to engage in COVID-related volunteer work, so long as it was on their own time. When Dr. Eltorai, upon request of the Yale Department of Medicine, asked Dr. Hines if she could pick up some volunteer shifts in June, Dr. Hines denied her request.

vii. Procedural Background

Plaintiffs filed their initial complaint on March 12, 2020, (Complaint [Doc. 1]), at which time Plaintiffs were still awaiting the jurisdiction release of their Title VII and CFEPA claims from the Equal Employment Opportunity Commission (EEOC) and the Connecticut Commission on Human Rights and Opportunities (CHRO). Plaintiffs filed their amended complaint, including the released Title VII claims, on May 29, 2020, (Amended Compl. [Doc. # 44] at 4-5), and filed their second amended complaint, including the CFEPA claims, on January 4, 2021, (SAC). Defendants Dr. Fontes, YNNH, and Yale filed their Motions to Dismiss on June 17, 18, and 19, respectively, and Oral Argument was held, via video conference, on December 1, 2020.

Defendant YNNH argues that Plaintiffs' Title IX claims fail because:

(1) Title IX does not apply to YNHH, an entity not principally engaged in the business of education,

(2) Plaintiffs Boules's, Eltorai's and Olivers' relationships to an educational program or activity are too attenuated to entitle them to Title IX coverage,

(3) Title IX does not provide a private remedy for employment discrimination based on sex,

(4) Plaintiffs have not established that YNHH had actual notice of the alleged wrongdoing, and

(5) Plaintiffs Eltorai and Castro did not allege that they engaged in either a protected activity, or suffered an adverse employment action, both of which are necessary to sustain retaliation claims.

(YNNH's Mot. at 1-2.) YNNH further seeks dismissal of the Title VII claims because (6) Plaintiffs Eltorai and Castro fail to plead engagement in protected activities or adverse actions for their retaliation claims under Title VII and (7) Plaintiff Eltorai's failure to plead an adverse action similarly dooms her pregnancy discrimination claim. (*Id.*)

Yale's motion for dismissal similarly claims that Title IX does not provide a private remedy for employment discrimination and maintains that Drs. Jodi-Ann and Lori-Ann Oliver do not allege severe or pervasive harassment under Titles VII or IX, that Drs. Castro, Boules, Lori-Ann Oliver, and Jodi-Ann Oliver failed to establish that Yale had "actual notice" of the alleged wrongdoing, and that Drs. Eltorai ***603** and Castro have not alleged an adverse employment action under either Title VII or Title IX. (Yale's Mot. at 1-2.)

II. Discussion

The Court begins by addressing YNNH's claim that, even as a teaching hospital receiving federal funds, it is not subject to Title IX, and that the statute provides no private right of action for employees of educational programs to bring sex-based discrimination claims. The Court will then address the claimed factual insufficiencies regarding notice, nature of the harassment, and non-existence of an adverse action.

a. YNNH May Be Subject to Title IX

[1] Title IX prohibits sex-based discrimination in "any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Focusing on "educational program or activity," federal appellate courts apply a series of factors to determine the educational nature of the program or activity: the structure of the program, including the involvement of instructors and inclusion of examinations or formal evaluations; whether tuition is required; the benefits conferred through the program, such as degrees, diplomas, or other certifications; the "primary purpose" of the program; and whether regulators accrediting the institution "hold it out as educational in nature." *Doe v. Mercy Catholic Medical Center*, 850 F.3d 545, 556 (3d Cir. 2017) (a teaching hospital directly affiliated with a university and "operati[ng] an ACGME-accredited residency program" is subject to Title IX because "its mission, at least in part, [is] educational"); *see also* *Roubideaux v. North Dakota Dep't of Corr. and Rehab.*, 570 F.3d 966, 978 (8th Cir. 2009) (holding that Title IX did not apply to the on-the-job-training offered at a prison because "the primary purpose [ ] is to provide employment, not educational opportunities"); *O'Connor v. Davis*, 126 F.3d 112, 118-19 (2d Cir. 1997) (finding Title IX inapplicable to a hospital where the relationship between the medical center and the school was too attenuated).

YNNH asserts that, even if "an academic medical center [is] affiliated with a postsecondary institution or [ ] considered part of the same entity as the postsecondary institution," recent amendments to Title IX regulations "clarif[y] that 'academic medical centers *are not* postsecondary institutions.' " (YNNH's Mem. in Supp. of Mot. to Dismiss [Doc. # 52] at 8-9) (citing Proposed Dep't of Ed. Reg. § 106.3, 85 Fed. Reg. 30026, 30447-48, Q&A § 106.45(b) (May 19, 2020) (emphasis added).) Plaintiffs respond by quoting the Third Circuit that the "Supreme Court has twice instructed us [ ] to give Title IX the scope its origins dictate [by] accord[ing] it a sweep as broad as its language," *Mercy,* 850 F.3d at 555, and argue that the plain language of Title IX necessarily extends to a teaching hospital because it is an educational program or activity, (Pls.' Omnibus Opp. at 23).

The Court, heeding the Supreme Court's instruction to afford Title IX a broad scope and construing the pleadings in favor of the Plaintiffs, rejects the significance that YNNH attributes to the agency language that academic medical centers are not postsecondary institutions because it ignores the clear comment given by the Department of Education that "Congress *did not exempt* academic medical centers that receive Federal financial assistance from Title IX," and that "[w]hether these final [educational] regulations apply to a person, including a medical resident, *requires a factual determination*" like that utilized in *Mercy* and *O'Connor*. § 106.3, 85 Fed. Reg. at 30447 (emphasis

added). For example, in marked contrast to this case, the ***604** *O'Connor* court found that the medical institution at issue was not subject to Title IX specifically because "[t]he environment [ ] is not [ ] analogous to a teaching hospital's 'mixed employment-training context" such as is alleged to exist at YNNH. *O'Connor*, 126 F.3d at 118.

[2] Here, Plaintiffs allege the following relationship between YNNH and Yale:

> 31. Yale University is an academic university and educational institution that receives financial assistance from the Federal government. Yale University operates a School of Medicine, and works in conjunction with YNHH to operate a medical residency and fellowship program, the mission and purpose of which is educational....
>
> 33. Yale New Haven Hospital, Inc. is a teaching hospital ... and works in conjunction with Yale University to operate a medical residency and subspecialty fellow program, the mission and purpose of which is educational. On its website, YNHH states that it is the "primary teaching hospital of Yale School of Medicine." YNHH's medical residency program is affiliated with Yale University's School of Medicine. Residents and subspecialty fellows such as Dr. Reinhart and Dr. Castro sign "agreements of appointment" with YNHH which state, inter alia, that YNHH "shall ... provide such other support as shall be necessary to ensure a safe and appropriate work and educational environment," and that "[t]he institution does not tolerate sexual or other forms of harassment." These agreements also acknowledge that residents and fellows are subject to both YNHH and Yale University policies and procedures affecting their employment....
>
> 40. The medical residency and fellowship program operated at YNHH inures benefit to Yale University, and Yale University's affiliation to YNHH's medical residency inures benefit to YNHH. YNHH and the University share staff, funding and other support. Residents and fellows at YNHH provide valuable medical services to the residency and fellowship program in exchange for remuneration and educational training as to the knowledge and techniques that are applicable to the medical specialty in which the resident physician or fellow seeks certification. YNHH's medical residency and fellowship program requires its residents and fellows, including Dr. Reinhart and Dr. Castro, to train under Yale University faculty members and physicians, attend lectures conducted by Yale University faculty and staff, conduct research and/or draft scholarly papers with and/or under the supervision of Yale University faculty and staff, study medical and scholarly literature, make case presentations to Yale University faculty and staff, attend case presentations by Yale University faculty and staff and take annual examinations. YNHH's residency and fellowship program prepares its residents and fellows to sit for examinations for board certification in the area of medical specialty which is the focus of the program.

(SAC ¶¶ 31, 33, 40.) Applying the *Mercy*-*O'Connor* factors, Yale and YNNH have a contractual arrangement formally integrating the hospital with the university to share both staff and resources; instructors at the hospital are employed by both the university and the hospital; YNNH receives federal funding because of its status as a teaching hospital; and participation in the residency program prepares residents and fellows to sit for the examinations necessary for board certification. Further, YNNH's website states that it is the "primary teaching hospital of Yale School of Medicine," thereby affiliating itself with ***605** the university and holding itself out as an educational institution. *Id.* Thus, Plaintiffs have satisfactorily pled facts to demonstrate that YNNH, as a teaching hospital receiving federal funds for its residency program, is subject to the requirements of Title IX.

b. Employees of Educational Institutions May Bring Suit for Sex-based Discrimination Under Both Titles VII and IX

Defendants Yale and YNNH claim that Title IX does not provide a private right of action for employment discrimination based on sex. (Yale's Mem. in Supp. of Mot. to Dismiss [Doc. # 53-1] at 2; YNNH's Mem. at 12.) Plaintiffs point to "the majority of Circuit Courts (i.e., the First, Third, Fourth, Sixth, and Tenth Circuits) that [ ] have held that Title IX is not preempted by Title VII" and predict that the Second Circuit could soon join them. *See* *Mercy*, 850 F.3d at 560 ("Title VII's concurrent applicability does not bar Doe's private causes of action for retaliation and quid pro quo harassment under Title IX"); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 896 (1st Cir. 1988) (permitting claims against a teaching hospital to proceed under both Titles IX and VII); *Preston v. Com. of Va. ex rel. New River Com. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994) (holding that Title IX's private cause of action "extends to employment discrimination on the basis of gender by educational institutions receiving federal

funds"); *Hiatt v. Colorado Seminary*, 858 F.3d 1307, 1315 (10th Cir. 2017) (allowing both Title VII and Title IX claims to proceed in the same suit because Title IX "includes a prohibition on employment discrimination in federally funded educational programs"); *Ivan v. Kent State Univ.*, No. 94 Civ. 4090, 1996 WL 422496, at *2 (6th Cir. July 26, 1996) (applying the *McDonnell-Douglas* framework for employment discrimination to a claim of employment discrimination made under Title IX); *but see* *Lakoski v. James,* 66 F.3d 751, 758 (5th Cir. 1995) ("we hold that individuals seeking money damages for employment discrimination on the basis of sex in federally funded educational institutions may not assert Title IX"); *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 861 (7th Cir. 1996) (holding that Congress intended Title VII to be the exclusive remedy for sex-based employment discrimination).

While the Supreme Court has yet to directly decide the issue, it did permit a basketball coach to bring a Title IX claim of discrimination against the school district that employed him, which he alleged fired him for raising concerns about funding disparities among gendered programs. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005). The Supreme Court relied on its prior decisions in *Cannon v. Univ. of Chicago*, holding that a private right of action is "fully consistent with—and in some cases even necessary to—the orderly enforcement of [Title IX]," 441 U.S. 677, 705–06, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), and *North Haven Bd. of Educ. v. Bell*, "conclu[ding] that employment discrimination comes within the prohibition of Title IX," 456 U.S. 512, 530, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982), to conclude that the basketball coach, despite not being a victim of sex discrimination himself, could still bring suit under Title IX because the disparities that he reported, and was fired for, were covered under that statute. Thus, while *Jackson* did not explicitly address the relationship between Title IX and Title VII, it unequivocally permitted an employee to bring suit *under Title IX* against his employer for discrimination that directly affected his employment. Relying on the Supreme Court's implicit recognition that employment discrimination suits are cognizable ***606** under Title IX, the Third Circuit, the only Circuit to address the issue post-*Jackson*, concluded that Title IX encompasses a private right of action for employees seeking redress for sex-based employment discrimination.[2] *Mercy,* 850 F.3d at 560.

The Second Circuit has yet to rule on the matter, *see* *Summa v. Hofstra Univ.*, 708 F.3d 115, 131 (2d Cir. 2013) ("we [ ] do not address the [ ] issue of whether there is a private right of action for employment discrimination under Title IX"), and there exists a split within the District of Connecticut as well. *Compare* *Doe v. Cent. Connecticut State Univ.*, No. 3:19-CV-418 (MPS), 2020 WL 1169296, at *7 (D. Conn. Mar. 11, 2020) (adopting the reasoning of *Mercy* to hold that Title IX employment claims are not foreclosed by Title VII) *with* *Othon v. Wesleyan Univ.*, No. 3:18-CV-00958 (KAD), —— F.Supp.3d ——, 2020 WL 1492864, at *11 (D. Conn. Mar. 27, 2020) (finding that the legislative history of the 1972 and Educational Amendments "reflect Congress's selection of Title VII as the [sole] available private remedy for claims of employment discrimination"); *see also* *Piscitelli v. Univ. of Saint Joseph*, 3:19-CV-01589, 2020 WL 3316413 (KAD), at *1 (D. Conn. June 18, 2020) (adopting the reasoning of *Othon*); *Uyar v. Seli*, No. 3:16-CV-186, 2017 WL 886934 (VLB), at *6 (D. Conn. Mar. 6, 2017) (decided before *Mercy*, holding that "Title VII is Plaintiff's exclusive remedy" for employment discrimination, without discussion of *Jackson*); *Urie v. Yale Univ.*, 331 F. Supp. 2d 94 (RNC), 97–98 (D. Conn. 2004) (pre-*Jackson* denial of a Title IX claim for employment discrimination). With no controlling precedent in this Circuit, this issue is ripe for judicial review.

[3] **[4]** At heart, Title IX's private right of action is an enforcement tool used to hold educational institutions accountable for their actions. *See* *Cannon,* 441 U.S. at 706–08, 99 S.Ct. 1946 ("[T]he individual remedy will provide effective assistance to achieving the statutory purposes [of Title IX]."). The educational nature of the employer, not the position of the litigant, determines its applicability, *see* *O'Connor*, 126 F.3d at 116–17 (2d Cir. 1997); *North Haven*, 456 U.S. at 530-31, 102 S.Ct. 1912. While Title IX's private right of action is argued to be duplicative of Title VII, the enforcement mechanisms of each statute apply to different categories of employers and serve independent ends: Title VII provides redress to individual employees for the discriminatory actions of their employers, while Title

IX encompasses both individual redress and systemwide compliance by recipients of federal funds.[3] *See* *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998) ("[W]hereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds."); *Jackson*, 544 U.S. at 175, 180, 125 S.Ct. 1497 ("Title VII is a vastly different statute from Title IX" in part because "Congress enacted Title IX not only to prevent the use of federal dollars to support discriminatory practices, but also to provide individual citizens effective protection against those practices.") (internal quotations omitted). Even if the enforcement mechanisms may function similarly for litigants, ***607** the prospective impacts of each statute on the country's employment and educational sectors are distinct, and neither statute's power should be limited by restricting the legal devices used to realize those goals.[4]

[5] The Supreme Court has consistently held that Congress intended Title IX to be interpreted broadly and limiting its scope would be at odds with that directive. *See* *Jackson*, 544 U.S. at 175, 125 S.Ct. 1497; *North Haven*, 456 U.S. at 521, 102 S.Ct. 1912. Moreover, because the two Titles derive from two distinct sources of Congressional authority—Title VII was "enacted pursuant to the commerce power to regulate purely private decisionmaking," *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 207 n.6, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), and Title IX was passed under the Spending Power, conditioning the use of federal funds on "contractual" terms, *Jackson*, 544 U.S. at 181, 125 S.Ct. 1497—they are not inherently incompatible. *See* § 106.3, 85 Fed. Reg. at 30441. Thus, this Court construes Title IX with the breadth intended by Congress and recognized by the Supreme Court, concluding that employees of educational programs may bring suit against their federally-funded employers for sex-based discrimination, including retaliation, even if they could also seek remedy by suit under Title VII.

c. Claimed Factual Insufficiency

At the motion to dismiss stage, all factual allegations made by Plaintiffs are to be taken as true and Plaintiffs must "plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). While Plaintiffs must rely on more than "mere conclusory statements," "at the initial stage of a litigation, the plaintiff's burden is 'minimal'—he need only plausibly allege facts that provide 'at least minimal support for [his] proposition.' " *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 86–87 (2d Cir. 2015) (quoting *Littlejohn v. City of New York*, 795 F.3d 297, 311 (2d Cir. 2015)) (denying the employer's motion to dismiss plaintiff's Title VII claims). "On a motion to dismiss, the question is not whether a plaintiff is *likely* to prevail, but whether the well-pleaded factual allegations *plausibly* give rise to an inference of unlawful discrimination." *Id.* at 87. Defendants Yale and YNNH further argue that Plaintiffs claims should be dismissed because they failed to sufficiently plead:

1. that YNNH or Yale had notice of the allegedly discriminatory behavior, as required under Title IX;
2. for the purposes of their retaliation claims, that Drs. Eltorai and Castro engaged in protected activities or suffered adverse actions under Titles VII or IX;
3. that Dr. Eltorai suffered an adverse action because of her pregnancy;
4. that Drs. Boules, Eltorai and Olivers were sufficiently integrated within the educational aspect of the residency program to receive protection from Title IX.

(Yale's Mot. at 2; YNNH's Mot. at 2.) Yale also argues that Plaintiffs' claimed incidents of sexual harassment occurring within the administrative filing time limit of ***608** Title VII were insufficient to constitute severe and pervasive harassment. (Yale's Mem. at 12-22.)

i. Plaintiffs have plausibly alleged that they suffered from severe and pervasive harassment

A. Plaintiffs timely filed their claims with the EEOC

[6] **[7]** As an administrative prerequisite to filing suit, a "complainant must file with the EEOC within 180 days after the alleged discriminatory act occurred; [or] if he has already filed the charge with a state or local agency [ ], he must file his EEOC charge within 300 days of the alleged discriminatory act." *Blackwell v. City of Bridgeport*, 238 F. Supp. 3d 296,

306 (D. Conn. 2017); *see also* 42 U.S.C. § 2000e-5(e)(1). This requirement is not a jurisdictional prerequisite and therefore is "subject to waiver, estoppel, and equitable tolling." *Francis v. City of New York*, 235 F.3d 763, 767 (2d Cir. 2000).

[8] Defendant Yale, applying the 300-day filing deadline, acknowledges that Plaintiffs Boules, Eltorai, Olivers, and Reinhart each alleged at least one discriminatory event within the 300-day time period prior to December 4, 2019, when Plaintiffs Boules, Eltorai, and Reinhart filed with the EEOC, or December 5, when Plaintiffs Olivers filed their EEOC complaint, but argues that a single incident is insufficient to allege a hostile work environment. (Yale's Mem. at 12.) Because "in the case of a hostile work environment claim, the statute of limitations requires that only one sexually harassing act demonstrating the challenged work environment occur within 300 days of filing," *Petrosino v. Bell Atl.*, 385 F.3d 210, 220 (2d Cir. 2004), Boules's, Eltorai's, Olivers', and Reinhart's complaints were timely brought before the EEOC and will not be dismissed on those grounds.

Dr. Castro's circumstances are more complicated. The incident of physical harassment occurred in August of 2018, far outside the 300-day limitation. (*See* SAC ¶¶ 115-120.) However, Dr. Castro timely alleges that, on August 31, 2019, Dr. Fontes "derisively winked" at her, making Dr. Castro feel afraid and disgusted. (*Id.* ¶ 127.) While this sexualized gesture standing alone would not constitute actionable sexual harassment, in the context of Dr. Fontes's pattern of sexually harassing conduct unremedied by Defendants, it plausibly represents an intentional continuation of Dr. Fontes's long-standing behavior that contributed to the hostile environment that Dr. Castro was subjected to, beginning with Dr. Fontes's touching in August of 2018.[5] (*See* SAC ¶ 237.) Therefore, examining "the totality of the circumstances" of Dr. Castro's hostile work environment claims, including management's "failure to investigate or denounce" the harassment, *see Blackwell*, 238 F. Supp. 3d at *309, the Court concludes that Dr. Castro has pled sufficient facts to plausibly link the timely derisive wink as a gesture which was a part of, or contributed to, the hostile work environment that Dr. Castro experienced well into 2019. Her claim will not be dismissed on timeliness grounds.

B. Plaintiffs have alleged sufficient facts to plausibly claim that they were subjected to a hostile environment under Titles VII and IX

[9] **[10]** **[11]** **[12]** **[13]** To succeed on a hostile environment claim under either Title VII or Title ***609** IX, Plaintiffs "must show that [they] subjectively perceived the environment to be hostile or abusive and that the environment objectively was hostile or abusive." *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 89 (2d Cir. 2011) (applying the Title VII sex discrimination framework to Title IX). While Plaintiffs will ultimately need to demonstrate they experienced severe *or* pervasive harassment,[6] at this early stage, "a plaintiff need only plead facts sufficient to support the conclusion that she was faced with harassment of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse," and that she subjectively perceived the environment to be hostile. *Patane v. Clark*, 508 F.3d 106, 113 (2d Cir. 2007); *see also* *Terry v. Ashcroft*, 336 F.3d 128, 148 (2d Cir. 2003) (vacating a district court's grant of summary judgment in favor of the employer because "the standard for establishing a hostile work environment is high, [but] we have repeatedly cautioned against setting the bar too high"). Given the fact-specific nature of a hostile environment claim, evaluation of Plaintiffs' claims is best able to be made at the trial or summary judgment stage. *Hayut v. State Univ. of New York*, 352 F.3d 733, 745 (2d Cir. 2003); *see also* *McNeil v. Yale Univ.*, 436 F. Supp. 3d at 516 ("Second Circuit decisions probative of viable Title IX claims ... have been resolved at the summary judgment stage, at the earliest."). As all Plaintiffs have alleged that their employment was altered for the worse by Dr. Fontes's harassment, namely his forcible touching and kissing of Drs. Boules, Jodi-Ann Oliver, Lori-Ann Oliver, and Reinhart, (SAC ¶¶ 103, 105, 107-10, 173, 181, 184, 186-88, 195-97, 203, 206), and forcible touching of Drs. Castro and Eltorai, (*id.* ¶¶ 117, 154, 157, 159-62), and all alleged that they subjectively suffered from their experience, (*see id.* ¶¶ 113, 129, 160, 162-63, 192, 218), Defendant's contention of insufficient factual pleading fails.

ii. Yale and YNNH may have had "actual notice" of the Title IX violations

[14] In addition to alleging a hostile environment, Plaintiffs suing under Title IX must also demonstrate that the educational program or activity was deliberately indifferent to the alleged discrimination, meaning "that a school official with authority to address the alleged discrimination and to institute corrective measures had actual knowledge of the discrimination and failed to adequately respond." *McNeil*, 436 F. Supp. 3d at 513 (quoting *Papelino*, 633 F.3d at 89); *see also* *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 644, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999) (holding that "recipients of federal funding may be liable for [ ] discrimination where the recipient is deliberately indifferent to known acts of [ ] sexual harassment").

***610** **[15]** **[16]** Defendant YNNH alleges that it did not have actual notice of the abusive behavior of Dr. Fontes because Plaintiffs failed to properly notify anyone with authority at the hospital about Dr. Fontes's misconduct.[7] (YNNH's Mem. at 14.) YNNH argues that Plaintiffs Boules and Lori-Ann Oliver failed to make any complaint and that Plaintiffs Castro, Eltorai, Jodi-Ann Oliver, and Reinhart only informed *Yale* staff and faculty members, not YNNH staff, about the alleged unlawful discrimination. (*Id.* at 15-16.) Yale argues that Plaintiffs either failed to make a complaint or only complained to a member of *YNNH's* staff.[8] (Yale's Mem. at 22-24.)

Plaintiffs allege that they made complaints to individuals who are employed by both Yale and YNNH and are persons of authority at both institutions. Plaintiffs also point to YNNH's employee handbook which "actually instructs its staff, including its residents and fellows, to file complaints with Yale University officials when issues concerning sexual harassment/misconduct 'involving a University employee' like Fontes occur, and to 'contact [YNHH's] Human Resources Office' only when 'the complaint involves another trainee or a hospital employee.' " (Pls.' Opp. at 43 (quoting Pls.' Ex. A [Doc # 61-1] at 4).) Because there remains a factual dispute related to the integration of the two institutions, Plaintiffs contend the motion should be denied.

Each Plaintiff states that she informed at least one person in authority about the discriminatory actions of Dr. Fontes and was either ignored or brushed off because Dr. Fontes's behavior towards female subordinates was an "open secret" at Yale that was tolerated as "boys will be boys." (*Id.* ¶¶ 107-08, 117, 159-60, 171-72, 174-75, 184, 199-201, 203-05, 208-09.) The apparently complex relationship between Yale and YNNH, and Plaintiffs' claim that the employee handbook instructs fellows working at YNNH to report allegations of harassment through Yale, suggests that both institutions could be at fault. Regardless, neither institution may escape liability at this early stage by blaming the other, and dismissal will not be granted on these grounds.

iii. Drs. Eltorai and Castro may have suffered an adverse employment action sufficient to prove retaliation in violation of Titles VII and IX

Drs. Eltorai and Castro both claim retaliation by YNNH and Yale, because the institutions "engag[ed] in conduct reasonably likely to dissuade and/or deter Plaintiffs and others from engaging in protected acts," in violation of Title VII, and "fail[ed] to properly investigate their claims of discrimination and sexual assault in retaliation of their protected activity and by instigating retaliatory investigation practices," ***611** in violation of Title IX. (SAC ¶¶ 243, 229.) Defendants' Yale and YNNH argue that both retaliation claims fail because neither doctor experienced an adverse educational or employment action and, as YNNH argues, plaintiffs did not allege engagement in a "protected activity" as required for liability under both Titles. (Yale's Mot. at 2; YNNH's Mot. at 2.)

[17] **[18]** **[19]** **[20]** Under Titles VII and IX, "a plaintiff claiming retaliation [ ] must [ ] establish a prima facie case by showing: (1) protected activity by the plaintiff; (2) knowledge by the defendant of the protected activity; (3) adverse [ ] action; and (4) a causal connection between the protected activity and the adverse action." *Papelino*, 633 F.3d at 91; *see also* *Vega*, 801 F.3d at 90 ("[F]or a retaliation claim to survive a motion [ ] to dismiss, the plaintiff must plausibly allege that: (1) defendants discriminated—or took an adverse employment action—against him, (2) 'because' he has opposed any unlawful employment practice."). A "protected activity" "refers to action taken to protest or oppose statutorily prohibited discrimination," *Siuzdak v. Sessions*, 295 F. Supp. 3d 77, 96 (D. Conn. 2018) (quoting *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 566 (2d Cir. 2000)), and includes a wide range of activities, like reporting discrimination, testifying in a proceeding, or otherwise participating in an investigation about discrimination, 42 U.S.C. § 2000e-3(a). In the context of a retaliation claim, an adverse action may be "any

action that 'could well dissuade a reasonable worker from making or supporting a charge of discrimination,' " and is *not* limited to those which materially alter the employee's position. *Vega*, 801 F.3d at 90 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)). Adverse actions include intentionally failing to notify the individual of important workplace changes, *id.* at 91-92, negative performance reviews, *id.*, refusal to provide letters of recommendation or exclusion from job fairs and other networking events, *Novio v. New York Acad. of Art*, 286 F. Supp. 3d 566, 578-79 (S.D.N.Y. 2017); *see also Doe v. Sarah Lawrence Coll.*, 453 F. Supp. 3d 653, 668 (S.D.N.Y. 2020). At the motion to dismiss stage, temporal proximity, often no more than a few months, between the protected activity and the adverse action may suffice for a *prima facie* showing of discrimination. *Vega*, 801 F.3d at 90; *see also Echevarria v. Utitec, Inc.*, No. 3:15-CV-1840 (VLB), 2017 WL 4316390, at *10 (D. Conn. Sept. 28, 2017) ("The case law in the Second Circuit is unclear with regard to how much time can pass between a protected action and the adverse employment action before no causal connection can be inferred ... [but t]he three to four month gap present here is has been held sufficient to support an inference of causation.")

[21] Both Drs. Castro and Eltorai state that they made formal complaints about Dr. Fontes's sexual harassment, thereby engaging in protected activity under Titles VII and IX. (*See* SAC ¶¶ 121, 127, 147, 163, 165.) Dr. Eltorai claims that she was banned from working in the ICU, without cause, shortly after she reported Dr. Fontes's harassment in August of 2019. (*Id.* ¶ 164.) She further alleges that Dr. Fontes's retaliation increased after she filed this lawsuit, when she was reprimanded for another doctor's refusal of a transfer patient and was prohibited from volunteering for Tele-ICU, in the midst of the pandemic, despite being requested by the Yale Department of Medicine to cover the shifts. (*Id.* ¶¶ 165-68.) While the events of 2020 will need factual development to demonstrate their degree of adversity, removing Dr. Eltorai from the ICU meets the threshold of plausibility required to ***612** permit Dr. Eltorai's retaliation claim to proceed to discovery.

Dr. Castro claims that she reported Dr. Fontes's inappropriate touching in mid-August of 2018, (*id.* ¶¶ 117, 121), but his retaliatory acts against her occurred in July of *2019* when he refused to credit her mission trip as educational and required her to use vacation time, (*id.* ¶¶ 123-25, 127). While refusing to credit the trip, in some circumstances, arguably could be an adverse action, the timing is far too attenuated to plausibly claim that Dr. Fontes's refusal was a direct result of Dr. Castro's report, and Plaintiff does not allege any other connection between the two events. [9] Thus, Defendant's motion to dismiss Dr. Castro's retaliation claim is granted.

iv. Dr. Eltorai has pled facts sufficient to create an inference of discrimination for her pregnancy discrimination claim

[22] **[23]** YNNH further argues that Dr. Eltorai's Title VII pregnancy discrimination claim should be dismissed because she failed to allege any adverse action. (YNNH's Mot. at 2.) Title VII, as amended by the Pregnancy Discrimination Act of 1978, prohibits workplace discrimination "on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e–2(k); *see also Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 135 S.Ct. 1338, 1344, 191 L.Ed.2d 279 (2015). At the motion to dismiss stage, a plaintiff must "allege two elements: (1) the employer discriminated against [her] (2) because of [her] race, color, religion, sex [including pregnancy], or national origin." *Vega*, 801 F.3d at 85. Recognizing the "elusive nature of intentional discrimination," plaintiffs "may prove discrimination indirectly either by meeting the requirements of *McDonnell Douglas* ..., or by otherwise creating a mosaic of intentional discrimination by identifying bits and pieces of evidence that together give rise to an inference of discrimination." *Vega*, 801 F.3d at 86, 87 (internal quotations omitted). At this early stage in litigation, the plaintiffs' burden is minimal, requiring that plaintiffs allege only "enough to nudge their claims across the line from conceivable to plausible." *Id.* at 87 (internal quotations omitted).

[24] Dr. Eltorai claims that Dr. Fontes, shortly after learning about her pregnancy, refused to assist her with scheduling her research, failed to notify her that she had insufficient credits to qualify for her full annual salary, and suggested that she had "performance issues" in the ICU. (*See* SAC ¶¶ 135, 137-139, 141-150). These adverse actions, taken in quick succession after Dr. Eltorai informed Dr. Fontes about her pregnancy, create an inference of discrimination substantial enough to survive a motion to dismiss. *See Lenzi v. Systemax, Inc.*, 944 F.3d 97, 108 (2d Cir. 2019) (holding that the temporal proximity between when plaintiff disclosed her pregnancy

and her termination met plaintiff's burden at the summary judgment stage). To determine the significance of these adverse actions, their relationship to Dr. Fontes's knowledge of Dr. Eltorai's pregnancy requires a fully developed factual record, and dismissal is not warranted at this stage.

v. The relationship between YNNH, Yale, and Plaintiffs Boules, Eltorai, and Olivers is not too attenuated to preclude application of Title IX to their claims against YNNH

Defendant YNNH argues that "the relationships that the Attending Physician Plaintiffs [Boules, Eltorai, and Olivers] ***613** have with YNHH are too attenuated to allow them to sustain claims against YNHH under Title IX." (YNNH's Mem. at 11.) Plaintiffs respond that the nature of the institution, not the role of the individuals, determines the applicability of Title IX. The Third Circuit has held that residency programs are often subject to Title IX because "[c]ourts have repeatedly recognized the educational qualities of residency *programs* [ ], even where ultimately deeming *residents* nonstudents. So too has Congress." (*Mercy*, 850 F.3d at 557) (emphasis in original) (internal citations omitted). As Plaintiffs allege that Boules, Eltorai, and Olivers were not only employed by YNNH, but also faculty members of Yale and participants in the residency program at YNNH, it is difficult to see how these three doctors' relationships with YNNH, through its residency program, could be disentangled from YNNH's relationship with Yale at this early litigation stage. (*See* SAC ¶¶ 25, 27-29 (listing each attending physician as either an "assistant professor" or "assistant professor of clinical anesthesiology" in the Department of Anesthesiology Yale and attending physicians at YNNH).) [10] Their relationships with the educational program of Yale, housed within YNNH, appear to be directly related to their employment at the hospital, and Defendant's motion for dismissal will not be granted on these grounds.

III. Conclusion

Accordingly, Defendants' Motions to Dismiss are DENIED as to all claims except Dr. Castro's claim of retaliation, which is GRANTED.

IT IS SO ORDERED.

All Citations

518 F.Supp.3d 593

Footnotes

1 On the record at Oral Argument on December 1, 2020, the Court denied Defendant Fontes's motion that the Court decline supplemental jurisdiction over the state law claims against him. (Fontes's Mot. at 1-2.)

2 Compare with the pre-*Jackson* contrary holdings of the Fifth and Seventh Circuits, *Lakoski,* 66 F.3d 751 and *Waid*, 91 F.3d 857, decided a decade before *Jackson.*

3 *See also* U.S. Dep't of Justice, Title IX Legal Manual IV.B.2 (captured February 13, 2018) ("Title IX and Title VII are separate enforcement mechanisms. Individuals can use both statutes to attack the same violations.").

4 As the Supreme Court has observed, "Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination," *North Haven*, 456 U.S. at 535, 102 S.Ct. 1912, and it is up to Congress, not the courts, to make any corrective change deemed appropriate, *id.* at 535 n.26, 102 S.Ct. 1912.

5 *See Wei Fu v. ISO Innovative Analytics*, No. 3:12-CV-01444 (JCH), 2014 WL 1289235, at *17 (D. Conn. Mar. 31, 2014) (granting summary judgment for the *employer* because a wink and smile during a business meeting,

even when viewed in conjunction with a series of flirtatious emails, a number of invitations to unnecessary business trips, and sexual comments, did not create an objectively hostile environment).

6 Although individual incidents *typically* do not rise to the level of severe and pervasive, "even a single act can meet the threshold if, by itself, it can and does work a transformation of the plaintiff's workplace." *Rogers v. City of New Britain*, 189 F. Supp. 3d 345, 354 (D. Conn. 2016) (quoting *Alfano v. Costello*, 294 F.3d 365, 373-74 (2d Cir. 2002)); *see also* *McNeil v. Yale Univ.*, 436 F. Supp. 3d 489, 516 (D. Conn. 2020) (denying defendant's motion to dismiss because even a single incident of harassment could plausibly support university liability with a more developed factual record during discovery); *Redd v. New York Div. of Parole*, 678 F.3d 166, 176 (2d Cir. 2012) (Under Title VII, "even a single episode of harassment can establish a hostile work environment if the incident is sufficiently 'severe.' "). Thus, Yale's assertion that a single incident of harassment is insufficient to constitute severe or pervasive overreaches.

7 As there is little doubt that the type of hostile environment claim pled by Plaintiffs falls within the ambit of proscribed activities under Title IX, the Court assumes that Defendants are arguing that, though aware generally that this type of sex discrimination was prohibited, no one in the program was informed that discrimination of this kind had actually occurred.

8 Yale also argues that the Title VII claim should be dismissed because Yale did not have actual notice of the alleged harassment. However, Title VII does not have the same notice requirement as Title IX. Under Title VII, "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Burlington Industries, Inc. v. Ellerth.* 524 U.S. 742, 765, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). As Dr. Fontes supervised all of the women physicians he allegedly harassed, no notice is required for the Title VII claims, and dismissal will not be granted on these grounds.

9 Dr. Castro's claim regarding the derisive wink on August 31, 2019 may contribute to her hostile work environment claim, but it does not support her retaliation claim as the act could not be considered an adverse action.

10 None of the cases Defendant cites reflects the factual situation claimed by these Plaintiffs in which the plaintiffs were both employed by the institution and directly involved in its educational components. *See* *Burgess v. Harris Beach PLLC,* 346 F. App'x 658, 661 (2d Cir. 2009) (granting a motion to dismiss against an attorney who had sued a school district who then sued the district under Title IX for discriminating against her, as the attorney, in the prior suit); *Glaser v. Upright Citizens Brigade, LLC*, 377 F. Supp. 3d 387, 398 (S.D.N.Y. 2019) (granting a motion to dismiss because plaintiff's "time as a student at UCB ended years before Defendants' allegedly discriminatory conduct"); *Doe v. Univ. of Kentucky*, 357 F. Supp. 3d 620, 634 (E.D. Ky. 2019), *rev'd and remanded*, 971 F.3d 553 (6th Cir. 2020) ("Plaintiff has failed to show she was either a UK student or enrolled in a UK education program or activity.").

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LUCY CHI, individually and on behalf of all others similarly situated,

Plaintiff,

v.

UNIVERSITY OF SOUTHERN CALIFORNIA, BOARD OF TRUSTEES OF THE UNIVERSITY OF SOUTHERN CALIFORNIA, and GEORGE TYNDALL, M.D.,

Defendant.

No. 2:18-cv-4258

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

TABLE OF CONTENTS

Lucy Chi ("Plaintiff"), individually and on behalf of all women who received a medical examination from Dr. George Tyndall at the University of Southern California, alleges as follows:

I. INTRODUCTION

1. Trust is an essential part of the relationship between physician and patient. "Without trust, how could a physician expect patients to reveal the full extent of their medically relevant history, expose themselves to the physical exam, or act on recommendations for tests or treatments?"[1]

2. George Tyndall, M.D. violated this trust by taking advantage of female students who sought examination by a gynecologist at the University of Southern California's ("USC") student health center. Tyndall used his position of trust to place women in a place of complete vulnerability: naked or partially unclothed in a closed examination room with the expectation that physical contact would occur for medical treatment in accordance with the standard of care.

3. Tyndall violated this trust by causing physical contact, including in the form of sexual abuse, molestation, and unwanted touching, in violation of his female patients that was not for the purpose of providing medical care, but for the purpose of providing Tyndall with sexual gratification.

4. USC violated its female students' trust by knowingly putting women in the room for treatment by Tyndall, knowing that inappropriate physical contact and violations would occur. In fact, USC nurses, chaperones and other staff members were regularly present in the examination rooms, observed the inappropriate sexual molestation, and took no steps to stop it as it occurred.

[1] Susan Dorr Goold, MD, MHSA, MA, "Trust, Distrust and Trustworthiness, Lessons from the Field," J Gen Intern Med. 2002 Jan; 17(1): 79–81, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1495000/ (last accessed May 19, 2018) (citations omitted).

5. Moreover, even as numerous supervisors and administrators became aware of Tyndall's harmful conduct, USC failed to act to protect its female students by removing Tyndall from his position even though it was clear he was unfit to treat patients.

6. Defendants' sexual abuse, molestation, unwanted sexual touching and contact has caused widespread damage to Plaintiff and the Class, for which Defendants must be held responsible.

II. JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, because this action arises under the laws of the United States. This Court also has subject-matter jurisdiction pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2), because this is a class action, including claims asserted on behalf of a nationwide class, filed under Rule 23 of the Federal Rules of Civil Procedure; there are dozens, and likely hundreds, of proposed Class members; the aggregate amount in controversy exceeds the jurisdictional amount or $5,000,000.00; and Defendants are citizens of a State different from that of Plaintiff and members of the Class.

8. Venue is proper in this District under 28 U.S.C. § 1391 (a)–(d) because, inter alia, substantial parts of the events or omissions giving rise to the claim occurred in the District and/or a substantial part of property that is the subject of the action is situated in the District.

III. THE PARTIES

9. Lucy Chi is a resident of Culver City, California and citizen of the United States.

10. Defendant USC's principal place of business is in Los Angeles County, California.

11. As a private corporation, USC is governed by the Board of Trustees of The University of Southern California, which has approximately 55 voting members. The board is a self-perpetuating body, electing one-fifth of its members each year for a five-year term of office. Hereinafter, USC and the Board of Trustees will be referred to collectively as the USC Defendants.

12. Defendant George Tyndall, M.D. is an adult male who is a resident of Los Angeles County and citizen of the United States. Tyndall started working as a gynecologist at USC's student health center in or about 1989, and reportedly examined as many as 16 women per day at the clinic.

IV. FACTS

A. Students (and their parents) entrusted their medical care to USC.

13. Experts have asserted that health is an important factor for academic achievement in higher education.[2] "Health complaints limit students' capacity to perform adequately at university."[3] Thus, a university's promotion of health and well-being of its students promotes effective learning.[4]

14. To that end, USC touts the services of its student-health center to its students. It regularly runs workshops designed to invite the trust of students, such as a series of "Feel Better Workshops" entitled"Relationships and Connection," "Addressing Academic Anxiety," "Stress Management," and "Calm Your Anxiety."[5]

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[2] Ansari, "Is the Health and Wellbeing of University Students Associated with their Academic Performance?" Int J Environ Res Public Health. 2010 Feb; 7(2): 509–527, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2872284/#b3-ijerph-07-00509 (last accessed May 19, 2018) (citations omitted).

[3] *Id.*

[4] *Id.*

[5] https://engemannshc.usc.edu/events/ (last accessed May 19, 2018).

15. Women are encouraged to start seeing a gynecologist once a year when they turn 18 years old.[6] Thus, many of the women who are examined at USC's student health center have never had a gynecological examination before.[7]

16. USC provides its female students "a full range of women's health care services including well women annual visits, testing, contraceptives and pregnancy counseling."[8] USC explains: "These are yearly comprehensive, individual assessments of your health. These visits include a physical exam, a pelvic exam and screening for any other health problems. Use this visit as an opportunity to discuss any questions or concerns you have about your health with your doctor."

17. USC's invitation to its female students to discuss concerns about their health presumes a relationship of trust.

18. Trust is essential to both physician and patient.[9] "Without trust, how could a physician expect patients to reveal the full extent of their medically relevant history, expose themselves to the physical exam, or act on recommendations for tests or treatments?" [10]

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[6] http://www.4collegewomen.org/fact-sheets/firstgyno.html (last accessed May 21, 2018).

[7] https://www.latimes.com/local/california/la-me-usc-doctor-misconduct-complaints-20180515-story.html (last accessed May 21, 2018).

[8] http://sc.edu/about/offices_and_divisions/student_health_services/medical-services/womens-health/index.php (last accessed May 19, 2018).

[9] Susan Dorr Goold, MD, MHSA, MA, "Trust, Distrust and Trustworthiness, Lessons from the Field," J Gen Intern Med. 2002 Jan; 17(1): 79–81, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1495000/ (last accessed May 19, 2018).

[10] *Id.*

19. "Presumed consent is a critical manifestation of trust that makes possible much of routine doctor visits." [11] Absent a presumption of trust, patients might avoid essential medical care.[12]

20. "Important as it is to measure trust in individual clinicians and the actions and circumstances that affect it, it is equally important, in today's health system, to study (empirically and normatively) trust and trustworthiness in organizations and institutions." [13]

21. Knowing and inviting female students to place trust in its physicians, USC had a duty to ensure that Tyndall used his trusted position and the safe confines of a doctor's exam room at the USC student health center consistent with the standard of care and certainly not to abuse that trust through the molestation of students.

B. Tyndall's and USC's abuse of trust.

22. For nearly 30 years, the University of Southern California's student health clinic's only full-time gynecologist was Tyndall. USC hired Tyndall in 1989 after his residency.

23. According to the first report to expose Tyndall and USC, Tyndall used his position of trust to forego the standard of care. For example, in the exam room, Tyndall was typically accompanied by a female nurse or medical assistant known as a chaperone — a practice embraced by many male gynecologists. [14]

24. In the years after Tyndall started, some chaperones reportedly became alarmed about the frequency with which he used a camera during pelvic exams.[15]

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[11] *Id.*, citing Faden R, Beauchamp T. A History and Theory of Informed Consent. New York: Oxford University Press; 1986. pp. 274–80.

[12] *Id.*

[13] *Id.*

[14] https://www.latimes.com/local/california/la-me-usc-doctor-misconduct-complaints-20180515-story.html (last accessed May 21, 2018).

[15] *Id.*

Tyndall's chaperones questioned his motivations, with one reporting he took multiple pictures of hundreds of patients' genitals, while another said she witnessed 50 to 100 patients photographed. [16]

25. According to the LA Times, Bernadette Kosterlitzky, a clinic nurse from 1992 to 2013, said that after a chaperone alerted administrators to the camera, then-Executive Director Dr. Lawrence Neinstein ordered it removed.[17]

26. In fact, a member of the USC student health center's oversight committee purportedly admitted that: (i) in the early 2000s, several students submitted letters concerning inappropriate touching and remarks by Tyndall; and (ii) those complaint letters were read aloud during monthly committee meetings.[18] One member of the committee confronted Tyndall, and that confrontation is allegedly contained in university records that corroborate his accounts. [19]

27. After USC's grand opening of its new Engemann Student Health Center in or about 2013, chaperones became concerned regarding Tyndall's treatment of female patients.

28. Chaperones were concerned about "full body scans," where "Tyndall frequently had women lie naked on the exam table while he slowly inspected every part of their body, down to the area between their buttocks."[20] While a woman's annual gynecological visit might include a discussion of skin problems, such "meticulous" inspections of a patient's naked body "would be highly unusual if not inappropriate."[21]

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[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

29. While Tyndall conducted examinations, he made comments that the nursing staff found "unseemly," describing patients' skin as "flawless," "creamy" or "beautiful." He told students they had "perky breasts." [22]

30. In the spring of 2013, eight chaperones reported concerns about Tyndall to their supervisor, veteran nurse Cindy Gilbert. Gilbert went to Neinstein, the clinic's executive director, and the then-head of clinic nursing and now the clinic's executive director, Tammie Akiyoshi. Gilbert said Neinstein told her that he had talked to Tyndall about his behavior in the past. [23]

31. Neinstein reportedly referred the complaints to the university's Office of Equity and Diversity, which investigates sexual misconduct and racial and gender discrimination. USC has stated that an investigator interviewed seven employees and a patient, according to USC. However, Gilbert and multiple chaperones who complained said they were never informed of the probe or questioned by the investigator. [24]

32. The investigation apparently concluded there was no violation of school policy. The only action that Neinstein took was to bar Tyndall from locking the door of his office when patients were present. [25]

33. Tyndall then increased his attempts to groom patients, particularly of Chinese ethnicity. [26]

34. In his office, Tyndall had a map of China and encouraged women to point out their home province. He kept a bamboo plant, the traditional Chinese symbol of longevity and vitality, on a shelf above his desk. He sometimes showed off a photo of his Filipina wife and shared details of their relationship. [27]

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

35. In addition to grooming, Tyndall took steps to require patients to return for appointments more often. For example, while most physicians will prescribe one year's worth of birth control pill refills, Tyndall would only prescribe two months. He would not extend the prescription until the patients returned for another examination.[28]

36. However, as Tyndall's grooming efforts increased, so did the chaperones' concerns.

37. Chaperones began discussing the way Tyndall used his fingers at the outset of the pelvic exam for many young women. Before inserting a speculum, the metal duck-billed device that spreads open the walls of the vagina and enables the doctor to view the cervix, Tyndall would voice concern that the speculum might not fit.[29]

38. The Los Angeles Times reported:

> "He would put one finger in and say, 'Oh, I think it will fit. Let's put two fingers in,'" said a chaperone who worked with Tyndall for years. Four people familiar with Tyndall's exams said that while he spoke, he was moving his fingers in and out of the patients.
>
> They said he made nearly identical statements to hundreds of women as he probed them: My, what a tight muscle you have. You must be a runner.
>
> The chaperone who worked with Tyndall for years said she witnessed at least 70 such exams and remembered thinking the physician would eventually become embarrassed about repeating the same words to student after student.
>
> "He never was," she said.
>
> During some exams, Tyndall made explicit reference to sexual intercourse while his fingers were inside patients, according to five people who heard the remarks or were told about them.

[28] *Id.*

[29] *Id.*

> "He would tell young ladies their hymens are intact. 'Don't worry about it, your boyfriend's gonna love it,'" a chaperone recalled.[30]

39. The chief of Female Pelvic Medicine and Reconstructive Surgery at University Hospitals Cleveland Medical Center, Dr. Sangeeta Mahajan, has stated that she has never heard of a gynecologist moving his fingers in and out of a vagina to determine whether a speculum fit, calling it "very odd" and "creepy."[31] An assistant professor of gynecology at Harvard Medical School, Dr. Louise King, said the practice was not standard.[32]

C. Patients complained about Tyndall's behavior to USC, and refused to be scheduled with him again.

40. One nurse said that in 2013-14, she spoke to at least five women who refused to be scheduled with Tyndall despite having gynecological problems that needed immediate attention. The patients reported feeling like "he was inappropriately touching them, that it didn't feel like a normal exam," and "like they were violated." The nurse told her immediate supervisor and later Akiyoshi, the head of nursing, who said they would look into it.[33]

41. During the 2013-2016 period, one clinician received unsolicited complaints from at least three students who said they would never see Tyndall again. The clinician gave the students the email addresses for administrators and encouraged them to put their complaints in writing.[34]

42. Having already felt uncomfortable on how Tyndall violated her with his hand during a gynecological exam before the speculum was inserted, one student was told on her second visit that Tyndall wanted her to remove all her clothes. After

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[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

waiting for Tyndall naked, she got dressed, after asking herself why she needed to take off all her clothes. She told a female clinic employee she wanted to see another doctor. That employee reportedly told the student "there were a lot of complaints" about Tyndall. [35]

43. Chaperones reported the names of women "who seemed particularly shaken" by Tyndall's exams to their supervisor, nurse Gilbert. Gilbert allegedly contacted patients and explained how to make a written complaint against the doctor. Some did, but others responded they just wanted to find another gynecologist and forget about the experience. [36]

44. Gilbert stated she repeatedly expressed concerns about Tyndall to Akiyoshi, Neinstein and other clinic administrators from 2014 to 2016, but they seemed uninterested. [37]

45. Chaperones forwarded some complaints about Tyndall to Sandra Villafan, who became the clinic's head of quality and safety in 2013. Villafan has stated she relayed any concerns to clinic administrators and university leadership, but was not privy to the outcomes of any investigations. [38]

46. Finally, in 2016, Gilbert went to USC's rape crisis center, known as Relationshop and Sexual Violence Prevention and Services, and spoke to Executive Director Ekta Kumar. That complaint (and the discovery of a box of film of women's genitalia in Tyndall's office) finally prompted the investigation that led to Tyndall's removal. [39]

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[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

D. USC admits it was on notice of Tyndall's violation of female students.

47. On May 15, 2018, USC issued a release titled "Summary of Coordinated Investigation of Student Health Physician" ("Statement") from Todd R. Dickey, Senior Vice President for Administration, Gretchen Dahlinger Means, Title IX Coordinator and Executive Director of the Office of Equity and Diversity, and Laura LaCorte, Associate Senior Vice President for Compliance.[40]

48. The Statement admitted that, in June 2016, USC's Office of Equity and Diversity ("OED") received a complaint from a staff member at the student health center regarding sexually inappropriate comments made to patients in front of medical assistants by Tyndall.[41]

49. As a result, USC states that it conducted an investigation. USC reported that medical assistants who assisted Dr. Tyndall during clinic visits reported concerns about the way he conducted pelvic examinations. Specifically, these medical assistants questioned Tyndall's practice of a digital insertion prior to insertion of a speculum.[42]

50. USC purportedly consulted with a gynecology expert who stated that this could be considered an acceptable practice, but then contracted with an outside medical review firm, MD Review, to review Dr. Tyndall's clinical practice. MD Review concluded that this examination practice not the standard of care. [43]

51. USC stated that, during its investigation, a box of clinical photos of cervixes and surrounding internal tissue allegedly from 1990-1991 was found during a search of Tyndall's office. [44]

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[40] *See* http://pressroom.usc.edu/statement-of-facts-may-15-2018/ (last accessed May 19, 2018).

[41] *See Id.*

[42] *See Id.*

[43] *See Id.*

[44] *See Id.*

52. USC reported that it also reviewed the files of Dr. Larry Neinstein, the former health center director from 1995-2014 (who is now deceased), which showed earlier patient complaints about Tyndall, including complaints about his clinical practice. The files contained eight complaints logged between 2000 and 2014 that were concerning. These included racially insensitive and other inappropriate comments, concerns that he was not adequately sensitive to patient privacy, a complaint of feeling "uncomfortable," another that Tyndall "gave me the skeevies," and another that he was "unprofessional."[45]

53. USC admitted that these complaints were sufficient to terminate Tyndall, and should have been elevated for "proper investigation."

54. Dr. Neinstein's notes also purportedly indicated that he brought in outside experts to review his clinical practices, although the Statement does not identify those experts nor the results of those engagements.[46]

55. USC stated that OED had previously conducted a review in 2013 of complaints of inappropriate comments made by Tyndall raised by staff members, but that there was insufficient evidence to find a violation of university policy.[47]

56. USC was silent on its failure to report Tyndall to criminal authorities, the attorney general or anyone outside the university for the purposes of conducting an independent investigation.[48]

57. USC concluded its 2016 investigation, finding that "Tyndall had violated the university's policy on harassment by making repeated racially discriminatory and

[45] *See Id.*

[46] *See Id.*

[47] *See Id.*

[48] *See Id.*

sexually inappropriate remarks during patient encounters." The Statement was silent as to any conclusions concerning sexual assault, violation or molestation. [49]

58. Ultimately, in 2017, the university began termination proceedings. However, USC did not contact law enforcement, the attorney general or the medical licensing board. [50] Nor did USC inform Tyndall's patients.[51] Because Tyndall threatened a lawsuit against USC, USC entered into a separation agreement with Tyndall. [52]

59. USC states that, once Tyndall sent a letter to USC asking to return to his position at the student health center in 2018, USC finally made a report to the California Medical Board on March 9, 2018. According to USC, this was the first report to authorities it had made despite being on notice of Tyndall's behavior for decades. [53]

E. Plaintiff was violated by Tyndall without a chaperone present.

60. In 2012, Plaintiff Lucy Chi was a first-year graduate student at USC. She called USC's student health center and asked for the first available appointment for her annual exam.

61. The scheduling desk told her the first appointment available (which was within a couple of days) was with Tyndall. Chi asked if the clinic had any female doctors instead. The office told her the wait for a female doctors would be three weeks. So Chi made the appointment with Tyndall.

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[49] *See Id.*

[50] *See Id.*

[51] https://www.latimes.com/local/california/la-me-usc-doctor-misconduct-complaints-20180515-story.html

[52] *See* http://pressroom.usc.edu/statement-of-facts-may-15-2018/ (last accessed May 19, 2018).

[53] *See Id.*

62. When Chi arrived for her appointment, Tyndall told her he didn't have any chaperones available to accompany him for her appointment. He told her she would have to wait for at least 30 minutes if she wanted to wait for a chaperone. Chi decided to proceed with the examination.

63. While alone with Tyndall in the examination room, Tyndall kept looking Chi up and down. Tyndall's demeanor was making Chi very uncomfortable because her experience was that male doctors take on a more detached or clinical demeanor when examining female patients. However, Tyndall was acting in a more suggestive manner, and seemed nervous.

64. Chi lay on the examination table for her gynecological examination. Tyndall put on gloves, and penetrated her with his fingers. He told her that he wanted to check whether the speculum would fit. She was uncomfortable and did not think this was normal. However, she was not sure and did not feel like she was in a position to second guess the doctor.

65. Tyndall moved his fingers in and out of her vagina, saying he wanted to loosen up her vaginal muscles for the speculum. Chi told Tyndall that was unnecessary, but he insisted the penetration and movement prevented discomfort. Tyndall's conduct caused Chi significant distress, but she could not move at this point.

66. When it was time for the breast examination, Tyndall asked Chi to move the sheet covering her upper body so he could see both breasts at the same time. Chi's prior experience was that doctors typically drape the sheets over one breast while examing the other. However, she kept telling herself that maybe doctors on the West Coast conducted examinations differently than in the Midwest. Moreover, Chi was in a vulnerable position, naked and laying on an examination table, without any power to question the doctor.

67. Tyndall then took off his gloves and began squeezing her breasts, fondling her in an atypical way. The way Tyndall squeezed her breasts was very

different than the way physicians typically use their finger pads to check for any irregularities in a woman's breasts. Chi continued to try and reassure herself that she would be ok, that maybe this is how an examination was conducted at USC. However, she vowed silently to herself to never see Tyndall again.

68. The examination took approximately 15 minutes. Chi left the examination room feeling distressed and upset. At that point, a chaperone had appeared and told Tyndall and Chi she had been waiting outside. The chaperone asked Tyndall why he hadn't waited for her given that she had told him she was going on a short break. Tyndall replied that Chi had given him permission to proceed without a chaperone, as if the violation of protocol and standard of care was Chi's fault.

69. Chi felt shaky and unsure if what she had experienced was normal. Chi felt violated and embarrassed. She did not go back to him.

70. On May 15, 2018, Chi read the articles that disclosed Tyndall's wrongdoing. Chi became extremely upset and angry that USC let Tyndall violate her and others over such a long period of time. She felt distressed all over again, replaying Tyndall's violation of her in her mind.

F. The statute of limitations is tolled based on the continuing violations doctrine and fraudulent concealment.

71. Tyndall concealed the existence of Plaintiff's claims and that Plaintiff had a cause of action against Tyndall and/or USC at the time his sexual assaults occurred making a material representation(s) to Plaintiff involving a past or existing fact by:

a. Misrepresenting that his acts and/or conduct were for the purpose of conducting a vaginal examination;

b. Misrepresenting that digital penetration of a woman's vagina at the outset of a gynecological examination was medically appropriate, contemporaneously and/or shortly before the abrupt, sudden, quick and unexpected sexual assaults by Tyndall;

c. Misrepresenting that his acts and/or conduct were for the purpose of conducting a breast examination;

d. Misrepresenting that it was necessary for a female patient to be fully naked for a gynecologist to conduct a full body scan for skin irregularities;

e. Misrepresenting that his acts and/or conduct was "treatment" and/or conformed to accepted medical practice.

72. The material representation(s) to Plaintiff and the Class were false, in that Tyndall was actually performing these examinations for his own sexual gratification and pleasure.

73. When Tyndall made the material representation(s), he knew that they were false, in that he knew that the examinations were not proper, appropriate, legitimate, and/or considered within standard of care by any physician of any specialty and/or gynecology.

74. Tyndall made the material representation(s) with the intent that the material representation(s) should be acted upon by Plaintiff and the Class, in that Plaintiff and the Class Members should believe that the examinations were proper, appropriate, and legitimate; should not believe that they had been sexually assaulted; should not believe that they had been sexually assaulted so that he could prevent discovery of his sexual assaults; should continue to be seen by him so that he could continue to sexually assault them; should not question and/or report the conduct to appropriate authorities; and should not reasonably believe and not be aware of a possible cause of action that they have against Tyndall and/or USC.

75. Plaintiff and Class Members acted in reliance upon the material representation(s), in that they:

a. reasonably believed that the examinations were proper, appropriate, and legitimate;

b. reasonably did not believe that they had been sexually assaulted;

c. did not believe that they should question and/or report the conduct to appropriate authorities; and,

d. did not reasonably believe that they had and were not aware of a possible cause of action that they had against Tyndall and/or USC.

76. Plaintiff and Class Members suffered injury, in that they could not stop the sexual assault and suffered discomfort, severe emotional distress, shock, humiliation, fright, grief, embarrassment, and disgrace.

77. Tyndall further concealed the fraud by an affirmative act(s) that was/were designed and/or planned to prevent inquiry and escape investigation and prevent subsequent discovery of his fraud, in that he:

a. Misrepresented to other medical professionals in the examination room that digitally penetrating female patients was medically necessary and appropriate;

b. Prevented other medical professionals, chaperones, and/or caregivers from being in the room during examinations and treatments of Plaintiff and Class Members so that he could sexually assault them;

c. Did not abide by or follow the standard and care which requires another medical professional, chaperone, parent, guardian, and/or caregiver be in the room during the examination and treatment of minors and female patients.

78. Directors, managers, supervisors, physicans, nurses, chaperones in USC's student health center took affirmative steps to fraudulently conceal Tyndall's misconduct, including but limited to by depressing complaints made by patients by imposing onerous reporting requirements on them.

79. Directors, managers, supervisors, physicans, nurses, chaperones in USC's student health center also misrepresented that Tyndall's conduct during examinations was proper, including but not limited by (i) watching Tyndall's conduct as a purported chaperone without stopping the improper conduct; (ii) permitting Tyndall to conduct examinations without a chaperone present; and (iii) scheduling female patients for appointments with Tyndall despite having full knowledge of his improper conduct.

80. The actions and inactions of Tyndall and USC constituted fraudulent concealment.

81. At all times pertinent to this action, Tyndall was an agent, apparent agent, servant, and employee of USC and operated within the scope of his employment and his negligence is imputed to USC.

82. Plaintiff and Class Members did not know, could not have reasonably known, and were reasonably unaware of a possible cause of action that they had against Tyndall and/or USC until the May 15, 2018 publication of a story by the Los Angeles Times.

V. CLASS ALLEGATIONS

83. Plaintiff brings this action pursuant to Federal Rule of Civil Procedure 23(b)(3) and 23(c)(4) on behalf of themselves and the following Class:

> All women who were examined by George Tyndall, M.D. at the University of Southern California.

84. The Class consists of hundreds, if not thousands, of women, making joinder impracticable, in satisfaction of Fed. R. Civ. P. 23(a)(1). The exact size of the Class and the identitities of the individual members are ascertainable through records maintained by USC.

85. The claims of Plaintiff are typical of the Class. The claims of the Plaintiff and the Class are based on the same legal theories and arise from the same unlawful pattern and practice of sexual harassment and assault.

86. There are many questions of law and fact common to the claims of Plaintiff and the Class, and those questions predominate over any questions that may affect only individual Class members within the meaning of Fed. R. Civ. P. 23(a)(2) and (c)(4).

87. Common questions of fact and law affecting members of the Class include, but are not limited to, the following:

a. Whether Tyndall engaged in a sexual harassment, assault, and battery;

b. Whether Tyndall's sexual harassment, assault and battery was committed within the scope of his employment at USC;

c. Whether the USC Defendants had knowledge of Tyndall's sexual harassment, assault, and battery;

d. Whether the USC Defendants facilitated Tyndall's pattern and practice of sexual harassment, assault, and battery;

e. Whether the USC Defendants or Tyndall engaged in conduct designed to suppress complaints or reports regarding Tyndall's conduct;

f. Whether the USC Defendants negligently retained or supervised Tyndall;

g. Whether the USC Defendants ratified Tyndall's conduct;

h. Whether the USC Defendants are responsible for Tyndall's conduct under the doctrine of respondeat superior.

88. Absent a class action, most of the members of the Class would find the cost of litigating their claims to be prohibitive and will have no effective remedy. The class treatment of common questions of law and fact is also superior to multiple individual actions or piecemeal litigation, particularly as to USC's legal responsibility for Tyndall's actions, in that it conserves the resources of the courts and the litigants and promotes consistency and efficiency of adjudication.

89. Plaintiff will fairly and adequately represent and protect the interests of the Class. Plaintiff have retained counsel with substantial experience in prosecuting complex litigation and class actions. Plaintiff and their counsel are committed to vigorously prosecuting this action on behalf of the other respective Class members,

and have the financial resources to do so. Neither Plaintiff nor their counsel have any interests adverse to those of the other members of the Class.

VI. CAUSES OF ACTION

COUNT I

VIOLATONS OF TITLE IX, 20 U.S.C. § 1681(a) *et seq.* (AGAINST USC AND USC TRUSTEES)

90. Plaintiff restates and incorporates herein by reference the precedingparagraphs as if fully set forth herein.

91. Title IX of the Education Amendments Act of 1972 states, "No person in the United States shall on the basis of sex, be … subject to discrimination under any education program or activity receiving Federal financial assistance …" 20 U.S.C. § 1681 *et seq.*

92. Plaintiff and members of the Class are "persons" under Title IX.

93. USC receives federal financial assistance for its education program and is therefore subject to the provisions of Title IX of the Education Act of 1972, 20 U.S.C. §1681(a), *et seq*.

94. USC is required under Title IX to investigate allegations of sexual assault, sexual abuse, and sexual harassment.

95. Tyndall's conduct described above constitutes sexual harassment, abuse and assault, and constitutes sex discrimination under Title IX.

96. The USC Defendants were on notice of Tyndall's conduct as described above. The USC Defendants nonetheless failed to carry out their duties to investigate and take corrective action under Title IX.

97. As a direct and proximate result of the USC Defendants' actions and/or inactions, Plaintiff and members of the Class were damaged.

COUNT II

VIOLATION OF THE CALIFORNIA EQUITY IN HIGHER EDUCATION ACT [CALIF. ED. CODE §66270] (AGAINST THE USC, USC TRUSTEES, AND TYNDALL)

98. Plaintiff realleges and incorporates by reference the allegations contained in the previous paragraphs.

99. Section 66281.5 of the California Sex Equity in Education Act provides in pertinent part: "(a) It is the policy of the State of California, pursuant to Section 66251, that all persons, regardless of their sex, should enjoy freedom from discrimination of any kind in the postsecondary educational institution of the state. The purpose of this section is to provide notification of the prohibition against sexual harassment as a form of sexual discrimination and to provide notification of available remedies."

100. The USC Defendants' conduct as alleged herein consistutes sexual harassment as a form of sexual discrimination against Plaintiffs and the members of the Class, and violated the Equity in Higher Education Act. Plaintiff is entitled to enforce the Act through a civil action pursuant to Education Code Section 66292.4.

101. As a result of Defendants' conduct, Plaintiff and the members of the Class have been damaged in an amount to be proved at trial.

COUNT III

GENDER VIOLENCE [CAL. CIV. CODE §52.4] (AGAINST TYNDALL AND USC)

102. Plaintiff repeats and realleges the foregoing allegations as if fully set forth herein.

103. California Civil Code § 52.4 provides that gender violence is a form of sex discrimination and includes "[a] physical intrusion or physical invasion of a sexual nature under coercive conditions…." *Id.* at §52.4(c)(2).

104. California Civil Code § 52.4 incorporates the definition of "gender" from California Civil Code § 51, which provides: "'Gender means sex, and includes a person's gender identity and gender expression.'"

105. Here, Plaintiff and the Class Members are female.

106. Tyndall physically intruded and/or invaded the bodies of Plaintiff and the Class Members during medical examinations in a sexual manner. The conditions were coercive in that Plaintiff and Class Members were required to place their trust in their physician because he was held out to be an expert in gynecology by USC.

107. USC participated in the physical instrusion and/or invasion of the bodies of Plaintiff and the Class Members during medical examinations by either being physically present in the room through agent chaperones or other clinic staff members and/or bringing Plaintiff and the Class Members into the examination rooms and providing instructions to remove their clothing knowing that Tyndall would assault them in a sexual manner.

108. Plaintiff was injured as a result of the gender violence, and seeks all remedies provided for in Civil Code Section 52.4(a), including but not limited to actual damages, compensatory, damages, punitive damages, costs and attorneys' fees.

COUNT IV

GROSS NEGLIGENCE
(AGAINST THE USC, USC TRUSTEES, AND TYNDALL)

109. Plaintiff realleges and incorporates by reference the allegations contained in the previous paragraphs.

110. The USC Defendants owed Plaintiff and Class Members a duty to use due care to ensure their safety and freedom from sexual assault, abuse, and molestation while interacting with their employees, representatives, and/or agents, including Tyndall.

111. Tyndall owed Plaintiff a duty of due care in carrying out medical treatment as an employee, agent, and/or representative of the USC Defendants.

112. By seeking medical treatment from Tyndall in the course of his employment, agency, and/or representation of the USC Defendants, a special, confidential, and fiduciary relationship between Plaintiff and Tyndall was created, resulting in Tyndall owing Plaintiff a duty to use due care.

113. The USC Defendants' failure to adequately supervise Tyndall, especially after USC knew or should have known of complaints regarding his nonconsensual sexual touching and assaults during medical examinations was so reckless as to demonstrate a substantial lack of concern for whether an injury would result to Plaintiff.

114. Tyndall's conduct in sexually assaulting, abusing, and molesting Plaintiff in the course of his employment, agency, and/or representation of the USC Defendants and under the guise of rendering "medical treatment" was so reckless as to demonstrate a substantial lack of concern for whether an injury would result to Plaintiff.

115. The USC Defendants' conduct demonstrated a willful disregard for precautions to ensure Plaintiff' safety.

116. The USC Defendants' conduct as described above, demonstrated a willful disregard for substantial risks to Plaintiff and Class Members.

117. The USC Defendants breached duties owed to Plaintiff and Class Members and were grossly negligent when they conducted themselves by the actions described above, said acts having been committed with reckless disregard for Plaintiff and Class Members' health, safety, constitutional and/or statutory rights, and with a substantial lack of concern as to whether an injury would result.

118. As a direct and/or proximate result of Defendants' actions and/or inactions, Plaintiff and Class Members were damaged.

COUNT V

NEGLIGENT SUPERVISION AND RETENTION (AGAINST USC AND USC TRUSTEES)

119. Plaintiff restates and incorporates herein by reference the preceding paragraphs as if fully set forth herein.

120. At all times material since 1989 and until Tyndall was removed in 2016, the USC Defendants employed Tyndall.

121. Tyndall was unfit or incompetent to work directly with female patients and posed a particular risk of sexually harassing, violating and assaulting them.

122. The USC Defendants knew or should have known that Tyndall was unfit or incompetent to work directly with female patients and posed a particular risk of sexually harassing, violating and assaulting them, and that this unfitness created a particular risk to Plaintiff and the Class.

123. Tyndall's unfitness and particular risk to female patients harmed Plaintiff and the Class.

124. The USC Defendants negligence in supervising and or retaining Tyndall was a substantial factor in causing harm to Plaintiff and the Class.

COUNT VI

CIVIL BATTERY (AGAINST TYNDALL AND USC)

125. Plaintiff restates and incorporates herein by reference the preceding paragraphs as if fully set forth herein.

126. Tyndall intended to commit an act of unwanted contact and/or caused imminent apprehension of such an act against Plaintiff and the Class Members. He did so by, *inter alia*:

a. Isolating Plaintiff and Class Members in closed quarters and dismissing any bystanders; and

b. Causing sexual contact.

127. Tyndall did commit an unwanted contact with Plaintiff and the Class Members' person or property in a harmful or offensive manner, including but not limited to by causing molestation or sexual contact between Tyndall and each woman.

128. Tyndall's battery of Plaintiff and the Class caused harm, including physical, mental, and/or emotional harm of each Class Member.

129. Tyndall's conduct was committed within the scope of his employment at USC. A causal nexus existed between Tyndall's medical examinations, USC's pattern of allowing Tyndall to examine female patients without a chaperone, and the use of his role to batter the women. Each act of battery of a Class Member was foreseeable given, *inter alia,* USC's knowledge that Tyndall failed to follow protocol, including but not limited with respect to the use of chaperones and taking of photographs of genitalia, complaints from patients and staff members, and the commission of the acts at USC's student health center.

130. Tyndall's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of USC's business. Assaults in the context of a medical examination, when women are the most vulnerable but who put themselves in that situation in order to get the medical care they need, are exactly why female patients would expect physician offices and student health centers to take extra precautions to ensure that they are protected from the dominance of a physician in the doctor-patient relationship.

131. Holding USC liable forwards the underlying policy goals of respondent superior, including the prevention of future injuries and assurance of compensation to victims, given that Plaintiff and the Class Members do not have separate remedies under Title VII because they were not employees of USC.

COUNT VII

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (AGAINST TYNDALL AND USC)

132. Plaintiff restates and incorporates herein by reference the preceding paragraphs as if fully set forth herein.

133. Tyndall's extreme and outrageous conduct intentionally or recklessly caused severe emotional distress to Plaintiff and the Class Members.

134. Tyndall's outrageous conduct was not the type of ordinary physician examination or even rude or obnoxious behavior that women should be expected to tolerate. Rather, Tyndall's conduct exceeded all possible bounds of decency.

135. Tyndall acted with intent or recklessness, knowing that his female victims were likely to endure emotional distress given the relationship and trust placed in physicians by patients. In fact, he used this trust to subdue the women and prevent them from complaining or suing based on his actions. He did so with deliberate disregard as to the high possibility that severe emotional distress would occur.

136. Tyndall's conduct caused suffering for Plaintiff and the Class Members at levels that no reasonable person should have to endure.

137. Tyndall's conduct was committed within the scope of his employment at USC. A causal nexus existed between Tyndall's medical examinations, USC's pattern of allowing Tyndall to examine female patients without a chaperone, and the use of his role to intentionally inflict emotional distress the women. Each act of battery or assault of a Class Member was foreseeable given, *inter alia,* USC's knowledge that Tyndall failed to follow protocol, including but not limited with respect to the use of chaperones and taking of photographs of genitalia, complaints from patients and staff members, and the commission of the acts at USC's student health center.

138. Tyndall's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of USC's business. Assaults in the context of a medical examination, when women are the most vulnerable but who

put themselves in that situation in order to get the medical care they need, are exactly why female patients would expect physician offices and student health centers to take extra precautions to ensure that they are protected from the dominance of a physician in the doctor-patient relationship.

139. Holding USC liable forwards the underlying policy goals of respondent superior, including the prevention of future injuries and assurance of compensation to victims, given that Plaintiff and the Class Members do not have separate remedies under Title VII because they were not employees of USC.

COUNT VIII

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS (AGAINST TYNDALL AND USC)

140. Plaintiff restates and incorporates herein by reference the preceding paragraphs as if fully set forth herein.

141. Tyndall's conduct negligently caused emotional distress to Plaintiff and the Class Members.

142. Tyndall could reasonably foresee that his action would have caused emotional distress to Plaintiff and the Class Members.

143. Plaintiff and the Class Members were in a specific zone of danger meeting with Tyndall in the examination room and at risk of physical harm, causing their fear when the examination became sexual in nature.

144. Plaintiff and the Class Members, during their medical examination, suffered distress and emotional harm.

145. Tyndall's conduct was committed within the scope of his employment at USC. A causal nexus existed between Tyndall's medical examinations, USC's pattern of allowing Tyndall to examine female patients without a chaperone, and the use of his role to negligently inflict emotional distress on the women. Each act of battery or assault of a Class Member was foreseeable given, *inter alia,* USC's knowledge that Tyndall failed to follow protocol, including but not limited with respect to the use of

chaperones and taking of photographs of genitalia, complaints from patients and staff members, and the commission of the acts at USC's student health center.

146. Tyndall's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of USC's business. Assaults in the context of a medical examination, when women are the most vulnerable but who put themselves in that situation in order to get the medical care they need, are exactly why female patients would expect physician offices and student health centers to take extra precautions to ensure that they are protected from the dominance of a physician in the doctor-patient relationship.

147. Holding USC liable forwards the underlying policy goals of respondent superior, including the prevention of future injuries and assurance of compensation to victims, given that Plaintiff and the Class Members do not have separate remedies under Title VII because they were not employees of USC.

COUNT IX

RATIFICATION
(AGAINST USC AND USC TRUSTEES)

148. Plaintiff restates and incorporates herein by reference the preceding paragraphs as if fully set forth herein.

149. Tyndall was an agent and employee of USC between 1989 and 2016.

150. Tyndall was acting at all times in his position as an agent of and on behalf of USC.

151. All acts or omissions alleged were ratified by USC and USC Trustees. As alleged *supra,* many of USC's employees, managers, and supervisors, including other medical personnel in the student health center, knew Tyndall was sexually abusing female students and refused to take any action to stop him. Moreover, USC's managers, supervisors, executives, and directors hid this information so Tyndall could continue to work for USC.

152. With knowledge of Tyndall's sexual misconduct, no disciplinary action was taken and he was allowed to be alone with female students who attended USC.

153. USC is thus responsible for Tyndall's acts of assault, battery, and intentional or negligent infliction of emotional distress.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all Class Members prays that this Court:

A. Certify the Class, name Plaintiff as representatives of the Class, and appoint her lawyers as Class Counsel;

B. Enter judgment against George Tyndall in favor of Plaintiff and the Class;

C. Enter judgment against University of Southern California in favor of Plaintiff and the Class;

D. Enter judgment against the Board of Trustees of the University of Southern California in favor of Plaintiff and the Class,

E. Award Plaintiff and the Class Members damages for pain and suffering, and compensatory and punitive damages,

F. Award Plaintiff her attorneys' fees and costs.

Dated: May 21, 2018

Respectfully submitted,

HAGENS BERMAN SOBOL SHAPIRO LLP

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KeyCite Yellow Flag - Negative Treatment
Disagreed With by Watkins v. Town of Webster, W.D.N.Y., March 17, 2022

850 F.3d 545

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

United States Court of Appeals, Third Circuit.

Jane DOE, Appellant
v.
MERCY CATHOLIC MEDICAL CENTER

No. 16-1247
|
Argued December 6, 2016
|
(Filed: March 7, 2017)

Synopsis

Background: Female former participant in private hospital's medical residency program brought action against hospital, asserting Title IX claims alleging creation of a hostile environment, retaliation, and quid pro quo harassment, as well as violations of state law. The United States District Court for the Eastern District of Pennsylvania, Michael M. Baylson, J., 158 F.Supp.3d 256, dismissed action. Former participant appealed.

Holdings: The Court of Appeals, D. Michael Fisher, Circuit Judge, held that:

[1] as a matter of first impression, participant sufficiently alleged that hospital's residency program was an educational program or activity under Title IX;

[2] participant was employee of hospital for purposes of Title VII;

[3] hospital's decision to dismiss program participant was discrete discriminatory act for purposes of continuing-violation doctrine; and

[4] supervisor's alleged advocacy of participant's dismissal from program was not sufficiently similar to the supervisor's previous acts for purposes of continuing-violation doctrine.

Affirmed in part; reversed in part; remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (30)

[1] **Federal Courts** Pleading

The Court of Appeals exercises plenary review of a dismissal for failure to state a claim, affirming if the plaintiff failed to allege plausible claim. Fed. R. Civ. P. 12(b)(6).

2 Cases that cite this headnote

[2] **Civil Rights** Persons Protected and Entitled to Sue

Only a citizen of the United States or person within the jurisdiction thereof can sue under § 1983 for unconstitutional sex discrimination in education programs. 42 U.S.C.A. § 1983.

[3] **Statutes** Similarity or difference

Where Congress used specific language in one part of a statute but different language in another, a federal court presumes different meanings were intended.

[4] **Statutes** Superfluousness

A statute is to be construed so that effect is given to all its provisions, so no part will be inoperative or superfluous, void or insignificant.

1 Cases that cite this headnote

[5] **Civil Rights** Sex Discrimination

A program or activity is an education program or activity under Title IX if it has features such that one could reasonably consider its mission to be, at least in part, educational. Education Amendments of 1972 §§ 901, 908, 20 U.S.C.A. §§ 1681(a), 1687.

14 Cases that cite this headnote

[6] **Civil Rights** Sex Discrimination

Title IX's application turns primarily on whether the defendant-entity's questioned program or activity has educational characteristics. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a).

3 Cases that cite this headnote

[7] **Civil Rights** Sex Discrimination

Features of a program or activity supporting a finding that it is an education program or activity under Title IX are that: (1) the program is incrementally structured through a particular course of study or training, whether full- or part-time; (2) the program allows participants to earn a degree or diploma, qualify for a certification or certification examination, or pursue a specific occupation or trade beyond mere on-the-job training; (3) the program provides instructors, examinations, an evaluation process or grades, or accepts tuition; or (4) the entities offering, accrediting, or otherwise regulating a program hold it out as educational in nature. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a).

7 Cases that cite this headnote

[8] **Civil Rights** Education

Whether a program or activity is sufficiently educational for Title IX to apply is a mixed question of law and fact. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a).

7 Cases that cite this headnote

[9] **Civil Rights** Sex Discrimination

Female former participant in private hospital's medical residency program sufficiently alleged that hospital's residency program was an education program or activity, as required to state a claim under Title IX; participant alleged that she was enrolled in a multiyear regulated program of study and training in diagnostic radiology at the hospital, which required her to learn and train under faculty members, attend lectures, participate in a class on a university campus, and sit for annual examination, and that the hospital provided the "clinical bases," for the university's emergency medicine residency. Education Amendments of 1972 §§ 901, 908, 20 U.S.C.A. §§ 1681(a), 1687(3)(A)(ii).

3 Cases that cite this headnote

[10] **Civil Rights** Sex Discrimination

Whether a program or activity receives federal financial assistance for purposes of Title IX is determined by reference to the entire entity or whole organization. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a).

1 Cases that cite this headnote

[11] **Federal Courts** Matters of Substance

Theories not raised squarely before district court cannot be surfaced for the first time on appeal.

4 Cases that cite this headnote

[12] **Civil Rights** Nature and existence of employment relationship

Female former participant in private hospital's medical residency program was hospital's employee for purposes of Title VII; hospital was source of instrumentalities and tools of participant's work as a resident, location of participant's work was at the hospital, hospital assigned participant projects and tasks, and participant had no discretion over when and how long she worked beyond accrediting agency's guidelines limiting her workweek to 80 hours. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[13] **Civil Rights** Existence of other remedies; exclusivity

Private-sector employees are not limited to Title VII in their search for relief from workplace discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4 Cases that cite this headnote

[14] **Civil Rights** Sex Discrimination

Provision of Title IX providing that no person may be discriminated against based on sex encompasses employees as well as students. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a).

5 Cases that cite this headnote

[15] **Civil Rights** Sex Discrimination

Civil Rights Practices prohibited or required in general; elements

Retaliation against a person, including an employee, because she complained of sex discrimination is a form of intentional sex discrimination actionable under Title IX. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a).

13 Cases that cite this headnote

[16] **Action** Statutory rights of action

Civil Rights Education

Civil Rights Education

A private retaliation claim exists for employees of federally-funded education programs under Title IX notwithstanding Title VII's concurrent applicability. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a); Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

29 Cases that cite this headnote

[17] **Civil Rights** Sex Discrimination

Title VII's retaliation framework generally governs Title IX retaliation claims. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a); Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

21 Cases that cite this headnote

[18] **Civil Rights** Sex Discrimination

To establish a prima facie retaliation case under Title IX, a plaintiff must prove she engaged in activity protected by Title IX, she suffered an adverse action, and there was a causal connection between the two, and if she makes this showing, the burden shifts to the defendant to advance a legitimate, nonretaliatory reason for its conduct, and if it does so, the plaintiff must show that the defendant's proffered explanation was false and that retaliation was the real reason for the adverse action. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a).

16 Cases that cite this headnote

[19] **Action** Statutory rights of action

Civil Rights Education

Civil Rights Education

A private quid pro quo sexual harassment claim exists for employees of federally-funded education programs under Title IX notwithstanding Title VII's concurrent applicability. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a); Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

22 Cases that cite this headnote

[20] **Civil Rights** Existence of other remedies; exclusivity

Private-sector employees may pursue independently their rights under both Title VII and other applicable federal statutes. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[21] **Civil Rights** Sexual harassment; sexually hostile environment

"Quid pro quo sexual harassment," i.e., when tangible adverse action results from an underling's refusal to submit to a higher-up's sexual demands, is, by its very nature, intentional unequal treatment based on sex, and thus constitutes discrimination under Title IX. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a).

2 Cases that cite this headnote

[22] **Civil Rights** Education

Private Title IX damages actions are available against recipients of federal funds only if the recipient had adequate notice it could be liable for the conduct alleged. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a).

[23] **Civil Rights** Sexual harassment; sexually hostile environment

Title VII's quid pro quo sexual harassment framework generally governs Title IX claims alleging quid pro quo harassment. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a); Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

8 Cases that cite this headnote

[24] **Civil Rights** Sexual harassment; sexually hostile environment

Unwelcome sexual advances, requests for sexual favors, or other verbal or physical actions of a sexual nature constitute quid pro quo sexual harassment actionable under Title IX when: (1) the plaintiff's submission to that conduct is made either explicitly or implicitly a term or condition of her education or employment experience in a federally-funded education program, or (2) submission to or rejection of that conduct is used as the basis for education or employment decisions that affect the plaintiff. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a).

3 Cases that cite this headnote

[25] **Civil Rights** Sexual harassment; sexually hostile environment

A Title IX plaintiff seeking damages for quid pro quo sexual harassment must prove that an official who at a minimum had authority to address the alleged discrimination and to institute corrective measures on the defendant's behalf had actual knowledge of discrimination in the defendant's programs and failed adequately to respond; a response is inadequate if the officer failed to provide one or if she provided one amounting to deliberate indifference to the discrimination alleged. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a).

3 Cases that cite this headnote

[26] **Civil Rights** Continuing violations; serial, ongoing, or related acts

Under "continuing-violation doctrine," discriminatory acts that are not individually actionable may be aggregated to make out a Title VII hostile environment claim; the acts can occur at any time if they are linked in a pattern of actions continuing into Title VII's limitations period, but all of the alleged acts must be part of the same unlawful employment practice, i.e., they must involve similar conduct by the same individuals, suggesting a persistent, ongoing pattern. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

6 Cases that cite this headnote

[27] **Limitation of Actions** Civil rights

Decision of private hospital that ran medical residency program to dismiss female program participant was a discrete discriminatory act under Title IX, which occurred within two-year limitations period, and thus it could not be aggregated with other events that occurred outside limitations period, under continuing-violation doctrine, to support participant's hostile

environment claim. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a).

4 Cases that cite this headnote

[28] Limitation of Actions Civil rights

Medical residency program participant's supervisor's alleged advocacy for participant's dismissal from the program, which occurred within two-year limitations period for Title IX claims, was not sufficiently similar to the supervisor's previous acts in which the supervisor allegedly made sexualized comments or touched the participant in a sexual way, which fell outside of the limitations period, and thus continuing-violation doctrine did not apply to the previous acts. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a).

2 Cases that cite this headnote

[29] Federal Courts Effect of dismissal or other elimination of federal claims

A federal court may decline to exercise supplemental jurisdiction over state law claims when it dismisses all claims over which it has original jurisdiction. 28 U.S.C.A. § 1367(c)(3).

11 Cases that cite this headnote

[30] Federal Courts Issues or questions not passed on below

Remand to district court of state law claims asserted against private hospital that ran medical residency program, by female program participant, over which district court had declined supplemental jurisdiction after dismissing the participant's Title IX claims, for district court's consideration of the claims in the first instance, was warranted, where Court of Appeals reversed dismissal of the participant's Title IX claims and remanded them to district court. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a); 28 U.S.C.A. § 1367(c)(3).

12 Cases that cite this headnote

***549** On Appeal from the United States District Court for the Eastern District of Pennsylvania (E.D. Pa. No. 2-15-cv-02085) District Judge: Honorable Michael M. Baylson

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Before: FISHER,* KRAUSE and MELLOY,** Circuit Judges.

OPINION OF THE COURT

FISHER, Circuit Judge.

Medical residencies are a vital component of American medical education. *McKeesport Hosp. v. ACGME*, 24 F.3d 519, 525 (3d Cir. 1994). They provide new doctors a supervised transition between the pure academics of medical school and the realities of practice. Generally they do so successfully: Our nation's residency programs reliably produce some of the "finest physicians and medical researchers in the world." 15 U.S.C. § 37b(a)(1)(A). But as this case shows, these programs aren't exempt from charges

of sex discrimination. Here we must decide whether an ex-resident, proceeding anonymously as Jane Doe, can bring private causes of action for sex discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, against Mercy Catholic Medical Center, a private teaching hospital operating a residency program. The District Court held she cannot and dismissed her complaint in its entirety. We will affirm in part and reverse in part that order. Doe's Title IX retaliation and *quid pro quo* claims endure. Her Title IX hostile environment claim is, however, time-barred.

***550 I**

We recount the facts as Doe alleged them, accepting them as true. *Davis v. Wells Fargo*, 824 F.3d 333, 338 n.2 (3d Cir. 2016); *see* App. 100–24.

Graduate medical education, or residency education, is a period of didactic and clinical instruction in a medical specialty during which physicians prepare for independent practice after graduating from medical school. Residency programs are typically accredited. Leading on that front is the Accreditation Council for Graduate Medical Education, or ACGME, which aims to improve healthcare by assessing and advancing the quality of residents' educations. Its reach is far and its influence wide. During the 2013–14 academic year, around 9,600 ACGME-accredited programs operated in about 700 institutions, enrolling over 120,000 residents and fellows in 130 medical specialties. The ACGME calls these programs structured educational experiences, and completing one generally results in eligibility for board certification.

Predictably, residency programs are expensive to run. The Association of American Medical Colleges says it costs a hospital about $152,000 a year to train a single resident. But the federal government helps with funding by way of direct and indirect graduate medical education payments through Medicare.

Our case is about a residency program at Mercy, a private teaching hospital in Philadelphia that accepts Medicare payments and is affiliated with Drexel University's College of Medicine. Owing to its commitment to medical education, Mercy offers four ACGME-accredited residency programs in internal medicine, diagnostic radiology, general surgery, and a transitional year residency, in addition to providing the clinical bases for Drexel Medicine's emergency medicine residency.

Under a residency agreement, Doe joined Mercy's diagnostic radiology residency program in 2011 as a second-year, or R2. The program offered training in all radiology subspecialties in a community-hospital setting combining hands-on experience with didactic teaching. As required, Doe attended daily morning lectures presented by faculty and afternoon case presentations given by residents under faculty or attending physicians' supervision. She took a mandatory physics class taught on Drexel's campus, attended monthly radiology lectures and society meetings, joined in interdepartmental conferences, and sat for annual examinations to assess her progress and competence.

Doe says the director of Mercy's residency program, whom she calls Dr. James Roe, sexually harassed her and retaliated against her for complaining about his behavior, resulting in her eventual dismissal. Early on, Dr. Roe inquired about her personal life and learned she was living apart from her husband. He found opportunities to see and speak with her more than would otherwise be expected, often looking at her suggestively. This made Doe uncomfortable, especially when the two were alone. From these interactions she surmised Dr. Roe was sexually attracted to her and wished to pursue a relationship, though they both were married.

Three months into her residency Doe sent Dr. Roe an email voicing concern that others knew about his interest in her. She wanted their relationship to remain professional, she said, but Dr. Roe persisted, stating he wanted to meet with her while they attended a conference in Chicago. She replied with text messages to clear the air that she didn't want to pursue a relationship with him. Apparently displeased, Dr. Roe reported these messages to Mercy's human resources department, or HR. In ***551** response, HR called Doe to a meeting where she described Dr. Roe's conduct, like how he'd touched her hand at work, and said his unwelcome sexual attention was negatively affecting her training. The next day HR referred Doe to a psychiatrist, noting that her attendance was optional. Doe, however, believed Mercy would use it against her if she didn't go, given her complaints against Dr. Roe. She thus attended three sessions and complained there about Dr. Roe's conduct, but she heard nothing more from HR. Later Dr. Roe apologized to Doe for reporting her. He did it, he said, for fear he'd be reprimanded for having an inappropriate relationship with her. Thereafter two male faculty members, both close with Dr. Roe, trained her significantly less than they had before.

In Fall 2012 Dr. Roe learned Doe was getting divorced. His overtures intensified. He too was getting divorced, he told her, and he wanted a relationship with her. He suggested they go shooting and travel together. He said he was uncomfortable with her going to dinner for fellowship interviews and unhappy about her leaving Philadelphia post-residency. During this time Doe asked Dr. Roe and another faculty member for fellowship recommendation letters. They agreed but wrote short, cursory, and perfunctory ones. Dr. Roe even told the fellowship's director that Doe was a poor candidate. When Doe called Dr. Roe to ask why, he said it was to teach her a lesson before hanging up on her.

In response to Doe's complaints about Dr. Roe, Mercy's vice president, Dr. Arnold Eiser, called Doe to a meeting with Dr. Roe and others. There Doe complained about Dr. Roe's conduct again but was told to wait outside. A short time later Dr. Eiser escorted her to Mercy's psychiatrist. As they walked Dr. Eiser told Doe her second in-service examination score was poor, an issue she needed to address. Later, however, Doe learned this wasn't true: Her score was in the 70th percentile, and Dr. Eiser had received misinformation. She asked Dr. Roe to report her improvement to the fellowship she'd applied to, but he refused. Mercy later told Doe that to remain in the program, she'd have to agree to a corrective plan. Reluctantly, she signed on.

Dr. Roe's conduct continued into Spring 2013. Once while Doe was sitting alone with Dr. Roe at a computer reviewing radiology reports, he reached across her body and placed his hand on hers to control the mouse, pressing his arm against her breasts in the process. She pushed herself back in her chair, stood up, and protested. Another time, when a physician expressed interest in Doe, Dr. Roe became jealous and told Doe she shouldn't date him. Later, in April 2013 Dr. Roe told another resident to remove Doe's name as coauthor from a research paper she'd contributed to. Doe complained, but Dr. Roe said she was acting unprofessionally and ordered her to another meeting with Dr. Eiser. At that meeting Doe again told Dr. Eiser about Dr. Roe's conduct over the past year. Dr. Eiser, however, said the other residents loved Dr. Roe and told her to apologize to him. She did, but Dr. Roe wouldn't accept it, calling it insincere. Dr. Eiser suspended Doe, recommending another visit to the psychiatrist.

Thereafter on April 20, 2013 Doe received a letter from Mercy stating she'd been terminated but could appeal. She appeared before an appeals committee four days later where she described Dr. Roe's behavior. Dr. Roe appeared there too advocating for her dismissal. He did so, she says, because she'd rejected his advances. The committee upheld Doe's dismissal, giving her five days to bring another appeal. She declined and quit the program, with ***552** Mercy accepting her resignation. Since then, no other residency program has accepted her, blocking her from full licensure.

* * *

Doe sued Mercy in the District Court on April 20, 2015, exactly two years after she learned she'd been dismissed. Seeking damages and equitable relief, she alleges six claims, three under Title IX—retaliation, *quid pro quo*, and hostile environment—and three under Pennsylvania law—contract-based sex discrimination, wrongful termination, and breach of the covenant of good faith and fair dealing. She concedes she never filed a charge with the Equal Employment Opportunity Commission, or EEOC, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

Ultimately the District Court dismissed the third iteration of Doe's complaint under Federal Rule of Civil Procedure 12(b)(6). Title IX doesn't apply to Mercy, the court held, because it's not an "education program or activity" under 20 U.S.C. § 1681(a). Even if Title IX did apply, it stated, Doe can't use Title IX to "circumvent" Title VII's administrative requirements, as Congress intended Title VII as the "exclusive avenue for relief" for employment discrimination. 158 F.Supp.3d 256, 261 (E.D. Pa. 2016). The court also found Doe's hostile environment claim untimely. Having dismissed all Doe's Title IX claims, the court declined jurisdiction of her state law claims. Doe timely appealed.

II

[1] The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1367(a), and we have it under 28 U.S.C. § 1291. We exercise plenary review of a Rule 12(b)(6) dismissal, *In re Asbestos Products Liability Litigation (No. VI)*, 822 F.3d 125, 131 (3d Cir. 2016), affirming if the plaintiff failed to allege plausible claims, *see* *Ashcroft v. Iqbal*, 556 U.S. 662, 677–80, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

III

Our analysis is threefold. We address whether Title IX applies to Mercy, whether Doe's private causes of action are cognizable under Title IX, and what to do about Doe's state law claims. Title IX's applicability to Mercy is first.

A

We start, of course, with Title IX's language, *North Haven Board of Education v. Bell*, 456 U.S. 512, 520, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982), which says, "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," 20 U.S.C. § 1681(a) (emphasis added). We must decide, then, if Mercy's operation of a residency program makes it an "education program or activity" under Title IX.

[2] We note this question of first impression reaches far beyond one ex-resident's private lawsuit. It touches on the Executive's very power to address gender discrimination in residency programs under existing federal law. Congress enacted Title IX under its Spending Clause powers, making it in the nature of a contract: In accepting federal funds, States agree to comply with its mandate. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181–82, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005). Given its origins, Title IX's only (express) enforcement mechanism is through agencies' regulation of federal funding. Congress directs agencies to effectuate § 1681(a) by, among other means, the "termination of or refusal to grant or to continue" ***553** funding to education programs. 20 U.S.C. § 1682; *see Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255, 129 S.Ct. 788, 172 L.Ed.2d 582 (2009). Today this directive applies afar: Twenty-one federal agencies currently enforce Title IX. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,858 (Aug. 30, 2000) [hereinafter Title IX Common Rule] (codified in various sections of the *Code of Federal Regulations*). And no other federal statute empowers agencies to restrict funding from education programs engaging in sex discrimination. Title VI bars only race, color, and national origin discrimination, not sex discrimination. 42 U.S.C. § 2000d; *see Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998). Title VII is rooted in the Commerce Clause and § 5 of the Fourteenth Amendment, not the Spending Clause. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 367, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (Brennan, White, Marshall, & Blackmun, JJ., concurring in the judgment in part and dissenting in part); *Gebser*, 524 U.S. at 286–87, 118 S.Ct. 1989. And only a "citizen of the United States" or "person within the jurisdiction thereof" can sue under 42 U.S.C. § 1983 for unconstitutional sex discrimination in education programs. *See Fitzgerald*, 555 U.S. at 252, 255–56, 129 S.Ct. 788. Mindful of Title IX's place in this intricate scheme, we tread carefully.

* * *

To resolve whether Mercy's residency program makes it an "education program or activity," we must square Title IX's definition of a "program or activity," codified at 20 U.S.C. § 1687, with § 1681(a)'s language "*education* program or activity." This requires a brief look at Title IX's history.

Patterned after Title VI, Title IX was enacted through the Education Amendments of 1972 in which Congress set out § 1681(a)'s "education program or activity" language. In *Grove City College v. Bell*, however, the Supreme Court read that phrase narrowly, holding that the receipt of federal funds by a particular program within an institution "does not trigger institutionwide coverage" under Title IX. 465 U.S. 555, 573, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984). Congress disagreed. Overruling *Grove City College* it passed the Civil Rights Restoration Act of 1987, or CRRA, to define the phrase "program or activity" broadly in provisions of four civil rights statutes—Title VI, 42 U.S.C. § 2000d-4a; the Rehabilitation Act, 29 U.S.C. § 794(b); the Age Discrimination in Employment Act, 42 U.S.C. § 6107(4); and Title IX, 20 U.S.C. § 1687. *See NCAA v. Smith*, 525 U.S. 459, 465–66 & n.3, 119 S.Ct. 924, 142 L.Ed.2d 929 (1999).

As amended by the CRRA, Title IX now says in § 1687 that "program or activity" means "*all* of the operations" of the following kinds of entities, "any part of which" is extended federal funding:

state or local government instrumentalities, 20 U.S.C. § 1687(1);

colleges, universities, postsecondary institutions, public systems of higher education, local educational agencies, vocational education systems, and "other" school systems, *id.* § 1687(2);

"entire" corporations, partnerships, "other" private organizations, and sole proprietorships *if* assistance is extended to them "as a whole" *or* they're "principally engaged in the business of providing education, health care, housing, social services, or parks and recreation," *id.* § 1687(3)(A);

"entire" plants or other "comparable, geographically separate" facilities in the case of "any other" corporation, ***554** partnership, private organization, or sole proprietorship not described in subsection (3)(A), *id.* § 1687(3)(B); and

"any other entity" established by "two or more" entities described in subsections (1) through (3), *id.* § 1687(4).

In enacting § 1687, however, Congress retained in § 1681(a) the modifier "education" before "program or activity." It left "education" undefined and gave no guidance to reconcile § 1687's broad phrase "program or activity" with § 1681(a)'s ostensibly narrower language. Case law is scant on the issue. The Supreme Court has never addressed it. Nor have we. Down this unmarked path we must now travel.

How did the District Court navigate it? It focused on the fact that in enacting the CRRA, Congress kept the word "education" in § 1681(a). That, combined with § 1681(c)—which defines an "educational institution" in part as "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education"—"clearly" contemplated cabining Title IX to education programs "in the sense of schooling." 158 F.Supp.3d at 260. Title IX thus couldn't apply to Mercy, it held, as residents already have a degree, don't pay tuition, and are paid for their services and protected by labor laws.

[3] Respectfully, we find this approach wanting. Sections 1681(a) and 1682 extend Title IX to "education programs or activities," not to the "educational institutions" of § 1681(c). Where Congress used specific language in one part of a statute but different language in another, we presume different meanings were intended. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004). That's especially so here, where Congress used "educational institution" only in provisions to describe where Title IX *doesn't* control. *See* 20 U.S.C. §§ 1681(a)(1)–(5), (7)–(8), 1681(b), 1686; *Jackson*, 544 U.S. at 175, 125 S.Ct. 1497 (Section 1681(a)'s subsections are "specific, narrow exceptions" to Title IX.); *North Haven*, 456 U.S. at 514 & n.1, 102 S.Ct. 1912 (same). We also query: If Congress intended to limit education programs or activities only to educational institutions "in the sense of schooling," why did it enact detailed provisions expressly exempting *non*educational institutions—like social fraternities, the YMCA, and the Girl Scouts—from Title IX's reach? *See, e.g.*, 20 U.S.C. § 1681(a)(6). Those organizations would have *already* been impliedly exempt from Title IX, rendering superfluous § 1681(a)'s express exemptions for them. Because we strive to avoid superfluity in construing statutes, *see* *Corley v. United States*, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009), we reject this reading of Title IX.

What direction does Mercy suggest we take? Tacitly conceding that § 1681(c) isn't the way, they abandon it for § 1687(3)(A)(ii). That provision says "program or activity" means all the operations of a private entity "principally engaged in the business of providing education, health care, housing, social services, or parks and recreation." But because § 1681(a) says "*education* program or activity," Mercy tells us we're to ignore the words "health care, housing, social services, or parks and recreation" and hold that Title IX applies only to private entities "principally engaged in the business of providing *education*." Applying that reading, Mercy deems the result inevitable: A private hospital like Mercy that employs physicians in its own residency program is "quite plainly" not principally engaged in the education business. Mercy Br. 8–9.

[4] If only it were so plain. Yet no part of Title IX says it reaches only entities ***555** "principally engaged in the business of providing education." Quite the opposite. Section 1687 leaves space aplenty for a variety of entities irrespective of what they're "principally" engaged in—for example,

state and local government instrumentalities, private entities extended assistance as a whole, other private entities' entire plants or separate facilities, and *any* entity established by two or more covered entities. More important, Mercy's approach strikes out considerable portions of § 1687(3)(A)(ii)'s text. Doe's helpful visual aid puts that much on display: Mercy suggests Title IX applies only to private entities "principally engaged in the business of providing education~~, health care, housing, social services, or parks and recreation.~~ " Reply Br. 8 (strikethrough in original). By that reading we cannot abide, for it violates a "most basic" interpretive rule that a statute is to be construed so that effect is given to *all* its provisions, so no part will be inoperative or superfluous, void or insignificant. *Corley*, 556 U.S. at 314, 129 S.Ct. 1558.

It is then Doe who, we think, charts the soundest course. She says, and we agree, there's no reason to read the phrase "education program or activity" so narrowly. The Supreme Court has twice instructed us that, to give Title IX the scope its origins dictate, we're to accord it a sweep as broad as its language. *North Haven*, 456 U.S. at 521, 102 S.Ct. 1912; *see* *Jackson*, 544 U.S. at 175, 125 S.Ct. 1497. And indeed the ordinary meaning of "education"—a word Congress has yet to define—is "very broad." *Roubideaux v. North Dakota Dep't of Corrs. & Rehab.*, 570 F.3d 966, 977 (8th Cir. 2009). Congress expressly exempted specific kinds of programs from Title IX's reach—like military academies, religious schools, and sororities, *see* 20 U.S.C. § 1681(a)(1)–(9)—so we're hesitant to impose further restrictions without strong justifications from Title IX's text. *See* *North Haven*, 456 U.S. at 521–22, 102 S.Ct. 1912 (The "absence of a specific" proffered exclusion from § 1681(a)'s exceptions "tends to support" that it shouldn't be inferred.); *Jeldness v. Pearce*, 30 F.3d 1220, 1225 (9th Cir. 1994) (Because § 1681(a) lists specific exemptions, others are not to be "judicially implied."). The statute offers no such justification, so we reconcile § 1687 with § 1681(a) as follows.

[5] Like the Second Circuit we hold that a "program or activity" under § 1687 is an "*education* program or activity" under § 1681(a) if it has "features such that one could reasonably consider its mission to be, at least in part, educational." *O'Connor v. Davis*, 126 F.3d 112, 117 (2d Cir. 1997). This accords with Title IX's text and structure. It lines up with the Eighth and Ninth Circuits' applications of Title IX beyond educational institutions "in the sense of schooling" to entire state-prison systems offering inmates educational programs. *See* *Klinger v. Dep't of Corrs.*, 107 F.3d 609, 613–16 & n.5 (8th Cir. 1997); *Roubideaux*, 570 F.3d at 976–79; *Jeldness*, 30 F.3d at 1224–25. It's consistent with the First Circuit's application of Title IX to a university's medical residency program. *See* *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988). And it's in step with how twenty-one federal agencies, including the Departments of Education and Health and Human Services, have interpreted the statute. *See* 34 C.F.R. § 106.1; 45 C.F.R. § 86.1; Title IX Common Rule, *supra*, at 52,865 (all saying Title IX applies to "any" education program or activity "whether or not" it's "offered or sponsored by an educational institution"); U.S. *Amicus* Br. 18–19 n.7. We adopt it.

We recognize, however, that creative minds could conceivably read the word "education" in Title IX to "encompass every ***556** experience of life," *Roubideaux*, 570 F.3d at 977, transforming Title IX into a remedy for any dispute in which someone is "potentially" learning something, *Doe*, 158 F.Supp.3d at 260. We see no sign Congress intended as much. Indeed by merely including the word "education" in § 1681(a), Congress signified that Title IX has *some* boundary. We endeavor here to delimit it.

[6] **[7]** We note first that Title IX's application turns primarily on whether *the defendant-entity's* questioned program or activity has educational characteristics. *The plaintiff's* characteristics—for example, whether she's a student, employee, or something else—may be relevant in some cases, but they aren't necessarily dispositive. That caveat aside, we highlight here several features that support deeming a "program or activity" an "*education* program or activity" under Title IX, emphasizing that particular features (or other features not here listed) may be more or less relevant depending on the unique circumstances of each case. In no particular order, these features are that (A) a program is incrementally structured through a particular course of study or training, whether full- or part-time; (B) a program allows participants to earn a degree or diploma, qualify for a certification or certification examination, or pursue a specific occupation or trade beyond mere on-the-job training; (C) a program provides instructors, examinations, an evaluation process or grades, or accepts tuition; or (D) the entities

offering, accrediting, or otherwise regulating a program hold it out as educational in nature. *Accord* *O'Connor*, 126 F.3d at 117–18 (Education programs "typically provide instructors, evaluations, and offer a particular course of training."). These guidelines are, we think, in keeping with the common understanding of the word "education" prevalent when Title IX was enacted. *See, e.g.*, Webster's New World Dictionary 444 (2d ed. 1970) (Education is the "process of training and developing the knowledge, skill, mind, character, etc., esp. by formal schooling; teaching; training."); *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 132 S.Ct. 1997, 2002, 182 L.Ed.2d 903 (2012) ("When a term goes undefined in a statute," we give it its "ordinary meaning.").

[8] We end with this: Whether a program or activity is sufficiently educational under Title IX is a mixed question of law and fact. When the facts are uncontested, the judge decides the matter. Factual disputes material to her legal conclusion are, however, left for the finder of fact.

* * *

Applying this reading, we identify two plausible ways Mercy's residency program makes it an "education program or activity" under Title IX.

[9] *First* Doe's allegations raise the plausible inference that Mercy is a private organization principally engaged in the business of providing healthcare, 20 U.S.C. § 1687(3)(A)(ii), whose operation of an ACGME-accredited residency program makes its mission, at least in part, educational, *see* *O'Connor*, 126 F.3d at 117; 20 U.S.C. § 1681(a). Doe says, and we accept as true, that she was enrolled in a multiyear regulated program of study and training in diagnostic radiology at Mercy. That program required her to learn and train under faculty members and physicians, attend lectures and help present case presentations under supervision, participate in a physics class on a university campus, and sit for annual examinations. Had Doe completed Mercy's program, she would have been eligible to take the American Board of Radiology's certification examinations, and passing scores there would have certified her to practice for six years. Doe also ***557** says Mercy held out its residency programs as educational in nature and that the ACGME calls residency programs "structured educational experience[s]." App. 103. These allegations, we think, satisfy Federal Rule of Civil Procedure 8. *See* *Iqbal*, 556 U.S. at 677–80, 129 S.Ct. 1937. Courts have repeatedly recognized the educational qualities of residency *programs* in other contexts, even where ultimately deeming *residents* nonstudents. *See, e.g.*, *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 47, 131 S.Ct. 704, 178 L.Ed.2d 588 (2011) ("Most doctors who graduate from medical school" pursue "additional education in a specialty to become board certified to practice in that field."); *id.* at 60, 131 S.Ct. 704 (Residents are "engaged in a valuable educational pursuit" and are "students of their craft."); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 507, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994) (Because residents "learn both by treating patients and by observing other physicians do so," graduate medical education programs "take place in a patient care unit (most often in a teaching hospital), rather than in a classroom."); *McKeesport Hosp.*, 24 F.3d at 525 (Residencies are a "vital component" of "medical education."); *Johnson v. Baptist Med. Ctr.*, 97 F.3d 1070, 1072 (8th Cir. 1996) (Residencies combine "features of both employment and academic study."); *Lipsett*, 864 F.2d at 897 (A resident is "both an employee *and* a student."). So too has Congress. *See, e.g.*, 15 U.S.C. § 37b(b)(1)(B)(i) (A "graduate medical education program" is a "residency program" for "medical education and training.").

[10] We hasten to note, however, that our assessment of the educational features of Mercy's residency program does not imply that one must perform a program-specific analysis on each and every prerequisite to Title IX coverage. For instance, whether a covered program or activity receives "Federal financial assistance," 20 U.S.C. § 1681(a), is determined by reference to the "entire" entity or "whole" organization, *id.* § 1687. Congress made that clear in overruling *Grove City College*, 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516. *See* S. Rep. No. 100-64, at 4 (1987). With respect to "Federal financial assistance" for purposes of Title IX coverage, our analysis here does not alter the requirement of an institution-wide assessment.

Second we find it plausible Mercy's operation of a residency program makes its mission, at least in part, educational under Title IX because of Mercy's "affiliat[ion]" with Drexel Medicine, App. 104, a university program plausibly covered by Title IX, *see* 20 U.S.C. § 1687(2)(A). Two decisions guide us—*Lam v. Curators of UMKC Dental School*, 122

F.3d 654 (8th Cir. 1997), and *O'Connor* from the Second Circuit.

In *Lam* a clinician hired a university dental student to work at his private office "[un]affiliated" with the university. 122 F.3d at 655. Alleging the clinician sexually assaulted her there, the student sued the university under Title IX. The university argued that she failed to show a "nexus" between the private office and the university, *id.* at 656, and the Eighth Circuit agreed, holding that the "independent, private dental practice" wasn't a "program or activity of the University" under Title IX. *Id.* An education program, the court explained, is one "controlled by" and that inures "some benefit" to the covered institution. *Id.* In the student's case, it found, the clinician conferred "no benefit" to the university by operating a "separate, competing" clinic, as the university exercised "no control" over it and didn't provide it "staff, funding," or "any other support." *Id.*

***558** Similarly in *O'Connor* a college arranged for its student to serve as an unpaid intern at a hospital. 126 F.3d at 113. Alleging she was sexually harassed there, the intern sued the college and hospital under Title IX, but the college was dismissed from the case. The intern argued that Title IX reached the hospital because it accepted interns and thus operated a vocational training program. *Id.* at 116. Framing the issue as whether Title IX applied to a hospital that allowed students to volunteer from a college with which it had "no affiliation," the Second Circuit disagreed. *Id.* at 117. The hospital, it found, maintained "none of the characteristics associated with being an educator," unlike, for example, a "teaching hospital's 'mixed employment-training context.' " *Id.* at 118 (quoting *Lipsett*, 864 F.2d at 897). And the college's status as an education program couldn't be "imputed" to the hospital, it held, because there was no evidence of an "institutional affiliation," a "written agreement binding" them, shared staff, or funds "circulated between them." *Id.*

Our case is different. Unlike *Lam* where the private dental office was "[un]affiliated" with the university, 122 F.3d at 655, here we accept as true that Mercy's residency program is "affiliated" with Drexel Medicine, App. 104. Doe supports that contention with allegations that she took a physics class "taught on Drexel's campus," App. 106, and that Mercy provided the "clinical bases" for Drexel Medicine's emergency medicine residency, App. 104. It's thus plausible, we think, that Mercy's residency program inured "some benefit" to Drexel Medicine (and vice versa) and that these entities shared "staff, funding," and "other support." *Lam*, 122 F.3d at 656; *see* *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937 (Rule 8's inquiry is a "context-specific task" requiring us to draw on our "judicial experience and common sense.").

O'Connor is distinguishable too. There the hospital accepted student-interns from a college with which it had "no institutional affiliation." 126 F.3d at 118. Here, in contrast, Doe expressly alleges such an affiliation between Mercy and Drexel Medicine. And given her supporting allegations, we find it plausible to infer an "agreement binding" them and the sharing of "staff" and "funds." *Id.* Given these alleged connections, it's plausible Mercy's operation of a residency program affiliated with Drexel Medicine makes its mission, at least in part, educational under Title IX, satisfying § 1681(a). We will therefore vacate the District Court's order so far as it concludes otherwise.

* * *

[11] Of our first inquiry just one matter remains. In a lengthy footnote Mercy claims it doesn't receive "Federal financial assistance" under Title IX because its Medicare payments stem from "contracts of insurance." Mercy Br. 7–8 n.2. Mercy, however, made no such argument in the District Court. Our rule is well established in that circumstance: Theories not raised squarely there cannot be surfaced for the first time on appeal. *Lesende v. Borrero*, 752 F.3d 324, 333 (3d Cir. 2014); *see* *United States v. Joseph*, 730 F.3d 336, 338–42 (3d Cir. 2013). Seeing no reason to depart from this rule (Mercy offers none), we decline to consider this argument, particularly as "contracts of insurance" in federal civil rights statutes intend to refer to contracts in the traditional sense, like those involving "individual bank accounts in a bank with federally guaranteed deposits." *United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1048 (5th Cir. 1984). We thus assume without deciding that Mercy receives "Federal financial assistance" under Title IX, leaving it for the District Court to address on remand.

***559 B**

We continue to our second inquiry—whether Doe's private causes of action are cognizable under Title IX. As we said above, Title IX provides just one *express* enforcement mechanism: action through federal agencies. *See* 20 U.S.C. § 1682. But in *Cannon v. University of Chicago* the Supreme Court held that Title IX *implies* a cause of action for *private* litigants. 441 U.S. 677, 717, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). We must decide, therefore, if *Cannon* extends to Doe's Title IX retaliation, *quid pro quo*, and hostile environment claims.

Mercy says, and the District Court agreed, a roadblock stands in Doe's way—Title VII. Residents are employees, Mercy submits, and Title VII governs employment relationships, prohibiting discrimination based on sex. *See* 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a); *Covington v. Int'l Assoc. of Approved Basketball Officials*, 710 F.3d 114, 118–19 (3d Cir. 2013). But, Mercy notes, Title VII also sets out elaborate administrative requirements an employee must satisfy before seeking relief in court. *See* *Burgh v. Borough Council of Borough of Montrose*, 251 F.3d 465, 469–71 (3d Cir. 2001). Title IX is, in contrast, bare. While it requires proof an appropriate person had notice of the alleged discrimination so the institution had an opportunity to address it, *see* 20 U.S.C. § 1682; *Jackson*, 544 U.S. at 181, 125 S.Ct. 1497; *Gebser*, 524 U.S. at 290, 118 S.Ct. 1989, Title IX doesn't have administrative hurdles like Title VII. This means Title IX plaintiffs can "file directly in court" under *Cannon*'s implied cause of action. *Fitzgerald*, 555 U.S. at 255, 129 S.Ct. 788. Given Title VII's carefully-drawn framework, Mercy contends, the District Court was right that Congress intended Title VII as the sole avenue of private relief for employees of federally-funded education programs who allege sex discrimination. Private Title IX claims alleging the same conduct, Mercy argues, are not cognizable because they'd allow education-program employees to plead their way round Title VII's administrative scheme.

[12] We agree with just one part of this assessment. While we won't (and can't) speak for *all* residents, we agree *here* it's plausible Doe was Mercy's "employee" notwithstanding any other status the law may or may not have reposed on her (for example, a "student"). We rely on *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992), to decide if a person is an "employee" under Title VII, *see* *Covington*, 710 F.3d at 119. Applied to Doe's complaint, *Darden*'s factors indeed suggest she was an employee under Title VII. *See* 503 U.S. at 323–24, 112 S.Ct. 1344.

For instance, Mercy was the source of the instrumentalities and tools of Doe's work as a resident, the location of Doe's work was at Mercy, and Mercy assigned Doe projects and tasks. *See* *id.* Doe had no discretion over when and how long she worked beyond ACGME guidelines limiting her workweek to 80 hours. *See* *id.* And assuming she was paid (a plausible assumption, we think), her paychecks were taxed like other employees under the Federal Insurance Contributions Act, or FICA. *See* *id.*; *see* *Mayo Found.*, 562 U.S. at 47, 60, 131 S.Ct. 704. She had no apparent role in hiring or paying assistants, her work was part of Mercy's regular business of providing healthcare to patients, and she could bargain collectively as a resident like other employees. *See* *Darden*, 503 U.S. at 323–24, 112 S.Ct. 1344; *Boston Med. Ctr. Corp.*, 330 N.L.R.B. 152, 168 (1999). In sum, we agree with Mercy that, had Doe complied with Title VII's administrative requirements, she could have filed Title VII claims in court as an "employee" like ***560** other residents have before. *See, e.g.*, *Takele v. Mayo Clinic*, 576 F.3d 834 (8th Cir. 2009).

Nevertheless we reject the rest of Mercy's argument. Title VII's concurrent applicability does not bar Doe's private causes of action for retaliation and *quid pro quo* harassment under Title IX. Six Supreme Court decisions guide us.

* * *

First is *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975), which involved whether the timely filing of an EEOC charge alleging race discrimination under Title VII tolled the limitations period on a claim alleging race discrimination under 42 U.S.C. § 1981, a statute without administrative requirements. Though it ultimately found the latter claim untimely, the Court held

that the "remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Id.* at 461, 95 S.Ct. 1716. Despite Title VII's "range" and "design as a comprehensive solution" for "invidious discrimination in employment," the Court explained, a private-sector employee "clearly is not deprived of other remedies" and isn't "limited to Title VII in his search for relief." *Id.* at 459, 95 S.Ct. 1716. Title VII "manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable" federal statutes. *Id.* (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974)). The employer argued that allowing Johnson's § 1981 claim to proceed might permit his circumvention of Title VII's administrative requirements, going against Congress's intent. But the Court disagreed:

> 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.

Id. at 461, 95 S.Ct. 1716 (emphasis added). The Court thus declined to infer any positive preference for Title VII without a more "definite" congressional expression. *Id.*

A year later came *Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976), which involved an amendment to Title VII (*see* 42 U.S.C. § 2000e-16) that waived sovereign immunity to grant federal employees access to administrative and judicial relief from workplace discrimination. Alleging race discrimination, an ex-GSA employee filed claims under § 1981 and § 2000e-16, but the latter was untimely under the amendment's jurisdictional limitations period. Holding that Congress intended § 2000e-16 as the "exclusive, pre-emptive administrative and judicial scheme for the redress of *federal* employment discrimination," 425 U.S. at 829, 96 S.Ct. 1961 (emphasis added), the Supreme Court affirmed dismissal of Brown's case for want ***561** of jurisdiction. Critically, the Court distinguished *Johnson* as "inapposite," for *Johnson* held only that Title VII doesn't "pre-empt" other remedies in "*private employment*," not federal employment. *Id.* at 833, 96 S.Ct. 1961. *Johnson*'s inapplicability was especially plain, the Court found, because private employment doesn't raise "problems of sovereign immunity." *Id.*

Then in 1979, seven years after Title IX's enactment, the Court decided *Cannon*, 441 U.S. 677, 99 S.Ct. 1946, in which an applicant sued a medical school alleging it denied her admission based on her sex, in violation of Title IX. The Seventh Circuit affirmed dismissal of her claim, holding that Congress intended Title IX's administrative device as the "exclusive means" to enforce the statute. 441 U.S. at 683–84, 99 S.Ct. 1946. The Supreme Court disagreed. Reading § 1681(a), it inferred a private cause of action for the applicant to allege the medical school "rejected her" based on sex, *id.* at 688–89, 99 S.Ct. 1946, notwithstanding that Title IX doesn't "expressly authorize" private action, *id.* at 683, 99 S.Ct. 1946. Title IX "explicitly confers a benefit on *persons* discriminated against" based on sex, the Court held, and the plaintiff was "clearly a member of that class for whose

special benefit the statute was enacted." *Id.* at 694, 99 S.Ct. 1946 (emphasis added).

Three years later came *North Haven*, 456 U.S. 512, 102 S.Ct. 1912, in which ex-school employees filed Title IX agency actions alleging sex discrimination against two school boards. Agencies had promulgated regulations interpreting Title IX to extend to sex-based employment discrimination. *See* *id.* at 516, 102 S.Ct. 1912 (citing, for example, 34 C.F.R. § 106.51(a)(1)). The boards sued the agencies, seeking to declare these regulations *ultra vires* under Title IX. Voting six to three, the Supreme Court upheld them, as the agencies had fairly read § 1681(a)'s "broad directive that 'no *person*' may be discriminated against" based on sex to encompass "employees as well as students." *Id.* at 520, 102 S.Ct. 1912 (emphasis added). The Court rejected the argument that Title IX shouldn't extend to private employment because employees have "remedies other than those available under Title IX," like Title VII. *Id.* at 535 n.26, 102 S.Ct. 1912. Even if "alternative remedies are available and their existence is relevant," it rejoined, "Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination." *Id.* (citing, among other decisions, *Johnson*, 421 U.S. at 459, 95 S.Ct. 1716).

Joined by Chief Justice Burger and Justice Rehnquist, Justice Powell dissented. Given Title VII's "comprehensive" scheme and "carefully prescribed procedures" for EEOC conciliation, he would have held that Title IX doesn't extend to private employment, as Title IX has "no time limits for action, no conciliation provisions, and no guidance as to procedure." *Id.* at 552, 102 S.Ct. 1912 (Powell, J., dissenting). He also thought it "unlikely" Congress would "duplicate" enforcement of Titles VII and IX in private-sector employment by "different departments of government with different enforcement powers, areas of expertise, and enforcement methods." *Id.* at 553, 102 S.Ct. 1912.

A decade later the Court decided *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992), in which a student sought damages for sexual harassment under Title IX. Acknowledging *Cannon*'s implied cause of action and relying on the presumption that "all appropriate remedies" are available for private litigants, *id.* at 66, 112 S.Ct. 1028, the Court held that damages are available in private Title IX actions, *id.* at 76, 112 S.Ct. 1028.

***562** Finally in 2005 the Court decided *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S.Ct. 1497, in which a school board relieved a high school "employee" of his coaching position after he complained that the girls' basketball team received unequal treatment based on sex. *Id.* at 171, 125 S.Ct. 1497. He sued in his private capacity, bringing a Title IX retaliation claim. Reversing the Eleventh Circuit, the Court allowed the employee's retaliation claim to proceed under *Cannon*. *Id.* at 173–74, 125 S.Ct. 1497. If funding recipients were "permitted to retaliate freely," the Court held, "individuals" who witness sex discrimination would be "loath to report it" and "all manner of Title IX violations might go unremedied." *Id.* at 180, 125 S.Ct. 1497.

* * *

[13] From these six decisions we derive four guiding principles. *First* private-sector employees aren't "limited to Title VII" in their search for relief from workplace discrimination. *Johnson*, 421 U.S. at 459, 95 S.Ct. 1716. The Supreme Court has so held despite Title VII's "range" and "design as a comprehensive solution" for "invidious discrimination in employment." *Id.*; *see* *Brown*, 425 U.S. at 833, 96 S.Ct. 1961; *North Haven*, 456 U.S. at 535 n.26, 102 S.Ct. 1912.

Second 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. *North Haven*, 456 U.S. at 535 n.26, 102 S.Ct. 1912 (Concurrent enforcement was a "policy" consideration for Congress to weigh, and we cannot ignore Title IX's language and history even if we disagree with that legislative choice.); *Johnson*, 421 U.S. at 461, 95 S.Ct. 1716 (These are the "natural effects of the choice Congress has made available" to an employee "by its conferring upon him independent administrative and judicial remedies."). *North Haven* is

particularly illuminating. Dissenting there, Justice Powell described vividly the putative inefficiencies, redundancies, and contradictions of parallel enforcement in private-sector employment under Titles VII and IX. 456 U.S. at 540–55, 102 S.Ct. 1912 (Powell, J., dissenting). But given Congress's use of the expansive term "person" in § 1681(a), six Justices rejected those views, *see* *id.* at 514–40 & n.26, 102 S.Ct. 1912 (majority opinion), signifying they carry little, if indeed any, weight in our analysis.

[14] *Third* the provision implying Title IX's private cause of action, 20 U.S.C. § 1681(a), encompasses employees, not just students, *see* *North Haven*, 456 U.S. at 520, 102 S.Ct. 1912 (Section 1681(a)'s "broad directive" that no "person" may be discriminated against based on sex encompasses "employees as well as students."); *Cannon*, 441 U.S. at 694, 99 S.Ct. 1946 (A private cause of action exists under Title IX for "persons" suffering sex discrimination.). Because § 1681(a) "neither expressly nor impliedly excludes employees from its reach," we're to interpret it as "covering and protecting these 'persons,' " for Congress easily could have substituted " 'student' or 'beneficiary' for the word 'person' if it had wished to restrict" § 1681(a)'s scope. *North Haven*, 456 U.S. at 521, 102 S.Ct. 1912.

[15] *Fourth* Title IX's implied private cause of action extends explicitly to *employees* of federally-funded education programs who allege sex-based *retaliation* claims under Title IX. *See* *Jackson*, 544 U.S. at 171, 125 S.Ct. 1497. Retaliation against a "person," including an employee, because she "complained of sex discrimination" is another form of "intentional sex discrimination" actionable under Title IX. ***563** *Id.* at 174, 125 S.Ct. 1497. Mercy, for its part, urges a narrower reading of *Jackson* because, unlike Doe, the plaintiff there likely had no recourse under Title VII. But *Jackson* bears out no such qualification. Indeed *Jackson* repeatedly underscores Title IX's wide range. *See, e.g.*, *id.* at 171, 125 S.Ct. 1497 (Title IX retaliation claims extend to "individual[s]," not individuals who can't bring Title VII claims.); *id.* at 173, 125 S.Ct. 1497 (Section 1681(a) "broadly" encompasses "any person."); *id.* at 175, 125 S.Ct. 1497 (Discrimination "covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach."); *id.* (Title IX is a "broadly written general prohibition on discrimination."); *id.* at 179 & n.3, 125 S.Ct. 1497 (Title IX is "broadly worded" and its "beneficiaries plainly include all those" subjected to sex discrimination); *id.* at 183, 125 S.Ct. 1497 (The Court's decisions since *Cannon* "consistently" have interpreted Title IX's private cause of action "broadly" to encompass "diverse forms of intentional sex discrimination."). And no subsequent decision has narrowed *Jackson* as Mercy so urges. *See* *Gomez-Perez v. Potter*, 553 U.S. 474, 483, 128 S.Ct. 1931, 170 L.Ed.2d 887 (2008) (*Jackson* holds that a "private party," not a private party who can't proceed under Title VII, "may assert a retaliation claim under Title IX."). This principle thus holds true.

We note the Fifth and Seventh Circuits have held categorically that Title VII provides the "exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions." *Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995); *accord* *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 861–62 (7th Cir. 1996), *abrogated in part on other grounds by* *Fitzgerald*, 555 U.S. 246, 129 S.Ct. 788, 172 L.Ed.2d 582. Allowing *any* private Title IX claim to proceed there, these courts held, would "disrupt" Title VII's "carefully balanced remedial scheme for redressing employment discrimination." *Lakoski*, 66 F.3d at 754; *see* *Waid*, 91 F.3d at 861–62. Given the four principles described above, we decline to follow *Lakoski* and *Waid*, both of which went against the First and Fourth Circuits' decisions recognizing employees' private Title IX claims. *See* *Lipsett*, 864 F.2d at 895–97; *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994) (*Cannon* extends to "employment discrimination on the basis of gender by educational institutions receiving federal funds."); *see also* *Summa v. Hofstra Univ.*, 708 F.3d 115, 131 n.1 (2d Cir. 2013) (noting *Lakoski*'s split from *Lipsett* and *Preston*). More important, *Lakoski* and *Waid* did

not address the Supreme Court's decisions in *Johnson* and *Brown* and the provisions of *North Haven* rejecting "policy"-based rationales like those Justice Powell set out in his dissent and that Mercy and its *amicus* raise here. Finally, *Lakoski* and *Waid* were decided a decade before the Supreme Court handed down *Jackson*, which explicitly recognized an employee's private claim under *Cannon*. We thus question the continued viability of *Lakoski* and *Waid* and see fit here to deviate from them.

We now apply these principles to Doe's Title IX claims.

Retaliation

[16] For reasons already explained, we confirm that a private retaliation claim exists for employees of federally-funded education programs under Title IX notwithstanding Title VII's concurrent applicability. *Jackson* and the decisions before it make plain: When a funding recipient retaliates against a "person," including an employee, because she complains of sex discrimination, that's "intentional discrimination" ***564** based on sex, violative of Title IX and actionable under *Cannon*'s implied cause of action. *Jackson*, 544 U.S. at 174, 125 S.Ct. 1497; *see* *North Haven*, 456 U.S. at 520, 102 S.Ct. 1912. Whether that person could also proceed under Title VII is of no moment, for Congress provided a "variety of remedies, at times overlapping, to eradicate" private-sector employment discrimination. *North Haven*, 456 U.S. at 535 n.26, 102 S.Ct. 1912; *see* *Johnson*, 421 U.S. at 459, 95 S.Ct. 1716; *Brown*, 425 U.S. at 833, 96 S.Ct. 1961. It is thus Congress's prerogative — not ours — to alter that course.

[17] **[18]** Without addressing *Jackson* or Doe's factual allegations, the District Court dismissed Doe's retaliation claim as inviable under Title IX. Because we disagree, we will vacate that dismissal and remand this claim for consideration in the first instance. The following standards apply: Title VII's familiar retaliation framework "generally governs" Title IX retaliation claims. *Emeldi v. Univ. of Oregon*, 698 F.3d 715, 723–25 & n.3 (9th Cir. 2012). Our fellow Courts of Appeals have so held. *See, e.g.*, *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 867–68 (9th Cir. 2014) (Under Title IX, speaking out against sex discrimination is "protected activity."); *Papelino v. Albany Coll. of Pharm. of Union Univ.*, 633 F.3d 81, 91–92 (2d Cir. 2011); *Preston*, 31 F.3d at 206–07. Accordingly, to establish a *prima facie* retaliation case under Title IX, Doe must prove she engaged in activity protected by Title IX, she suffered an adverse action, and there was a causal connection between the two. *Cf.* *Moore v. City of Philadelphia*, 461 F.3d 331, 340–42 (3d Cir. 2006). If she makes this showing, the burden shifts to Mercy to advance a legitimate, nonretaliatory reason for its conduct. *Id.* at 342. If Mercy does so, Doe must show that Mercy's proffered explanation was false and that retaliation was the real reason for the adverse action against her. *Id.*

Finally, Doe's retaliation claim is timely under Title IX's two-year limitations period only so far as she alleges retaliatory conduct that occurred on or after April 20, 2013, two years before she filed this lawsuit. *See* *Bougher v. Univ. of Pittsburgh*, 882 F.2d 74, 78 (3d Cir. 1989) (For Title IX claims arising from actions occurring in Pennsylvania and involving Pennsylvania citizens, Pennsylvania's two-year limitations period "applicable to personal injury actions" controls.); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (Retaliation is a discrete act.). We note that, as Doe's complaint currently stands, only two incidents fit this temporal criteria—Mercy's decision to dismiss her by letter dated April 20, 2013 and Dr. Roe's advocating for her dismissal at her appeal hearing on April 24, 2013.

Quid Pro Quo *Harassment*

[19] **[20]** We likewise hold that a private *quid pro quo* claim exists for employees of federally-funded education programs under Title IX notwithstanding Title VII's concurrent applicability, for private-sector employees may pursue independently their rights under both Title VII and other applicable federal statutes. *Johnson*, 421 U.S. at 459, 95 S.Ct. 1716; *see* *North Haven*, 456 U.S. at 535 n.26, 102 S.Ct. 1912; *Brown*, 425 U.S. at 833, 96 S.Ct. 1961. We decline here to infer any positive preference for Title VII without a more definite congressional expression—for example, a provision in Title VII barring concurrent private

Title IX claims. *Cf.* *Johnson*, 421 U.S. at 461, 95 S.Ct. 1716.

[21] In so holding, we recognize that the Supreme Court has yet to extend *Cannon* to *quid pro quo* claims in the private employment setting. But to exclude them ***565** would, we think, ignore the import of the Court's "repeated" holdings construing the word discrimination in Title IX broadly and deeming sexual harassment actionable under *Cannon* in other contexts. *Jackson*, 544 U.S. at 174–75, 125 S.Ct. 1497 (citing *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643, 650, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999); *Gebser*, 524 U.S. at 290–91, 118 S.Ct. 1989; *Franklin*, 503 U.S. at 74–75, 112 S.Ct. 1028). As *Jackson* admonished, the term "discrimination" in § 1681(a) covers a "wide range of *intentional* unequal treatment." *Id.* at 175, 125 S.Ct. 1497 (emphasis added). And *quid pro quo* sexual harassment—i.e., when tangible adverse action results from an underling's refusal to submit to a higher-up's sexual demands—is, by its very nature, intentional unequal treatment based on sex. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753–54, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *see* *id.* at 752, 118 S.Ct. 2257 (Sex discrimination is "explicit" in a *quid pro quo* scenario.).

[22] The Spending Clause's notice requirements also pose no obstacle to Title IX *quid pro quo* claims seeking damages in the employment setting. Given the Clause's contractual nature, private Title IX damages actions are available only if the funding recipient had adequate notice it could be liable for the conduct alleged. *Jackson*, 544 U.S. at 181, 125 S.Ct. 1497; *cf.* *id.* at 181–84, 125 S.Ct. 1497 (Title IX retaliation claims meet this requirement.). But funding recipients have known they could be sued privately for intentional sex discrimination under Title IX "since 1979" when the Court decided *Cannon*. *Id.* at 182, 125 S.Ct. 1497. And *quid pro quo* sexual harassment is, as we said above, intentional sex discrimination, whether it occurs in an education or employment setting. The First Circuit impliedly recognized as much in 1988 in allowing a medical resident's *quid pro quo* claim to proceed under Title IX. *See* *Lipsett*, 864 F.2d at 898. And other courts have recognized Title IX *quid pro quo* claims in other contexts. *See, e.g.*, *Papelino*, 633 F.3d at 89; *Klemencic v. Ohio State Univ.*, 263 F.3d 504, 510 (6th Cir. 2001). These decisions have, we think, adequately apprised covered entities of their potential liability for *quid pro quo* harassment in the employment setting, as the Spending Clause demands.

[23] **[24]** **[25]** The District Court, of course, never got this far. It dismissed Doe's *quid pro quo* claim as inviable under Title IX without considering her factual allegations. We thus treat this claim precisely the way we treated her retaliation claim: We will vacate its dismissal and remand it for consideration in the first instance. These standards apply: Like retaliation, Title VII's *quid pro quo* framework generally governs Title IX claims alleging *quid pro quo* harassment. Our fellow Courts of Appeals have again held as much. *See, e.g.*, *Papelino*, 633 F.3d at 88–90; *Lipsett*, 864 F.2d at 898–89. Accordingly, unwelcome sexual advances, requests for sexual favors, or other verbal or physical actions of a sexual nature constitute *quid pro quo* harassment when (A) the plaintiff's submission to that conduct is made either explicitly or implicitly a term or condition of her education or employment experience in a federally-funded education program, or (B) submission to or rejection of that conduct is used as the basis for education or employment decisions that affect the plaintiff. *Cf.* *Bonenberger v. Plymouth Twp.*, 132 F.3d 20, 27 (3d Cir. 1997). Given Title IX's Spending Clause origins, a Title IX plaintiff seeking damages for *quid pro quo* harassment must also prove that an "official who at a minimum" had "authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf" ***566** had "actual knowledge of discrimination in the recipient's programs" and failed adequately to respond. *Gebser*, 524 U.S. at 290, 118 S.Ct. 1989; *see* *Papelino*, 633 F.3d at 88–89. A response is inadequate if the officer failed to provide one or if she provided one amounting to deliberate indifference to the discrimination alleged. *Gebser*, 524 U.S. at 290, 118 S.Ct. 1989; *see* *Papelino*, 633 F.3d at 88–89 (A recipient's response to sex discrimination must be clearly unreasonable "in light of known circumstances." (citing *Davis*, 526 U.S. at 648, 119 S.Ct. 1661)).

Finally, like her retaliation claim, Doe's *quid pro quo* claim is timely only so far as she alleges conduct that occurred on

or after April 20, 2013, two years before she sued Mercy. *See* *Bougher*, 882 F.2d at 78; *Bonenberger*, 132 F.3d at 28 (distinguishing discrete acts of *quid pro quo* harassment from acts aggregated to make out a hostile environment claim). And again, as Doe's complaint currently stands, only her April 20, 2013 dismissal and Dr. Roe's appearance at her April 24, 2013 appeal hearing meet this criteria.

Hostile Environment

On Doe's final Title IX claim—hostile environment—we need not decide whether Title VII's applicability renders it inviable. Even if Title VII doesn't preclude this claim, we agree with the District Court that it's time-barred. Doe concedes only two incidents occurred on or after April 20, 2013, within Title IX's two-year limitations period—her April 20, 2013 dismissal and Dr. Roe's appearance at her April 24, 2013 appeal hearing. She says these incidents invoke the continuing-violation doctrine recognized under Title VII. We hold otherwise.

[26] Under that doctrine, discriminatory acts that aren't individually actionable may be aggregated to make out a Title VII hostile environment claim. *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 165 (3d Cir. 2013). These acts can occur at any time if they're linked in a pattern of actions continuing into Title VII's limitations period. *Id.* All the alleged acts, however, must be part of the same unlawful employment practice, *id.* at 165–66, meaning they involved "similar conduct by the same individuals, suggesting a persistent, ongoing pattern," *id.* at 167. It's an open question in our Court whether this doctrine applies under Title IX. Some courts suggest it does. *See, e.g.*, *Stanley v. Trs. of California State Univ.*, 433 F.3d 1129, 1136 (9th Cir. 2006). Others suggest it doesn't. *See, e.g.*, *Folkes v. New York Coll. of Osteopathic Med.*, 214 F.Supp.2d 273, 288–91 (E.D.N.Y. 2002). But we need not decide this question today. Even were we to apply the doctrine to Doe's Title IX hostile environment claim, the two timely incidents she points to wouldn't invoke it.

[27] **[28]** Concerning Doe's April 20, 2013 dismissal, Mercy's decision to dismiss her was a discrete act actionable on its own as retaliation or *quid pro quo* harassment. It cannot simultaneously support a hostile environment claim. *See* *Mandel*, 706 F.3d at 165 (Discrete acts are not actionable if time-barred even when related to timely acts. (citing *Morgan*, 536 U.S. at 113, 122 S.Ct. 2061)). Concerning her April 24, 2013 appeal hearing, Doe alleges only that Dr. Roe "advocated" for her dismissal there. App. 115. She doesn't allege, as the District Court noted, that he made sexualized comments or touched her in a sexual way there. Dr. Roe's conduct at the hearing, therefore, wasn't sufficiently similar to his pre-April 20, 2013 conduct to plausibly invoke the continuing-violation doctrine, assuming we'd apply it here. *Mandel*, 706 F.3d at 167. Accordingly, this claim is time-barred and we will affirm its dismissal.

***567 C**

[29] **[30]** We come to our final inquiry—what to do about Doe's state law claims. The District Court declined supplemental jurisdiction of them after dismissing her Title IX claims. A court may do so under 28 U.S.C. § 1367(c)(3) when it dismisses all claims over which it has original jurisdiction. *Elkadrawy v. Vanguard Grp., Inc.*, 584 F.3d 169, 174 (3d Cir. 2009). But we hold that Doe's Title IX retaliation and *quid pro quo* claims endure. We will therefore reverse dismissal of her state law claims and remand them for consideration in the first instance.

IV

For the reasons above, we will affirm in part and reverse in part the District Court's order and remand for further proceedings consistent with this opinion.

All Citations

850 F.3d 545, 101 Empl. Prac. Dec. P 45,757, 341 Ed. Law Rep. 1

Footnotes

* Honorable D. Michael Fisher, United States Circuit Judge for the Third Circuit, assumed senior status on February 1, 2017.

** Honorable Michael J. Melloy, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN - SOUTHERN DIVISION

RACHAEL DENHOLLANDER; JANE A. DOE by next friend JANE B. DOE; JANE C. DOE; JANE D. DOE; JANE E. DOE; JANE F. DOE; JANE G. DOE; JANE H. DOE; JANE J. DOE; JANE K. DOE by next friend JANE L. DOE; JANE M. DOE; JANE N. DOE; JANE O. DOE; JANE P. DOE by next friend JANE Q. DOE; JANE R. DOE; JANE S. DOE by next friend JANE T. DOE; JANE U. DOE; JANE X. DOE

Plaintiffs,

v.

MICHIGAN STATE UNIVERSITY; THE BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY; LAWRENCE GERARD NASSAR (individual and official capacity); USA GYMNASTICS, INC.; TWISTARS USA, INC. d/b/a GEDDERTS' TWISTARS GYMNASTICS CLUB USA

Defendants.
_____/

Case No. 1:17-cv-

HON.

COMPLAINT AND JURY DEMAND

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COMPLAINT AND JURY DEMAND

NOW COME Plaintiffs, by and through their attorneys DREW, COOPER & ANDING, and MANLY, STEWART & FINALDI, and hereby allege and state as follows:

I. PRELIMINARY STATEMENT AND INTRODUCTION

1. This is a civil action for declaratory, injunctive, equitable, and monetary relief for injuries sustained by Plaintiffs as a result of the acts, conduct, and omissions of Lawrence Nassar, D.O., Michigan State University ("MSU"), USA Gymnastics ("USAG"), and Twistars USA, Inc. ("Twistars") and their respective employees, representatives, and agents, relating to sexual assault, abuse, molestation, and nonconsensual sexual touching and harassment by Defendant Nassar against Plaintiffs, all female, many of whom were minors when the sexual assaults took place.

2. Plaintiffs are or were young athletes participating in a variety of sports including gymnastics, swimming, figure skating, track and field, field hockey, basketball, and soccer.

3. Defendant Nassar came highly recommended to Plaintiffs as a renowned orthopedic sports medicine physician, purportedly well-respected in the sports medicine community, specifically in the gymnastics community as the Team Physician for the United States Gymnastics team.

4. Plaintiffs and their parents had no reason to suspect Defendant Nassar was anything other than a competent and ethical physician.

5. From approximately 1996 to 2016 Defendant Nassar worked for Michigan State University in various positions and capacities.

6. From 1986 to approximately 2015 Defendant Nassar also worked for USA Gymnastics in various positions and capacities.

7. For over 20 years, Defendant Nassar had unfettered access to young female athletes through the Sports Medicine Clinic at MSU, and through his involvement with USAG and Twistars, who referred athletes to his care.

8. To gain Plaintiffs' trust, at appointments, Defendant Nassar would give some Plaintiffs gifts such as t-shirts, pins, flags, leotards, and other items, some with USAG logos and others without.

9. From 1996 to 1999, under the guise of treatment, Defendant Nassar sexually assaulted, abused, and molested Plaintiffs Jane H. Doe, Jane M. Doe, Jane N. Doe, Jane O. Doe, and Jane X. Doe, some of whom were minors, by nonconsensual vaginal and anal digital penetration and without the use of gloves or lubricant. In some situations, he also touched and groped their breasts.

10. Plaintiffs Jane H. Doe, Jane M. Doe, Jane N. Doe, Jane O. Doe, and Jane X. Doe were seeking treatment for athletic injuries to their lower backs, hamstrings, hip, tailbone, and elbow.

11. While most of the assaults were carried out at MSU, others were carried out at Twistars.

12. The ages of the Plaintiffs assaulted during 1996 to 1999 ranged from 11 to 22 years old.

13. In 1999, Jane X. Doe, a MSU student athlete, reported to trainers and her coach who were employees of MSU concerns about Defendant Nassar's conduct and "treatment," yet MSU failed to take any action in response to her complaints.

14. In 2000, Jane T.T. Doe, another MSU student athlete reported to trainers concerns about Defendant Nassar's conduct and "treatment," yet again MSU failed to take any action in response to her complaints.

15. Many Plaintiffs were seen alone with only the individual Plaintiff and Defendant Nassar in

the room, without chaperones.

16. At other times, Defendant Nassar would position himself in a manner in which parents or chaperones in the room could not see his conduct.

17. Because MSU took no action to investigate the 1999 or 2000 complaints and took no corrective action, from 2000 to 2016, under the guise of treatment, Plaintiffs Denhollander, Jane A. Doe, Jane C. Doe, Jane D. Doe, Jane E. Doe, Jane F. Doe, Jane G. Doe, Jane J. Doe, Jane K. Doe, Jane L. Doe, Jane M. Doe, Jane N. Doe, Jane O. Doe, Jane P. Doe, Jane R. Doe, Jane S. Doe, Jane U. Doe, and Jane X. Doe, many of whom were minors, were also sexually assaulted, abused, and molested by Defendant Nassar by nonconsensual vaginal and anal digital penetration, nonconsensual sexual touching of the vaginal area without the use of gloves or lubricant and by nonconsensual touching and groping of their breasts.

18. While most victims were assaulted at MSU, other victims were assaulted at Twistars.

19. The ages of the Plaintiffs assaulted from 2000 to 2016 ranged from 9 to 29 years old.

20. Additional complaints regarding Defendant Nassar's conduct surfaced in 2014. A victim reported she had an appointment with Defendant Nassar to address hip pain and was sexually abused and molested by Defendant Nassar when he cupped her buttocks, massaged her breast and vaginal area, and became sexually aroused.[1]

21. Upon information and belief, Defendant MSU investigated the 2014 complaints through their Office of Institutional Equity, and although the victim reported to Defendant MSU certain facts, some were omitted from the investigative report including but not limited to

[1] *See*, At MSU: Assault, harassment and secrecy. Matt Mencarini, December 15, 2016. Available at http://www.lansingstatejournal.com/story/news/local/2016/12/15/michigan-state-sexual-assault- harassment-larry-nassar/94993582/. (Last accessed January 5, 2017.)

the following:

A. Defendant Nassar was sexually aroused while touching her;

B. The appointment with Defendant Nassar did not end until she physically removed his hands from her body.

22. Three months after initiating the investigation, in July 2014, the victim's complaints were dismissed and Defendant MSU determined she didn't understand the "nuanced difference" between sexual assault and an appropriate medical procedure and deemed Defendant Nassar's conduct "medically appropriate" and "Not of a sexual nature."[2]

23. Following the investigation, upon information and belief Defendant Nassar became subject to new institutional guidelines, one of which – it is believed – was that Defendant Nassar was not to examine or treat patients alone.[3]

24. Defendant Nassar continued to treat patients alone.

25. Following the investigation, between approximately 2014 and 2016, Plaintiffs Jane A. Doe, Jane K. Doe, and Jane S. Doe were sexually assaulted by Defendant Nassar.

26. Through his position with MSU, his notoriety, and support by USAG and Twistars, Defendant Nassar used his position of authority as a medical professional to abuse Plaintiffs without any reasonable supervision by MSU or USAG.

27. Defendant Nassar carried out these acts without fully explaining the "treatment" or obtaining consent of Plaintiffs or their parents.

28. All of Defendant Nassar's acts were conducted under the guise of providing medical care at his office at Michigan State University or at Twistars.

[2] *Id.*
[3] *Id.*

29. The failure to give proper notice or to obtain consent for the purported "treatment" from Plaintiffs or their parents robbed them of the opportunity to reject the "treatment."

30. Defendant Nassar used his position of trust and confidence in an abusive manner causing Plaintiffs to suffer a variety of injuries including shock, humiliation, emotional distress and related physical manifestations thereof, embarrassment, loss of self-esteem, disgrace, and loss of enjoyment of life.

31. In September 2016, a story was published regarding a complaint filed with Defendant MSU's Police Department titled "Former USA Gymnastics doctor accused of Abuse," which included Plaintiff Denhollander's allegations against Defendant Nassar.

32. Following the September 2016 publication, other victims began coming forward after recognizing that they were victims of sexual abuse at a time when most of them were minors.

33. Plaintiffs have been forced to relive the trauma of the sexual assaults.

34. In summer 2015, USA Gymnastics relieved Defendant Nassar of his duties after becoming aware of concerns about his actions, yet USAG failed to inform Michigan State University of the circumstances regarding his dismissal.

35. As early as 1999, representatives of Michigan State University were made aware of Defendant Nassar's conduct, yet failed to appropriately respond to allegations, resulting in the sexual assault, abuse, and molestation of Plaintiffs through approximately 2016.

36. Michigan State University's deliberate indifference before, during, and after the sexual assault, abuse, and molestation of Plaintiffs was in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq*., 42 U.S. C. §1983, as well as other Federal and State laws.

37. MSU and USAG's failure to properly supervise Defendant Nassar and their negligence in retaining Defendant Nassar was in violation of Michigan common law.

38. In late November 2016, Defendant Nassar was arrested and charged in Ingham County, Michigan on three charges of first-degree criminal sexual conduct with a person under 13.[4]

39. In mid-December 2016, Defendant Nassar was indicted, arrested, and charged in Federal Court in Grand Rapids, Michigan on charges of possession of child pornography and receipt/attempted receipt of child pornography.

40. The acts, conduct, and omissions of Defendants Michigan State University, USA Gymnastics, and Twistars, and their policies, customs, and practices with respect to investigating sexual assault allegations severely compromised the safety and health of Plaintiffs and an unknown number of individuals, and have resulted in repeated instances of sexual assault, abuse, and molestation of Plaintiffs by Defendant Nassar, which has been devastating for Plaintiffs and their families.

41. This action arises from Defendants' blatant disregard for Plaintiffs' federal and state rights, and Defendants' deliberately indifferent and unreasonable response to physician-on-patient/physician-on-student sexual assault, abuse, and molestation.

II. JURISDICTION AND VENUE

42. This action is brought pursuant to Title IX of the Educational Amendments of 1972, 20 U.S.C. §1681, *et seq*., as more fully set forth herein.

43. This is also an action to redress the deprivation of Plaintiffs' constitutional rights under the Fourteenth Amendment of the United States Constitution pursuant to 42 U.S.C. §1983.

44. Subject matter jurisdiction is founded upon 28 U.S.C. §1331 which gives district courts

[4] State of Michigan, Ingham County Circuit Court Case No. 1603031.

jurisdiction over all civil actions arising under the Constitution, laws and treaties of the United States.

45. Subject matter jurisdiction is also founded upon 28 U.S.C. §1343 which gives district courts original jurisdiction over any civil actions authorized by law to be brought by any person to redress the deprivation, under color of any State Law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States, and any civil action to recover damages or to secure equitable relief under any Act of Congress providing for the protection of civil rights.

46. Plaintiff further invokes the supplemental jurisdiction of this Court, pursuant to 28 U.S.C. § 1367(a) to hear and decide claims arising under state law that are so related to the claims within the original jurisdiction of this Court that they form part of the same case or controversy.

47. The claims are cognizable under the United States Constitution, 42 U.S.C. §1983, 20 U.S.C. §1681 *et seq*., and under Michigan Law.

48. The events giving rise to this lawsuit occurred in Ingham County, Michigan which sits in the Southern Division of the Western District of Michigan.

49. Venue is proper in the United States District Court for the Western District of Michigan, pursuant to 28 U.S.C. § 1391 (b)(2), in that this is the judicial district in which the events giving rise to the claim occurred.

50. Because Michigan State University is a public university organized and existing under the laws of the State of Michigan, and Michigan statutory law requires parties to file a Notice

of Intention to File Claim in order to maintain any action against the state, in satisfaction of M.C.L. §600.6431 Plaintiffs filed Notices of Intent to File Claim with the Michigan Court of Claims on November 29, 2016 (Exhibit 1), December 21, 2016 (Exhibit 2), and January 9, 2017 (Exhibit 3).

III. PARTIES AND KEY INDIVIDUALS

51. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

52. With the exception of Plaintiff Rachael Denhollander, the names of the Plaintiffs have been withheld from this Complaint to protect their identities as some are currently minor children, or were minor children at the time the sexual abuse occurred.[5]

53. Plaintiff Rachael Denhollander is a female and is a resident of Kentucky, but resided in Michigan at all relevant times as indicated below. Plaintiff Denhollander was a minor at the times she was sexually assaulted, abused, and molested by Defendant Nassar.

54. Plaintiff Jane A. Doe is a minor female and is a resident of Michigan.

55. Plaintiff Jane B. Doe is an adult female, the mother of Plaintiff Jane A. Doe, and is a resident of Michigan.

56. Plaintiff Jane C. Doe is an adult female and is a resident of Michigan.

57. Plaintiff Jane D. Doe is an adult female and is a resident of Illinois, but resided in Michigan at all relevant times as indicated below. Plaintiff Jane D. Doe was a minor at the times she was sexually assaulted, abused, and molested by Defendant Nassar.

58. Plaintiff Jane E. Doe is an adult female and is a resident of Michigan. Plaintiff Jane E. Doe

[5] Plaintiffs will seek an Order of the Court regarding disclosure of Plaintiffs' identities and all conditions for disclosure.

was a minor at the time she was sexually assaulted, abused, and molested by Defendant Nassar.

59. Plaintiff Jane F. Doe is an adult female and is a resident of Washington, but resided in Michigan at all relevant times as indicated below. Plaintiff Jane F. Doe was a minor at the time she was sexually assaulted, abused, and molested by Defendant Nassar.

60. Plaintiff Jane G. Doe is an adult female and is a resident of California, but resided in Michigan at all relevant times as indicated below. Plaintiff Jane G. Doe was a minor at the time she was sexually assaulted, abused, and molested by Defendant Nassar.

61. Plaintiff Jane H. Doe is an adult female and is a resident of Arizona, but resided in Michigan at all relevant times as indicated below. Plaintiff Jane H. Doe was a minor at the time she was sexually assaulted, abused, and molested by Defendant Nassar.

62. Plaintiff Jane J. Doe is an adult female and is a resident of Michigan. Plaintiff Jane J. Doe was a minor at the time she was sexually assaulted, abused, and molested by Defendant Nassar.

63. Plaintiff Jane K. Doe is a minor female and is a resident of Michigan.

64. Plaintiff Jane L. Doe is an adult female, the mother of Plaintiff Jane K. Doe, and is a resident of Michigan.

65. Plaintiff Jane M. Doe is an adult female and is a resident of Illinois, but resided in Michigan at all relevant times as indicated below. Plaintiff Jane M. Doe was a minor at the time she was sexually assaulted, abused, and molested by Defendant Nassar.

66. Plaintiff Jane N. Doe is an adult female and is a resident of California, but resided in Michigan at all relevant times as indicated below.

67. Plaintiff Jane O. Doe is an adult female and is a resident of Michigan. Plaintiff Jane O. Doe

was a minor at the time she was sexually assaulted, abused, and molested by Defendant Nassar.

68. Plaintiff Jane P. Doe is a minor female and is a resident of Michigan.

69. Plaintiff Jane Q. Doe is an adult female, the mother of Plaintiff Jane P. Doe, and a resident of Michigan.

70. Plaintiff Jane R. Doe is an adult female and is a resident of Michigan. Plaintiff Jane R. Doe was a minor at the time she was sexually assaulted, abused, and molested by Defendant Nassar.

71. Plaintiff Jane S. Doe is a minor female and is a resident of Michigan.

72. Plaintiff Jane T. Doe is an adult female, the mother of Plaintiff Jane S. Doe, and a resident of Michigan.

73. Plaintiff Jane U. Doe is an adult female and is a resident of Michigan. Plaintiff Jane U. Doe was a minor at the times she was sexually assaulted, abused, and molested by Defendant Nassar.

74. Plaintiff Jane X. Doe is an adult female and is a resident of North Carolina but resided in Michigan at all relevant times as indicated below.

75. Defendant Lawrence "Larry" Nassar, is a Doctor of Osteopathic Medicine, and is a resident of Michigan.

76. Defendant Michigan State University (hereinafter, "Defendant MSU") was at all relevant times and continues to be a public university organized and existing under the laws of the state of Michigan.

77. Defendant Michigan State University receives federal financial assistance and is therefore subject to Title IX of the Educational Amendments of 1972, 20 U.S.C. §1681(a).

78. Defendant The Board of Trustees of Michigan State University (hereinafter, "Defendant MSU Trustees") is the governing body for Michigan State University.

79. Defendant MSU and Defendant MSU Trustees are hereinafter collectively referred to as the MSU Defendants.

80. Lou Anna K. Simon is the current President of Defendant MSU, appointed in approximately January 2005. Prior to her appointment as President, Defendant Simon held several administrative roles including assistant provost for general academic administration, associate provost, and provost and vice president for academic affairs during her career with MSU.

81. M. Peter McPherson is the immediate Past President of Defendant MSU, and served as President from approximately 1993 – 2004.

82. William D. Strampel, D.O. is the Dean of the College of Osteopathic Medicine at Michigan State University serving as Dean since approximately April 2002 and as Acting Dean between December 2001 and April 2002.

83. Jeffrey R. Kovan, D.O. is or was the Director of Division of Sports Medicine at Michigan State University.

84. Defendant United States of America Gymnastics (hereinafter "Defendant USAG") was and continues to be an organization incorporated in Indiana, authorized to conduct business and conducting business throughout the United States, including but not limited to Michigan.

85. Steve Penny is the current president of Defendant USAG, named in approximately April 2005, who is currently responsible for the overall management and strategic planning of Defendant USAG.

86. Robert Colarossi is the past president of Defendant USAG and held the position from

approximately 1998 to 2005, and during that time was responsible for the overall management and strategic planning of Defendant USAG.

87. Defendant Twistars USA, Inc. d/b/a Geddert's Twistars Gymnastics Club USA (hereinafter, "Defendant Twistars") was and continues to be an organization incorporated in Michigan.

88. John Geddert is the owner and operator of Twistars USA, Inc. d/b/a Geddert's Twistars Gymnastics Club USA.

IV. COMMON FACTUAL ALLEGATIONS

89. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

90. At all relevant times, Defendant Nassar maintained an office at MSU in East Lansing, Michigan.

91. At all relevant times, Defendants MSU, MSU Trustees, and Nassar were acting under color of law, to wit, under color of statutes, ordinances, regulations, policies, customs, and usages of the State of Michigan and/or Defendant Michigan State University.

92. At all relevant times, including the years of 1996 to 2016, Defendant Nassar was acting in the scope of his employment or agency with Defendant MSU.

93. At all relevant times, including the years of 1996 to 2015, Defendant Nassar was acting in the scope of his employment or agency with Defendant USAG.

94. At all relevant times, including the years of 1996 to 2016, Defendant Nassar was acting in the scope of his agency with Defendant Twistars.

95. Defendant Nassar graduated from Michigan State University with a Doctor of Osteopathic Medicine degree in approximately 1993.

96. Defendant Nassar was employed by and/or an agent of Defendant USAG from approximately 1986 to 2015, serving in various positions including but not limited to:

A. Certified Athletic Trainer;

B. Osteopathic Physician;

C. National Medical Director;

D. National Team Physician, USA Gymnastics;

E. National Team Physician, USA Gymnastics Women's Artistic Gymnastics National Team.

97. Defendant Nassar was employed by Defendant MSU from approximately 1996 to 2016 in various positions including but not limited to:

A. Associate Professor, Defendant MSU's Division of Sports Medicine, Department of Radiology, College of Osteopathic Medicine;

B. Team Physician, Defendant MSU's Men's and Women's Gymnastics Team;

C. Team Physician, Defendant MSU's Men's and Women's Track and Field Teams;

D. Team Physician, Defendant MSU's Men's and Women's Crew Team;

E. Team Physician, Defendant MSU's Intercollegiate Athletics;

F. Medical Consultant, Defendant MSU's Wharton Center for the Performing Arts;

G. Advisor, Student Osteopathic Association of Sports Medicine.

98. Defendant Twistars is a gymnastics facility with which Defendant Nassar affiliated from its inception in or around 1996.

99. John Geddert, owner and operator of Twistars USA, Inc. d/b/a Geddert's Twistars Gymnastics Club USA served as the USA World and Olympic Women's Gymnastics Team Head Coach.

100. Mr. Geddert regularly recommended Defendant Nassar to members of Defendant Twistars as a reputable physician.

101. For a period of time, Defendant Twistars displayed a photo of Defendant Nassar at its facility.

102. As an agent of Defendant Twistars, Defendant Nassar regularly provided services and treatment to Defendant Twistars' members and Defendant USAG's members on Defendant Twistars' premises.

103. As a physician of Osteopathic Medicine, Defendant Nassar's medical care and treatment should have consisted largely of osteopathic adjustments and kinesiology treatment to patients, including students and student-athletes of Defendant MSU.

104. Defendant Nassar is not and has never been a medical doctor of obstetrics or gynecology.

105. While employed by Defendants MSU and USAG, Defendant Nassar practiced medicine at Defendant MSU's Sports Medicine Clinic, a facility at MSU.

106. During his employment, agency, and representation with the MSU Defendants, Defendant USAG, and Defendant Twistars, Defendant Nassar sexually assaulted, abused, and molested Plaintiffs by engaging in nonconsensual sexual touching, assault, and harassment including but not limited to digital vaginal and anal penetration.

107. The State of Michigan's Department of Licensing and Regulatory Affairs Occupational Health Standards regarding Bloodborne Infectious Diseases mandates use of gloves when exposed to potentially infectious material, including vaginal secretions.[6]

108. In 1997, a parent of a gymnast at Defendant Twistars' facility complained to Mr. Geddert

[6] *See*, Michigan Administrative Code, R. 325.70001, et seq., Available at http://www.michigan.gov/documents/CIS_WSH_part554_35632_7.pdf. Last accessed, January 5, 2017.

regarding Dr. Nassar's conduct, yet the concerns and allegations went unaddressed.

109. In or around 1999 the MSU Defendants were also put on notice of Defendant Nassar's conduct by Jane X. Doe, an MSU student athlete, after she complained to MSU employees, including trainers and her head coach, that Defendant Nassar touched her vaginal area although she was seeking treatment for an injured hamstring.

110. Despite her complaints to MSU representatives, Jane X. Doe's concerns and allegations went unaddressed.

111. In approximately 2000, a female student athlete (hereinafter Jane T.T. Doe),[7] a member of Defendant MSU's Women's Softball Team, was sexually assaulted and abused during "treatment" by Defendant Nassar and reported Defendant Nassar's conduct to Defendant MSU's employees, including trainers.

112. Jane T.T. Doe's allegations regarding the sexual assault include the following statements:

> Plaintiff is informed and believes, and on that basis alleges, that Defendants knew or should have known that NASSAR had engaged in unlawful sexually-related conduct in the past, and/ or was continuing to engage in such conduct. Defendants had a duty to disclose these facts to Plaintiff, her parents and others, but negligently and/or intentionally suppressed, concealed or failed to disclose this information. The duty to disclose this information arose by the special, trusting, confidential, fiduciary relationship between Defendants and Plaintiff. Specifically, the Defendant MSU knew that NASSAR was performing intravaginal adjustments with his bare, ungloved hand and in isolation with young females, based on the following:
>
> a. The Plaintiff, approximately 18 years old at the time, had a visit with NASSAR where he touched her vagina, in order to purportedly heal back pain she was having, under the guise of legitimate medical treatment. The Plaintiff complained to a trainer on her softball team who responded by saying that NASSAR was a world renowned doctor, and that it was legitimate medical treatment. The Plaintiff continued with the purported treatment;
>
> b. As the purported treatments continued, NASSAR became more bold,

[7] Referenced as Jane T.T. Doe in Exhibit 2.

having the Plaintiff remove her pants, and then inserting his bare, ungloved and unlubricated hand into her vagina. The Plaintiff, again, reported to Defendant MSU training staff, this time a higher ranking trainer. This trainer told the Plaintiff that the treatment sounded unusual and that the Plaintiff needed to speak to an even higher level trainer in the Department, who ended up being one of three individuals who supervised the entire department at Defendant MSU;

c. When the Plaintiff went to see this individual, the Plaintiff was told by that individual that what happened to the Plaintiff was not sexual abuse, that NASSAR was a world renowned doctor, and that the Plaintiff was not to discuss what happened with NASSAR and was to continue seeing him for purported treatment. The Plaintiff continued to see NASSAR for treatment;

d. Finally, in or around 2001, the Plaintiff refused to continue to see NASSAR for these abusive and invasive procedures. Defendant MSU then pressured and coerced the Plaintiff to declare herself medically inactive. The Plaintiff was shunned from the Defendant MSU sports program, and left Defendant MSU to return home to California.[8]

113. Despite her complaints to MSU employees, agents, and representatives, Jane T.T. Doe's concerns and allegations went unaddressed in violation of reporting policies and procedures and Title IX and in a manner that was reckless, deliberately indifferent, and grossly negligent.

114. Because MSU took no action to investigate the 1999 or 2000 complaints and took no corrective action, from 2000 to 2016, under the guise of treatment, Plaintiffs Denhollander, Jane A. Doe, Jane C. Doe, Jane D. Doe, Jane E. Doe, Jane F. Doe, Jane G. Doe, Jane J. Doe, Jane K. Doe, Jane L. Doe, Jane M. Doe, Jane N. Doe, Jane O. Doe, Jane P. Doe, Jane R. Doe, Jane S. Doe, Jane U. Doe, and Jane X. Doe, many of whom were minors, were also sexually assaulted, abused, and molested by Defendant Nassar by vaginal and anal digital penetration, without the use of gloves or lubricant and by touching and groping their

[8] *See*, Case No. BC644417, filed with the Superior California Court of the State of California, County of Los Angeles, December 21, 2016, ¶26.

breasts.

115. In 2014, following receipt of an unrelated complaint regarding a sexual assault on Defendant MSU's campus, between 2014 and 2015 the U.S. Department of Education's Office of Civil Rights (hereinafter "OCR") conducted an investigation regarding the complainant's allegations, another complaint regarding sexual assault and retaliation from 2011, and Defendant MSU's response to said complaints, and their general policies, practices, and customs pertaining to their responsibilities under Title IX.[9]

116. The OCR concluded their investigation in 2015 and presented Defendant MSU with a twenty-one page agreement containing measures and requirements to resolve the 2011 and 2014 complaints and to bring Defendant MSU in compliance with Title IX.[10]

117. While the OCR was conducting their investigation, additional complaints regarding Defendant Nassar's conduct surfaced in 2014. The victim reported she had an appointment with Defendant Nassar to address hip pain and was sexually abused and molested by Defendant Nassar when he cupped her buttocks, massaged her breast and vaginal area, and he became sexually aroused.[11]

118. Upon information and belief, Defendant MSU investigated the 2014 complaints through their Office of Institutional Equity.

[9] *See*, Letter from U.S. Department of Education Office for Civil Rights to Michigan State University, September 1, 2015, OCR Docket #15-11-2098, #15-14-2113. Available at https://www2.ed.gov/documents/press-releases/michigan-state-letter.pdf, last accessed January 4, 2017.

[10] *See*, Resolution Agreement, August 28, 2015, OCR Document #15-11-2098, #15-14-2133. Available at https://www2.ed.gov/documents/press-releases/michigan-state-agreement.pdf. Last accessed January 5, 2017.

[11] *See*, At MSU: Assault, harassment and secrecy. Matt Mencarini, December 15, 2016. Available at http://www.lansingstatejournal.com/story/news/local/2016/12/15/michigan-state-sexual-assault- harassment-larry-nassar/94993582/. Last accessed January 5, 2017.

119. However, the victim reported to Defendant MSU facts which were omitted or withheld from the investigative report including but not limited to the following

A. Defendant Nassar was sexually aroused while touching her;

B. The appointment with Defendant Nassar did not end until she physically removed his hands from her body.

120. Three months after initiating the investigation, in July 2014, the victim's complaints were dismissed and Defendant MSU determined she didn't understand the "nuanced difference" between sexual assault and an appropriate medical procedure and deemed Defendant Nassar's conduct "medically appropriate" and "Not of a sexual nature."[12]

121. Following the investigation, upon information and belief, Defendant Nassar became subject to new institutional guidelines, one of which – it is believed – was that Defendant Nassar was not to examine or treat patients alone.[13]

122. After receiving allegations of "athlete concerns," in approximately summer 2015, Defendant USAG relieved Defendant Nassar of his duties.[14]

123. At no time did Defendant USAG inform Defendants MSU, MSU Trustees, or other MSU representatives of the concerns that led to Defendant Nassar being relieved from his duties with Defendant USAG.

124. From July 2014 to September 2016, despite complaints about Nassar's conduct, Defendant MSU continued to permit Defendant Nassar unfettered access to female athletes without adequate oversight or supervision to ensure he was complying with the new guidelines.

[12] *Id*.
[13] *Id*.
[14] *See*, Former USA Gymnastics doctor accused of abuse, Mark Alesia, Marisa Kwiatkowski, Tim Evans, September 12, 2016. Available at, http://www.indystar.com/story/news/2016/09/12/former-usa-gymnastics-doctor-accused-abuse/89995734/. Last accessed, January 5, 2017.

125. Plaintiffs were made aware of Defendant Nassar's widespread sexual abuse on or around September 12, 2016 or shortly thereafter through related media coverage.[15]

126. Defendant Nassar's employment ended with Defendant MSU on approximately September 20, 2016 only after the MSU Defendants became aware that:

A. Defendants Nassar and USAG were sued by a former Olympian who alleged she was sexually assaulted by Defendant Nassar;[16] and,

B. A former patient of Defendant Nassar, Plaintiff Rachel Denhollander, filed a criminal complaint with the Michigan State University Police Department alleging Defendant Nassar sexually assaulted her when she was 15 years old and seeking treatment for back pain as a result of gymnastics. Plaintiff Denhollander's allegations of sexual assault by Defendant Nassar included but were not limited to:

A. Massaging her genitals;

B. Penetrating her vagina and anus with his finger and thumb; and,

C. Unhooking her bra and massaging her breasts.[17]

127. In late November 2016, Defendant Nassar was arrested and charged in Ingham County, Michigan on three charges of first-degree criminal sexual conduct with a person under 13, and was later released on $1 million bond.[18]

128. In mid-December 2016, Defendant Nassar was indicted, arrested, and charged in Federal

[15] *Id*.
[16] *See*, Case No. 34-2016-00200075, filed with the Superior Court of the State of California, County of Sacramento, September 8, 2016. A copy of the Complaint is available at https://www.documentcloud.org/ documents/3106054-JANE-JD-COMPLAINT-Signed.html. Last accessed, January 5, 2017.
[17] *See*, Former USA Gymnastics doctor accused of abuse, Mark Alesia, Marisa Kwiatkowski, Tim Evans, September 12, 2016. Available at, http://www.indystar.com/story/news/2016/09/12/former-usa-gymnastics-doctor-accused-abuse/89995734/. Last accessed, January 5, 2017.
[18] State of Michigan, Ingham County Circuit Court Case No. 1603031.

Court in Grand Rapids, Michigan on charges of possession of child pornography and receipt/attempted receipt of child pornography.

129. According to the federal indictment,[19] Defendant Nassar:

A. Knowingly received and attempted to receive child pornography between approximately September 18, 2004 and December 1, 2004;

B. Knowingly possessed thousands of images of child pornography between approximately February 6, 2003 and September 20, 2016 including images involving a minor who had not attained 12 years of age.

130. To the best of Plaintiffs' knowledge, Defendant Nassar is in federal custody pending the child pornography criminal charges.

V. SPECIFIC FACTUAL ALLEGATIONS

A. RACHAEL DENHOLLANDER

131. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

132. Plaintiff Rachael Denhollander[20] treated with Dr. Nassar at his office at MSU in 2000.

133. In 2000, Plaintiff Denhollander was a minor, 15 years old.

134. Plaintiff Denhollander presented to Dr. Nassar with complaints of injuries to her wrists and back suffered through gymnastics.

135. On approximately five separate occasions, at appointments at his office at MSU, Defendant Nassar digitally penetrated Plaintiff Denhollander's vagina and anus with his finger and thumb without prior notice and without gloves or lubricant under the guise of performing

[19] 1:16-cr-00242 PageID.1-4.
[20] Referred to as Jane D.R. Doe in Exhibit 2.

"treatment."

136. Defendant Nassar also massaged Plaintiff Denhollander's genitals.

137. Defendant Nassar also touched Plaintiff Denhollander's breasts without permission by unhooking her bra and massaging one of her breasts.

138. Defendant Nassar did not explain his conduct disguised as "treatment" as a medical procedure to Plaintiff Denhollander.

139. Defendant Nassar did not give prior notice or obtain consent for digital penetration or to touch Plaintiff Denhollander's vagina, anus, or breasts.

140. Plaintiff Denhollander did not treat or intend to treat with Dr. Nassar for issues related to obstetrics or gynecology (hereinafter "OB/GYN").

141. Plaintiff Denhollander believes the conduct by Defendant Nassar was sexual assault, abuse, and molestation and for Defendant Nassar's pleasure and self-gratification.

142. After reviewing a media report regarding Defendant USAG's failure to report sexual abuse,[21] in or around late August 2016 or early September 2016, Plaintiff Denhollander made a complaint with Defendant MSU's Police Department.

B. JANE A. DOE BY NEXT FRIEND JANE B. DOE

143. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

144. Plaintiff Jane A. Doe treated with Defendant Nassar at his office at MSU from approximately 2011 to 2014.

[21] A blind eye to sex abuse: How USA Gymnastics failed to report cases, Marisa Kwiatkowski, Mark Alesia, Tim Evans, August 4, 2016. Available at http://www.indystar.com/story/news/investigations/2016/08/04/usa-gymnastics-sex-abuse-protected-coaches/85829732/. Last accessed January 5, 2017.

145. From 2011 to 2014, Plaintiff Jane A. Doe was a minor, approximately 12 to 15 years old.

146. Plaintiff Jane A. Doe presented to Defendant Nassar with complaints of back pain as a result of gymnastics.

147. In 2014 at an appointment at his office at MSU, Defendant Nassar digitally penetrated Plaintiff Jane A. Doe's vagina multiple times without prior notice and without gloves or lubricant.

148. Defendant Nassar did not explain his conduct disguised as "treatment" as a medical procedure to Plaintiffs Jane A. Doe or Jane B. Doe.

149. Defendant Nassar did not give prior notice or obtain consent for digital penetration from Jane A. Doe, Jane B. Doe, or Jane A. Doe's father.

150. Plaintiff's medical records regarding her visits with Dr. Nassar are completely devoid of any reference to any type of intra-vaginal procedure.

151. Plaintiff Jane A. Doe did not treat or intend to treat with Dr. Nassar for OB/GYN issues.

152. Following the September 12, 2016 publication of a story regarding a complaint filed with Defendant MSU's Police Department titled "Former USA Gymnastics doctor accused of Abuse," (included as part of Exhibits 1, 2 and 3) Plaintiff Jane A. Doe made a complaint to MSU's Office of Institutional Equity.

153. Plaintiffs Jane A. Doe and Jane B. Doe believe the conduct by Defendant Nassar was sexual assault, abuse, and molestation and for Defendant Nassar's pleasure and self-gratification.

C. JANE C. DOE

154. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

155. Plaintiff Jane C. Doe was a student athlete at the University of Michigan from

approximately 1998 to 2001.

156. Plaintiff treated with Dr. Nassar in 2001, 2011, and 2012 at his office at MSU.

157. Plaintiff Jane C. Doe presented to Dr. Nassar with complaints of back pain suffered through her participation in field hockey.

158. On approximately four separate occasions, at appointments at his office at MSU, Defendant Nassar digitally penetrated Plaintiff Jane C. Doe's vagina without prior notice and without gloves or lubricant and put an excessive amount of pressure on her labia and vaginal area without gloves or lubricant.

159. Defendant Nassar would put his hands under Plaintiff Jane C. Doe's underwear and push her underwear to the side to digitally penetrate Plaintiff Jane C. Doe's vagina.

160. Defendant Nassar also touched her breasts without permission.

161. Defendant Nassar would put his hands under Plaintiff Jane C. Doe's sports bra to touch her breasts.

162. In 2011, another medical professional was in the room and asked Dr. Nassar where his hand was while he was digitally penetrating Plaintiff Jane C. Doe. Dr. Nassar allegedly said something the Plaintiff did not understand, dismissed the medical professional from the room and continued to digitally penetrate Plaintiff Jane C. Doe.

163. Defendant Nassar did not explain his conduct disguised as "treatment" as a medical procedure to Plaintiff Jane C. Doe.

164. Defendant Nassar did not give prior notice or obtain consent for digital penetration or to touch Plaintiff Jane C. Doe's vagina or breasts.

165. Plaintiff Jane C. Doe did not treat or intend to treat with Dr. Nassar for OB/GYN issues.

166. Plaintiff Jane C. Doe believes the conduct by Defendant Nassar was sexual assault, abuse,

and molestation and for Defendant Nassar's pleasure and self-gratification.

D. JANE D. DOE

167. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

168. Plaintiff Jane D. Doe treated with Dr. Nassar between approximately 2004 and 2007 at his office at MSU.

169. From 2004 to 2007, Plaintiff Jane D. Doe was a minor, approximately 12 to 15 years old.

170. Plaintiff Jane D. Doe presented to Defendant Nassar with complaints of lower back pain as a result of old and new fractures suffered as a result of gymnastics.

171. On approximately eight separate occasions at appointments at his office at MSU, Defendant Nassar digitally penetrated Plaintiff Jane D. Doe's vagina and anus without prior notice and without gloves or lubricant for several minutes at a time. The assaults would sometimes last up to 30 minutes.

172. Defendant Nassar would put his hands under Plaintiff Jane D. Doe's spandex shorts to digitally penetrate Plaintiff Jane D. Doe's vagina and anus.

173. Defendant Nassar did not explain his conduct disguised as "treatment" as a medical procedure to Plaintiff Jane D. Doe.

174. Defendant Nassar did not give prior notice or obtain consent for digital penetration from Jane D. Doe or from Jane D. Doe's parents even though she was a minor at the time.

175. Plaintiff Jane D. Doe did not treat or intend to treat with Dr. Nassar for OB/GYN issues.

176. Plaintiff Jane D. Doe believes the conduct by Defendant Nassar was sexual assault, abuse, and molestation and for Defendant Nassar's pleasure and self-gratification.

177. As a result of the sexual assault, abuse, and molestation Plaintiff Jane D. Doe suffered

severe urinary tract infections, vaginal bleeding, and bleeding while urinating.

E. JANE E. DOE

178. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

179. Plaintiff Jane E. Doe treated with Dr. Nassar between approximately 2006 and 2007 at his office at MSU.

180. From 2006 to 2007, Plaintiff Jane E. Doe was a minor, approximately 14 years old.

181. Plaintiff Jane E. Doe presented to Defendant Nassar with complaints of back pain caused by fractures suffered as a result of gymnastics.

182. On approximately six separate occasions at his office at MSU, Defendant Nassar digitally penetrated Plaintiff Jane E. Doe's vagina without prior notice and without gloves for several minutes at a time.

183. Defendant Nassar required Plaintiff Jane E. Doe to change into breakaway shorts with Velcro on the side, began massaging her back, and then put his hand under the shorts to digitally penetrate her vagina.

184. Defendant Nassar did not explain his conduct disguised as "treatment" as a medical procedure to Plaintiff Jane E. Doe.

185. Defendant Nassar did not give prior notice or obtain consent for digital penetration from Jane E. Doe or from Jane E. Doe's parents even though she was a minor at the time.

186. Plaintiff Jane E. Doe did not treat or intend to treat with Dr. Nassar for OB/GYN issues.

187. Plaintiff Jane E. Doe believes the conduct by Defendant Nassar was sexual assault, abuse, and molestation and for Defendant Nassar's pleasure and self-gratification.

F. JANE F. DOE

188. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

189. Plaintiff Jane F. Doe treated with Defendant Nassar between in approximately 2004 at his office at MSU.

190. In 2004, Defendant Jane F. Doe was a minor, approximately 16 and 17 years old.

191. Plaintiff Jane F. Doe presented to Defendant Nassar with complaints of back pain caused by her participation on basketball and soccer teams.

192. On one occasion at a medical appointment at his office at MSU, Defendant Nassar touched Plaintiff Jane F. Doe's vagina and/or vaginal area without prior notice and without gloves or lubricant for several minutes at a time.

193. Defendant Nassar also requested and required Plaintiff to re-dress while he was in the room.

194. Defendant Nassar also grabbed Plaintiff Jane F. Doe's breast with his bare hand for several minutes at a time.

195. Defendant Nassar did not explain his conduct disguised as "treatment" as a medical procedure to Plaintiff Jane F. Doe.

196. Defendant Nassar did not give prior notice or obtain consent to touch Plaintiff Jane F. Doe's vagina, vaginal area, or breasts from Jane F. Doe or Jane F. Doe's parents even though she was a minor at the time.

197. Plaintiff Jane F. Doe did not treat or intend to treat with Dr. Nassar for OB/GYN issues.

198. Plaintiff Jane F. Doe believes the conduct by Defendant Nassar was sexual assault, abuse, and molestation and for Defendant Nassar's pleasure and self-gratification.

199. Plaintiff Jane F. Doe reported Defendant Nassar's conduct to her parents and to local law enforcement, Meridian Township Police in 2004.

200. Plaintiff did not return for additional treatment following her complaints.

G. JANE G. DOE

201. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

202. Plaintiff Jane G. Doe treated with Defendant Nassar from approximately 1999 to 2003 at his office at MSU.

203. From 1999 to 2003, Plaintiff Jane G. Doe was a minor, approximately 14 to 17 years old.

204. Plaintiff Jane G. Doe presented to Defendant Nassar with complaints of low back pain caused by gymnastics.

205. On several occasions between 1999 and 2003, at appointments at his office at MSU, Defendant Nassar digitally penetrated Plaintiff Jane G. Doe's vagina and anus without prior notice and without gloves or lubricant.

206. On at least one occasion at a USAG sanctioned event which took place at Defendant Twistars USA Inc.'s facility, Defendant Nassar digitally penetrated Plaintiff Jane G. Doe's vagina without gloves or lubricant.

207. Defendant Nassar did not explain his conduct disguised as "treatment" as a medical procedure to Plaintiff Jane G. Doe.

208. Defendant Nassar did not give prior notice or obtain consent for digital penetration from Jane G. Doe or from Jane G. Doe's parents even though she was a minor at the time.

209. Plaintiff Jane G. Doe did not treat or intend to treat with Dr. Nassar for OB/GYN issues.

210. Plaintiff Jane G. Doe believes the conduct by Defendant Nassar was sexual assault, abuse,

and molestation and for Defendant Nassar's pleasure and self-gratification.

H. JANE H. DOE

211. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

212. Plaintiff Jane H. Doe treated with Defendant Nassar in 1998.

213. In 1998, Plaintiff Jane H. Doe was a minor, 16 years old.

214. Plaintiff Jane H. Doe presented to Defendant with complaints of pain from a torn hamstring and fractured ischium caused by gymnastics.

215. On one occasion at a medical appointment at his office at MSU, Defendant Nassar digitally penetrated Plaintiff Jane H. Doe's anus without prior notice and without gloves or lubricant for several minutes.

216. At the appointment, Plaintiff was not permitted to sign in at the front desk and was brought to an examination by Defendant Nassar.

217. During the sexual assault, at 16 years old, only Plaintiff Jane H. Doe and Defendant Nassar were in the examination room. There was no chaperone.

218. Defendant Nassar explained his conduct as a "new procedure" which involved vaginal penetration to Plaintiff Jane H. Doe.

219. Defendant Nassar did not discuss anal penetration with Plaintiff Jane H. Doe.

220. Defendant Nassar did not give prior notice or obtain consent for anal penetration from Plaintiff Jane H. Doe or for vaginal or anal digital penetration from Plaintiff Jane H. Doe's parents even though she was a minor at the time.

221. Plaintiff Jane H. Doe did not treat or intend to treat with Dr. Nassar for OB/GYN issues.

222. Following the September 12, 2016 publication of a story regarding a complaint filed with

Defendant MSU's Police Department titled "Former USA Gymnastics doctor accused of Abuse," (included as part of Exhibits 1, 2 and 3) Plaintiff Jane H. Doe made a complaint to Defendant MSU's Police Department.

223. Plaintiff Jane H. Doe believes the conduct by Defendant Nassar was sexual assault, abuse, and molestation and for Defendant Nassar's pleasure and self-gratification.

I. JANE J. DOE

224. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

225. Plaintiff Jane J. Doe treated with Defendant Nassar in 2005 and 2006 at his office at MSU and at Defendant Twistars' facility.

226. In 2005 and 2006 Plaintiff Jane J. Doe was a minor, approximately 16 years old to 17 years old.

227. Plaintiff Jane J. Doe presented to Defendant Nassar with complaints of back pain caused by gymnastics.

228. On at least two separate occasions during appointments at his office at MSU and on at least one occasion at Defendant Twistars' facility at a USAG sanctioned event, Defendant Nassar digitally penetrated Plaintiff Jane J. Doe's vagina and anus without prior notice and without gloves or lubricant.

229. Defendant Nassar did not explain his conduct disguised as "treatment" as a medical procedure to Plaintiff Jane J. Doe.

230. Defendant Nassar did not give prior notice or obtain consent for digital penetration from Jane J. Doe or from Jane J. Doe's parents even though she was a minor at the time.

231. Plaintiff Jane J. Doe requested her medical records, however Defendant MSU could not

locate a paper chart documenting all of her appointments with Defendant Nassar. The records Defendant MSU did produce were completely devoid of any reference to any type of intra-vaginal procedure.

232. Plaintiff Jane J. Doe did not treat or intend to treat with Dr. Nassar for OB/GYN issues.

233. Plaintiff Jane J. Doe was also sexually assaulted by Defendant Nassar in the same manner described above at Twistars Gymnastics Club.

234. As a result of Defendant Nassar's sexual assault, abuse, and molestation, Plaintiff Jane J. Doe developed a bacterial infection.

235. Following the September 12, 2016 publication of a story regarding a complaint filed with Defendant MSU's Police Department titled "Former USA Gymnastics doctor accused of Abuse," (included as part of Exhibits 1, 2, and 3) Plaintiff Jane J. Doe made a complaint to Defendant MSU's Police Department.

236. Plaintiff Jane J. Doe believes the conduct by Defendant Nassar was sexual assault, abuse, and molestation and for Defendant Nassar's pleasure and self-gratification.

J. JANE K. DOE BY NEXT FRIEND JANE L. DOE

237. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

238. Plaintiff Jane K. Doe treated with Defendant Nassar at his office at MSU in approximately 2014 and 2016.

239. In 2014 and 2016, Plaintiff Jane K. Doe was a minor, approximately 13 years old and 14 years old.

240. Plaintiff presented to Defendant Nassar with complaints of hamstring pain as a result of gymnastics.

241. On more than one occasion, approximately two or three times at appointments at his office at MSU, Defendant Nassar digitally penetrated Plaintiff Jane K. Doe's vagina without prior notice and without gloves or lubricant, from 10 to 15 minutes at a time.

242. Defendant Nassar did not give prior notice or obtain consent for digital penetration from Jane K. Doe, Jane L. Doe, or Jane K. Doe's father.

243. Plaintiff Jane K. Doe did not treat or intend to treat with Dr. Nassar for OB/GYN issues.

244. At an appointment in approximately April 2016, during an examination he pulled Jane K. Doe's shorts to the side and viewed her vagina and vaginal area.

245. Defendant Nassar did not explain his conduct disguised as "treatment" as a medical procedure to Plaintiffs Jane K. Doe or Jane L. Doe.

246. It is believed some of the aforementioned sexual assaults occurred after the MSU Defendants were notified in 2014 of allegations of sexual abuse by Dr. Nassar during "treatments" with athletes.

247. Following the September 12, 2016 publication of a story regarding a complaint filed with Defendant MSU's Police Department titled "Former USA Gymnastics doctor accused of Abuse," (included as part of Exhibits 1, 2 and 3) Plaintiff Jane K. Doe made a complaint with Defendant MSU's Police Department.

248. Plaintiffs Jane K. Doe and Jane L. Doe believe the conduct by Defendant Nassar was sexual assault, abuse, and molestation and for Defendant Nassar's pleasure and self-gratification.

K. JANE M. DOE

249. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

250. Plaintiff Jane M. Doe treated with Defendant Nassar from approximately 1999 to 2002.

251. From 1999 to 2000, Plaintiff Jane M. Doe was a minor, approximately 14 to 16 years old.

252. Plaintiff Jane M. Doe presented to Defendant with complaints of low back pain caused by gymnastics.

253. On more than one occasion at appointments at his office at MSU, Defendant Nassar digitally penetrated Plaintiff Jane M. Doe's vagina without prior notice and without gloves or lubricant.

254. Defendant Nassar would also touch Plaintiff Jane M. Doe's vaginal area through her clothes.

255. Defendant Nassar would ask Plaintiff Jane M. Doe to wear baggy shorts and put his hands under Plaintiff Jane M. Doe's shorts to digitally penetrate her vagina or touch her vaginal area.

256. Defendant Nassar would also put his hand under Plaintiff Jane M. Doe's shirt under the guise of "checking her sternum" and would touch her breasts.

257. Defendant Nassar did not explain his conduct disguised as "treatment" as a medical procedure to Plaintiff Jane M. Doe.

258. Defendant Nassar did not give prior notice or obtain consent for digital penetration from Jane M. Doe or from Jane M. Doe's parents even though she was a minor at the time.

259. Plaintiff Jane M. Doe did not treat or intend to treat with Dr. Nassar for OB/GYN issues.

260. Plaintiff Jane M. Doe believes the conduct by Defendant Nassar was sexual assault, abuse, and molestation and for Defendant Nassar's pleasure and self-gratification.

L. JANE N. DOE

261. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

262. Plaintiff Jane N. Doe treated with Defendant Nassar in approximately 2002.

263. Plaintiff Jane N. Doe presented to Defendant Nassar with complaints of back pain caused by gymnastics.

264. On more than one occasion at appointments at his office at MSU, Defendant Nassar digitally penetrated Plaintiff Jane N. Doe's vagina without prior notice and without gloves or lubricant for several minutes at a time.

265. Defendant Nassar did not explain his conduct disguised as "treatment" as a medical procedure to Plaintiff Jane N. Doe.

266. Defendant Nassar did not give prior notice or obtain consent for digital penetration from Jane N. Doe.

267. Plaintiff Jane N. Doe did not treat or intend to treat with Dr. Nassar for OB/GYN issues.

268. Following the September 12, 2016 publication of a story regarding a complaint filed with Defendant MSU's Police Department titled "Former USA Gymnastics doctor accused of Abuse," (included as part of Exhibits 1, 2 and 3) Plaintiff Jane N. Doe made a complaint to Defendant MSU's Police Department.

269. Plaintiff Jane N. Doe believes the conduct by Defendant Nassar was sexual assault, abuse, and molestation and for Defendant Nassar's pleasure and self-gratification.

M. JANE O. DOE

270. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

271. Plaintiff Jane O. Doe treated with Defendant Nassar from approximately 1999 to 2002.

272. From 1999 to 2002, Plaintiff Jane O. Doe was a minor, approximately 11 to 13.

273. Plaintiff Jane H. Doe presented to Defendant with complaints of injury to her hip, back,

knees, ankles, wrists and ribs caused by figure skating.

274. On more than one occasion at appointments at his office at MSU, Defendant Nassar moved his hands under Plaintiff Jane O. Doe's underwear and digitally penetrated Plaintiff Jane O. Doe's vagina without prior notice and without gloves or lubricant for up to 15 minutes at a time.

275. Defendant Nassar also touched Plaintiff's breast without permission on more than one occasion with his bare hand, once asking her if she had ever had a breast exam.

276. Defendant Nassar did not explain his conduct disguised as "treatment" as a medical procedure to Plaintiff Jane O. Doe.

277. Defendant Nassar did not give prior notice or obtain consent for digital penetration from Jane O. Doe or from Jane O. Doe's parents even though she was a minor at the time.

278. Plaintiff Jane O. Doe did not treat or intend to treat with Dr. Nassar for OB/GYN issues.

279. Plaintiff Jane O. Doe believes the conduct by Defendant Nassar was sexual assault, abuse, and molestation and for Defendant Nassar's pleasure and self-gratification.

N. JANE P. DOE BY NEXT FRIEND JANE Q. DOE

280. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

281. Plaintiff Jane P. Doe treated with Defendant Nassar at his office at MSU in 2011.

282. In 2011, Plaintiff Jane P. Doe was a minor, 11 years old.

283. Plaintiff Jane P. Doe presented to Defendant Nassar with complaints of injuries to her back as a result of gymnastics.

284. On approximately five to six separate occasions at appointments at his office at MSU, Defendant Nassar digitally penetrated Plaintiff Jane P. Doe's vagina and anus without prior

notice and without gloves or lubricant.

285. Defendant Nassar did not explain his conduct disguised as "treatment" as a medical procedure to Plaintiffs Jane P. Doe or Jane Q. Doe.

286. Defendant Nassar did not give prior notice or obtain consent for digital penetration from Jane P. Doe, Jane Q. Doe, or Jane P. Doe's father.

287. Plaintiff Jane P. Doe did not treat or intend to treat with Dr. Nassar for OB/GYN issues.

288. Plaintiffs Jane P. Doe and Jane Q. Doe believe the conduct by Defendant Nassar was sexual assault, abuse, and molestation and for Defendant Nassar's pleasure and self-gratification.

289. Following the September 12, 2016 publication of a story regarding a complaint filed with Defendant MSU's Police Department titled "Former USA Gymnastics doctor accused of Abuse," (included as part of Exhibits 1, 2 and 3) Plaintiff Jane Q. Doe made a complaint to Defendant MSU's Police Department.

O. JANE R. DOE

290. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

291. Plaintiff Jane R. Doe treated with Defendant Nassar from approximately 2007 to 2008.

292. From 2007 to 2008, Plaintiff Jane R. Doe was a minor, approximately 14 to 15 years old.

293. Plaintiff Jane R. Doe presented to Defendant with complaints of back pain caused by swimming.

294. On several occasions at appointments at his office at MSU, Defendant Nassar digitally penetrated Plaintiff Jane R. Doe's vagina without prior notice and without gloves and other than one occasion, without lubricant, for several minutes at a time.

295. Defendant Nassar did not explain his conduct disguised as "treatment" as a medical

procedure to Plaintiff Jane R. Doe.

296. Defendant Nassar did not give prior notice or obtain consent for digital penetration from Jane R. Doe or from Jane R. Doe's parents even though she was a minor at the time.

297. Plaintiff Jane R. Doe did not treat or intend to treat with Dr. Nassar for OB/GYN issues.

298. Following the September 12, 2016 publication of a story regarding a complaint filed with Defendant MSU's Police Department titled "Former USA Gymnastics doctor accused of Abuse," (included as part of Exhibits 1, 2 and 3) Plaintiff Jane R. Doe made a complaint to Defendant MSU's Police Department.

299. Plaintiff Jane R. Doe believes the conduct by Defendant Nassar was sexual assault, abuse, and molestation and for Defendant Nassar's pleasure and self-gratification.

P. JANE S. DOE BY NEXT FRIEND JANE T. DOE

300. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

301. Plaintiff Jane S. Doe treated with Defendant Nassar at his office at MSU from approximately 2009 to 2014.

302. From 2009 to 2014, Plaintiff Jane S. Doe was a minor, approximately 9 to 14 years old.

303. Plaintiff Jane S. Doe presented to Defendant Nassar with complaints of back pain and heel pain as a result of gymnastics.

304. On more than one occasion at appointments at his office at MSU, Defendant Nassar digitally penetrated Plaintiff Jane S. Doe's vagina without prior notice and without gloves or lubricant.

305. Plaintiff Jane S. Doe was also sexually assaulted by Defendant Nassar in the same manner described above at Twistars USA, Inc. in or around 2009.

306. Defendant Nassar did not explain his conduct disguised as "treatment" as a medical procedure to Plaintiffs Jane S. Doe or Jane T. Doe.

307. Defendant Nassar did not give prior notice or obtain consent for digital penetration from Jane S. Doe, Jane T. Doe, or Jane S. Doe's father.

308. Plaintiff Jane S. Doe did not treat or intend to treat with Dr. Nassar for OB/GYN issues.

309. It is believed some of the aforementioned sexual assaults occurred after the MSU Defendants were notified in 2014 of allegations of sexual abuse by Dr. Nassar during "treatments" with athletes.

310. Plaintiffs Jane S. Doe and Jane T. Doe believe the conduct by Defendant Nassar was sexual assault, abuse, and molestation and for Defendant Nassar's pleasure and self-gratification.

Q. JANE U. DOE

311. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

312. Plaintiff Jane U. Doe treated with Defendant Nassar from approximately 2002 to 2011.

313. From 2002 to 2011, Plaintiff Jane U. Doe was a minor, approximately 9 to 17 years old.

314. Plaintiff Jane U. Doe presented to Defendant with complaints of hip, tailbone, elbow pain caused by gymnastics.

315. On several occasions at appointments at his office at MSU, Defendant Nassar digitally penetrated Plaintiff Jane U. Doe's vagina without prior notice and without gloves or lubricant.

316. Plaintiff Jane U. Doe would undress to her underwear with a towel and Defendant Nassar would put his hand in her underwear and digitally penetrate Plaintiff Jane U. Doe's vagina.

317. Plaintiff Jane U. Doe believes she had approximately 50 appointments with Dr. Nassar

between 2002 to 2011.

318. Defendant Nassar told Plaintiff Jane U. Doe he performed the same "treatment" on Olympic athletes.

319. Defendant Nassar also touched Plaintiff Jane U. Doe's breasts without permission, on some occasions touching her over her sports bra, at other times under her sports bra, and at other times telling her to take her sports bra off.

320. On one occasion, Defendant Nassar made inappropriate comments regarding his former girlfriends while digitally penetrating Plaintiff Jane U. Doe.

321. On one occasion Plaintiff Jane U. Doe was assaulted at Defendant Nassar's home in his basement.

322. Defendant Nassar also touched Plaintiff Jane U. Doe's breasts indicating he was attempting to manipulate Plaintiff Jane U. Doe's ribs, although she had no pain or injury to her rib area.

323. During some sexual assaults at MSU, only Plaintiff Jane U. Doe and Defendant Nassar were in the examination room. There was no chaperone.

324. Defendant Nassar did not explain his conduct disguised as "treatment" as a medical procedure to Plaintiff Jane U. Doe.

325. Defendant Nassar did not give prior notice or obtain consent for digital penetration from Jane U. Doe or from Jane U. Doe's parents even though she was a minor at the time.

326. Plaintiff Jane U. Doe did not treat or intend to treat with Dr. Nassar for OB/GYN issues.

327. Plaintiff Jane U. Doe believes the conduct by Defendant Nassar was sexual assault, abuse, and molestation and for Defendant Nassar's pleasure and self-gratification.

R. JANE X. DOE

328. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

329. Plaintiff Jane X. Doe treated with Defendant Nassar in 1999 as a student athlete at Michigan State University.

330. Plaintiff Jane X. Doe presented to Defendant with complaints of pain in her hamstring caused by track and field and cross-country.

331. Plaintiff Jane X. Doe was referred to Dr. Nassar by MSU trainers and training staff.

332. On more than one occasion at appointments at his office at MSU, Defendant Nassar digitally penetrated Plaintiff Jane X. Doe's vagina without prior notice and without gloves or lubricant.

333. Defendant Nassar used his hand to stimulate Plaintiff Jane X. Doe's vagina before digitally penetrating her vagina.

334. In approximately 1999, Plaintiff Jane X. Doe complained to MSU trainers and an MSU Coach who were employees, representatives, and agents of MSU and who had a duty to report allegations of sexual assault and abuse about Defendant Nassar's conduct and was told that he was an "Olympic doctor" and that Defendant Nassar "knew what he was doing."

335. It is believed no investigation was initiated given Jane X. Doe's complaints to MSU representatives nor was any corrective action taken, exposing Jane X. Doe and others to continued assaults.

336. Defendant Nassar did not explain his conduct disguised as "treatment" as a medical procedure to Plaintiff Jane X. Doe.

337. Defendant Nassar did not give prior notice or obtain consent for digital penetration from Jane X. Doe.

338. Plaintiff Jane X. Doe did not treat or intend to treat with Dr. Nassar for OB/GYN issues.

339. Plaintiff Jane X. Doe believes the conduct by Defendant Nassar was sexual assault, abuse, and molestation and for Defendant Nassar's pleasure and self-gratification.

VI. CLAIMS AGAINST MICHIGAN STATE UNIVERSITY DEFENDANTS

A. COUNT ONE

VIOLATIONS OF TITLE IX
20 U.S.C. §1681(a), *et seq.*
DEFENDANTS MSU, MSU TRUSTEES

340. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

341. Title IX's statutory language states, "No *person* in the United States shall on the basis of sex, be … subject to discrimination under any education program or activity receiving Federal financial assistance …"[22]

342. Plaintiffs are "persons" under the Title IX statutory language.

343. Defendant MSU receives federal financial assistance for its education program and is therefore subject to the provisions of Title IX of the Education Act of 1972, 20 U.S.C. §1681(a), *et seq.*

344. Defendant MSU is required under Title IX to investigate allegations of sexual assault, sexual abuse, and sexual harassment.

[22] U.S. Dept. of Ed., Office of Civil Rights, Dear Colleague Letter: Sexual Violence, April 4, 2011, n. 11 ("Title IX also protects third parties from sexual harassment or violence in a school's education programs and activities."). Available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf. Last accessed, January 5, 2017.

345. The U.S. Department of Education's Office of Civil Rights has explained that Title IX covers all programs of a school, and extends to sexual harassment and assault by employees, students and third parties.[23]

346. Defendant Nassar's actions and conduct were carried out under one of Defendant MSU programs, which provides medical treatment to students, athletes, and the public.

347. Defendant Nassar's conduct and actions toward Plaintiffs, that being nonconsensual digital vaginal and anal penetration, touching of Plaintiffs vaginal area, and touching of Plaintiffs breasts constitutes sex discrimination under Title IX.

348. As early as 1999 and/or 2000, an "appropriate person" at Defendant MSU had actual knowledge of the sexual assault, abuse, and molestation committed by Defendant Nassar.

349. Specifically, the MSU Defendants were notified about Defendant Nassar's sexual abuse and molestation by Jane X. Doe in or around 1999 and by Jane T.T. Doe in 2000 on more than one occasion.

350. The MSU Defendants failed to carry out their duties to investigate and take corrective action under Title IX following Jane X. Doe and Jane T.T. Doe's complaints of sexual assault, abuse, and molestation in or around 1999 and/or 2000.

351. The MSU Defendants were notified again in 2014 of Defendant Nassar's conduct when a victim reported she had an appointment with Defendant Nassar to address hip pain and was sexually abused and molested by Defendant Nassar when he cupped her buttocks, massaged her breast and vaginal area, and he became sexually aroused.[24]

[23] Cite OCR guidance that says this.

[24] *See*, At MSU: Assault, harassment and secrecy. Matt Mencarini, December 15, 2016. Available at http://www.lansingstatejournal.com/story/news/local/2016/12/15/michigan-state-sexual-assault- harassment-larry-nassar/94993582/. Last accessed January 5, 2017.

352. The victim reported to Defendant MSU facts which were omitted or withheld from the investigative report including but not limited to the following:

A. Defendant Nassar was sexually aroused while touching her;

B. The appointment with Defendant Nassar did not end until she physically removed his hands from her body.

353. Three months after initiating an investigation, in July 2014, the victim's complaints were dismissed and Defendant MSU determined she didn't understand the "nuanced difference" between sexual assault and an appropriate medical procedure and deemed Defendant Nassar's conduct "medically appropriate" and "Not of a sexual nature."[25]

354. Following the investigation, upon information and belief, Defendant Nassar became subject to new institutional guidelines, one of which – it is believed – was that Defendant Nassar was not to examine or treat patients alone.[26]

355. The MSU Defendants failed to adequately supervise or otherwise or ensure Defendant Nassar complied with the newly imposed institutional guidelines even though the MSU Defendants had actual knowledge Nassar posed a substantial risk of additional sexual abuse of females to whom he had unfettered access.

356. After the 2014 complaints Defendant Nassar continued to sexually assault, abuse, and molest individuals, including but not limited to Plaintiff Jane A. Doe and Plaintiff Jane K. Doe.

357. The MSU Defendants acted with deliberate indifference to known acts of sexual assault, abuse, and molestation on its premises by:

[25] *Id.*
[26] *Id.*

A. failing to investigate and address Jane X. Doe and Jane T.T. Doe's allegations as required by Title IX;

B. failing to adequately investigate and address the 2014 complaint regarding Defendant Nassar's conduct; and,

C. failing to institute corrective measures to prevent Defendant Nassar from violating and sexually abusing other students and individuals, including minors.

358. The MSU Defendants acted with deliberate indifference as its lack of response to the allegations of sexual assault, abuse, and molestation was clearly unreasonable in light of the known circumstances, Defendant Nassar's actions with female athletes, and his access to young girls and young women.

359. The MSU Defendants' deliberate indifference was confirmed by the Department of Education's investigation into Defendant MSU's handling of sexual assault and relationship violence allegations which revealed:

A. A sexually hostile environment existed and affected numerous students and staff on Defendant MSU's campus;

B. That the University's failure to address complaints of sexual harassment, including sexual violence in a prompt and equitable manner caused and may have contributed to a continuation of the sexually hostile environment.[27]

360. The MSU Defendants' responses were clearly unreasonable as Defendant Nassar continued to sexually assault female athletes and other individuals until he was discharged from the

[27] *See,* Letter from U.S. Department of Education Office for Civil Rights to Michigan State University, September 1, 2015, OCR Docket #15-11-2098, #15-14-2113. Available at https://www2.ed.gov/documents/press-releases/michigan-state-letter.pdf, last accessed January 4, 2017.

University in 2016.

361. Between the dates of approximately 1996 and 2016, the MSU Defendants acted in a deliberate, grossly negligent, and/or reckless manner when they failed to reasonably respond to Defendant Nassar's sexual assaults and sex-based harassment of Plaintiffs on and off school premises.

362. The MSU Defendants' failure to promptly and appropriately investigate and remedy and respond to the sexual assaults after they received notice subjected Plaintiffs to further harassment and a sexually hostile environment, effectively denying them all access to educational opportunities at MSU, including medical care.

363. As a direct and/or proximate result of the MSU Defendants' actions and/or inactions, Plaintiffs have suffered and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

B. COUNT TWO

VIOLATION OF CIVIL RIGHTS
42 U.S.C. § 1983
ALL PLAINTIFFS AGAINST THE MSU DEFENDANTS, DEFENDANT NASSAR

364. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

365. Plaintiffs, as females, are members of a protected class under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

366. Plaintiffs enjoy the constitutionally protected Due Process right to be free from the invasion of bodily integrity through sexual assault, abuse, or molestation.

367. At all relevant times, Defendants MSU, MSU Trustees, and Nassar were acting under color of law, to wit, under color of statutes, ordinances, regulations, policies, customs, and usages of the State of Michigan and/or Defendant Michigan State University.

368. The acts as alleged above amount to a violation of these clearly established constitutionally protected rights, of which reasonable persons in the MSU Defendants' positions should have known.

369. The MSU Defendants have the ultimate responsibility and authority to train and supervise its employees, agents, and/or representatives, in the appropriate manner of detecting, reporting, and preventing sexual abuse, assault, and molestation and as a matter of acts, custom, policy, and/or practice, failed to do so with deliberate indifference.

370. As a matter of custom, policy, and and/or practice, the MSU Defendants had and have the ultimate responsibility and authority to investigate complaints against their employees, agents, and representatives from all individuals including, but not limited to students, visitors, faculty, staff, or other employees, agents, and/or representatives, and failed to do so with deliberate indifference.

371. The MSU Defendants had a duty to prevent sexual assault, abuse, and molestation on their campus and premises, that duty arising under the above-referenced constitutional rights, as well as established rights pursuant to Title IX.

372. Defendant MSU's internal policies provide that "[a]ll University employees ... are expected to promptly report sexual misconduct or relationship violence that they observe or learn about and that involves a member of the University community (faculty, staff or student) or occurred

at a University event or on University property." They state further: "[t]he employee must report all relevant details about the alleged relationship violence or sexual misconduct that occurred on campus or at a campus-sponsored event. .. "

373. Defendant MSU's aforementioned internal policies were violated in or around 1999 when Jane X. Doe reported sexual assault, abuse, and molestation by Defendant Nassar to MSU representatives including trainers and a coach and no action was taken to address her complaints.

374. Defendant MSU's aforementioned internal policies were violated in 2000 when Jane T.T. Doe reported sexual assault, abuse, and molestation by Defendant Nassar to MSU representatives including trainers and no action was taken to address her complaints.

375. The MSU Defendants' failure to address Jane X. Doe and Jane T.T. Doe's complaints led to an unknown number of individuals being victimized, sexually assaulted, abused, and molested by Defendant Nassar.

376. Additionally, the MSU Defendant's failure to properly address the 2014 complaint regarding Defendant Nassar's conduct also led to others being victimized, sexually assaulted, abused and molested by Defendant Nassar.

377. Ultimately, Defendants failed to adequately and properly investigate the complaints of Plaintiffs or other similarly-situated individuals including but not limited to failing to:

A. perform a thorough investigation into improper conduct by Defendant Nassar with Plaintiffs after receiving complaints in 1999 and 2000;

B. thoroughly review and investigate all policies, practices, procedures and training materials related to the circumstances surrounding the conduct of Defendant Nassar;

C. recognize sexual assault when reported in 2014 and permitting University officials to deem sexual assault as "medically appropriate" and "not of a sexual nature;" and,

D. ensure all institutional guidelines issued following the 2014 investigation into Defendant Nassar's conduct were satisfied.

378. As indicated in the U.S. Department of Education Office of Civil Rights report,[28] the MSU Defendants had a culture that permitted a sexually hostile environment to exist affecting numerous individuals on Defendant MSU's campus, including Plaintiffs.

379. Also indicated in the report was Defendant MSU's custom, practice, and/or policy of failing to address complaints of sexual harassment, including sexual violence in a prompt and equitable manner which caused and may have contributed to a continuation of the sexually hostile environment.

380. By failing to prevent the aforementioned sexual assault, abuse, and molestation upon Plaintiffs, and by failing to appropriately respond to reports of Defendant Nassar's sexual assault, abuse, and molestation in a manner that was so clearly unreasonable it amounted to deliberate indifference, the MSU Defendants are liable to Plaintiffs pursuant to 42 U.S.C. §1983.

381. The MSU Defendants are also liable to Plaintiffs under 42 U.S.C. §1983 for maintaining customs, policies, practices which deprived Plaintiffs of rights secured by the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. §1983.

382. The MSU Defendants tolerated, authorized and/or permitted a custom, policy, practice or

[28] *See,* Letter from U.S. Department of Education Office for Civil Rights to Michigan State University, September 1, 2015, OCR Docket #15-11-2098, #15-14-2113. Available at https://www2.ed.gov/documents/press-releases/michigan-state-letter.pdf, last accessed January 4, 2017.

procedure of insufficient supervision and failed to adequately screen, counsel, or discipline Defendant Nassar, with the result that Defendant Nassar was allowed to violate the rights of persons such as Plaintiffs with impunity.

383. As a direct and/or proximate result of the MSU Defendants' actions and/or inactions, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

C. COUNT THREE

FAILURE TO TRAIN AND SUPERVISE
42 U.S.C. § 1983
ALL PLAINTIFFS AGAINST MSU DEFENDANTS

384. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

385. The MSU Defendants have the ultimate responsibility and authority to train and supervise its employees, agents, and/or representatives including Defendant Nassar and all faculty and staff regarding their duties toward students, faculty, staff, and visitors.

386. The MSU Defendants failed to train and supervise its employees, agents, and/or representatives including all faculty and staff, regarding the following duties:

A. Perceive, report, and stop inappropriate sexual conduct on campus;

B. Provide diligent supervision over student-athletes and other individuals;

C. Report suspected incidents of sexual abuse or sexual assault;

D. Ensure the safety of all students, faculty, staff, and visitors to Defendant MSU's

campuses premises;

E. Provide a safe environment for all students, faculty, staff, and visitors to Defendant MSU's premises free from sexual harassment; and,

F. Properly train faculty and staff to be aware of their individual responsibility for creating and maintaining a safe environment.

387. The above list of duties is not exhaustive.

388. The MSU Defendants failed to adequately train coaches, trainers, medical staff, and others regarding the aforementioned duties which led to violations of Plaintiffs rights.

389. As a result, the MSU Defendants deprived Plaintiffs of rights secured by the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. §1983.

390. As a direct and/or proximate result of Defendants' actions and/or inactions, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

D. COUNT FOUR

GROSS NEGLIGENCE
ALL PLAINTIFFS AGAINST THE MSU DEFENDANTS
AND DEFENDANT NASSAR

391. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

392. The MSU Defendants owed Plaintiffs a duty to use due care to ensure their safety and freedom

from sexual assault, abuse, and molestation while interacting with their employees, representatives, and/or agents, including Defendant Nassar.

393. Defendant Nassar owed Plaintiffs a duty of due care in carrying out medical treatment as an employee, agent, and/or representative of the MSU Defendants.

394. By seeking medical treatment from Defendant Nassar in the course of his employment, agency, and/or representation of the MSU Defendants, a special, confidential, and fiduciary relationship between Plaintiffs and Defendant Nassar was created, resulting in Defendant Nassar owing Plaintiffs a duty to use due care.

395. The MSU Defendants' failure to adequately supervise Defendant Nassar, especially after MSU knew or should have known of complaints regarding his nonconsensual sexual touching and assaults during "treatments" was so reckless as to demonstrate a substantial lack of concern for whether an injury would result to Plaintiffs.

396. Defendant Nassar's conduct in sexually assaulting, abusing, and molesting Plaintiffs in the course of his employment, agency, and/or representation of the MSU Defendants and under the guise of rendering "medical treatment" was so reckless as to demonstrate a substantial lack of concern for whether an injury would result to Plaintiffs.

397. The MSU Defendants' conduct demonstrated a willful disregard for precautions to ensure Plaintiffs' safety.

398. The MSU Defendants' conduct as described above, demonstrated a willful disregard for substantial risks to Plaintiffs.

399. The MSU Defendants breached duties owed to Plaintiffs and were grossly negligent when they conducted themselves by the actions described above, said acts having been committed with reckless disregard for Plaintiffs' health, safety, Constitutional and/or statutory rights, and

with a substantial lack of concern as to whether an injury would result.

400. As a direct and/or proximate result of Defendants' actions and/or inactions, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

E. COUNT FIVE

NEGLIGENCE
ALL PLAINTIFFS AGAINST THE MSU DEFENDANTS AND DEFENDANT NASSAR

401. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

402. The MSU Defendants owed Plaintiffs a duty of ordinary care to ensure their safety and freedom from sexual assault, abuse, and molestation while interacting with their employees, representatives and/or agents.

403. By seeking medical treatment from Defendant Nassar in his capacity as an employee, agent, and/or representative of the MSU Defendants, a special, confidential, and fiduciary relationship between Plaintiffs and Defendant Nassar was created, resulting in Defendant Nassar owing Plaintiffs a duty to use ordinary care.

404. Defendant Nassar owed Plaintiffs a duty of ordinary care.

405. The MSU Defendants' failure to adequately train and supervise Defendant Nassar breached the duty of ordinary care.

406. The MSU Defendants had notice through its own employees, agents, and/or representatives as early as 1999, again in 2000, and again in 2014 of complaints of a sexual nature related to Defendant Nassar's purported "treatments" with young girls and women.

407. The MSU Defendants should have known of the foreseeability of sexual abuse with respect to youth and collegiate sports.

408. The MSU Defendants' failure to properly investigate, address, and remedy complaints regarding Defendant Nassar's conduct was a breach of ordinary care.

409. Defendant Nassar's conduct in sexually assaulting, abusing, and molesting Plaintiffs in the course of his employment, agency, and/or representation of the MSU Defendants was a breach of the duty to use ordinary care.

410. As a direct and/or proximate result of Defendants' conduct, actions and/or inactions, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

F. COUNT SIX

VICARIOUS LIABILITY
ALL PLAINTIFFS AGAINST THE MSU DEFENDANTS

411. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

412. Vicarious liability is indirect responsibility imposed by operation of law where an employer is bound to keep its employees within their proper bounds and is responsible if it fails to do

so.

413. Vicarious liability essentially creates agency between the principal and its agent, so that the principal is held to have done what the agent has done.

414. The MSU Defendants employed and/or held Defendant Nassar out to be its agent and/or representative from approximately 1996 to 2016.

415. Defendant MSU's website contains hundreds of pages portraying Defendant Nassar as a distinguished member of Defendant MSU's College of Osteopathic Medicine, Division of Sports Medicine.[29]

416. The MSU Defendants are vicariously liable for the actions of Defendant Nassar as described above that were performed during the course of his employment, representation, and/or agency with the MSU Defendants and while he had unfettered access to young female athletes on MSU's campus and premises through its College of Osteopathic Medicine and Division of Sports Medicine.

417. As a direct and/or proximate result of Defendant Nassar's actions carried out in the course of his employment, agency, and/or representation of the MSU Defendants, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

[29] As of January 5, 2017, using the search term "Nassar" at www.msu.edu returns 402 results, the majority of which include references to Defendant Nassar dating as far back as 1997.

G. COUNT SEVEN

EXPRESS/IMPLIED AGENCY
ALL PLAINTIFFS AGAINST MSU DEFENDANTS

418. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

419. An agent is a person who is authorized by another to act on its behalf.

420. The MSU Defendants intentionally or negligently made representations that Defendant Nassar was their employee, agent, and/or representative.

421. On the basis of those representations, Plaintiffs reasonably believed that Defendant Nassar was acting as an employee, agent, and/or representative of the MSU Defendants.

422. Plaintiffs were injured as a result of Defendant Nassar's sexual assault, abuse, and molestation as described above, acts that were performed during the course of his employment, agency, and/or representation with the MSU Defendants and while he had unfettered access to young female athletes.

423. Plaintiffs were injured because they relied on the MSU Defendants to provide employees, agents, and or representatives who would exercise reasonable skill and care.

424. As a direct and/or proximate cause of Defendant Nassar's negligence carried out in the course of his employment, agency, and/or representative of the MSU Defendants, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to

sustain loss of earnings and earning capacity.

H. COUNT EIGHT

NEGLIGENT SUPERVISION
ALL PLAINTIFFS AGAINST THE MSU DEFENDANTS

425. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

426. The MSU Defendants had a duty to provide reasonable supervision of their employee, agent, and/or representative, Defendant Nassar, while he was in the course of his employment, agency or representation with the MSU Defendants and while he interacted with young female athletes including Plaintiffs.

427. It was reasonably foreseeable given the known sexual abuse in youth sports and gymnastics in particular that Defendant Nassar who had prior allegations against him had or would sexually abuse children, including Plaintiffs, unless properly supervised.

428. The MSU Defendants by and through their employees, agents, managers and/or assigns, such as President Simon, President McPherson, Dean Strampel or Dr. Kovan knew or reasonably should have known of Defendant Nassar's conduct and/or that Defendant Nassar was an unfit employee, agent, and/or representative because of his sexual interest in children.

429. The MSU Defendants breached their duty to provide reasonable supervision of Defendant Nassar, and permitted Defendant Nassar, who was in a position of trust and authority, to commit the acts against Plaintiffs.

430. The aforementioned sexual abuse occurred while Plaintiffs and Defendant Nassar were on the premises of Defendant MSU, and while Defendant Nassar was acting in the course of his employment, agency, and/or representation of the MSU Defendants.

431. The MSU Defendants tolerated, authorized and/or permitted a custom, policy, practice or procedure of insufficient supervision and failed to adequately screen, counsel, or discipline such individuals, with the result that Defendant Nassar was allowed to violate the rights of persons such as Plaintiffs with impunity.

432. As a direct and/or proximate result of the MSU Defendants' negligent supervision, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

I. COUNT NINE

NEGLIGENT FAILURE TO WARN OR PROTECT ALL PLAINTIFFS AGAINST THE MSU DEFENDANTS

433. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

434. The MSU Defendants knew or should have known that Defendant Nassar posed a risk of harm to Plaintiffs or those in Plaintiffs' situation.

435. As early as 1999, the MSU Defendants had direct and/or constructive knowledge as to the dangerous conduct of Defendant Nassar and failed to act reasonably and responsibly in response.

436. The MSU Defendants knew or should have known Defendant Nassar committed sexual assault, abuse, and molestation and/or was continuing to engage in such conduct.

437. The MSU Defendants had a duty to warn or protect Plaintiffs and others in Plaintiffs'

situation against the risk of injury by Defendant Nassar.

438. The duty to disclose this information arose by the special, trusting, confidential, and fiduciary relationship between Defendant Nassar as an employee, agent, and or representative of the MSU Defendants and Plaintiffs.

439. The MSU Defendants breached said duty by failing to warn Plaintiffs and/or by failing to take reasonable steps to protect Plaintiffs from Defendant Nassar.

440. The MSU Defendants breached its duties to protect Plaintiffs by failing to:

A. respond to allegations of sexual assault, abuse, and molestation;

B. detect and/or uncover evidence of sexual assault, abuse, and molestation; and,

C. investigate, adjudicate, and terminate Defendant Nassar's employment with Defendant MSU prior to 2016.

441. The MSU Defendants failed to adequately screen, counsel and/or discipline Defendant Nassar for physical and/or mental conditions that might have rendered him unfit to discharge the duties and responsibilities of a physician at an educational institution, resulting in violations of Plaintiffs' rights.

442. The MSU Defendants willfully refused to notify, give adequate warning, and implement appropriate safeguards to protect Plaintiffs from Defendant Nassar's conduct.

443. As a direct and/or proximate result of the MSU Defendants negligent failure to warn or protect, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full

enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

J. COUNT TEN

NEGLIGENT FAILURE TO TRAIN OR EDUCATE
ALL PLAINTIFFS AGAINST THE MSU DEFENDANTS

444. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

445. The MSU Defendants breached their duty to take reasonable protective measures to protect Plaintiffs and other minors from the risk of childhood sexual abuse and/or sexual assault by Defendant Nassar, such as the failure to properly train or educate Plaintiffs and other individuals (including minors) about how to avoid such a risk.

446. The MSU Defendants failed to implement reasonable safeguards to:

A. Prevent acts of sexual assault, abuse, and molestation by Defendant Nassar;

B. Avoid placing Defendant Nassar in positions where he would be in unsupervised contact and interaction with Plaintiffs and other young athletes.

447. As a direct and/or proximate result of the MSU Defendants' negligent failure to train or educate, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

K. COUNT ELEVEN

NEGLIGENT RETENTION
ALL PLAINTIFFS AGAINST THE MSU DEFENDANTS

448. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

449. The MSU Defendants had a duty when credentialing, hiring, retaining, screening, checking, regulating, monitoring, and supervising employees, agents and/or representatives to exercise due care, but they failed to do so.

450. The MSU Defendants were negligent in the retention of Defendant Nassar as an employee, agent, and/or representative in their failure to adequately investigate, report and address complaints about his conduct of which they knew or should have known.

451. The MSU Defendants were negligent in the retention of Defendant Nassar as an employee, agent, and/or representative when after they discovered, or reasonably should have discovered Defendant Nassar's conduct which reflected a propensity for sexual misconduct.

452. The MSU Defendants' failure to act in accordance with the standard of care resulted in Defendant Nassar gaining access to and sexually abusing and/or sexually assaulting Plaintiffs and an unknown number of other individuals.

453. The aforementioned negligence in the credentialing, hiring, retaining, screening, checking, regulating, monitoring, and supervising of Defendant Nassar created a foreseeable risk of harm to Plaintiffs as well as other minors and young adults.

454. As a direct and/or proximate result of the MSU Defendants' negligent retention, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of

emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life; were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life; have sustained and continue to sustain loss of earnings and earning capacity.

L. COUNT TWELVE

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ALL PLAINTIFFS AGAINST THE MSU DEFENDANTS

455. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

456. The MSU Defendants allowed Defendant Nassar to be in a position where he could sexually assault, abuse, and molest children and young adults.

457. A reasonable person would not expect the MSU Defendants to tolerate or permit their employee or agent to carry out sexual assault, abuse, or molestation after they knew or should have known of complaints and claims of sexual assault and abuse occurring during Defendant Nassar's "treatments."

458. The MSU Defendants held Defendant Nassar in high esteem and acclaim which in turn encouraged Plaintiffs and others to respect and trust Defendant Nassar and seek out his services and to not question his methods or motives.

459. The MSU Defendants protected Defendant Nassar in part to bolster and sustain his national and international reputation in the gymnastics community.

460. A reasonable person would not expect the MSU Defendants to be incapable of supervising Defendant Nassar and/or preventing Defendant Nassar from committing acts of sexual assault, abuse, and molestation.

461. The MSU Defendants' conduct as described above was intentional and/or reckless.

462. As a direct and/or proximate result of the MSU Defendants' conduct, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

M. COUNT THIRTEEN

FRAUD AND MISREPRESENTATION
ALL PLAINTIFFS AGAINST MSU DEFENDANTS

463. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

464. From approximately 1996 to September 2016, the MSU Defendants represented to Plaintiffs and the public that Defendant Nassar was a competent and safe physician.

465. By representing that Defendant Nassar was a team physician and athletic physician at Defendant MSU and a National Team Physician with Defendant USAG, the MSU Defendants represented to Plaintiffs and the public that Defendant Nassar was safe, trustworthy, of high moral and ethical repute, and that Plaintiffs and the public need not worry about being harmed by Defendant Nassar.

466. The representations were false when they were made as Defendant Nassar had and was continuing to sexually assault, abuse, and molest Plaintiffs and an unknown number of other individuals.

467. As of 1999 and 2000, the MSU Defendants knew their representations of Defendant Nassar were false as Jane X. Doe and Jane T.T. Doe had complained of Defendant Nassar's conduct

to MSU representatives.

468. Although MSU was informed of Defendant Nassar's conduct they failed to investigate, remedy, or in any way address Jane X. Doe or Jane T.T. Doe's complaints.

469. The MSU Defendants continued to hold Defendant Nassar out as a competent and safe physician.

470. Additional complaints against Defendant Nassar surfaced in 2014, however, because of Defendant MSU's culture which included existence of a sexually hostile environment on Defendant MSU's campus and premises and the University's failure to address complaints of sexual harassment, including sexual violence in a prompt and equitable manner which in turn caused and may have contributed to a continuation of the sexually hostile environment, Defendant Nassar was permitted to continue employment and sexually abuse, assault, and molest Plaintiffs and an unknown number of other individuals.[30]

471. Between the time of the 2014 complaint and September 2016, the MSU Defendants continued to hold Defendant Nassar out as a competent and safe physician.

472. Plaintiffs relied on the assertions of the MSU Defendants and several Plaintiffs continued to seek treatment from Defendant Nassar in the wake of known concerns and dangers.

473. Plaintiffs were subjected to sexual assault, abuse, and molestation as a result of the MSU Defendants' fraudulent misrepresentations regarding Defendant Nassar.

474. As a direct and/or proximate result of the MSU Defendants' fraudulent misrepresentations, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and

[30] *See,* Letter from U.S. Department of Education Office for Civil Rights to Michigan State University, September 1, 2015, OCR Docket #15-11-2098, #15-14-2113. Available at https://www2.ed.gov/documents/press-releases/michigan-state-letter.pdf, last accessed January 4, 2017.

continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life; were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life; have sustained and continue to sustain loss of earnings and earning capacity.

VII. CLAIMS AGAINST USA GYMNASTICS

A. COUNT FOURTEEN

GROSS NEGLIGENCE
PLAINTIFFS DENHOLLANDER; JANE A. DOE BY JANE B. DOE; JANE D. DOE; JANE E. DOE; JANE G. DOE; JANE H. DOE; JANE J. DOE; JANE N. DOE; JANE P. DOE BY JANE Q. DOE; JANE S. DOE BY JANE T. DOE; JANE U. DOE
AGAINST DEFENDANT USAG AND DEFENDANT NASSAR

475. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

476. Defendant USAG owed Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe a duty to use due care to ensure their safety and freedom from sexual assault, abuse, and molestation while interacting with their employees, representatives, and/or agents.

477. The above-named Plaintiffs are or were members of USAG, participated in USAG sanctioned events, and were knowledgeable of and in some cases referred to Defendant Nassar through USAG affiliations.

478. Defendant Nassar owed Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe a duty to use due care in his capacity as

an employee, representative, and/or agent of Defendant USAG.

479. By seeking medical treatment from Defendant Nassar in his capacity as an employee, agent, and/or representative of Defendant USAG, a special, confidential, and fiduciary relationship between Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe and Defendant Nassar was created, resulting in Defendant Nassar owing Plaintiffs a duty to use due care.

480. Defendant USAG's failure to adequately supervise Defendant Nassar was so reckless as to demonstrate a substantial lack of concern for whether an injury would result to Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe.

481. Defendant Nassar's conduct in sexually assaulting, abusing, and molesting Plaintiffs under the guise of rendering medical "treatment" as an employee, representative, and/or agent of Defendant USAG was so reckless as to demonstrate a substantial lack of concern for whether an injury would result to Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe.

482. Defendant USAG's conduct demonstrated a willful disregard for necessary precautions to reasonably protect Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe's safety.

483. Defendant USAG's conduct as described above, demonstrated a willful disregard for

substantial risks to Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe.

484. Defendant USAG breached duties owed to Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe and were grossly negligent when they conducted themselves by actions described above, including but not limited to their failure to notify MSU about the reasons for Nassar's separation from USAG and more broadly the issues surrounding sexual abuse in gymnastics and warning signs and reporting requirements. Said acts were committed with reckless disregard for Plaintiffs' health, safety, Constitutional and/or statutory rights, and with a substantial lack of concern as to whether an injury would result.

485. As a direct and/or proximate result of Defendant USAG'S actions and/or inactions, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

B. COUNT FIFTEEN

NEGLIGENCE
PLAINTIFFS DENHOLLANDER; JANE A. DOE BY JANE B. DOE; JANE D. DOE; JANE E. DOE; JANE G. DOE; JANE H. DOE; JANE J. DOE; JANE N. DOE; JANE P. DOE BY JANE Q. DOE; JANE S. DOE BY JANE T. DOE; JANE U. DOE AGAINST DEFENDANT USAG AND DEFENDANT NASSAR

486. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

487. Defendant USAG owed Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe a duty of ordinary care to ensure their safety and freedom from sexual assault, abuse, and molestation while being treated by their employees, representatives, and agents.

488. Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe as members of the USAG had a reasonable expectation that the USAG was recommending competent and ethical physicians and trainers for medical treatment who would carry out said treatment without sexual assault, abuse, and molestation.

489. By seeking medical treatment from Defendant Nassar in his capacity as an employee, agent, and/or representative of Defendant USAG, a special, confidential, and fiduciary relationship between Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe and Defendant Nassar was created, resulting in Defendant Nassar owing Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe

by Jane T. Doe, and Jane U. Doe a duty to use ordinary care.

490. Defendant Nassar owed Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe a duty of ordinary care in carrying out medical treatment.

491. Defendant USAG's failure to adequately train and supervise Defendant Nassar breached the duty of ordinary care.

492. Defendant USAG's failure to properly investigate, address, and remedy complaints regarding Defendant Nassar's conduct was a breach of ordinary care.

493. Defendant USAG's failure to inform Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe, and the public of the allegations and concerns leading to Defendant Nassar's separation from USAG was a breach of ordinary care.

494. Defendant Nassar's conduct in sexually assaulting, abusing, and molesting Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe was a breach of the duty to use ordinary care.

495. As a direct and/or proximate result of Defendants' conduct, actions and/or inactions, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented

from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

C. COUNT SIXTEEN

VICARIOUS LIABILITY
PLAINTIFFS DENHOLLANDER; JANE A. DOE BY JANE B. DOE; JANE D. DOE; JANE E. DOE; JANE G. DOE; JANE H. DOE; JANE J. DOE; JANE N. DOE; JANE P. DOE BY JANE Q. DOE; JANE S. DOE BY JANE T. DOE; JANE U. DOE AGAINST DEFENDANT USAG

496. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

497. Vicarious liability is indirect responsibility imposed by operation of law where an employer is bound to keep its employees within their proper bounds and is responsible if it fails to do so.

498. Vicarious liability essentially creates agency between the principal and its agent, so that the principal is held to have done what the agent has done.

499. Defendant USAG's website contains sites portraying Defendant Nassar as the recipient of distinguished awards and boasts him as having been "instrumental" to the success of USA gymnastics.[31]

500. Defendant USAG employed and/or held Defendant Nassar out to be its agent and/or representative from approximately 1986 to 2015.

501. Defendant USAG is vicariously liable for the actions of Defendant Nassar as described above that were performed during the course of his employment, representation, or agency with Defendant USAG and while he had unfettered access to young female athletes.

502. As a direct and/or proximate cause of Defendant Nassar's negligence carried out in the

[31] For example, *see*, https://usagym.org/pages/post.html?PostID=14677&prog=h.

course of his employment, agency, and/or representation with Defendant USAG Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

D. COUNT SEVENTEEN

EXPRESS/IMPLIED AGENCY
PLAINTIFFS DENHOLLANDER; JANE A. DOE BY JANE B. DOE; JANE D. DOE; JANE E. DOE; JANE G. DOE; JANE H. DOE; JANE J. DOE; JANE N. DOE; JANE P. DOE BY JANE Q. DOE; JANE S. DOE BY JANE T. DOE; JANE U. DOE AGAINST DEFENDANT USAG

503. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

504. An agent is a person who is authorized by another to act on its behalf.

505. Defendant USAG intentionally or negligently made representations that Defendant Nassar was their employee, agent, and/or representative.

506. On the basis of those representations, Plaintiffs reasonably believed Defendant Nassar was acting as an employee, agent, and/or representation of Defendant USAG.

507. Plaintiffs were injured as a result of Defendant Nassar's sexual assault, abuse, and molestation as described above carried out through his employment, agency, and/or representation with Defendant USAG.

508. Plaintiffs were injured because they relied on Defendant USAG to provide employees or agents who would exercise reasonable skill and care.

509. As a direct and/or proximate cause of Defendant Nassar's negligence carried out in the course of his employment, agency, and/or representation with Defendant USAG Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

E. COUNT EIGHTEEN

NEGLIGENT SUPERVISION
PLAINTIFFS DENHOLLANDER; JANE A. DOE BY JANE B. DOE; JANE D. DOE; JANE E. DOE; JANE G. DOE; JANE H. DOE; JANE J. DOE; JANE N. DOE; JANE P. DOE BY JANE Q. DOE; JANE S. DOE BY JANE T. DOE; JANE U. DOE AGAINST DEFENDANT USAG

510. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

511. Defendant USAG had a duty to provide reasonable supervision of its employee, agent, and/or representative, Defendant Nassar, while he was in the course of his employment, agency and/or representation of Defendant USAG and while he interacted with young female athletes including Plaintiffs.

512. It was reasonably foreseeable given the known sexual abuse in youth sports and gymnastics in particular that Defendant Nassar who had prior allegations against him had or would sexually abuse children, including Plaintiffs, unless properly supervised.

513. Defendant USAG by and through their employees, agents, managers and/or assigns such as Mr. Penny or Mr. Colarossi, knew or reasonably should have known of Defendant

Nassar's conduct and/or that Defendant Nassar was an unfit employee, agent, and/or representative because of his sexual interest in children and young adults.

514. Defendant USAG breached its duty to provide reasonable supervision of Defendant Nassar, and its failure permitted Defendant Nassar, who was in a position of trust and authority, to commit the acts against Plaintiffs.

515. The aforementioned sexual abuse occurred while Defendant Nassar was acting in the course of his employment, agency and/or representation of Defendant USAG.

516. Defendant USAG tolerated, authorized and/or permitted a custom, policy, practice or procedure of insufficient supervision and failed to adequately screen, counsel or discipline Defendant Nassar, with the result that Defendant Nassar was allowed to violate the rights of persons such as Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe with impunity.

517. As a direct and/or proximate result of Defendant USAG's negligent supervision, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

F. COUNT NINETEEN

NEGLIGENT FAILURE TO WARN OR PROTECT PLAINTIFFS DENHOLLANDER; JANE A. DOE BY JANE B. DOE; JANE D. DOE; JANE E. DOE; JANE G. DOE; JANE H. DOE; JANE J. DOE; JANE N. DOE; JANE P. DOE BY JANE Q. DOE; JANE S. DOE BY JANE T. DOE; JANE U. DOE AGAINST DEFENDANT USAG

518. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

519. Given the direct or indirect knowledge of sexual abuse in youth sports and in particular gymnastics, it was reasonably foreseeable that sexual abuse of minors may occur if proper procedures were not taken by Defendant USAG.

520. Defendant USAG knew or should have known that Defendant Nassar posed a risk of harm to Plaintiffs or those in Plaintiffs' situation.

521. Defendant USAG had direct and/or constructive knowledge as to the dangerous conduct of Defendant Nassar and failed to act reasonably and responsibly in response.

522. Defendant USAG knew or should have known that Defendant Nassar previously committed sexual assault, abuse, and molestation and/or was continuing to engage in such conduct.

523. Defendant USAG had a duty to warn or protect Plaintiffs and others in Plaintiffs' situation against the risk of injury by Defendant Nassar.

524. The duty to disclose this information arose by the special, trusting, confidential, and fiduciary relationship between Defendant Nassar in his capacity as employee, agent, and/or representative of Defendant USAG and Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe.

525. Defendant USAG breached said duty by failing to warn Plaintiffs and/or by failing to take reasonable steps to protect Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe from Defendant Nassar.

526. Defendant USAG breached its duties to protect Plaintiffs by failing to detect and/or uncover evidence of sexual abuse and sexual assault, investigate Defendant Nassar, adjudicate and suspend and/or ban Defendant Nassar from USAG affiliation and USAG sanctioned events.

527. Defendant USAG failed to adequately screen, counsel and/or discipline Defendant Nassar for physical and/or mental conditions that might have rendered him unfit to discharge the duties and responsibilities of a physician in his capacity as an employee, agent, and/or representative of Defendant USAG, resulting in violations of Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe's rights.

528. Defendant USAG willfully refused to notify, give adequate warning, and implement appropriate safeguards to protect Plaintiffs from Defendant Nassar's conduct.

529. As a direct and/or proximate result of Defendant USAG's negligent failure to warn or protect, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full

enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

G. COUNT TWENTY

NEGLIGENT FAILURE TO TRAIN OR EDUCATE
PLAINTIFFS DENHOLLANDER; JANE A. DOE BY JANE B. DOE; JANE D. DOE; JANE E. DOE; JANE G. DOE; JANE H. DOE; JANE J. DOE; JANE N. DOE; JANE P. DOE BY JANE Q. DOE; JANE S. DOE BY JANE T. DOE; JANE U. DOE
AGAINST DEFENDANT USAG

530. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

531. Defendant USAG breached its duty to take reasonable protective measures to protect Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe and other individuals from the risk of childhood sexual abuse and/or sexual assault by Defendant Nassar, such as the failure to properly train or educate Plaintiffs and other individuals (including minors) about how to avoid such a risk.

532. Defendant USAG failed to implement reasonable safeguards to:

A. Prevent acts of sexual assault, abuse, and molestation by Defendant Nassar;

B. Avoid placing Defendant Nassar in positions where he would be in unsupervised contact and interaction with Plaintiffs and other young athletes.

533. As a direct and/or proximate result of Defendant USAG's negligent failure to train or educate, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue

to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

H. COUNT TWENTY-ONE

NEGLIGENT RETENTION
PLAINTIFFS DENHOLLANDER; JANE A. DOE BY JANE B. DOE; JANE D. DOE; JANE E. DOE; JANE G. DOE; JANE H. DOE; JANE J. DOE; JANE N. DOE; JANE P. DOE BY JANE Q. DOE; JANE S. DOE BY JANE T. DOE; JANE U. DOE
AGAINST DEFENDANT USAG

534. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

535. Defendant USAG had a duty when credentialing, hiring, retaining, screening, checking, regulating, monitoring, and supervising employees, agents and/or representatives to exercise due care, but they failed to do so.

536. Defendant USAG was negligent in the retention of Defendant Nassar as an employee, agent, and/or representative in their failure to adequately investigate, report, and address complaints about his conduct of which they knew or should have known.

537. Defendant USAG was negligent in the retention of Defendant Nassar when after they discovered, or reasonably should have discovered Defendant Nassar's conduct which reflected a propensity for sexual misconduct.

538. Defendant USAG's failure to act in accordance with the standard of care resulted in Defendant Nassar gaining access to and sexually abusing and/or sexually assaulting Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe as well as an unknown number of other individuals.

539. The aforementioned negligence in the credentialing, hiring, retaining, screening, checking, regulating, monitoring, and supervising of Defendant Nassar created a foreseeable risk of harm to Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe as well as other minors and young adults.

540. As a direct and/or proximate result of Defendant USAG's negligent retention, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life; were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life; have sustained and continue to sustain loss of earnings and earning capacity.

I. COUNT TWENTY-TWO

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS PLAINTIFFS DENHOLLANDER; JANE A. DOE BY JANE B. DOE; JANE D. DOE; JANE E. DOE; JANE G. DOE; JANE H. DOE; JANE J. DOE; JANE N. DOE; JANE P. DOE BY JANE Q. DOE; JANE S. DOE BY JANE T. DOE; JANE U. DOE AGAINST DEFENDANT USAG

541. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

542. Defendant USAG allowed Defendant Nassar to be in a position where he could sexually assault, abuse, and molest children and young adults.

543. A reasonable person would not expect Defendant USAG to tolerate or permit their employee, agent, or representative to carry out sexual assault, abuse, or molestation.

544. Defendants USAG held Defendant Nassar in high esteem and acclaim which in turn

encouraged Plaintiffs and others to respect and trust Defendant Nassar and seek out his services and to not question his methods or motives.

545. Defendants USAG protected Defendant Nassar in part to bolster his national and international reputation in the gymnastics community.

546. A reasonable person would not expect Defendant USAG to be incapable of supervising Defendant Nassar and/or preventing Defendant Nassar from committing acts of sexual assault, abuse and molestation.

547. Defendant USAG's conduct as described above was intentional and/or reckless.

548. As a direct and/or proximate result of Defendant USAG's conduct, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

J. COUNT TWENTY-THREE

FRAUD AND MISREPRESENTATION
PLAINTIFFS DENHOLLANDER; JANE A. DOE BY JANE B. DOE; JANE D. DOE; JANE E. DOE; JANE G. DOE; JANE H. DOE; JANE J. DOE; JANE N. DOE; JANE P. DOE BY JANE Q. DOE; JANE S. DOE BY JANE T. DOE; JANE U. DOE AGAINST DEFENDANT USAG

549. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

550. From approximately 1996 to summer 2015, Defendant USAG represented to Plaintiffs and the public that Defendant Nassar was a competent, ethical, and safe physician.

551. By representing that Defendant Nassar was a team physician and athletic physician at Defendant MSU and a National Team Physician with Defendant USAG, Defendant USAG represented to Plaintiffs and the public that Defendant Nassar was safe, trustworthy, of high moral and ethical repute, and that Plaintiffs and the public need not worry about being harmed by Defendant Nassar.

552. The representations were false when they were made as Defendant Nassar had and was continuing to sexually assault, abuse, and molest Plaintiffs and an unknown number of other individuals.

553. Additionally, complaints were made to Defendant USAG, yet Defendant USAG did not contact Plaintiffs Denhollander, Jane A. Doe by Jane B. Doe, Jane D. Doe, Jane E. Doe, Jane G. Doe, Jane H. Doe, Jane J. Doe, Jane N. Doe, Jane P. Doe by Jane Q. Doe, Jane S. Doe by Jane T. Doe, and Jane U. Doe, the MSU Defendants, or any other clubs, or organizations affiliated with Defendant Nassar to inform them of the allegations and potential harm to Plaintiffs and others.

554. Plaintiffs relied on the assertions of Defendant USAG and several Plaintiffs continued to seek treatment of Defendant Nassar in the wake of known concerns and dangers.

555. Plaintiffs were subjected to sexual assault, abuse, and molestation as a result of Defendant USAG's fraudulent misrepresentations regarding Defendant Nassar.

556. As a direct and/or proximate result of Defendant USAG's fraudulent misrepresentations, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life; were prevented and will continue to be prevented

from performing Plaintiffs' daily activities and obtaining the full enjoyment of life; have sustained and continue to sustain loss of earnings and earning capacity.

VIII. CLAIMS AGAINST TWISTARS

A. COUNT TWENTY-FOUR

GROSS NEGLIGENCE
PLAINTIFFS JANE G. DOE; JANE J. DOE; JANE S. DOE BY JANE T. DOE AGAINST DEFENDANT TWISTARS AND DEFENDANT NASSAR

557. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

558. Defendant Twistars owed Plaintiffs Jane G. Doe, Jane J. Doe, and Jane S. Doe by Jane T. Doe a duty to use due care to ensure their safety and freedom from sexual assault, abuse, and molestation while interacting with their employees, representatives, and/or agents.

559. Defendant Nassar owed Plaintiffs a duty to use due care as an employee, representative, and/or agent of Defendant Twistars.

560. By seeking medical treatment from Defendant Nassar in his capacity as an employee, agent, and/or representative of Defendant Twistars, a special, confidential, and fiduciary relationship between Plaintiffs Jane G. Doe, Jane J. Doe and Jane S. Doe by Jane T. Doe and Defendant Nassar was created, resulting in Defendant Nassar owing Plaintiffs a duty to use due care.

561. Given known sexual abuse which has taken place in youth sports including gymnastics and the reasonable foreseeability that harm may occur to athletes, Defendant Twistars not only referred athletes to Defendant Nassar but also failed to adequately supervise Defendant Nassar. Defendant Twistars' action were so reckless as to demonstrate a substantial lack of concern for whether an injury would result to Plaintiffs Jane G. Doe, Jane J. Doe and Jane S. Doe by Jane T. Doe.

562. Defendant Nassar's conduct in sexually assaulting, abusing, and molesting Plaintiffs Jane G. Doe, Jane J. Doe and Jane S. Doe by Jane T. Doe in the course of his employment, agency, and/or representation of Defendant Twistars and under the guise of rendering medical "treatment" as an employee, representative, and/or agent of Defendant Twistars was so reckless as to demonstrate a substantial lack of concern for whether an injury would result to Plaintiffs Jane G. Doe, Jane J. Doe and Jane S. Doe by Jane T. Doe.

563. Defendant Twistars' conduct demonstrated a willful disregard for precautions to ensure Plaintiffs Jane G. Doe, Jane J. Doe and Jane S. Doe by Jane T. Doe's safety.

564. Defendant Twistars' conduct as described above, demonstrated a willful disregard for substantial risks to Plaintiffs Jane G. Doe, Jane J. Doe and Jane S. Doe by Jane T. Doe.

565. Defendant Twistars breached duties owed to Plaintiffs and were grossly negligent when they conducted themselves by actions described above, said acts having been committed with reckless disregard for Plaintiffs Jane G. Doe, Jane J. Doe and Jane S. Doe by Jane T. Doe's health, safety, Constitutional and/or statutory rights, and with a substantial lack of concern as to whether an injury would result.

566. As a direct and/or proximate result of Defendant Twistars' actions and/or inactions, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

B. COUNT TWENTY-FIVE

NEGLIGENCE
PLAINTIFFS JANE G. DOE; JANE J. DOE; JANE S. DOE BY JANE T. DOE
DEFENDANT TWISTARS AND DEFENDANT NASSAR

567. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

568. In or around 1997, a parent of a gymnast at Defendant Twistars' facility complained to Mr. Geddert, the owner and operator of Defendant Twistars, regarding Dr. Nassar's conduct alleging sexual abuse, assault, and molestation.

569. Despite being informed of Defendant Nassar's conduct, Mr. Geddert recommended Defendant Nassar as a physician to members and guests of Defendant Twistars.

570. Mr. Geddert owed Plaintiffs a duty of ordinary care to ensure their safety and freedom from sexual assault, abuse, and molestation.

571. In recommending Defendant Nassar with knowledge of Defendant Nassar's conduct, Mr. Geddert breached the duty of ordinary care to Plaintiffs and the public.

572. Defendant Twistars breached the duty of ordinary care to Plaintiffs and the public in failing to investigate the 1997 allegations which were made to Mr. Geddert.

573. Defendant Twistars breached the duty of ordinary care to Plaintiffs and the public by failing to report the 1997 allegations, which were made to Mr. Geddert, to law enforcement.

574. Plaintiffs Jane G. Doe, Jane J. Doe and Jane S. Doe by Jane T. Doe, as members of the Twistars USA, Inc. and in taking the recommendation of Mr. Geddert to seek medical treatment from Defendant Nassar had a reasonable expectation that Defendant Nassar would carry out medical treatment without subjecting them to sexual assault, abuse, or molestation.

575. By seeking medical treatment from Defendant Nassar, a special, confidential, and fiduciary

relationship between Plaintiffs and Defendant Nassar was created, resulting in Defendant Nassar owing Plaintiffs a duty to use ordinary care.

576. Defendant Nassar owed Plaintiffs a duty of ordinary care in carrying out medical treatment at Defendant Twistars' facilities.

577. Defendant Twistars' failure to adequately train and supervise Defendant Nassar while he was at their facility breached the duty of ordinary care.

578. Defendant Nassar's conduct at Defendant Twistars' facility, in sexually assaulting, abusing, and molesting Plaintiffs in the course of and under the guise of rendering medical "treatment" was a breach of the duty to use ordinary care.

579. As a direct and/or proximate result of Defendants' conduct, actions and/or inactions, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

C. COUNT TWENTY-SIX

EXPRESS/IMPLIED AGENCY
PLAINTIFFS JANE G. DOE; JANE J. DOE; AND JANE S. DOE BY JANE T. DOE AGAINST DEFENDANT TWISTARS

580. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

581. An agent is a person who is authorized by another to act on its behalf.

582. Defendant Twistars intentionally or negligently made representations that Defendant Nassar

was their employee, agent, and/or representative.

583. On the basis of those representations, Plaintiffs reasonably believed that Defendant Nassar was acting as an employee, agent, and/or representative of Defendant Twistars.

584. Plaintiffs Jane G. Doe, Jane J. Doe, and Jane S. Doe by Jane T. Doe were injured as a result of Defendant Nassar's sexual assault, abuse, and molestation as described above.

585. Plaintiffs were injured because they relied on Defendant Twistars to provide employees, agents, and/or representatives who would exercise reasonable skill or care.

586. As a proximate cause of Defendant Nassar's negligence carried out through his employment, agency, and or representation of Defendant Twistars Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

D. COUNT TWENTY-SEVEN

NEGLIGENT SUPERVISION
PLAINTIFFS JANE G. DOE; JANE J. DOE; AND JANE S. DOE BY JANE T. DOE AGAINST DEFENDANT TWISTARS

587. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

588. Defendant Twistars each had a duty to provide reasonable supervision of its employee, agent, and/or representative, Defendant Nassar, while he was in the course of his employment, agency, or representation of Defendant Twistars when he interacted with young female

athletes including Plaintiffs.

589. It was reasonably foreseeable given the known sexual abuse in youth sports and gymnastics in particular that Defendant Nassar who had prior allegations against him had or would sexually abuse children, including Plaintiffs Jane G. Doe, Jane J. Doe, and Jane S. Doe by Jane T. Doe, unless properly supervised.

590. Defendant Twistars by and through their employees, agents, managers, and/or assigns, knew or reasonably should have known of Defendant Nassar's conduct and/or that Defendant Nassar was an unfit employee, agent, and/or representative because of his sexual interest in children and young adults and due to the 1997 complaint made to Mr. Geddert of the nonconsensual sexual touching during "treatment."

591. Defendant Twistars breached its duty to provide reasonable supervision of Defendant Nassar, and permitted Defendant Nassar, who was in a position of trust and authority, to commit the acts against Plaintiffs Jane G. Doe, Jane J. Doe, and Jane S. Doe by Jane T. Doe.

592. The aforementioned sexual abuse occurred while Plaintiffs and Defendant Nassar were on the premises of Defendant Twistars, and while Defendant Nassar was acting in the course of his employment, agency, or representation of Defendant Twistars.

593. Defendant Twistars tolerated, authorized and/or permitted a custom, policy, practice or procedure of insufficient supervision and failed to adequately screen, counsel, or discipline such individuals, with the result that Defendant Nassar was allowed to violate the rights of persons such as Plaintiffs Jane G. Doe, Jane J. Doe, and Jane S. Doe by Jane T. Doe with impunity.

594. As a direct and/or proximate result of Defendant Twistars' negligent supervision, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to

suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

E. COUNT TWENTY-EIGHT

NEGLIGENT FAILURE TO WARN OR PROTECT PLAINTIFFS JANE G. DOE; JANE J. DOE; AND JANE S. DOE BY JANE T. DOE AGAINST DEFENDANT TWISTARS

595. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

596. Defendant Twistars knew or should have known that Defendant Nassar posed a risk of harm to Plaintiffs or those in Plaintiffs' situation.

597. As early as 1997, Defendant Twistars, by a complaint made to its owner/employee/agent/representative John Geddert, had direct and/or constructive knowledge as to the dangerous conduct of Defendant Nassar and failed to act reasonably and responsibly in response.

598. Defendant Twistars knew or should have known that Defendant Nassar committed sexual assault, abuse, and molestation and/or was continuing to engage in such conduct.

599. Defendant Twistars had a duty to warn or protect Plaintiffs Jane G. Doe, Jane J. Doe, and Jane S. Doe by Jane T. Doe and others in Plaintiffs' situation against the risk of injury by Defendant Nassar.

600. The duty to disclose this information arose by the special, trusting, confidential, and fiduciary relationship between Defendant Nassar, an agent/representative/employee of

Defendant Twistars and Plaintiffs Jane G. Doe, Jane J. Doe, and Jane S. Doe by Jane T. Doe.

601. Defendant Twistars breached said duty by failing to warn Plaintiffs Jane G. Doe, Jane J. Doe, and Jane S. Doe by Jane T. Doe and/or by failing to take reasonable steps to protect Plaintiffs Jane G. Doe, Jane J. Doe, and Jane S. Doe by Jane T. Doe from Defendant Nassar.

602. Defendant Twistars breached its duties to protect Plaintiffs Jane G. Doe, Jane J. Doe, and Jane S. Doe by Jane T. Doe by failing to detect and/or uncover evidence of sexual abuse and sexual assault, which was taking place on its premises and at its facility.

603. Defendant Twistars breached its duties to protect Plaintiffs Jane G. Doe, Jane J. Doe, and Jane S. Doe by Jane T. Doe by failing to investigate Defendant Nassar, adjudicate and suspend and/or ban Defendant Nassar from Twistars sanctioned events.

604. Defendant Twistars failed to adequately screen, counsel, and/or discipline Defendant Nassar for physical and/or mental conditions that might have rendered him unfit to discharge the duties and responsibilities of a physician with their organization, resulting in violations of Plaintiffs Jane G. Doe, Jane J. Doe, and Jane S. Doe by Jane T. Doe's rights.

605. Defendant Twistars willfully refused to notify, give adequate warning, and implement appropriate safeguards to protect Plaintiffs Jane G. Doe, Jane J. Doe, and Jane S. Doe by Jane T. Doe from Defendant Nassar's conduct.

606. As a direct and/or proximate result of Defendant Twistars' negligent failure to warn or protect, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue

to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

F. COUNT TWENTY-NINE

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
PLAINTIFFS JANE G. DOE; JANE J. DOE; AND JANE S. DOE BY JANE T. DOE
AGAINST DEFENDANT TWISTARS

607. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

608. Defendant Twistars allowed Defendant Nassar to be in a position where he could sexually assault, abuse, and molest children and young adults at its facility and other places.

609. A reasonable person would not expect Defendant Twistars to tolerate or permit their employee, agent, or representative to carry out sexual assault, abuse, or molestation.

610. Defendant Twistars held Defendant Nassar in high esteem and acclaim which in turn encouraged Plaintiffs and others to respect and trust Defendant Nassar, seek his services, and to not question his methods or motives.

611. Defendant Twistars protected Defendant Nassar in part to bolster and sustain his national and international reputation in the gymnastics community, and Twistars' reputation in the gymnastics community.

612. A reasonable person would not expect Defendant Twistars to be incapable of supervising Defendant Nassar and/or preventing Defendant Nassar from committing acts of sexual assault, abuse, and molestation on their premises and at their facility.

613. Defendant Twistars' conduct as described above was intentional and/or reckless.

614. As a result of Defendant Twistars' conduct, Plaintiffs suffered discomfort, bleeding, urinary

tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

G. COUNT THIRTY

FRAUD AND MISREPRESENTATION
PLAINTIFFS JANE G. DOE; JANE J. DOE; AND JANE S. DOE BY JANE T. DOE AGAINST DEFENDANT TWISTARS

615. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

616. From approximately 1996 to September 2016, Defendant Twistars represented to Plaintiffs Jane G. Doe, Jane J. Doe, Jane S. Doe by Jane T. Doe, and the public that Defendant Nassar was a competent, ethical, and safe physician.

617. By representing that Defendant Nassar was a team physician and athletic physician at Defendant MSU and a National Team Physician with Defendant USAG, Defendant Twistars represented to Plaintiffs Jane G. Doe, Jane J. Doe, Jane S. Doe by Jane T. Doe, and the public that Defendant Nassar was safe, trustworthy, of high moral and ethical repute, and that Jane G. Doe, Jane J. Doe, Jane S. Doe by Jane T. Doe, and the public need not worry about being harmed by Defendant Nassar.

618. The representations were false when they were made as Defendant Nassar had and was continuing to sexually assault, abuse, and molest Plaintiffs Jane G. Doe, Jane J. Doe, and Jane S. Doe by Jane T. Doe and an unknown number of individuals, at times at Defendant Twistars'

facility.

619. As early as 1997, Defendant Twistars knew their representations of Defendant Nassar were false as Defendant Twistars received a complaint of Defendant Nassar's conduct.

620. Between the time of the 1997 complaint and September 2016, Defendant Twistars continued to hold Defendant Nassar out as a competent and safe physician.

621. Plaintiffs Jane G. Doe, Jane J. Doe, and Jane S. Doe by Jane T. Doe relied on the assertions of Defendants Twistars and several Plaintiffs continued to seek treatment of Defendant Nassar in the wake of known concerns and dangers.

622. Plaintiffs Jane G. Doe, Jane J. Doe, and Jane S. Doe by Jane T. Doe were subjected to sexual assault, abuse, and molestation as a result of Defendant Twistars' fraudulent misrepresentations regarding Defendant Nassar.

623. As a direct and/or proximate result of Defendant Twistars' fraudulent misrepresentations, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life; were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life; have sustained and continue to sustain loss of earnings and earning capacity.

IX. CLAIMS AGAINST NASSAR

A. COUNT THIRTY-ONE

ASSAULT & BATTERY
ALL PLAINTIFFS AGAINST
DEFENDANT LAWRENCE NASSAR

624. Plaintiffs reallege and incorporate by reference the allegations contained in the previous

paragraphs.

625. The acts committed by Defendant Nassar against Plaintiffs described herein constitute assault and battery, actionable under the laws of Michigan.

626. Defendant Nassar committed nonconsensual sexual acts which resulted in harmful or offensive contact with the bodies of Plaintiffs.

627. Specifically, Defendant Nassar committed acts which caused injury to Plaintiffs by subjecting them to an imminent battery and/or intentional invasions of their rights to be free from offensive and harmful contact, and said conduct demonstrated that Defendant had a present ability to subject Plaintiffs to an immediate, intentional, offensive and harmful touching.

628. Defendant Nassar assaulted and battered Plaintiffs by nonconsensual and unwanted digital vaginal penetration, digital anal penetration, and touching some of Plaintiffs' breasts without notice or explanation of the "treatment."

629. Plaintiffs did not consent to the contact, which caused injury, damage, loss, and/or harm.

630. As a direct and/or proximate result of Defendant Nassar's assault and battery, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

B. COUNT THIRTY-TWO

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
ALL PLAINTIFFS AGAINST DEFENDANT LAWRENCE NASSAR

631. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

632. Defendant Nassar used his authority and position with Defendants MSU and USAG to sexually assault, abuse, and molest Plaintiffs, and an unknown number of other individuals, minors, and young adults.

633. Defendant Nassar in committing acts of sexual assault, abuse, and molestation as described above under the guise of medical "treatment" exhibited conduct that is extreme, outrageous and/or reckless in nature.

634. A reasonable person would not expect their physician to sexually assault, abuse, or molest them, and to do so under the guise of medical "treatment" without proper notice or explanation, and without giving the patient the opportunity to refuse "treatment" of that nature.

635. Defendant Nassar's conduct was intentional or reckless as he repeatedly sexually assaulted, abused, and molested Plaintiffs over several years, from approximately 1996 to 2016.

636. Defendant Nassar's conduct has caused and continues to cause Plaintiffs to suffer emotional and psychological distress.

637. As a direct and/or proximate result of Defendant Nassar's outrageous conduct Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life, were prevented and will continue to be prevented from performing

Plaintiffs' daily activities and obtaining the full enjoyment of life, and have sustained and continue to sustain loss of earnings and earning capacity.

X. DAMAGES - FOR ALL AFOREMENTIONED CAUSES OF ACTION

638. Plaintiffs reallege and incorporate by reference the allegations contained in the previous paragraphs.

639. As a direct and/or proximate result of Defendants' actions and/or inactions stated above, Plaintiffs suffered discomfort, bleeding, urinary tract infections, bacterial infections, and continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life; were prevented and will continue to be prevented from performing Plaintiffs' daily activities and obtaining the full enjoyment of life; have sustained and continue to sustain loss of earnings and earning capacity.

640. The conduct, actions and/or inactions of Defendants as alleged in the above stated counts and causes of action constitute violations of Plaintiffs' Constitutional and Federal rights as well as the common and/or statutory laws of the State of Michigan, and the United States District Court has jurisdiction to hear and adjudicate said claims.

641. In whole or in part, as a result of some or all of the above actions and/or inactions of Defendants, Plaintiffs have and continue to suffer irreparable harm as a result of the violations.

642. The amount in controversy for each Plaintiff exceeds the jurisdictional minimum of $75,000.00.

WHEREFORE, Plaintiffs request this Court and the finder of fact to enter a Judgment in Plaintiffs' favor against all named Defendants on all counts and claims as indicated above in an

amount consistent with the proofs of trial, and seeks against Defendants all appropriate damages arising out of law, equity, and fact for each or all of the above counts where applicable and hereby requests that the trier of fact, be it judge or jury, award Plaintiffs all applicable damages, including but not limited to compensatory, special, exemplary and/or punitive damages, in whatever amount the Plaintiffs are entitled, and all other relief arising out of law, equity, and fact, also including but not limited to:

a) Compensatory damages in an amount to be determined as fair and just under the circumstances, by the trier of fact including, but not limited to medical expenses, loss of earnings, mental anguish, anxiety, humiliation, and embarrassment, violation of Plaintiffs' Constitutional, Federal, and State rights, loss of social pleasure and enjoyment, and other damages to be proved;

b) Punitive and/or exemplary damages in an amount to be determined as reasonable or just by the trier of fact;

c) Reasonable attorney fees, interest, and costs; and,

d) Other declaratory, equitable, and/or injunctive relief, including, but not limited to implementation of institutional reform and measures of accountability to ensure the safety and protection of young athletes and other individuals, as appears to be reasonable and just.

Dated: January 10, 2017 By: /s/ Stephen R. Drew

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W.D. Michigan Admission Pending

JURY DEMAND

Plaintiffs, DREW, COOPER & ANDING, and MANLY, STEWART & FINALDI, hereby demand a trial by jury on all claims set forth above.

Dated: January 10, 2017 By: /s/ Stephen R. Drew

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W.D. Michigan Admission Pending

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Marie v. American Red Cross, 6th Cir.(Ohio), November 14, 2014

126 F.3d 112
United States Court of Appeals,
Second Circuit.

Bridget O'CONNOR, Plaintiff–Appellant,
v.
James DAVIS, Dr., Rockland Psychiatric Center, and State of New York, Defendants–Appellees.

No. 728 Docket 96–7769.
|
Argued Jan. 29, 1997.
|
Decided Sept. 19, 1997.

Synopsis
College student sued state and hospital, claiming that doctor subjected her to sexual harassment in violation of Title VII and Title IX, while she worked as volunteer intern. The United States District Court for the Southern District of New York, Charles L. Brieant, J., granted summary judgment in favor of hospital and state. Student appealed. The Court of Appeals, Walker, Circuit Judge, held that: (1) student was not employee under Title VII, and (2) hospital was not transformed into administrator of education program or activity under Title IX by permitting student to perform volunteer field work at its facility.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (9)

[1] Federal Courts Summary judgment

On appeal from grant of summary judgment, all evidence would be viewed in light most favorable to nonmoving party. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

1 Cases that cite this headnote

[2] Labor and Employment Nature, Creation, and Existence of Employment Relation

When Congress uses term "employee" without defining it with precision, courts should presume that Congress had in mind conventional master-servant relationship as understood by common-law agency doctrine.

34 Cases that cite this headnote

[3] Labor and Employment Independent Contractors and Their Employees

Common feature shared by both employee and independent contractor is that they are hired parties, and thus, prerequisite to considering whether individual is one or the other under common-law agency principles is that individual have been hired in the first instance.

46 Cases that cite this headnote

[4] Labor and Employment Labor and Employment

Courts turn to common-law principles to analyze character of economic relationship only in situations that plausibly approximate employment relationship.

22 Cases that cite this headnote

[5] Labor and Employment Nature, Creation, and Existence of Employment Relation

If no financial benefit is obtained by purported employee from employer, no plausible employment relationship of any sort can be said to exist; although compensation by putative employer to putative employee in exchange for his services is not sufficient condition, it is essential condition to existence of employer-employee relationship.

65 Cases that cite this headnote

[6] Civil Rights Nature and existence of employment relationship

College student was not employee, under Title VII, of psychiatric hospital where she spent

volunteer internship as part of her studies in social work; although college paid student, with federal work study funding, for hours spent at hospital, hospital provided student with no direct or indirect economic remuneration or promise thereof. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e(f).

62 Cases that cite this headnote

[7] **Civil Rights** Sex Discrimination

State-run psychiatric hospital that received federal money was not transformed into administrator of education program or activity under Title IX, by permitting student-intern from college with which hospital had no affiliation to perform volunteer field work at its facility; hospital accepted no tuition, had no teachers or evaluation process, required no regular hours or course of study for volunteer workers, did not share staff with college, and did not circulate funds with college. Education Amendments of 1972, § 908, as amended, 20 U.S.C.A. § 1687; 34 C.F.R. § 106.2.

34 Cases that cite this headnote

[8] **Statutes** Superfluousness

Court is bound, under ordinary rules of statutory construction, to give content to entire phrase selected by Congress.

[9] **Civil Rights** Sex Discrimination

To implicate Title IX in the first instance, entity must have features such that one could reasonably consider its mission to be, at least in part, educational. Education Amendments of 1972, § 901(a), as amended, 20 U.S.C.A. § 1681(a).

22 Cases that cite this headnote

Attorneys and Law Firms

***113** Craig T. Dickinson, White Plains, NY (Jonathan Lovett, Lovett & Gould, White Plains, NY, on the brief), for Plaintiff–Appellant.

Janine M. Spinnato, Assistant Attorney General, New York City (Dennis C. Vacco, Attorney General, New York City, Thomas D. Hughes, Assistant Attorney General, New York City, on the brief), for Defendants–Appellees.

Before: WALKER, PARKER, and HEANEY *, Circuit Judges.

Opinion

WALKER, Circuit Judge:

Plaintiff-appellant Bridget O'Connor ("O'Connor") appeals from the May 23, 1996, judgment of the United States District Court for the Southern District of New York (Brieant, *J.*) granting the summary judgment motion of defendants-appellees Rockland Psychiatric Center ("Rockland") and the State of New York and dismissing O'Connor's sexual harassment claims, which were brought pursuant to both Title VII of the Civil Rights Act of 1964, § 706(e), as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), and Title IX of Education Amendments of 1972, § 901(a), as amended, 20 U.S.C. §§ 1681, *et seq.* ("Title IX"). For the following reasons, we affirm.

BACKGROUND

While enrolled as a student at Marymount College ("Marymount"), a private Catholic college located in Tarrytown, New York, Bridget O'Connor majored in social work. As a component of her major, O'Connor was required during her senior year to perform 200 hours of field work at one of several Marymount-approved organizations which, in the past, had included schools, daycare centers, community organizations, correctional facilities, and social service agencies. Marymount arranged for O'Connor to be placed for her senior-year internship with Rockland, a hospital for the mentally disabled operated by New York State. Because this internship was considered to be "work study" for financial aid purposes, O'Connor received, through Marymount, federal work study funds for the time she spent performing her volunteer work with Rockland.

O'Connor's internship with Rockland began on September 20, 1994. The hours O'Connor worked were flexible, although she generally chose to work on Mondays and Wednesdays from approximately 8:00 a.m. to 4:30 p.m. because that schedule did not conflict with her regular Marymount classes. O'Connor regularly attended morning staff meetings with Rockland employees and other volunteers, met with the patients assigned to her both one-on-one and in groups. She then documented the results of these patient sessions in "process recordings" which were given first to her Rockland supervisor, Lisa Punzone ("Punzone"), and then to faculty at Marymount.

Dr. James Davis ("Davis") worked as a licensed psychiatrist at Rockland. Approximately two days after O'Connor began her internship, Davis referred to O'Connor, in her presence, as "Miss Sexual Harassment"—a term Davis later explained was intended, as a compliment, to convey the idea that O'Connor was physically attractive and, as such, was likely to be the object of sexual harassment. O'Connor promptly complained about Davis's comment to Punzone, who explained that Davis made similar comments to her, and that O'Connor should try her best to ignore him.

Not only did Davis continue to address O'Connor as "Miss Sexual Harassment," he added to his repertoire of inappropriate sexual remarks. For instance, on one Monday morning, Davis told O'Connor that she ***114** looked tired, and that she and her boyfriend must have had "a good time" the night before. On another occasion, Davis pointed to a picture in a newspaper of a woman dressed only in underwear and announced that O'Connor was the woman photographed. He also suggested to O'Connor (and other women present) that they should participate in an "orgy." Finally, on yet another occasion, Davis told O'Connor to remove her clothing in preparation for a meeting with him; he explained, "Don't you always take your clothes off before you go in the doctor's office?"

O'Connor was apparently not Davis's only target; he also commented regularly on the physical appearance of a number of women employed at Rockland, and directed sexual jokes and sexually suggestive noises at them—particularly, as Davis put it, on occasions when he thought the women "looked very well that day." Davis also made "jokes" about female patients—suggesting in one instance that a women patient would benefit from sterilization and, on another occasion, when considering a woman patient who was an incest victim, stating: "the family that plays together stays together."

Although O'Connor reported a good deal of this conduct to Punzone, Punzone did not report any of O'Connor's complaints to James Wagner, her own supervisor, until January of 1995. And when Wagner learned of O'Connor's encounters with Davis, he, like Punzone, did nothing to remedy the situation.

Also in January of 1995, O'Connor complained to Virginia Kaiser, Marymount's social work field instructor, who in turn brought Davis's conduct to the attention of Madeline Connolly, Rockland's director of social work. Connolly then notified Wilbur T. Aldridge, Rockland's affirmative action administrator, who thereafter investigated O'Connor's complaint.

Finally, at some point in January of 1995, O'Connor left Rockland; however, Marymount arranged for her to complete her internship at another facility.

In March of 1995, O'Connor filed the instant action against Marymount, Rockland, the State of New York, and various Marymount and Rockland employees, alleging, *inter alia,* sexual harassment in violation of Title VII, 42 U.S.C. § 2000e, *et seq.,* and Title IX, 20 U.S.C. §§ 1681, *et seq.* The action was eventually discontinued against Marymount, Punzone, Wagner, Connolly, and Davis himself. The remaining defendants (Rockland and New York State) moved for summary judgment on several grounds. First, they argued that the plaintiff's Title VII claim should be dismissed because O'Connor was not an "employee" of Rockland within the meaning of Title VII. Second, the defendants argued that the Title IX claim should be dismissed because Rockland was not an "educational institution" as set forth in Title IX. Finally, the defendants argued that O'Connor failed to establish a prima facie case of sexual harassment.

In an opinion and order dated May 20, 1996, the district court granted the defendants' summary judgment motion, agreeing that O'Connor was not an "employee" under Title VII and that Rockland was not an "educational institution" under Title IX. [1] Because of this disposition, the district court did not reach the defendants' assertion that O'Connor failed to establish a prima facie case of sexual harassment.

DISCUSSION

[1] Summary judgment may not be granted unless the court determines that there are no genuine issues of material fact in dispute and that the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48, 106 S.Ct. 2505, 2509–10, 91 L.Ed.2d 202 (1986). Because summary judgment was granted against O'Connor, we consider all of the evidence in the light most favorable to her. *See* *Kracunas v. Iona College,* 119 F.3d 80, 82–83 (2d Cir.1997).

***115** I. *Title VII*

O'Connor's first argument on appeal is that the district court improperly concluded that she was not a Rockland employee within the meaning of Title VII. She argues that although she worked at Rockland as an unpaid intern, she nevertheless satisfies the common-law agency definition of "employee." We disagree.

[2] The definition of the term "employee" provided in Title VII is circular: the Act states only that an "employee" is an "individual employed by an employer." 42 U.S.C. § 2000e(f); *see also* *EEOC v. Johnson & Higgins,* 91 F.3d 1529, 1538 (2d Cir.1996). However, it is well established that when Congress uses the term "employee" without defining it with precision, courts should presume that Congress had in mind "the conventional master-servant relationship as understood by the common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 322–23, 112 S.Ct. 1344, 1348, 117 L.Ed.2d 581 (1992) (quoting *Community for Creative Non–Violence v. Reid,* 490 U.S. 730, 739–40, 109 S.Ct. 2166, 2172–73, 104 L.Ed.2d 811 (1989)); *see also* *Walters v. Metropolitan Educ. Enters., Inc.,* 519 U.S. 202, ——, 117 S.Ct. 660, 666, 136 L.Ed.2d 644 (1997); *Frankel v. Bally, Inc.,* 987 F.2d 86, 90 (2d Cir.1993).

In most cases where an attempt has been made to discern the contours of the "conventional master-servant relationship," it has been because a court has been asked to consider whether, under a particular statute, a party is an employee or an independent contractor. *See, e.g.,* *Reid,* 490 U.S. at 739–40, 109 S.Ct. at 2172–73 (considering the Copyright Act of 1976, 17 U.S.C. § 101); *Darden,* 503 U.S. 318, 322–23, 112 S.Ct. 1344, 1348, 117 L.Ed.2d 581 (1992) (considering ERISA, 29 U.S.C. § 1132(a)); *Alford v. United States,* 116 F.3d 334, 337–38 (8th Cir.1997) (considering 26 U.S.C. § 62(a)(1) of the Internal Revenue Code); *Cilecek v. Inova Health Sys. Servs.,* 115 F.3d 256, 260 (4th Cir.1997) (considering Title VII); *Sharkey v. Ultramar Energy Ltd.,* 70 F.3d 226, 232 (2d Cir.1995) (considering ERISA). In this context, the Supreme Court has outlined the following factors, culled from the Restatement of Agency, *see* *Reid,* 490 U.S. at 752 n. 31, 109 S.Ct. at 2179 n. 31, and from caselaw, as relevant to the inquiry:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Reid, 490 U.S. at 751–52, 109 S.Ct. at 2178–79 (footnotes omitted).

[3] Both parties on appeal (and the district court below) addressed themselves to the question of whether or not O'Connor was an employee within this framework. However, we think that this analysis is flawed because it ignores

the antecedent question of whether O'Connor was hired by Rockland for any purpose. As the Supreme Court suggests, the common feature shared by both the employee and the independent contractor is that they are "hired part [ies]," *id.*, and thus, a prerequisite to considering whether an individual is one or the other under common-law agency principles is that the individual have been hired in the first instance. That is, only where a "hire" has occurred should the common-law agency analysis be undertaken.

[4] **[5]** Other courts have agreed with this view. As the Eighth Circuit has explained, courts turn to common-law principles to analyze the character of an economic relationship "only in situations that plausibly approximate an employment relationship." *Graves v. Women's Prof'l Rodeo Assoc.,* 907 F.2d 71, 74 (8th Cir.1990). Where no financial benefit ***116** is obtained by the purported employee from the employer, no "plausible" employment relationship of any sort can be said to exist because although "compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition, ... it is an essential condition to the existence of an employer-employee relationship." *Graves,* 907 F.2d at 73. *See also* *Neff v. Civil Air Patrol,* 916 F.Supp. 710, 712–13 (S.D.Ohio, 1996); *Smith v. Berks Community Television,* 657 F.Supp. 794, 796 (E.D.Pa.1987); *cf.* *Haavistola v. Community Fire Co.,* 6 F.3d 211, 219 (4th Cir.1993).

This "essential condition" of remuneration has been recognized in this Circuit as well. In *Tadros v. Coleman,* 898 F.2d 10, 11 (2d Cir.1990), we explicitly upheld the dismissal of the Title VII claims of a plaintiff who worked as a volunteer on the faculty of Cornell Medical College on the ground that the plaintiff was not an employee under Title VII. As a volunteer, the plaintiff received no salary, health benefits, retirement benefits, and also had no regular hours assigned to him by the hospital. In concluding that the plaintiff was not an employee, the district court in *Tadros* held that "[a] Title VII plaintiff is only an 'employee' if the defendant both pays him and controls his work." 717 F.Supp. 996, 1004 (S.D.N.Y.1989).

[6] We believe that the preliminary question of remuneration is dispositive in this case. It is uncontested that O'Connor received from Rockland no salary or other wages, and no employee benefits such as health insurance, vacation, or sick pay, nor was she promised any such compensation.[2] This case thus differs from *Haavistola v. Community Fire Co.,* in which the Fourth Circuit considered whether a volunteer member of a fire company was an employee for Title VII purposes where "[o]n the one hand, [plaintiff] did not receive direct compensation as a member of the Fire Company, but, on the other hand, she did not affiliate with the company without reward entirely." 6 F.3d 211, 221 (4th Cir.1993). The court then noted that the plaintiff received, through her volunteer position, a state-funded disability pension, survivors' benefits for dependents, scholarships for dependents upon death or disability, group life insurance, and several other benefits. *See id.* The court concluded that the district court granted summary judgment improvidently, given that a factfinder should determine whether "the benefits represent indirect but significant remuneration ... or inconsequential incidents of an otherwise gratuitous relationship." *Id.* at 222.

Because the absence of either direct or indirect economic remuneration or the promise thereof is undisputed in this case, we agree with the district court that O'Connor was not a Rockland employee within the meaning of Title VII and thus that her discrimination claim under that statute must fail.

II. *Title IX*

[7] O'Connor's second argument is that the district court erred in dismissing her Title IX claim in the belief that Title IX did not apply to Rockland because Rockland is not an "education program or activity." O'Connor urges that because Rockland both receives federal financial assistance either through the state, its patients, or its employees, and also operates "vocational training through an organized educational program," Appellant's Brief at 30, it is subject to Title IX's prohibition against sex discrimination—proscribed conduct that includes sexual harassment. *See* *Franklin v. Gwinnett County Pub. Schs.,* 503 U.S. 60, 75, 112 S.Ct. 1028, 1037–38, 117 L.Ed.2d 208 (1992); *Kracunas,* 119 F.3d at 88–89. We disagree.

Title IX provides in pertinent part 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.

20 U.S.C. § 1681(a). Title IX has been construed to prohibit gender discrimination ***117** against students and employees alike in educational institutions that receive federal funding. *See Murray v. New York Univ. College of Dentistry,* 57 F.3d 243, 248 (2d Cir.1995) (citing *North Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 520–34, 102 S.Ct. 1912, 1917–25, 72 L.Ed.2d 299 (1982)).

At issue in the present case is whether an entity such as Rockland that (1) is a state-run clinic that receives federal money,[3] and (2) permits student-interns from a college with which it has no affiliation to perform volunteer field work at its facility, is subject to Title IX on the ground that it operates an "education program or activity."

In *Grove City College v. Bell,* 465 U.S. 555, 571–75, 104 S.Ct. 1211, 1220–22, 79 L.Ed.2d 516 (1984) the Supreme Court considered the meaning of Title IX's phrase "education program or activity" and defined it narrowly, holding that by referring to particular activities or programs, Congress intended that Title IX apply only to the particular program receiving financial assistance. Thus, in *Grove City,* the Court found that the receipt by students of federal grants did not trigger institution-wide Title IX coverage, but only coverage of the school's financial aid program. *Id.* at 573–74, 104 S.Ct. at 1221–22.

In response to the Court's interpretation of Title IX, as well as out of concern that the *Grove City* definition of "program or activity" would be applied to similar language contained in § 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title VI of the Civil Rights Act of 1964, Congress passed the Civil Rights Restoration Act of 1987, Pub.L. No. 100–259, Sec. 3(a), § 908, 102 Stat. 28, 28–29 (1988) (codified at 20 U.S.C. § 1687) ("the 1988 Amendment"), which amended each of the affected statutes, including Title IX, by adding a section broadly redefining the term "program or activity." *See* S.Rep. No. 100–64, at 4 (1988) *reprinted in* 1988 U.S.C.C.A.N. 3, 6; *see also Cohen v. Brown Univ.,* 991 F.2d 888, 894 (1st Cir.1993). The amendment to Title IX provides in relevant part:

> For the purposes of this chapter, the term "program or activity" and "program" mean all of the operations of—
>
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency ... to which the assistance [to a State or local government] is extended;
>
> (2)(A) a college, university, postsecondary institution, or a public system of higher education; or
>
> (B) a local educational agency ..., system of vocational education, or other school system....
>
> any part of which is extended Federal financial assistance.

20 U.S.C. § 1687. Following the 1988 Amendment, courts have consistently interpreted Title IX to mean that if one arm of a university or state agency receives federal funds, the entire entity is subject to Title IX's proscription against sex discrimination. *See Horner v. Kentucky High Sch. Athletic Ass'n,* 43 F.3d 265, 271 (6th Cir.1994); *Cohen,* 991 F.2d at 894.

[8] **[9]** However, by modifying the phrase "program or activity," Congress left the modifier "education" intact, and we are bound under ordinary rules of statutory construction to give content to the entire phrase selected by Congress. *See Connecticut Dep't of Income Maintenance v. Heckler,* 471 U.S. 524, 530 n. 15, 105 S.Ct. 2210, 2213 n. 15, 85 L.Ed.2d 577 (1985). In so doing, we think it evident that in order to implicate Title IX in the first instance, an entity must have features such that one could reasonably consider its mission to be, at least in part, educational. That Congress intended this interpretation can be discerned, if vaguely, in the following ***118** example of the effect of the new statute, contained in the Senate Report accompanying the 1988 Amendment:

> If a private hospital corporation is extended federal assistance for its emergency rooms, the pediatrics department, admissions, discharge offices, etc., are covered under Title VI, section 504, and the Age Discrimination Act. Since Title IX

> is limited to education programs or activities, it would only apply to the students and employees of educational programs operated by the hospital, if any.

S.Rep. No. 100–64, at 18 (1988) *reprinted in* 1988 U.S.C.C.A.N. 3, 20. While expanding the reach of Title IX to include all departments or branches of an educational institution or program that receives federal funding, the foregoing suggests to us that the 1988 Amendment did not purport to alter the preliminary requirement that the entity funded operate an "education program."

Although the term "education" is not defined by the regulations governing Title IX and has not been construed by this court, O'Connor argues that because Rockland provides its volunteers with some modicum of on-the-job training, Rockland therefore provides vocational training, and, on that basis, may be considered to operate an organized educational program. We decline, however, to convert Rockland's willingness to accept volunteers into conduct analogous to administering an "education program" as contemplated by Title IX.

Preliminarily, in light of O'Connor's contention that Rockland's internship program is analogous to vocational training, it is instructive to look to 34 C.F.R. § 106.2, which defines for Title IX purposes the term "institution of vocational education" as:

> a school or institution (except an institution of professional or undergraduate higher education) which has as its *primary purpose* preparation of students to pursue a technical, skilled, or semiskilled occupation or trade ..., whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

24 C.F.R. § 106.2(n) (emphasis supplied). Rockland plainly does not satisfy this definition, as its "primary purpose" is in no sense to educate: it accepts no tuition, has no teachers, has no evaluation process, and requires no regular hours or course of study for its volunteer workers.

Not only is Rockland's internship program not classifiable as a vocational program, Rockland also cannot be said more generally to operate an "education program" because the institution maintains none of the characteristics associated with being an educator. The environment at Rockland is not, for example, analogous to a teaching hospital's "mixed employment-training context," *see* *Lipsett v. University of Puerto Rico,* 864 F.2d 881, 897 (1st Cir.1988); *Henschke v. New York Hosp.-Cornell Med. Ctr.,* 821 F.Supp. 166 (S.D.N.Y.1993). Nor is Rockland's acceptance of volunteers comparable to running an educational or vocational program at a state correctional facility, *see, e.g.,* *Jeldness v. Pearce,* 30 F.3d 1220, (9th Cir.1994); *Women Prisoners of the Dist. of Columbia Dep't of Corrections v. District of Columbia,* 899 F.Supp. 659, 668–69 (D.D.C.1995), as such programs typically provide instructors, evaluations, and offer a particular course of training.

Finally, the fact that Marymount operates an "education program" may not be imputed to Rockland simply because O'Connor was a student at the former while she performed volunteer work with the latter. Factors that could lead to a different conclusion simply are not present here: the two entities have no institutional affiliation; there is no written agreement binding the two entities in any way; no staff are shared; no funds are circulated between them; and, indeed, Marymount students had previously volunteered at Rockland on only a few occasions. The only hint of a connection between Marymount and Rockland lies in the fact that (1) Marymount contacted Rockland for the purpose of placing O'Connor in an internship, and (2) Marymount appears to base its evaluation of its students' performance during their internships in part on an evaluation prepared by the person who supervised the student on-site—which, in O'Connor's case, would have been Lisa Punzone of Rockland. Such connections are insufficient to establish Rockland ***119** as an agent or arm of Marymount for Title IX purposes. Rather, we think it clear that Rockland is a state-funded psychiatric hospital, with no affiliation to any educational institution whatsoever, that allows volunteers from a nearby college to perform (with minimal supervision) volunteer work at its facility. Rockland thus does not conduct an "education program or activity," and O'Connor's Title IX claim was properly dismissed.

CONCLUSION

By allowing an intern to perform the fieldwork required of her by the wholly unaffiliated college she attends, Rockland is not transformed into an employer under Title VII or into an administrator of an education program or activity under Title IX. We conclude by saying only that we are not unsympathetic to O'Connor's situation. We recognize, for example, that from her perspective, her success at Marymount was dependent to some degree on successfully completing her internship with Rockland, and that her dependency on Rockland made her vulnerable to continued harassment much as an employee dependent on a regular wage can be vulnerable to ongoing misconduct. In a similar vein, we recognize that O'Connor was not in quite the same position to simply walk away from the alleged harassment as are many other volunteers. However, it is for Congress, if it should choose to do so, and not this court, to provide a remedy under either Title VII or Title IX for plaintiffs in O'Connor's position. We therefore affirm the judgment of the district court.

All Citations

126 F.3d 112, 74 Fair Empl.Prac.Cas. (BNA) 1561, 121 Ed. Law Rep. 517

Footnotes

* The Honorable Gerald W. Heaney of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

1 In a ruling not challenged on appeal, the district court also found that the plaintiff had abandoned the claims she brought pursuant to 42 U.S.C. § 1983.

2 We reject O'Connor's claim that she was compensated to the extent that she received, through Marymount, federal work study funding for the hours of volunteer work performed at Rockland. Plainly, it was Marymount —not Rockland—that made these payments to O'Connor.

3 We note that O'Connor's complaint contains no allegation that Rockland receives any federal funding. Instead, O'Connor refers to federal funding only in her description of Marymount, a party since dropped from the case. However, because O'Connor's complaint does allege that Rockland is an agency of New York State, we will construe her complaint broadly to allege that, as a state health-care agency, Rockland receives federal money in connection with medical services provided—an inference we think equitable given that Rockland does not contest on appeal the question of federal funding.

Sexual Misconduct Concerns Involving Patient Care at Academic Medical Centers, Healthcare-Related Schools, Student Health Centers, and Athletic Training Services

May 19, 2022

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May 19, 2022

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Webinar

Stuck at a Crossroads:

Sexual Misconduct Concerns Involving Patient Care at Academic Medical Centers, Healthcare-Related Schools, Student Health Centers, and Athletic Training Services

Sonya Sanchez (she/her), Principal Counsel, University of California

Catherine Spear (she/her), Vice President, USC Office for Equity, Equal Opportunity and Title IX

Farnaz Thompson (she/her), Partner, McGuireWoods LLP

2020 Title IX Regulations

"Congress did not exempt academic medical centers that receive Federal financial assistance from Title IX."

85 Fed. Reg. 30,026, 30,446 (May 19, 2020).

2020 Title IX Regulations

Title IX applies to academic medical centers

- part of the postsecondary institution,
- affiliated with the postsecondary institution, or
- "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the context of the harassment and the respondent, 34 C.F.R. 106.44(a).

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2020 Title IX Regulations

Supportive Measures

Informal resolution,
Optional Live Hearing with Cross-Examination, or
Submission of Written Questions

Investigations, Experts, and Evidence

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FERPA CONSIDERATIONS

The term "education record" does not include --

records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice. 20 U.S.C. § 1232g(a)(4)(B)(iv).

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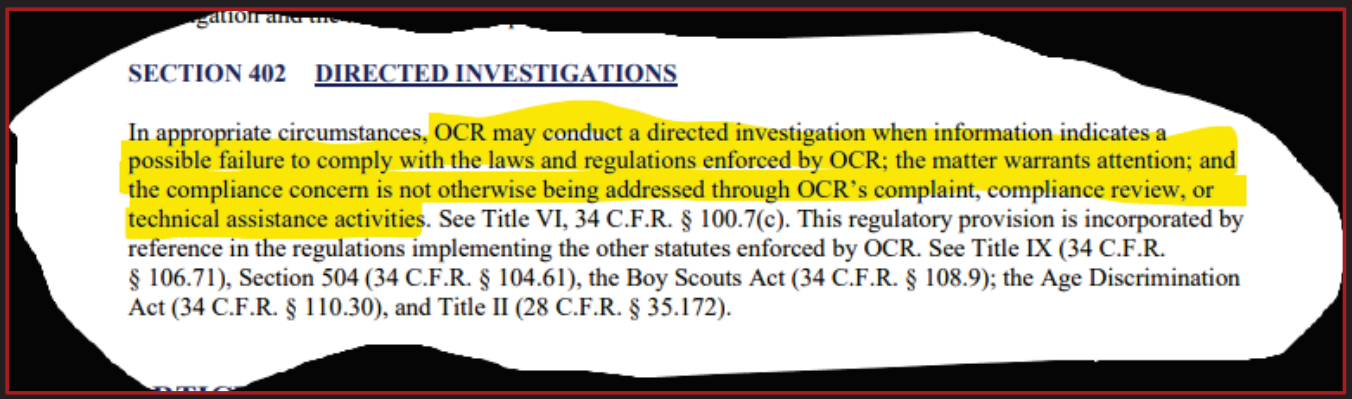
Directed Investigations



SECTION 402 DIRECTED INVESTIGATIONS

In appropriate circumstances, OCR may conduct a directed investigation when information indicates a possible failure to comply with the laws and regulations enforced by OCR; the matter warrants attention; and the compliance concern is not otherwise being addressed through OCR's complaint, compliance review, or technical assistance activities. See Title VI, 34 C.F.R. § 100.7(c). This regulatory provision is incorporated by reference in the regulations implementing the other statutes enforced by OCR. See Title IX (34 C.F.R. § 106.71), Section 504 (34 C.F.R. § 104.61), the Boy Scouts Act (34 C.F.R. § 108.9); the Age Discrimination Act (34 C.F.R. § 110.30), and Title II (28 C.F.R. § 35.172).

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Section 302 Resolution

- *a resolution letter may be better than a letter of findings*

SECTION 302 RESOLUTION AGREEMENT REACHED DURING AN INVESTIGATION

Allegations under investigation may be resolved at any time when, prior to the point when OCR issues a draft letter of findings under CPM Section 303(b), the recipient expresses an interest in resolving the allegations ***and*** OCR determines that it is appropriate to resolve them because OCR's investigation has identified concerns that can be addressed through a resolution agreement. The provisions of the resolution agreement must be tied to the allegations, and the evidence obtained during the investigation and will be consistent with applicable regulations.

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Key Takeways: Michigan State University Resolution Agreement (ED-OCR)

- **STRUCTURE**
  - Independent authority of Title IX office
  - But also, direct reporting line to MSU President to ensure authority "free from undue influence or pressure"
  - Monitoring by outside consultant: three academic years
- **NOTICE**
  - Ensure physical posting of Notice of Non-Discrimination and Anti-Harassment Statement where "Student Affairs and Athletics" regularly post notices
  - Community-wide (students, employees, and youth program participants) email with Notice and Resolution Agreement
  - End-of-semester reports to President + Board of Trustees re: all open and recently resolved Title IX investigations involving employees (report + determination)

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More MSU Takeways

- **INDEPENDENT EXPERTS**
  - Ensure conflict of interest policy applies to medical and other scientific experts
  - Equal opportunity for parties to provide expert witnesses
  - Identify as experts in reports and assure no conflict of interest
- **PERSONNEL FILES**
  - Note all final Title IX reports/determinations in respondent's file
  - Notation shall "provide a summary of the nature of the allegations in sufficient detail for a reasonable reviewer to identify potential patterns of behavior," including any violation finding + sanction
  - Identify consequence for employee's failure to comply with documentation requirements violation findings/sanctions imposed

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More MSU Takeways

- **EMPLOYEE SANCTIONS**
  - Review actions of all current/former employees who had notice or were reported to have received notice of complaints/concerns of sex discrimination by identified employees
  - Assess whether failed to adequately respond
  - If so, identify what additional responsive actions are required, including disciplinary proceedings, revocation of tenure, revocation of honorary and other titles, demotion, etc.
- **CLIMATE AND TRAINING**
  - Assess impact of conduct of identified employees on the equal access of students/employees to MSU education programs and activities
  - Revise training to ensure student athletes can identify sexual harassment and assault covered by Title IX and "that occurs in the context of medical treatment, which may be more difficult to identify"
  - Comprehensive Title IX training for Board of Trustees and President, select staff from Title IX Office and OGC, and other select administrators

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Key MSU Takeway: Youth Programs

- **"YOUTH PROGRAM"**
  - "Any class, camp, program, or other learning activity that includes participation by minors
- **NOTICE**
  - Notify youth program participants of Title IX grievance procedure and its applicability to youth programs and youth program participants and all forms of sex discrimination—as well as how to file a report
  - Ensure notice is "easily understood, easily located and widely distributed"
  - Include name, title, and contact information for the University's Title IX Coordinator, with explanation of role and duties

Goal: ensure the university exercises "adequate Title IX oversight over its youth programs"

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Final MSU Takeway: Individual Remedies

- **NOTICE**
  - Notice on website homepage for 180 days inviting current/former students/employees who were subjected to sexual harassment/assault by Employee X to contact the Title IX Office
- **RESPONSE**
  - Take reasonable steps to verify the need for remedial action
  - Range of possible measures to restore access: counseling services, grade adjustments, tuition reimbursement, the opportunity to retake classes without penalty or additional costs, academic assistance, performance evaluation adjustments, or other services to affected students/employees
  - Not required to duplicate any accommodation previously provided or where a person has signed a release or waiver of liability

Goal: "fully assess and remedy" any sex discrimination caused by identified employees that denied a student the ability to participate in or benefit from university programs or that unreasonably interfered with an individual's work performance or opportunities

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Key Takeways: University of Southern California Resolution Agreement (ED-OCR)

- **STRUCTURE**
  - Independent authority ("free from undue influence and pressure") of Title IX office
  - No reporting line to OGC
  - Oversight of all Title IX investigations
  - Deputy Title IX Coordinator for Keck Medical Enterprise + Healthcare Title IX Investigators, *with* office visible/accessible to main Student Health Center
- **NOTICE**
  - Prominent posting of Notice of Non-Discrimination, including Keck School of Medicine webpage, the Keck Medical Enterprises internal web page, and in visible locations throughout the main and health science campuses, including Student Health Center—distributed to all employees and students at the beginning of each academic year
  - Notify community (students, faculty, staff, and alumni) of OCR findings and agreement *See* https://change.usc.edu/transformation/ocr-2020/

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More USC Takeways

- **PERSONNEL FILES**
  - Performance evaluation to include: information about employee's compliance with Title IX policies; any reports or complaints about compliance with the policy; an attestation that the employee identified, reported, and/or took steps to prevent sex discrimination; that employee complied with training requirements
  - Ensure all supervisors, including faculty supervisors, "promptly forwarded all complaints and reports of possible sex discrimination to the Title IX Office"
  - Ensure all final Title IX findings and sanctions are included in the employee's personnel file and Title IX data system
- **CENTRALIZED REPORTING DIRECTIVE**
  - Notify all employees who are Designated/Responsible Employees to report all Title IX reports (defined as sexual harassment/misconduct) to the Title IX Office

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More USC Takeways

- **DATABASE SYSTEM**
  - Maintain a data system that has the capacity to search for prior or concurrent reports involving the same complainants/respondents
  - Upon receipt of a report, run a query for any prior reports, as well as contact the employee's supervisor, manager, or head of department, school, or unit to identify any prior reports; as needed, gather performance evaluations, personnel records, etc.
  - Assess and document in Title IX Office records
- **EMPLOYEE REVIEW**
  - Conduct Title IX self-assessment of current and former employees with supervisory responsibilities to ensure took action with respect to reports of sex discrimination about Employee 1 consistent with their role and authority

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Key USC Takeway: Training

- **TRAINING: STUDENT HEALTH CARE EMPLOYEES**
  - For employees whose primary job responsibilities are in the University's Student Health Centers, the training will be annual and conducted in-person
  - Minimum of two of hours per year
  - Specific to "potential Title IX issues that can arise in the context of medical provider-patient relationship, the role and responsibility of the medical chaperones, and identification of those qualified and charged with determining medical standard of care when such issues arise in the context of a possible Title IX matter"
  - For supervisory employees, will also cover duty to promptly report to Title IX Office and consequences for failure to do so

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Final USC Takeway: Repair

- **FOCUS ON UNIVERSITY AND STUDENT HEALTH CARE CLIMATE**
  - Creation of an independent Women's Health Advocate position
  - Additional patient survey questions
  - Creation and dissemination of Sensitive Health Exams booklet
  - Hiring new physicians to ensure physician preference based on gender
  - Enhanced background screening and training
  - Expanded information in consent for treatment forms
  - Adoption of a sensitive exam chaperone policy
  - Inclusion of student representation on Trauma Informed Care Committee and as Community Health Organizers
  - Provision of an online opportunity for anonymous feedback, questions, concerns, complaints

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HHS-OCR Resolution Agreement with MSU

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE FOR CIVIL RIGHTS

- Revise non-discrimination notices and sexual misconduct policies
- Improve Title IX and Section 1557 investigation and resolution processes
- Institute new chaperone policy
- Maximize patient privacy during sensitive exams

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HHS-OCR Regulatory Landscape

- Title IX and 45 C.F.R. Part 86
  - HHS Guidance *Effective Practices for Preventing Sexual Harassment* (issued September 2020)

- Patient Protection and Affordable Care Act section 1557
  - 45 C.F.R. Part 92
  - Section 1557 of the ACA extends the protections of Title IX and other civil rights statutes to, *inter alia*, "any health program or activity, any part of which is receiving Federal financial assistance" from HHS.

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ED-OCR and HHS-OCR: Practical Considerations

- ❑ Cooperation and Communication
  - ❑ Timelines
  - ❑ Rolling Productions
- ❑ Clarifying Scope
  - ❑ Time Frame
  - ❑ Type of Conduct
  - ❑ Identity of Parties
  - ❑ Transparency
- ❑ Data Requests
  - ❑ Narrative Responses
  - ❑ Spreadsheets
- ❑ Witness Interviews
- ❑ Resolution
  - ❑ Letters of Finding
  - ❑ Resolution Agreements
- ❑ Monitoring

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PRIMARY INSTITUTIONAL REQUIREMENTS

COLLECT, CLASSIFY & COUNT CRIME

Clery act crimes in Clery reportable geography

- Publicize in Annual Security Report
- Submit to Dept of ED annually
- Procedure for collecting crimes

ISSUE CAMPUS ALERTS

Notice to the university community of serious or ongoing dangers

- Timely warnings
- Emergency notifications
- University discretionary alerts
- Annual exercise is required

ANNUAL SECURITY & FIRE SAFETY REPORT

Compilation of crime statistics (3 years) and security policies and procedures

- Distribute to all students, faculty, and staff by Oct 1 of each year
- Provide notice of availability to prospective students and employees
- Elements required to be met for each Clery "campus"

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Litigation – Practical Considerations

Broad Litigation Holds

Retention Policies For Both the Academic Medical Center and School of Medicine

Protective Orders & Applicable Privileges, i.e., Patient-Physician Privilege

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Litigation

- Causes of Action
  - Title IX
  - 42 U.S.C. § 1983 (public colleges & universities)
  - Gross Negligence
  - Negligent Supervision
  - Negligent Retention
  - Civil Battery
  - Intentional infliction of emotional distress

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Litigation

- Statute of Limitations
- Class Certification
- Settlement & Consideration of Equitable Relief

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Title IX Litigation

Factors to determine the educational nature of the program or activity:

- structure of the program, including involvement of instructors and inclusion of examinations or formal evaluations;
- whether tuition is required;
- benefits conferred through the program, such as degrees, diplomas, or other certifications;
- "primary purpose" of the program; and
- whether regulators accrediting the institution hold it out as educational in nature (i.e., ACGME-accredited residency program).

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Title VII v. Title IX
A Circuit Split

- Circuit split as to whether an implied private right of action exists for damages under Title IX for redressing **employment discrimination** by employers.
  - First, Third, Fourth, Sixth, and Tenth Circuits recognize employees' private Title IX claims.
  - Fifth and Seventh Circuits have held categorically that Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex with respect to employers that receive federal funds.

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Preventative Measures Related to Clinical Visits

- Establish Minimum Standards for Chaperone Policies at All Clinical Locations
- Supplemental Credentialing Application Questions
- Due Diligence in Health Acquisitions, Affiliations, and Joint Ventures
- Boundaries Training, Procedural Guidelines, and Patient Education
- Ensuring Title IX's Independence and Responsiveness

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Reporting

- Ensure Reports Are Properly Made and Directed
- Make Certain That Reports Have Impact
- Do Not Forget Health Privacy

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Investigations

- Interdisciplinary Case Management Team Model
- Interim Measures
- Experts and Conflicts of Interest
- External Reporting Obligations
- Attorney-Client Privilege

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Adjudication and Discipline

- Coordination of Policies (i.e., Title IX Policy, LCME Technical Standards, Threat Assessment Team)
- Reporting Obligations (i.e., state medical boards, Child Protective Services)
- Identifying Decisionmakers (A decisionmaker regarding responsibility may be different than a decisionmaker regarding sanctions.)

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Adjudication and Discipline
A Multitude of Decisionmakers

- Part 1: Questions and Answers Regarding the Department's Title IX Regulations (January 15, 2021) – Q & A No. 8

  - "The regulations do not preclude a recipient from using one decision-maker to reach the determination regarding responsibility, and having different decision-maker(s) (e.g., a tenure committee) determine appropriate disciplinary sanctions (including making such a decision during a separate process, such as another hearing), so long as the end result is that the single written determination includes any disciplinary sanctions imposed by the recipient against the respondent, pursuant to 34 C.F.R. § 106.45(b)(7). The issuance of a written determination cannot be a piecemeal process that is broken down into chronologically occurring sub-parts."

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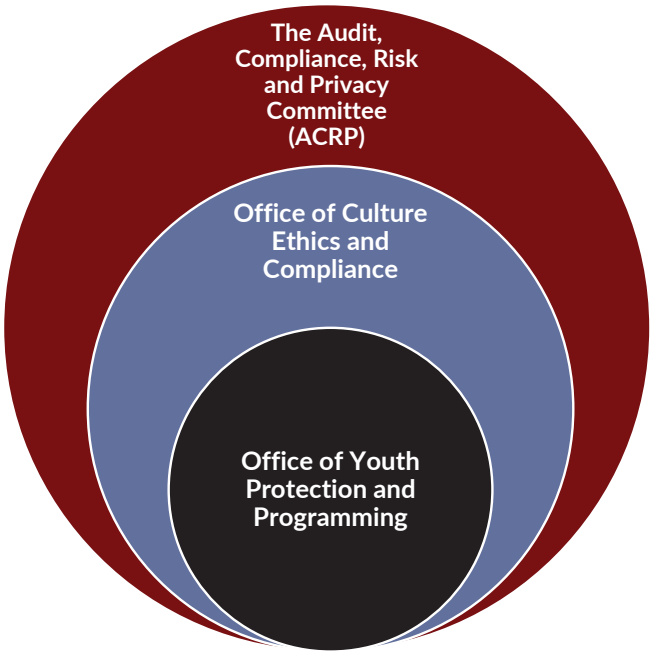
YOUTH PROTECTION AND PROGRAMMING | USC EXAMPLE



- Develop and promote compliance with relevant, effective safety policies and practices that help safeguard minors engaging with USC;
- Provide support and guidance to youth programs so that they can operate safe, compliant activities and meet their responsibility of protecting participants;
- Communicate requirements for reporting child abuse or neglect, as well as other serious incidents or violations relating to minors;
- Offer the USC community resources, education, and training on child abuse prevention and awareness; and
- Continuously identify and improve mechanisms for preventing child abuse and protecting minors across the university.

From Policy to Practice: What Works

- Multidisciplinary assessment/triage teams
- Comprehensive database
- Targeted training tailored to healthcare audiences
- Information sharing agreement
- Infographics/written protocols, especially for when to report, interplay between requirements (i.e.,TIX, accreditation, 1557), etc.
- Dedicated personnel with knowledge of healthcare settings
- Coordination/collaboration/communication...early and often

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Due Diligence Checklist Following Receipt of a Report Indicating Potential Widespread Abuse

- ✓ Complainant Reporting Options
- ✓ Supportive Resources For Complainants
- ✓ Interim Measures
- ✓ Preliminary Fact Gathering
- ✓ Reporting Obligations Under IHE Policies
- ✓ External Reporting Obligations
- ✓ Expert Witness and Conflict of Interest
- ✓ Enforcement Implications
- ✓ Concurrent Civil and/or Criminal Proceedings
- ✓ Stakeholder Engagement
- ✓ Crisis Communication
- ✓ Health Privacy
- ✓ Settlements
- ✓ Public Records Act Requests

Checklist Cont.

- Complainant Reporting Options
- Supportive Resources
- Interim Measures

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Checklist Cont.

- Preliminary Fact Gathering
- Reporting Under IHE Policies
- External Reporting

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Checklist Cont.

- Enforcement Implications
- Concurrent Civil and/or Criminal Proceedings
- Stakeholder Engagement
- Crisis Communication

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Checklist Cont.

- Expert Witness and Conflict of Interest
- Health Privacy
- Public Records Act Requests

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