

**STUDY GUIDE:
INTERSECTIONS OF TITLE VII
AND TITLE IX**

20-Minutes-to...
Trained

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20-Minutes-to...*Trained*:
Intersection of Title VII and Title IX
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20-Minutes-to...*Trained*: Intersection of Title VII and Title IX Learning Outcomes

- Participants will understand the scope of Title IX as addressing sex-based discrimination in education and Title VII addressing discrimination against additional protected classes including race, color, religion, and national origin in employment.
- Participants will be able to assess behavior under Title IX's "severe, pervasive and objectively offensive" hostile environment definition and Title VII's "severe or pervasive" standard.
- Participants will recognize the value in working together with Human Resources and other departments that address employee conduct.
- Participants will be able to explain what legal liabilities exist under Title VII and Title IX.
- Participants will appreciate the importance of knowing Title VII, Title IX, and state fair employment laws when addressing sex-based discrimination involving employees.



20-Minutes-to...*Trained*: Intersection of Title VII and Title IX Discussion Questions

- What are the benefits to having one policy and one process? Are there any barriers to creating one policy/one process at your institution? How might those barriers be overcome?
- How does the First Amendment come into play during Title VII and Title IX investigations?
- Could behavior be found to create a hostile environment under Title VII but not under Title IX? Why?
- What lessons can be taken from Title IX case law and OCR resolutions for Title VII investigations?
- What are the inherent differences between Title VII and Title IX's definitions of hostile environment?



20-Minutes-to...*Trained*: Intersection of Title VII and Title IX Case Studies

Professor Weber

As the Title IX Coordinator at a community college, you were recently notified that a sociology faculty member, Professor Weber, had written a somewhat inflammatory memo regarding pregnancy and wage discrimination and circulated it throughout the department. Professor Weber, an older, outspoken, and staunchly conservative lifelong academic, is known for engaging his colleagues in often spirited (and sometimes public) debates on issues of race and gender-based discrimination, but this is the first time he’s ever put it in writing and attempted to reach such a broad audience.

The memo – an arguably well-written, 4-page op-ed of sorts – argues that there is extensive research demonstrating that women who decide to take a year or two off from either school or their jobs have a correlative drop in their earning potential. The memo asserts that women knowingly make the decision to have kids, accepting the temporary hold it places on their academic or professional careers, but then “whine” about wage discrimination when their male colleagues, who he emphasizes do not take such leaves, end up making more than they do.

Though conceding that malicious wage-discrimination does exist in the workforce, he argues that such incidents are “anomalous,” with the “vast majority of gender-based wage discrimination claims being propagated by women who are simply dissatisfied with the biological obligations of their sex and the corresponding vocational sacrifice associated with the decision to start a family.” Professor Weber calls the typical college campus a “bastion of liberalism,” which he argues “unwittingly encourages women to declare victim-status” rather than “being accountable for the decisions they, themselves, make,” ultimately equating the decision to have children to “any other decision with career implications, such as leaving a management position at a large corporation to work for a promising startup.” He concludes by acknowledging his unconventional approach of sending out a seemingly unprompted internal memo to his colleagues, but remarks that, as the self-proclaimed “island of conservatism in a sea of liberalism” and given the multiple discussions he has had with his female colleagues on the topic, he is tired of feeling pressured into silence as the minority viewpoint and felt it his moral obligation to present the opposing side.

After several intra-departmental female faculty members angrily forwarded the memo to other faculty members outside of the department, the memo rapidly became the prevailing gossip on campus. Students quickly learned of the memo, many from other faculty members who mentioned it during their lectures in vents of frustration. Within a few days, social media had erupted with calls for Professor Weber’s termination – from students, faculty,

and staff alike. The school newspaper ran several editorials addressing the situation and several student organizations became highly vocal as well, setting up shop in the free speech area of campus and calling for a sit-in at the president's office.

Multiple faculty members have contacted you directly, insisting that Professor Weber's memo "clearly created a hostile educational environment in violation of College policy." The faculty members pointed to the palpable unrest on campus, the notable distraction the whole situation has caused, and the message it sends to the campus community if at least something is not done in response to something so clearly averse to the College's mission. One of the faculty members, with whom you've partnered on several occasions for outreach and prevention initiatives, asked you point blank how this could *not* meet the definition of hostile environment sexual harassment, given that it was "objectively offensive, sex-based, written behavior that is so pervasive that you would be hard pressed to find a member of the community who didn't know about it."

In your initial meeting with Professor Weber, he told you that he was stunned by the community response to his memo, insisting that not only was the memo never intended for anyone outside of his department, but that he was simply offering a differing viewpoint on a topic and never intended to offend anyone. He added that it was exactly this type of thin-skinned, overreaction that he was referring to in his memo and that undermines the free exchange of ideas.

Sarah, Janelle, and Nev

Sarah, an administrative assistant at Braeburn Community College, approaches her supervisor, Nev, asking if she can speak with her confidentially about one of her co-workers. Nev agrees, and they meet one-on-one in Nev's office. Sarah starts by saying that she does not want to get anyone in trouble and that she is only trying to help. She reveals that the matter is very sensitive and involves one of her co-workers, Janelle. Nev immediately asks what is going on.

Sarah says she thinks that Janelle is being physically abused by her partner, Robert. Robert is a groundskeeper for the college. Sarah tells Nev that Janelle seems noticeably withdrawn. Recently, Janelle came to work late, had red puffy eyes, and looked as though she had been crying. When Sarah and others asked Janelle if she was OK, she simply nodded and said she was fine, and that she was just dealing with some personal issues. Sarah shares that she saw Janelle walking with a limp last week and, when asked about it, Janelle told people that she twisted her knee after slipping on some ice in her driveway. Later that same day, Sarah overheard Janelle on the phone saying, "But I'm scared of what he would do if I tried to leave him."

Sarah shares with Nev that a month ago, Janelle missed a few days of work and returned to work wearing a sling. Janelle claimed that she had sprained her shoulder while working in the yard. Just yesterday, Janelle showed up over an hour late to work and had some swelling around her eye and her bottom lip. When asked, Janelle said that she got up to the bathroom last night in the dark and walked right into the edge of her open closet door. Sarah says that she also heard Janelle crying in the bathroom yesterday. Sarah notes that she has hesitated to raise any concerns or suspicions previously, but she now worries that Janelle's situation is escalating and that someone needs to step in. Nev thanks Sarah for coming in, for her candor, and her concern. Sarah returns to her desk.

Concerned, Nev pulls Janelle's employee file. Nev knows that Janelle has been making more mistakes lately, and has missed an unusual amount of time, but feels that Janelle is a good employee who interacts well with students, faculty, and administrators. Whatever is going on, it is really beginning to impact Janelle's attendance at work. Janelle has taken 10 sick days in the last six weeks, which is more than she used the previous six months combined. Janelle only has one sick day remaining. While normally punctual, Janelle has also been late five times in the last month.

Nev had already planned to address the tardiness issue in her one-on-one with Janelle tomorrow, but given this new information, Nev is unsure of what approach to take. She is also unsure of whether she should share Sarah's concerns with anyone else.



20-Minutes-to...*Trained*: Intersection of Title VII and Title IX Case Studies Question & Answer

Professor Weber

For Discussion:

- What politics exist at the institution that could impact response?
 - It should be determined whether Professor Weber is a tenured faculty member and/or is a member of a union.
 - Firing an openly conservative professor for what some would argue was expressing conservative thought would play poorly in the media.
 - Administrators should evaluate faculty and students calls for Professor Weber to resign or be fired. These decisions may be out of the hands of the Title IX Coordinator. If Professor Weber is no longer employed with the institution, there is no disciplinary jurisdiction.
- What polices may have been violated? Who should respond?
 - Ideally, the institution has adopted ATIXA's only policy/one process where one equity officer would be responsible for coordinating the response.
 - If there are two policies, a Title VII policy and a Title IX policy, the coordinators of those policies should come together to strategize who will coordinate the investigation and how they will respond.
 - Care should be taken to ensure all aspects of the respective laws are considered.
 - A Title IX Coordinator should maintain a collegial relationship with representatives from Human Resources where there are different policies for employees.
- Would this behavior qualify as sexual harassment under the institution's policy?
 - The equity officer should review the policy definition and evaluate the conduct in comparison to the policy.
 - A First Amendment analysis should also be considered here. Professor Weber will likely claim academic freedom.
 - While the writing could be considered sex-based discrimination, there must be an evaluation as to whether it is so severe, persistent or pervasive, and objectively offensive, such that it unreasonably interferes with, denies, or limits someone's ability to participate in or benefit from the institution's education or employment programs.

- Here, the conduct is a writing which could easily be disregarded or not read by those who are offended.

Sarah, Janelle, and Nev

For Discussion:

- What Title VII and Title IX issues may be implicated?
 - a. Janelle may be the victim of intimate partner violence, a form of sex-based discrimination.
 - b. It should also be determined whether the violence is one-sided or whether Robert is also a victim of intimate partner violence.
- Does Nev have an obligation to investigate this matter further?
 - a. Nev probably has enough information to pass along to a Title IX Coordinator and/or the person responsible for overseeing Title VII compliance.
 - b. Ideally, Braeburn Community College has one officer responsible for responding to sex-based discrimination.



ATIXA Tip of the Week September 20th, 2018

Title IX and Title VII Intersection

By [Anna Oppenheim, J.D.](#), Associate Attorney, The NCHERM Group & Advisory Board Member, ATIXA

I am looking for any guidance or direction regarding working with HR and the intersection of Title IX and Title VII. I am finding that Employee Relations folks tend to categorize all things employee-related under Title VII and for us, since we have two policies, the path for the investigation is very different. Is there anything out there that states Title IX takes precedence over Title VII or best practices that address the intersection of the two?

In theory, the question is not whether the reported misconduct implicates VII or IX - the question is whether the reported misconduct violates policy. Ideally, there is a good working relationship among *all* who handle sexual misconduct matters, although I appreciate that may not be the case. You mention there are two paths for investigation but I wonder exactly how they are different, on a substantive level - and why.

If you're writing because you're facing a specific incident, I would clearly establish a plan going forward given the available facts as you understand them, designating the lead investigator (consider the status of the parties), making sure the relevant stakeholders are kept apprised of the necessary details, and articulating the steps forward.

If you're not currently dealing with a specific incident, this is a perfect time to work with the appropriate HR folks to draft an agreed-upon approach, emphasizing open lines of communication, considering the different scenarios, when which department will assume the "lead" investigator role, possible sanctions and implementation thereof, and allowing for flexibility.



ATIXA Litigation Update August 3rd, 2017

The Justice Department, Under Jeff Sessions, Uses the Amicus Brief to Opine on Title VII's Applicability to Sexual Orientation Discrimination

In a case involving a sexual---orientation discrimination, the Justice Department has filed an *amicus brief* ("friend---of---the---court" brief) arguing that Title VII should not apply to sexual orientation. The lawsuit was filed by a skydiving instructor who decided to tell a female client he was gay before taking her on a tandem dive, in order to comfort her and avoid any awkwardness from their being tightly strapped together during the fall. In a terrible example of, "no good deed goes unpunished," the woman's husband lodged a complaint, and the skydiving instructor was fired. He, in turn, sued the company, claiming a violation of Title VII.¹ The application of Title VII to sexual---orientation discrimination has long been a subject of dispute among the courts. Rather than stand by and allow the matter to unfold in the courts as it will, the Justice Department submitted an *amicus brief* arguing that the D.O.J. has a "substantial and unique interest" in ensuring that Title VII is interpreted correctly, and that, despite "notable changes in societal and cultural attitudes," Title VII has not changed and does not include protection for discrimination on the basis of sexual orientation. The D.O.J. argued that, if the law is outdated, then it is Congress' job to draft a new one. As for the E.E.O.C., which submitted a brief in support of the plaintiff, the D.O.J. said they do "not speak for the United States." It has been noted that the signatories on the *amicus brief* were all political appointees; none of the career employees at the D.O.J. signed the brief. The A.C.L.U. is quoted as referring to the brief as a "gratuitous and extraordinary attack on L.G.B.T. people's civil rights." It remains to be seen to what degree this action by the D.O.J. represents an isolated action or is another step in the systematic implementation of a political agenda.² What is clear is that the members of the current administration should be judged by their actions, not their words.

John Doe v. University of Kentucky: Trial and Error or Triple Jeopardy?

The U.S. Court of Appeals for the Sixth Circuit has reversed the district court's dismissal of the claims against the Director of Student Conduct (both individually and in her official capacity) and remanded the case to the district court for hearing after the University of Kentucky ("UK") concludes its proceedings. The University Appeals Board ("UAB") in this case found itself *repeatedly* reversing the Hearing Panel's decisions regarding Doe's responsibility in a sexual misconduct allegation. In both appeals, the UAB found numerous violations of policy and due process, including the "withholding [of] critical evidence and witness questions," the "improper partitioning of Doe and his advisors from" the reporting party, and the denial of a "supplemental proceeding" to which Doe was entitled under UK policy. The UAB also found inappropriate "ex parte communications between [the reporting party], the Director of Student Conduct, and the Hearing Panel, regarding sanctions." The UK Hearing Panel was about to try for the third time, when Doe decided he'd had enough and filed suit in the district court seeking injunctive and monetary relief.

¹ Notably, the plaintiff's state claims failed, because he died by the time it got to court. Only the federal claims can continue without him, because the burden of proof is lower.

² Trump announced via Twitter the same day that transgender people would no longer be allowed to serve in the military.

Doe argued that UK's process suffered irredeemable, unconstitutional flaws, including due process and equal protection problems. UK responded by arguing that they would definitely get it right the third time, pointing out that they'd already instituted new procedures to rectify the problems. The district court granted UK's request to let them try again (at Doe's expense), which the U.S. Court of Appeals affirmed.

The Younger doctrine³ has been interpreted as a restraint on courts from interference in state functions, including the disciplinary proceedings of public higher---education institutions. As long as three criteria are met,⁴ the courts will be hands---off: "(1) the state proceedings are currently pending; (2) the proceedings involve an important state interest; and (3) the state proceedings will provide the federal plaintiff with an adequate opportunity to raise his constitutional claims." The Court found that all three requirements were met, emphasizing that the due process required in school proceedings is important, but need not rise to the level of that which is required in criminal proceedings. The court further reasoned:

The final factor is whether Doe has an adequate opportunity to raise his constitutional claims in the university proceeding. See *id.* Doe has raised his constitutional claims twice already, and the UAB has overturned the Panel's decisions. Clearly, there is an avenue available to raise such claims, and the UAB has not rubber---stamped the Panel's decision but has carefully examined it for defects. Doe can appeal after the third hearing, which will involve more protections and procedures, if he believes the hearing still suffers from constitutional error, and he may raise his claims again in federal court once the proceedings have concluded. While the previous system had its flaws, and the University has recognized and attempted to correct this, Doe was still able to raise his constitutional challenges, and he will continue to be able to do so under the new system. As such, we find that the Middlesex factors are met and abstention applies.

There are, of course, exceptions to Younger, which are times when courts may still intervene— specifically, when there is evidence of "bad faith, harassment, or flagrant unconstitutionality" in the school's policy or proceedings, such that it is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." However, the Court remarked: "That is not the case here." (It would be difficult to imagine when, if ever, it would be the case). Even though UAB found that Doe's Constitutional rights were violated, those violations were the result of UK's process, not policy. As for the yo---yo---ing of Doe through UK's system, and Doe's claim that UK was trying to make an example of him in doing so, the Court did not take issue with that. So, Doe gets to await his third hearing on the same matter.

³ *Younger v. Harris*, 401 U.S. 37 (1971).

⁴ This is known as the "Middlesex test." *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982).



ATIXA Litigation Update August 3rd, 2017

Second Circuit Recognizes Sexual Orientation as Protected Characteristic Under Title VII

Authored by [Anna Oppenheim, J.D.](#), Supervising Lead Consultant, TNG

On February 26, 2018, an *en banc*¹ Court of Appeals for the Second Circuit considered whether sexual orientation was protected under Title VII of the Civil Rights Act (Title VII) in a suit brought by the estate of Donald Zarda against Zarda's former employer, Altitude Express, Inc. The court held that sexual orientation is a characteristic inextricably linked to sex and thus discrimination on the basis of sexual orientation in employment violated Title VII.² The court's decision, which overturned significant precedent,³ was motivated in part by the Equal Employment Opportunity Commission's ("EEOC") decision in *Baldwin v. Foxx*,⁴ which determined that a claim of sexual orientation discrimination is inherently a claim of discrimination on the basis of sex, as sexual orientation is a "sex-based consideration."

Background

Donald Zarda worked as a sky-diving instructor for Altitude Express. His duties included participating in tandem sky-dives with customers. Zarda often attempted to comfort female customers, apprehensive about the close physical proximity of a tandem dive (where the instructor's chest is strapped to the customer during the dive,) with a male instructor by disclosing the fact that he was gay.

In 2010, a female customer accused Zarda of touching her inappropriately and then disclosing his sexual orientation to excuse his behavior. Altitude Express fired Zarda, and he filed an EEOC claim stating that he was fired due to his sexual orientation. He subsequently filed a federal law suit. The district court, citing *Simonton*, granted summary judgment to Altitude Express, concluding that "although there was sufficient evidence to permit plaintiff to proceed with his claim for sexual orientation discrimination under New York law, plaintiff had failed to establish a prima facie case of gender stereotyping discrimination under Title VII."

After the EEOC decided *Baldwin*, Zarda moved to have his claims reinstated. The district court denied the motion and Zarda appealed in federal court, arguing that legal precedent should be overturned in light of *Baldwin*. While the appeals panel declined to revisit precedent, the panel acknowledged Zarda had standing to appeal and ordered an *en banc* hearing.

Court's Discussion

The court utilized three analytical frameworks. First, by using the U.S. Supreme Court's comparative test for sex discrimination,⁵ the court determined that "but for" Zarda's sex, the adverse action he experienced (his

¹ Circuit Courts of Appeals decisions are typically rendered by three-judge panels drawn randomly from the pool of circuit court judges in the relevant circuit. *En banc* sessions are heard by every judge in the circuit. These sessions are typically reserved for rehearing a decision by one of the court's panels which conflicts with the court's prior decisions or in matters of extreme public importance.

² [Zarda v. Altitude Express, Inc., 883 F.3d 100 \(2nd Cir. 2018\)](#).

³ *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) and *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217-23 (2d Cir. 2005).

⁴ EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015).

⁵ *Los Angeles v. Manhart*, 435 U.S. 711 (1978).

termination) would not have occurred. Second, the court looked to *Price Waterhouse v. Hopkins*⁶ and assessed whether the discrimination was based on certain traits which were based in sex stereotypes.

Third, the court found that adverse action based on sexual orientation was analogous to race-based associational discrimination, which was prohibited by the court in *Holcomb v. Iona College*, 521 F.3d 130, 139 (2d Cir. 2008) and was also prohibited by the Fifth, Sixth, and Eleventh Circuits. Considering all three analyses, the court determined that sexual orientation discrimination is motivated, at least in part, by sex, and is thus a subset of sex discrimination prohibited by Title VII.

Significance

This decision deepens the divide on the issue of whether sexual orientation is protected under both Title VII and other civil rights laws prohibiting sex discrimination. The Second and Seventh Circuits, along with many states, cities, and municipalities, have determined that sexual orientation discrimination is prohibited, and, in its *Baldwin* decision, the EEOC concurred. However, other circuit courts have disagreed,⁷ the Department of Justice filed a brief supporting Altitude Express, and then-Attorney General Jeff Sessions voiced his opposition to the *Zarda* decision. While the Supreme Court has declined to address the matter to date, the current divide indicates a possible review in the future.

Until Congress acts or the Supreme Court considers the issue, the legality of sexual orientation discrimination under Title VII is dependent on location, though specific state statutes may be unequivocal. However, unless a religious-based reason exists, including a prohibition against sexual orientation discrimination in organization policy and procedure is undoubtedly best practice. Beyond creating a safe and inclusive culture, the rapid evolution of the legal landscape suggests that sexual orientation may be uniformly recognized as a protected characteristic in the near future.

⁶ 490 U.S. 250 (1989).

⁷ *Evans v. Georgia Regional Hosp.*, 850 F.2d 1248 (11th Cir. 2017).

This brief overview will define and discuss the intersection of Title IX and Title VII

Title VII

It shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Title IX

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.

THE INTERSECTION

- Titles IX and VII intersect any time sex discrimination occurs in an employment context in a federally-funded educational workplace
- The result is that for our purposes, both apply, and remedies employed by schools must satisfy both statutes (as well as any applicable state-level protections)
- This can become complicated where you have two different policies or procedures, rather than a unified approach. Which one applies?
- Remedial requirements similar under both laws

- Other areas of complex overlap or intersection include:
 - Protections of the First Amendment. “Purpose or effect” language can apply to Title VII, but struck down by Third Circuit in Title IX context (*DeJohn v. Temple Univ.*)
 - Also consider the question of whether the (poorly written?) Title IX hostile environment standard of “severe, pervasive and objectively offensive” is meaningfully different from the Title VII standard of “severe or pervasive.” Can misconduct meet one but not the other?

HR and Title IX Office: No Need for Turf War

- Communicate throughout process
 - Team approach can be positive so long as there is continued dialogue
- Consider and strategize in advance
 - Point person
 - Implicated policies
- Rights of individuals involved
 - Union rep
 - Advisor
 - Attorney

Title VII

- Express cause of action
- Specific compensatory damages
- Doesn't rely on contractual framework
- Affirmative defense; some strict liability; damages capped

But...

- Must exhaust administrative remedies: Must file EEOC charge and wait for specified period of time before able to bring lawsuit

Title IX

- No exhaustion of administrative remedies required
- No cap on damages

Filing a lawsuit...

When it comes to legal liability, circuits are split in allowing claims brought under both (vs. just one) of these laws

Doe v. Mercy Catholic Med. Ctr. (3rd Cir., Mar. 7, 2017)

Although medical residents are EEs, they are ALSO students: thus have recourse under Title VII and Title IX

Translation: Title IX enables plaintiffs to turn to courts to settle matters without requirement of administrative exhaustion, for sexual harassment, discrimination and retaliation

- Third Circuit follows First, Second, and other circuits
- Fifth and Seventh Circuits – Title VII preempts Title IX claims

TITLE IX AND TITLE VII INVESTIGATIONS (CONT.)



- Consider:
 - Role of institutional equity/AA/EOP officer.
 - Human resources/faculty.
 - Coordinator of school/campus conduct.
 - Athletics.
 - Public safety/SRO/Law enforcement.
- Oversight of deputy coordinators/investigators.
- Ability to merge/combine investigatory and hearing processes.
- Coordination of remedies in student/employee and employee/student resolution processes.
- What happens when employee is a student or student is an employee?

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DUE PROCESS: CURRENT ISSUES



- Due Process is at the heart of current litigation and OCR regulatory guidance. Processes are becoming increasingly complex
- Current key issues:
 - Standard of Proof
 - Detailed Notice of Allegations/Investigation
 - Hearings & Investigations
 - Cross-examination
 - Attorney involvement
 - Providing copies of report and evidence for review
 - Bias by Investigators, Hearing Officers, Appellate Officers
 - Training: Biased training; insufficient training
 - Improper influences impacting decision (E.g.: Athletics; Social Media; Power/Position)

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