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# Circumventing Congress's Comprehensive Schemes: The Third Circuit Allows Employees of Educational Institutions to Bypass Title VII and Bring Claims Under Title IX in *Doe v. Mercy Catholic Medical Center*

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# CIRCUMVENTING CONGRESS'S COMPREHENSIVE SCHEMES: THE THIRD CIRCUIT ALLOWS EMPLOYEES OF EDUCATIONAL INSTITUTIONS TO BYPASS TITLE VII AND BRING CLAIMS UNDER TITLE IX IN *DOE v. MERCY CATHOLIC MEDICAL CENTER*

**Abstract**: Five of the U.S. Courts of Appeals are currently split as to whether employees bringing claims of sex-based employment discrimination are able to use either Title VII or Title IX of the Civil Rights Act as avenues of relief where both statutes are concurrently applicable. On March 3, 2017, the U.S. Court of Appeals for the Third Circuit, in *Doe v. Mercy Catholic Medical Center*, became the most recent circuit to address this issue. Joining the First and Fourth Circuits, the Third Circuit held that the concurrent applicability of Title VII and Title IX did not preclude the plaintiff employee's private causes of action under Title IX. This Comment argues that by ignoring Title VII's administrative remedial schemes, the Third Circuit improperly circumvented congressionally imposed structures to make Title VII the primary avenue of relief for claims of employment discrimination.

## INTRODUCTION

The Civil Rights Act of 1964 provides a comprehensive framework to prohibit employment discrimination in the United States.[1] In 1972, Congress passed the Higher Education Amendments to the Civil Rights Act, including Title IX, which prohibited discrimination based on sex in federally funded educational programs.[2] Although Title IX was enacted to combat discrimination

[1] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2012); Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) (noting that the purpose of Title VII was to break down employment practices favoring particular groups to the permanent detriment of others). The prohibitions of Title VII are not limited to discrimination, but the statute also prohibits retaliation against employees that assert Title VII rights. *See* 42 U.S.C. § 2000e-(3)(a) (noting that the anti-retaliation provision of Title VII prohibits discrimination in retaliation because an employee made a "charge, testified, assisted, or participated . . . in an investigation, proceeding, or hearing" under Title VII); *see also* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 62, 64 (2006) (noting that the anti-retaliation provision attempts to protect an employee's right to bring an action or enforcement under Title VII).

[2] *See* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2012) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits

in the education setting, in 1982, the U.S. Supreme Court, in *North Haven Board of Education v. Bell*, held that employees were permitted to bring private rights of action under Title IX to remedy employment discrimination.[3] Consequently, in bringing employment discrimination claims, plaintiffs were increasingly faced with the choice of bringing either Title VII or Title IX claims against educational employers.[4] This choice has significant implications where plaintiffs are able to raise both claims concurrently.[5]

To succeed on a claim under Title VII, plaintiffs must comply with the statute's congressionally imposed administrative procedures.[6] For example, plaintiffs must first file a claim with the Equal Employment Opportunity Commission ("EEOC") 180 days after the alleged discriminatory act transpires and then comply with the EEOC's conciliation methods.[7] If plaintiffs do not comply with these requirements, they will be precluded from bringing a suit under Title VII.[8] In contrast, a claim under Title IX allows plaintiffs direct ac-

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of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.").

[3] *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 538–39 (1982) (upholding the validity of Department of Health, Education, and Welfare ("HEW") regulations interpreting Title IX that prohibited sex-based discrimination in employment by educational institutions that received federal funds); *see also* 118 CONG. REC. 5803 (1972) (remarks of Senator Bayh explaining that the purpose of Title IX is to combat "corrosive and unjustified discrimination against women" in education).

[4] *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 171 (2005) (holding that a plaintiff, an employee of a federally-funded education program, can bring a claim of sex-based employment discrimination under Title IX's implied private cause of action); *Bell*, 456 U.S. at 538–39; Doe v. Mercy Catholic Med. Ctr. (*Mercy II*), 850 F.3d 545, 552, 562 (3d Cir. 2017) (holding that a medical resident of a federally-funded education program can bring a claim of employment discrimination under Title IX rather than Title VII).

[5] *See Mercy II*, 850 F.3d at 562 (holding that plaintiffs do have a right to choose to bring a Title IX claim when Title VII applies concurrently); Douglas P. Ruth, *Title VII & Title IX = ?: Is Title IX the Exclusive Remedy for Employment Discrimination in the Educational Sector?*, 5 CORNELL J.L. PUB. POL'Y 185, 197–98 (1996) (arguing that allowing claims under Title IX would enable plaintiffs to evade Title VII's administrative requirements such as filing deadlines and conciliation procedures).

[6] 42 U.S.C. §§ 2000e-5(b), 2000e-5(f); *see* McKart v. United States, 395 U.S. 185, 193 (1969) (stating that in the "jurisprudence of administrative law," the requirement that a plaintiff exhaust administrative remedies is considered foundational); R. Wayne Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies*, 7 B.C. L. REV. 495, 495–96 (1966) (noting the statutory procedures for enforcement of Title VII); *see also* Diane Heckman, *The Entrenchment of the Glass Sneaker Ceiling: Excavating Forty-Five Years of Sex Discrimination Involving Educational Athletic Employment Based on Title VII, Title IX and the Equal Pay Act*, 18 VILL. SPORTS & ENT. L.J. 429, 434 (2011) (noting that plaintiffs must determine whether the statute allows claims to be brought initially in court or whether they must first exhaust any administrative remedies).

[7] *See* 42 U.S.C. § 2000e-5(e)(1) (stating the time requirement for a plaintiff to file a claim with the Equal Employment Opportunity Commission ("EEOC")); *id.* § 2000e-5(b) (stating that the EEOC used methods of "conference, conciliation, and persuasion" to resolve claims). Conciliation is a process similar to mediation or arbitration, in which a disinterested third party joins the parties to solve the dispute. *Conciliation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[8] *See* 42 U.S.C. §§ 2000e-5(b), 2000e-5(f); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938) (noting that a plaintiff is not entitled to judicial relief until he or she has pursued all required statutory administrative remedies); JACOB A. STEIN, ET AL., 5 ADMINISTRATIVE LAW

cess to the courthouse without the administrative burdens that accompany Title VII.[9] In situations where a plaintiff has a potential claim under both Title VII and Title IX, the court must determine whether the plaintiff has a right to choose to bring a Title IX claim, thereby avoiding the administrative requirements under Title VII.[10] The Supreme Court has not directly addressed the relationship between Title VII and Title IX, but recent cases appear to expand the rights of Title IX litigants by providing a private right of action for claims of employment discrimination based on sex.[11]

In 2017, in *Doe v. Mercy Catholic Medical Center* ("*Mercy II*"), the U.S. Court of Appeals for the Third Circuit addressed whether an employee of a federally-funded educational institution was precluded from using Title IX as an avenue of relief when Title VII and Title IX were concurrently applicable.[12] In *Mercy II*, the plaintiff, a female medical resident, did not file administrative claims with the EEOC pursuant to Title VII, and instead sought to litigate her claims entirely under Title IX.[13] Even after the plaintiff failed to comply with the administrative requirements of Title VII, she nevertheless brought her claims against the defendant, Mercy Catholic Medical Center, under Title IX.[14]

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§ 49.01, Lexis (database updated Dec. 2017) (stating that under the "doctrine of administrative exhaustion," plaintiffs may not bring claims to court until all administrative remedies have been pursued).

[9] *See* Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) (finding an implied private right of action under Title IX); *see also* 20 U.S.C. § 1682 (2012) (stating that the sole enforcement mechanism for Title IX violations is the revocation of federal funding). Title IX contains none of the administrative remedial procedures of Title VII, namely the requirement of conciliation, time requirements, or deference to state agencies. 20 U.S.C. § 1682 (requiring all departments and agencies that extend financial assistance to educational programs to create procedures to terminate funding for institutions not in compliance with Title IX); 42 U.S.C. §§ 2000e-5(e), 2000e-5(f).

[10] *See Mercy II*, 850 F.3d at 562–63 (holding that plaintiffs do have a right to choose to bring a Title IX claim when Title VII applies concurrently). *But see* Waid v. Merrill Area Pub. Sch., 91 F.3d 857, 861–62 (7th Cir. 1996) (holding that Title VII's "comprehensive statutory scheme" prevents private Title IX claims); Lakoski v. James, 66 F.3d 751, 753 (5th Cir. 1995) (holding that Title VII is the exclusive avenue of relief for sex-based employment discrimination claims in federally funded educational institutions).

[11] *See Jackson*, 544 U.S. at 173 (holding that Title IX is "broadly worded" and its applicability extends beyond students to anyone bringing claims of sex discrimination); *Bell*, 456 U.S. at 521 (determining that Title IX's prohibition of sex-based discrimination applied to both employees and students by a broad reading of "person" within the statute); *Cannon*, 441 U.S. at 717 (determining that the statute provided a private cause of action even without express statutory authorization); Johnson v. Ry. Express Agency Inc., 421 U.S. 454, 459 (1975) (holding that a private sector employee is not prevented from pursuing remedial avenues other than Title VII but could maintain concurrent actions under Title VII and § 1981 of the Civil Rights Act for claims of race discrimination).

[12] *See Mercy II*, 850 F.3d at 560 (holding that "concurrent applicability" of Title VII and Title IX did not prevent the plaintiff from bringing sex-based employment discrimination claims under Title IX).

[13] *See id.* at 552 (noting that the plaintiff stated that she failed to file a charge with the EEOC, but rather filed Title IX claims directly in district court).

[14] *See id.* (noting that the plaintiff acknowledged her failure to file a claim under Title VII with the EEOC).

This Comment argues that the Third Circuit erred in holding that the plaintiff could circumvent the administrative remedial scheme of Title VII and bring her claim solely under Title IX.[15]

Part I of this Comment reviews the statutory scheme and background of the Civil Rights Act, outlines the deference given to congressionally imposed remedial schemes, and explains the factual background and procedural history of *Mercy II*.[16] Part II discusses the tests and standards that the U.S. Courts of Appeals have developed to address Title VII versus Title IX claims and examines the Third Circuit's *Mercy II* decision.[17] Finally, Part III concludes that in light of the exhaustive administrative remedial schemes of Title VII, the Third Circuit incorrectly held that when Title VII and Title IX are concurrently applicable, plaintiffs may bring claims solely under Title IX, thereby circumventing the administrative procedures of Title VII.[18]

## I. THE ORIGINS OF TITLE VII AND TITLE IX AND THE BACKGROUND OF THE *MERCY II* LITIGATION

### *A. Title VII*

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against any current or prospective employee on the basis of that individual's "race, color, religion, sex or national origin."[19] To ensure effective enforcement of the statute, Congress created the EEOC to administer Title VII.[20] Along with creation of the EEOC, Congress implemented specific

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[15] *See id.* at 562–63; *see also* McCarthy v. Madigan, 503 U.S. 140, 144–45 (1992) (noting that under the principle of exhaustion of administrative remedies, claimants must pursue all administrative avenues prior to filing a claim in court). The doctrine of exhaustion of administrative remedies serves the purpose of preventing judicial interference in the administrative process and allows agencies to apply their expertise without judicial interference. STEIN, *supra* note 8, § 49.01

[16] *See infra* notes 19–44 and accompanying text.

[17] *See infra* notes 45–97 and accompanying text.

[18] *See infra* notes 98–124 and accompanying text.

[19] *See* 42 U.S.C. § 2000e-2(a)(1) (stating it is unlawful for an employer to adversely impact or deprive an individual of employment opportunities for discriminatory purposes); *Griggs*, 401 U.S. at 429–30 (noting that the purpose of Title VII was to break down employment practices favoring particular groups to the permanent detriment of others); Amelia M. Wirts, *Discriminatory Intent and Implicit Bias: Title VII Liability for Unwitting Discrimination*, 58 B.C. L. REV. 809, 812 (2017) (describing the two purposes of Title VII as eliminating work-place discrimination and creating equal opportunities for employment for all individuals).

[20] *See* 42 U.S.C. § 2000e-4 (delineating the structure and authority of the EEOC); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (stating that the EEOC was created because congress intended employment discrimination claims to be settled primarily through means of "cooperation and voluntary compliance"); SUSAN M. OMILIAN & JEAN P. KAMP, 1 SEX-BASED EMPLOYMENT DISCRIMINATION § 12:1, Westlaw (database updated Oct. 2017) (listing the Title VII administrative requirements that one must exhaust before bringing suit in federal District Court); Kim M. Cafaro et al., *Employment Discrimination Law*—Trigg v. Fort Wayne Community Schools*: State Employee Discrimination Claims—Is the Conflict Between Title VII and Section 1983 Resolved?*, 61 NOTRE DAME

administrative requirements that plaintiffs must exhaust prior to bringing an action under Title VII.[21] For example, plaintiffs must file a claim with the EEOC no later than 180 days after the alleged discriminatory act transpires.[22] If, after a period of investigation, the EEOC finds reasonable grounds for the claim, it first seeks to dissipate the claim through means of "conference, conciliation, and persuasion."[23] Only if these procedures fail does the EEOC inform the claimant of his or her right to bring a civil action in federal court.[24] Furthermore, if a plaintiff fails to meet these administrative requirements or chooses not to initiate an action at all, he or she is precluded from obtaining relief under Title VII.[25]

### *B. Title IX*

Title IX, enacted as part of the Higher Education Amendments of 1972, makes it unlawful to discriminate against any person on the basis of sex in any "educational program or activity receiving federal financial assistance."[26] Unlike Title VII, the language of Title IX does not expressly provide for a private cause of action and does not contain the administrative requirements of meet-

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L. REV. 88, 89 (1986) (noting that EEOC authority includes reviewing claims of discrimination, pursuit of informal methods of conciliation, and bringing civil actions in federal court to enforce Title VII).

[21] *See* 42 U.S.C. § 2000e-5(e)(1) (stating that plaintiffs must file charges with the EEOC within 180 days of claimed discriminatory act); *id*. § 2000e-5(b) (stating that the EEOC must pursue unofficial methods of "conference, conciliation, and persuasion").

[22] *See id*. § 2000e-5(e)(1) (stating that claims must be filed with the EEOC within 180 days of the claimed discriminatory act).

[23] *See id*. § 2000e-5(b) (stating that the EEOC must pursue unofficial methods of "conference, conciliation, and persuasion").

[24] *See id*. § 2000e-5(f)(1) (stating that where EEOC conciliation efforts fail, the EEOC must inform the claimant who then has ninety-days to bring a civil action in federal court); Cafaro et al., *supra* note 20, at 89 (noting that claimants must first satisfy Title VII's administrative requirements before filing a claim in court).

[25] *See* Bonds v. Leavitt, 629 F.3d 369, 379 (4th Cir. 2011) (holding that for Title VII claims, the plaintiff is required to pursue all administrative remedies with the EEOC, or its state counterpart, before bringing a claim of employment discrimination in court); Shikles v. Sprint/United Mgmt. Co., 426 F.3d 1304, 1317 (10th Cir. 2005) (noting that it is foundational that a plaintiff must pursue all the administrative remedies under Title VII prior to bringing a claim in federal court); OMILIAN & KAMP, *supra* note 20, § 12:1 (listing the statutory requirements under Title VII); *see also* Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) (holding that the filing time requirement with the EEOC is similar to a statute of limitations).

[26] *See* 20 U.S.C. § 1681(a); *Cannon*, 441 U.S. at 704 (stating that the purpose of Title IX is to protect individuals against use of federal funds to aid discrimination in educational institutions); 118 CONG. REC. 5803 (1972) (remarks of Senator Bayh explaining purpose of Title IX was to combat "corrosive and unjustified discrimination against women" in education); Ruth, *supra* note 5, at 185 (stating that Title IX was passed as part of the Education Amendments of 1972).

ing filing deadlines, deferring to comparable state agencies, or participating in informal conciliation procedures.[27]

Under the statute, enforcement of Title IX requires all departments and agencies that extend federal funds to educational programs to create procedures for ceasing those funds if an institution violates Title IX.[28] Supreme Court cases interpreting Title IX, however, have expanded the statute's applicability so that employees of federally-funded educational institutions can bring employment discrimination claims under an implied private cause of action.[29] Consequently, Title IX plaintiffs can file directly in court under private rights of action created by the Supreme Court.[30]

### *C. Factual and Procedural History of* Mercy II

The plaintiff in *Mercy II*, Jane Doe, began a medical residency program with the defendant, Mercy Catholic Medical Center, in July 2011.[31] The defendant is a private teaching hospital associated with Drexel University's College of Medicine and accepts federal Medicare funding.[32] The plaintiff claimed that during the course of her residency, Dr. James Roe subjected her to sexual harassment that included inappropriate comments, glances, and touching.[33] Despite the plaintiff's many grievances about Roe's behavior to the defend-

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[27] *See* 20 U.S.C. § 1682 (stating that the sole mechanism for enforcement in the statute is ceasing federal funds where a violation of Title IX is found); 42 U.S.C. §§ 2000e-4(g), 2000e-5(e)(b) (expressly requiring meeting filing deadlines, deference to comparable state agencies, or informal conciliation procedures).

[28] *See* 20 U.S.C. § 1682 (stating that the sole mechanism for enforcement in the statute is ceasing federal funds where a violation of Title IX is found).

[29] *See Bell*, 456 U.S. at 521 (determining that Title IX's "broad" language and prohibition of sex-based discrimination applied to both employees and students by a broad reading of "person" within the statute); *Cannon*, 441 U.S. at 717 (finding an individual private right of action under Title IX and not ruling on whether that right existed specifically for employment discrimination claims); Claudia S. Lewis, Note, *Title IX of the 1972 Education Amendments: Harmonizing Its Restrictive Language with Its Broad Remedial Purpose*, 51 FORDHAM L. REV. 1043, 1046 (1983) (noting that the language of Title IX provides restrictive remedies and comparing the Supreme Court's "expansive[]" reading of the statute to broaden the remedial scope). A private right of action provides an individual right to bring a legal claim to court. *Right of Action*, BLACK'S LAW DICTIONARY (10th ed. 2014). A presumption against an implied right of action exists because where a statute precludes an act, a violation of that act does not implicitly create a private right of action. *Id., Presumption Against Implied Right of Action*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[30] *See Cannon*, 441 U.S. at 717 (finding an implied private right of action under Title IX). *Compare* 20 U.S.C. § 1682 (stating that the sole mechanism for enforcement in the statute is ceasing federal funds where a violation of Title IX is found), *with* 42 U.S.C. § 2000e-5(e)(b) (noting that Title VII requires plaintiffs to initially file charges with the EEOC before bringing claims in court whereas Title IX does not contain such requirements).

[31] Doe v. Mercy Catholic Med. Ctr. (*Mercy I*), 158 F. Supp. 3d 256, 258 (E.D. Pa. 2016).

[32] *See Mercy II*, 850 F.3d at 550 (noting that although Mercy is a private hospital, the hospital's receipt of Medicare payments brings Mercy within Title IX as a federally-funded educational institution).

[33] *Mercy I*, 158 F. Supp. 3d at 258.

ant's Human Resources Department, the defendant discharged the plaintiff from her residency on April 20, 2013.[34] After an unsuccessful internal appeal hearing with the defendant's Human Resources Department on April 24, 2013, the plaintiff decided not to file a further appeal.[35]

On April 20, 2015, the plaintiff initiated a suit against the defendant in the U.S. District Court for the Eastern District of Pennsylvania.[36] The plaintiff sought damages and equitable relief while also alleging three claims under Pennsylvania state law and the following three claims under Title IX: (1) retaliation, (2) quid pro quo, and (3) hostile environment.[37] The plaintiff did not bring any claims under Title VII because she never filed a charge with the EEOC.[38] Thus, the plaintiff did not exhaust the required administrative remedies required under Title VII.[39]

The district court ultimately dismissed the plaintiff's complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, holding that Title IX does not apply to the defendant because the defendant's residency program was not an "education program or activity" within the meaning of Title IX.[40] The district court further concluded that even if Title IX did apply, the plaintiff could not use Title IX to "circumvent" the administrative requirements of Title VII because Congress intended Title VII as the "exclusive avenue for relief" for employment discrimination.[41] The plaintiff's hostile environment claim was dismissed with prejudice as untimely.[42] As no federal claims remained,

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[34] *Id.*

[35] *Id.*

[36] *Id.* at 257–58.

[37] *Id.* at 257.

[38] *See Mercy II*, 850 F.3d at 552 (noting that the plaintiff acknowledged her failure to file a claim with the EEOC); *Mercy I*, 158 F. Supp. 3d at 258 (noting that plaintiff resigned from the residency program in 2013 and filed suit in U.S. District Court for the Eastern District of Pennsylvania in 2015).

[39] *See* 42 U.S.C. §§ 2000e-5(b), 2000e-5(e) (listing filing employment discrimination charges with the EEOC as initial step to satisfy administrative remedial scheme under Title VII); *Mercy II*, 850 F.3d at 552 (noting that the plaintiff acknowledged her failure to file a claim with the EEOC); *Mercy I*, 158 F. Supp. 3d at 258 (noting that plaintiff resigned from the residency program in 2013 and filed suit in federal court in 2015).

[40] *See* 20 U.S.C. § 1681(a); *Mercy I*, 158 F. Supp. 3d at 257, 259, 263 (referencing legislative history and principles of judicial restraint to narrowly interpret Title IX that the defendant's medical residency program was not an "education program or activity"). The statute, 20 U.S.C. § 1681(a), states 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).

[41] *See Mercy I*, 158 F. Supp. 3d at 261 (noting that some courts have held that even where sex-based employment discrimination occurs in an educational institution, plaintiffs are still not allowed to circumvent the administrative scheme of Title VII by choosing to bring claims under Title IX).

[42] *Id.* at 261, 263. The district court found that the plaintiff could not rely on a continuing violations theory to make a hostile environment claim. *Id.* at 262 (citing Mandel v. M & Q Packaging Corp., 706 F.3d 157, 167 (3d Cir. 2013)); *see also Mandel*, 706 F.3d at 167 (noting that to determine whether a continuing violation has occurred, courts must look to the breadth of the claimed discriminatory incidents).

pursuant to 28 U.S.C. § 1367(c), the district court denied supplemental jurisdiction over the plaintiff's state law claims.[43] Accordingly, the court dismissed the state claims without prejudice, and the plaintiff appealed.[44]

## II. The Third Circuit's Decision and the Circuit Split

Courts have been unable to reach a consensus on the issue of whether employees with the ability to bring sex-based employment discrimination claims under either Title VII or Title IX are precluded from exclusively using Title IX as an avenue of relief.[45] Section A examines the reasoning underlying the U.S. Court of Appeals for the Third Circuit's 2017 decision in *Mercy II*.[46] Section B discusses the circuit split on the issue.[47] Section C discusses the four U.S. Supreme Court cases that the *Mercy II* court relied upon in its decision.[48]

### *A. The Third Circuit's Finding That Title VII's Concurrent Applicability Does Not Preclude an Employee's Private Causes of Action Under Title IX*

In *Mercy II*, the Third Circuit set out to address three issues: (1) whether the defendant was subject to Title IX; (2) whether the plaintiff could bring private causes of action under Title IX; and (3) whether the plaintiff's state law claims should be dismissed.[49] First, the *Mercy II* court concluded that Title IX should apply only if the defendant's "program or activity" had "educational characteristics."[50] Using a four-factor test, the court held that the defendant's operation of the residency program satisfied Title IX because the program was

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[43] *See* 28 U.S.C. § 1367(c) (2012) (stating that a district court may deny maintaining supplemental jurisdiction over a state claim for the following reasons: (1) the state claim "raises a novel or complex issue of State law"; (2) the state claim "substantially predominates over the claim" for which the court has original jurisdiction; (3) the court has already "dismissed all claims over which [the court] has original jurisdiction"; or (4) there are other "compelling reasons for declining jurisdiction"); *Mercy I*, 158 F. Supp. 3d at 263 (noting that the federal claims had been dismissed from the case).

[44] *See Mercy II*, 850 F.3d at 552; *Mercy I*, 158 F. Supp. 3d at 263.

[45] *See* Doe v. Mercy Catholic Med. Ctr. (*Mercy II*), 850 F.3d 545, 560 (3d Cir. 2017) (holding that the plaintiff's ability to bring a claim under either Title VII or Title IX did not prevent private causes of action for sex-based employment discrimination under Title IX). The *Mercy II* court's decision was contrary to the holdings of the Fifth and Seventh Circuits. *See* Waid v. Merrill Area Pub. Sch., 91 F.3d 857, 861–62 (7th Cir. 1996) (holding that Title VII's "comprehensive statutory scheme" prevented the plaintiff's Title IX claims); Lakoski v. James, 66 F.3d 751, 753–54 (5th Cir. 1995) (holding that the plaintiff did not have the right to ignore Title VII's administrative remedial procedures by instead bringing a claim of sex-based employment discrimination under Title IX).

[46] *See infra* notes 49–59 and accompanying text.

[47] *See infra* notes 60–78 and accompanying text.

[48] *See infra* notes 79–97 and accompanying text.

[49] *See Mercy II*, 850 F.3d at 552 (listing the three issues to be addressed).

[50] *See id.* at 552, 556 (describing the standard the defendant must meet to be subject to claims brought under Title IX).

"affiliated" with Drexel Medicine.[51] Based on this affiliation, the court found that the program was sufficiently educational under Title IX to be considered an educational program or activity.[52]

Second, the court determined whether the plaintiff could bring private causes of action under Title IX.[53] The Third Circuit agreed with the district court that it was conceivable that the plaintiff, as a medical resident, was the defendant's "employee."[54] The court further stated that the plaintiff could have filed a Title VII claim in court as an "employee" if she had conformed to the administrative requirements of Title VII.[55] The defendant argued that because the plaintiff failed to bring her claims under Title VII, she should not be allowed to bypass Title VII's administrative requirements by later bringing her claim under Title IX.[56] Rejecting the defendant's argument, the Third Circuit held that the applicability of both Title VII and Title IX did not preclude the plaintiff's private causes of action under Title IX for both retaliation and quid pro quo harassment.[57] The Third Circuit made this determination by relying, in significant part, on four Supreme Court decisions: (1) *Jackson v. Birmingham Board of Education*, (2) *North Haven Board of Education v. Bell*, (3) *Cannon v. University of Chicago*, and (4) *Johnson v. Railway Express Agency, Inc.*[58] Finally, the Third

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[51] *See id.* at 556–58 (listing the four-factor test). The Third Circuit reasoned that whether a program or activity is "sufficiently educational" under Title IX is both a question of law and fact, and determined four "features" to support this analysis. *Id.* at 556. The four features included: (1) a program that consists of either part-time or full-time study or training; (2) a program that enables participants to obtain a specific degree, diploma, or certification, qualify for an examination, or enables participants to seek a specific vocation or trade beyond an apprenticeship style program; (3) a program that uses "processes, examinations or grades" as evaluation tools, receives tuition payments, and "provides instructors"; or (4) the bodies "offering, accrediting, or regulating" the program regard it as having educational characteristics. *See id.*; O'Connor v. Davis, 126 F.3d 112, 118 (2d Cir. 1997) (finding education programs typically provide instructors, evaluations, and offer a particular course of training.).

[52] *See Mercy II*, 850 F.3d at 558 (holding that Mercy's purpose was sufficient because it was "in part" educational under Title IX). The Third Circuit presumed, without holding, that Mercy received "Federal financial assistance" under Title IX. *See id.* (deciding to not consider whether Mercy received "federal financial assistance" and remanding the issue for the District Court)

[53] *Id.* at 559.

[54] *Id.* (citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323–24 (1992)) (relying on *Darden*'s common-law factors to determine that the plaintiff was an "employee" within the meaning of Title VII); *see also Darden*, 503 U.S. at 323–24 (stating that the factors to determine whether one is an "employee" include but are not limited to whether the supervising entity maintains control of the party, the tax treatment of the "employee," and the level of ability required for the position).

[55] *See Mercy II*, 850 F.3d at 559–60 (affirming that the plaintiff could have filed a charge with the EEOC under Title VII because she was an "employee").

[56] Brief for Appellee at 6, 27, *Mercy II*, 850 F.3d 545 (No. 16-1247), 2016 WL 5345964, at *6, 27 [hereinafter *Mercy II* Appellee's Brief] (arguing that allowing an implied private right of action under Title IX for a medical resident at a private hospital would improperly alter Congress's intent by circumventing Title VII's congressionally imposed administrative remedial scheme).

[57] *Mercy II*, 850 F.3d at 560.

[58] *Id.* at 552–64. *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 171, 73–74 (2005) (allowing plaintiff's private Title IX sex-based employment retaliation claim under implied private right

Circuit held that the plaintiff's Title IX retaliation and quid pro quo harassment claims survived, while her hostile environment claim was time-barred and reversed the district court's dismissal of the plaintiff's claims under state law.[59]

### *B. Circuit Split*

In deciding *Mercy II*, the Third Circuit joined a circuit split among the U.S. Courts of Appeals on the issue of whether employees with the ability to bring sex-based employment discrimination claims under either Title VII or Title IX are precluded from solely using Title IX as an avenue of relief.[60] The Third Circuit, holding that Title VII's "concurrent applicability" does not prevent a plaintiff from bringing claims under Title IX, followed the reasoning of the First and Fourth Circuits while explicitly differing from the Fifth and Seventh Circuits.[61]

The First and Fourth Circuits found that Title VII's concurrent applicability did not preclude a plaintiff's private causes of action under Title IX.[62] In the

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of action set forth in *Cannon*); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (noting that Congress could have restricted the scope of "persons" in 20 U.S.C. § 1681(a) but did not choose to do so as a matter of policy; therefore, employees are not categorically excluded from its protection); Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) (finding an implied private cause of action in Title IX); Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459 (1975) (holding that private sector employee is not prevented from pursuing remedial avenues other than Title VII but could maintain concurrent actions under Title VII and § 1981 for claims of race discrimination).

[59] *Mercy II*, 850 F.3d at 549, 566–67 (holding that the court could exercise supplemental jurisdiction over the plaintiff's related state law claims because the court maintained original federal jurisdiction over the plaintiff's Title IX claims); *see* Doe v. Mercy Catholic Med. Ctr. (*Mercy I*), 158 F. Supp. 3d 256, 263 (E.D. Pa. 2016) (dismissing the plaintiff's state law claims because the court rejected the Title IX claims that created original federal jurisdiction); *see also* 28 U.S.C. § 1367(c)(3) (2012) (stating that a court may decline supplemental jurisdiction if it dismisses the claims that enable original jurisdiction).

[60] *See Mercy II*, 850 F.3d at 560 (holding that the plaintiff's ability to bring a claim under either Title VII or Title IX did not prevent private causes of action for sex-based employment discrimination under Title IX). The *Mercy II* court's decision was contrary to the holdings of the Fifth and Seventh Circuits. *See Waid*, 91 F.3d at 861–62 (holding that Title VII's "comprehensive statutory scheme" prevented the plaintiff's Title IX claims); *Lakoski*, 66 F.3d at 753, 54 (holding that the plaintiff did not have the right to ignore Title VII's administrative remedial procedures by instead bringing a claim of sex-based employment discrimination under Title IX).

[61] *See Mercy II*, 850 F.3d at 560, 563 (holding that relief under Title IX for claims of sex-based employment discrimination is not limited to plaintiffs with no avenue of relief under Title VII); Preston v. Virginia *ex rel.* New River Cmty. Coll. (*Preston II*), 31 F.3d 203, 206–07 (4th Cir. 1994) (allowing the plaintiff's Title IX claim for sex-based employment discrimination to proceed by determining that those claims under Title IX should be interpreted under Title VII standards); Lipsett v. Univ. of P.R., 864 F.2d 881, 896–97 (1st Cir. 1988) (allowing the plaintiff's Title IX sex-based employment discrimination claim to proceed). *But see Waid*, 91 F.3d at 861–62 (implying Congress's intent to preclude Title IX as an avenue of relief due to Title VII's "sufficiently comprehensive" remedial procedures); *Lakoski*, 66 F.3d at 753 (holding that Title VII is the exclusive avenue for relief for claims of sex-based employment discrimination in federally funded educational institutions).

[62] *See Preston II*, 31 F.3d 206–07 (allowing the plaintiff's Title IX claim to proceed but ultimately deciding that her claim of discrimination under Title IX failed under Title VII standards); *Lipsett*,

First Circuit's 1988 decision in *Lipsett v. University of Puerto Rico*, the plaintiff, while attending a residency training program, claimed sex-based discrimination against individuals and the University of Puerto Rico under § 1983 and Title IX.[63] On appeal, the First Circuit found that the plaintiff was both a student and employee and allowed the plaintiff's sex-based discrimination claims to proceed under Title IX.[64] Therefore, without explicitly addressing the issue, the First Circuit found by implication that the plaintiff was not prevented from bringing private causes of action under Title IX due to the concurrent applicability of Title VII and Title IX.[65]

Similarly, in the Fourth Circuit's 1994 decision in *Preston v. Virginia ex rel. New River Community College*, the plaintiff, a counselor at New River Community College, alleged retaliatory employment discrimination under Title VII and Title IX.[66] The Fourth Circuit noted that although the Supreme Court had yet to address whether Title VII standards of employment discrimination apply to Title IX claims, a majority of courts faced with this issue had found that Title IX claims should adhere to Title VII principles.[67] Following this rationale, the Fourth Circuit implicitly found that the plaintiff was not prevented from bringing claims of sex-based employment discrimination under Title IX, even where Title VII concurrently applied.[68] Thus, the First and Fourth Circuits have implicitly found that the concurrent applicability of Title

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864 F.2d at 896–97 (allowing the plaintiff's private Title IX claim to proceed by applying employment discrimination principles articulated under Title VII).

[63] *See Lipsett*, 864 F.2d at 884 (noting the plaintiff brought claims of sex-based discrimination under both § 1983 and Title IX).

[64] *See id.* at 897 (citing Mabry v. State Bd. of Cmty. Coll. & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987)) (examining EEOC guidelines and the legislative history of Title IX to determine that Title VII principles should apply to the plaintiff's Title IX claim for sex-based employment discrimination); *see also Mabry*, 813 F.2d at 316 n.6 (noting that Title VII is the "most appropriate analogue" to determine the appropriate standard for claims of employment sex discrimination under Title IX).

[65] *See Lipsett*, 864 F.2d at 897 (allowing the plaintiff's private Title IX claim to proceed by applying employment discrimination principles articulated under Title VII). The court further stated that it did not make a finding regarding whether the defendant university was an "educational institution" that received "federal financial assistance" under the statute. *See id.* at 885

[66] *Preston II*, 31 F.3d at 204, 205. The lower court held that it could not address the plaintiff's Title VII claim because she did not pursue the required administrative procedures and failed to obtain a "Right to Sue" letter. Preston v. Commonwealth, 779 F. Supp. 45, 46 (W.D. Va. 1990).

[67] *See Preston II*, 31 F.3d at 206–07 (listing the cases that found Title VII standards to be applicable for claims of sex-based employment discrimination under Title IX and following that interpretation); *see also* Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 832–33 (10th Cir. 1993) (stating that Title VII is "the most appropriate analogue" to determine standards of employment discrimination under Title IX); Cohen v. Brown Univ., 991 F.2d 888, 902 (1st Cir. 1993) (noting that in *Lipsett*, the use of Title VII principles was "perhaps" allowable when applied to employment discrimination claims under Title IX); *Lipsett*, 864 F.2d at 897 (allowing the plaintiff's private Title IX claim to proceed by applying employment discrimination principles articulated under Title VII).

[68] *See Preston II*, 31 F.3d at 208 (allowing the plaintiff's Title IX claim to proceed but ultimately deciding that her claim of discrimination under Title IX failed under Title VII standards).

VII and Title IX does not prevent employees of federally funded educational institutions from bringing claims of sex-based employment discrimination under either Title VII or Title IX.[69]

In contrast, the Fifth and Seventh Circuits have held that Title VII's concurrent applicability prevents plaintiffs' private causes of action under Title IX for employment discrimination.[70] In the Fifth Circuit's 1995 decision in *Lakoski v. James*, the plaintiff, a university professor, claimed sex-based employment discrimination.[71] The plaintiff did not comply with the administrative remedial scheme of Title VII but rather sought redress under Title IX and § 1983 of the Civil Rights Act.[72] The Fifth Circuit found that the plaintiff could not arbitrarily decide to evade Title VII's remedial scheme.[73] The court therefore held that Title VII was the sole avenue for relief for employees of federally-funded education institutions who sought to bring claims of sex-based employment discrimination.[74]

In 1996, in *Waid v. Merrill Area Public Schools,* the Seventh Circuit noted that where different statutes, such as Title VII and Title IX, appear to enable "parallel paths" to redress a claim, the court must determine if Congress intended either path to be the sole avenue of relief.[75] In *Waid*, the court was persuaded that Congress' decision to create Title VII's comprehensive administrative remedial scheme was implicit evidence of Congress' intention that Title VII be the exclusive remedy for sex-based employment discrimination.[76] Thus, both the Fifth and Seventh Circuits found that employees of federally funded educational institutions are prevented from bringing claims of employment

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[69] *See id.* at 206–07 (allowing the plaintiff's Title IX claim for sex-based employment discrimination to proceed by determining that those claims under Title IX should be interpreted under Title VII standards); *Lipsett*, 864 F.2d at 897 (allowing the plaintiff's private Title IX claim to proceed by applying employment discrimination principles articulated under Title VII).

[70] *See Waid*, 91 F.3d at 861–62 (holding that Title VII's "comprehensive statutory scheme" prevents private Title IX employment discrimination claims); *Lakoski*, 66 F.3d at 753 (holding that for claims of sex-based employment discrimination in federally funded educational institutions, Title VII is the sole avenue of relief).

[71] *Lakoski*, 66 F.3d at 752.

[72] *See id.* at 753 (implying that plaintiff did not file a charge with EEOC).

[73] *See id.*

[74] *See id.* at 753–54 (highlighting Congress's creation of Title VII's "carefully balanced remedial scheme" as evidence for the preclusion of Title IX as an avenue of relief). The Fifth Circuit in *Lakoski* narrowed its holding, that Title VII was the sole avenue for relief for claims of employment discrimination, to plaintiffs pursuing monetary damages under Title IX or § 1983. *See id.* at 753.

[75] *See Waid*, 91 F.3d at 861 (noting that the existence of a "comprehensive statutory scheme" might evidence Congress's intent to provide an exclusive avenue of relief under that statute); *see also* Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981) (noting that "sufficiently comprehensive" remedial procedures under a statute can evidence Congress's intent to prevent a plaintiff's cause of action under § 1983).

[76] *See Waid*, 91 F.3d at 861–62 (holding that the plaintiff was precluded from pursuing Title IX as an avenue of relief for claims of sex-based employment discrimination due to the exclusivity of Title VII).

discrimination on the basis of sex under Title IX.[77] The courts reasoned that allowing a plaintiff to bring claims of sex-based employment discrimination under Title IX would improperly evade Title VII's administrative remedial scheme."[78]

### *C. Mercy II's Reliance on Four Supreme Court Cases*

In this legal landscape, the Third Circuit in *Mercy II* faced the issue of whether Title IX's implied private cause of action applied to the plaintiff's retaliation, quid pro quo, and hostile environment claims.[79] The defendant claimed that the district court correctly prevented the plaintiff from bringing claims of sex-based employment discrimination under Title IX.[80] Pointing to Title VII's "carefully-drawn" framework, the defendant argued that the plaintiff was precluded from evading Title VII's elaborate administrative requirements by instead choosing to bring her claims under Title IX.[81] Dismissing the majority of the defendant's argument, the Third Circuit relied, in significant part, on four Supreme Court cases to support the holding that Title VII's "concurrent applicability" did not preclude the plaintiff's private causes of action under Title IX.[82]

The first of these cases was the Court's 1975 decision in *Johnson v. Railway Express Agency, Inc.*, which held that the scope of Title VII did not preclude private-sector employees from choosing to bring claims under § 1981 for race discrimination in employment.[83]

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[77] *See id.* at 861–62 (holding that Title VII's "comprehensive statutory scheme" prevents private Title IX employment discrimination claims); *Lakoski*, 66 F.3d at 753 (holding that for claims of sex-based employment discrimination in federally funded educational institutions, Title VII is the sole avenue of relief).

[78] *See Waid*, 91 F.3d at 862 (noting that Title VII's administrative remedial scheme exclusively enabled protection of employee's rights); *Lakoski*, 66 F.3d at 753 (noting that it was unlikely Congress created Title VII's remedial scheme with the intention of allowing other statutes to evade its protections).

[79] *See Mercy II*, 850 F.3d at 559 (reasoning that the *Lakoski* and *Waid* decisions of the Fifth and Seventh Circuits were inapplicable because they were decided ten years before the Supreme Court's 2005 decision in *Jackson*).

[80] *See id.* (referencing the defendant's claim that the district court correctly found Title VII as the exclusive means for redressing a claim of sex-based employment discrimination in federally funded educational institutions); *Mercy II* Appellee's Brief, *supra* note 56, at *6, 27 (stating that allowing an implied private right of action for claims brought under Title IX by an employee, specifically a resident at a hospital, would disturb Title VII's administrative remedial scheme).

[81] *See Mercy II*, 850 F.3d at 559 (noting the defendant's argument that concurrent claims under Title VII and Title IX would improperly enable plaintiffs to "plead around" the administrative procedures of Title VII).

[82] *Id.* at 560, 562 (relying on the Supreme Court's *Jackson*, *Bell*, *Cannon*, and *Johnson* decisions to delineate four principles that, when satisfied, allow an employee of a federally funded educational institution to bring claims of sex-based employment discrimination under Title IX as an appropriate avenue of relief).

[83] *See Johnson*, 421 U.S. at 459 (stating that Congress included in the legislative history that Title VII and § 1981 of the Civil Rights Act are not meant to prevent access to one another); *see also* Alex-

The second case was the Court's 1979 decision, in *Cannon v. University of Chicago*, that held that an implied private right of action exists for individuals to enforce Title IX.[84] After being rejected from admission to medical schools, the plaintiff in *Cannon* claimed sex-based discrimination under Title IX.[85] The Supreme Court found that a private right of action existed under Title IX, notwithstanding the fact that the statute did not provide a private right of action as a method of enforcement.[86]

The third Supreme Court case relied on by the *Mercy II* court was the Supreme Court's 1982 decision in *North Haven Board of Education v. Bell* that upheld agency regulations interpreting Title IX to extend to claims of sex-based employment discrimination.[87] The Court found that the agency correctly determined that the term "person" in Title IX included both employees and students within the category of people that the statute protected from sex-based discrimination.[88]

Lastly, the *Mercy II* court relied on the 2005 decision, in *Jackson v. Birmingham Board of Education*, where the Court found that claims of sex-based employment retaliation could proceed under Title IX through an implied private right of action set forth in *Cannon*.[89] In *Jackson*, the school board fired a high school employee after he claimed that the girls' basketball team had been subjected to disparate treatment based on sex.[90] The *Jackson* Court reasoned that if entities receiving federal funds under Title IX were "permitted to retaliate freely" against parties, such as the employee in this case, those parties

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ander v. Gardner-Denver Co., 415 U.S. 36, 48–49 (1974) (stating that Title VII's legislative history evidenced a congressional intent that plaintiffs should be able to choose their preferred statutory avenue of enforcement, either under Title VII or other appropriate statutes).

[84] *Cannon*, 441 U.S. at 717 (holding that despite the fact the statute did not explicitly include a private right of action, the court implied a private right of action). Title IX provides one express enforcement mechanism—action through federal agencies to revoke funding—under 20 U.S.C. § 1682. 20 U.S.C. § 1682 (2012).

[85] *Cannon*, 441 U.S. at 680.

[86] *See id.* at 683, 688–89, 717 (noting that the four-part test developed by the Supreme Court in its 1975 *Cort v. Ash* decision must be satisfied for a court to establish an implied private right of action in a statute).

[87] *See Bell*, 456 U.S. at 514, 538 (upholding the validity of HEW regulations because they conformed to the nature of Title IX). Notably, Chief Justice Burger, joined by Justice Rehnquist and Justice Powell, dissented, pointing to the entirety of Title VII's administrative remedial scheme and the minimal likelihood that Congress would provide a redundant method of enforcement under Title IX that was not limited by similar administrative protections. *See id.* at 552–53 (Powell, J., dissenting) (noting that Title VII and Title IX are governed by different governmental authorities that have distinct abilities to pursue specific statutory violations, means to address those violations, and distinct technical knowledge pertaining to the statute).

[88] *Id.* at 516, 521 (Blackmun, J., majority).

[89] *See Jackson*, 544 U.S. at 173–74 (holding that retaliation against a person for bringing a claim of sex discrimination is included in Title IX's broad prohibition against intentional sex-based discrimination).

[90] *Id.* at 171–72.

would be chilled in the future from bringing claims of sex-based employment discrimination.[91]

Based in significant part on these four Supreme Court cases, the *Mercy II* court derived four guiding principles to determine whether Title VII's concurrent applicability precluded the plaintiff's private causes of action under Title IX.[92] First, Title VII is not the exclusive avenue of relief for claims of employment discrimination by employees in private workplaces.[93] Second, Congress' use of "person" in Title IX represented a policy decision to allow employment discrimination claims to proceed under alternative statutes, rather than solely under Title VII.[94] Third, under Title IX, the term "person[s]" covers both employees and students.[95] Lastly, employees of federally-funded educational institutions can bring claims of sex-based employment discrimination under Title IX's implied private right of action.[96] Applying these four principles, the Third Circuit held that the applicability of both Title VII and Title IX did not preclude the plaintiff's private causes of action under Title IX for both retaliation and quid pro quo harassment.[97]

## III. Circumventing Congress' Comprehensive Schemes: The Errors of the Third Circuit's Decision to Allow Employees of Educational Institutions to Bypass Title VII by Bringing Claims Under Title IX

In its 2017 decision in *Mercy II*, the U.S. Court of Appeals for the Third Circuit incorrectly ruled that a plaintiff claiming sex-based employment discrimination could bring private causes of action under Title IX in cases where

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[91] *See id.* at 180 (noting that this chilling effect could potentially occur if individual claims of sex-based employment retaliation were not protected under Title IX because employers could discharge employees who filed complaints without consequence).

[92] *See Mercy II*, 850 F.3d at 560, 562 (listing *Johnson*, *Cannon*, *Bell*, and *Jackson* as four Supreme Court cases relied upon to develop the four guiding principles).

[93] *Id.* (relying on *Johnson* to conclude that employees are not limited to using Title VII as an avenue of relief for claims of sex-based employment discrimination); *see also Bell*, 456 U.S. at 521 (determining that Title IX's "broad" language and prohibition of sex-based discrimination applied to both employees and students); *Johnson*, 421 U.S. at 459 (holding that employees are not restricted to Title VII as the sole statute to redress claims of employment discrimination).

[94] *Mercy II*, 850 F.3d at 562 (finding the dissent in *Bell* to be unfounded due to the broad scope that Congress gave to the term "person" in Title IX); *see also Bell*, 456 U.S. at 535 n.26 (stating that the Court should defer to the policy judgments of Congress in determining the applicability of statutes).

[95] *Mercy II*, 850 F.3d at 562; *see Bell*, 456 U.S. at 521 (noting that Congress could have restrained the applicability of "persons" in the statute but did not do so; therefore, employees can be subject to its protections).

[96] *Mercy II*, 850 F.3d at 562; *see Jackson*, 544 U.S. at 173–74 (holding that retaliation against an individual for bringing a claim of sex discrimination is included in Title IX's expansive protection against intentional sex-based discrimination).

[97] *See Mercy II*, 850 F.3d at 560, 562 (applying the principles derived from *Johnson*, *Cannon*, *Bell*, and *Jackson* to the plaintiff's claims).

both Title VII and Title IX apply.[98] The Third Circuit erred in its decision for three reasons: (1) the holding is contrary to Congressional intent; (2) the court should have followed the reasoning and holding of the Fifth Circuit's 1995 decision in *Lakoski v. James*, which had very similar facts; and (3) the court incorrectly combined several prior U.S. Supreme Court holdings in order to support its conclusion.[99]

### *A. Contravention of Congressional Intent*

Congress, by including exhaustive administrative remedial schemes for any claim brought under Title VII, intended Title VII to be the sole avenue of relief for sex-based employment discrimination claims.[100] To prevail on a claim that Title IX is accessible as an avenue of relief for employees, the legislative history and language of Title IX must indicate clear Congressional intent to create an avenue of relief in addition to Title VII.[101] There is no such evidence of intent.[102]

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[98] *See* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938) (noting that a plaintiff must pursue all required statutory administrative remedies before filing a claim in court); *see, e.g.*, Bonds v. Leavitt, 629 F.3d 369, 379 (4th Cir. 2011) (holding that for Title VII claims, the plaintiff is required to pursue all administrative remedies with the EEOC or its state counterpart, before bringing a claim of employment discrimination in court); Shikles v. Sprint/United Mgmt. Co., 426 F.3d 1304, 1317 (10th Cir. 2005) (noting that it is foundational that a plaintiff must pursue all the required administrative procedures under Title VII prior to bringing a claim in federal court). *Contra* Doe v. Mercy Catholic Med. Ctr. (*Mercy II*), 850 F.3d 545, 560 (3d Cir. 2017) (holding that the plaintiff could bring claims under either Title VII or Title IX where both statutes applied).

[99] *See infra* notes 100–124 and accompanying text (examining three factors that negatively impact the Third Circuit's holding in *Mercy II*).

[100] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5(b), 2000e-5(e) (2012) (listing administrative remedial procedures a plaintiff must satisfy to bring a claim under Title VII); McCarthy v. Madigan, 503 U.S. 140, 144–45 (1992) (noting that under the principle of "exhaustion," claimants must pursue all administrative avenues before bringing a claim in court); *see also* Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981) (noting that the existence of "sufficiently comprehensive" remedial procedures in a statute can evidence congressional intent to prevent a plaintiff's cause of action under § 1983 of the Civil Rights Act); Hildebrand v. Allegheny Cty., 757 F.3d 99, 105 (3d Cir. 2014) (quoting *Nat'l Sea Clammers Ass'n*, 453 U.S. at 20–21) (stating that the presence of "sufficiently comprehensive" avenues of relief in a statute evidence Congress' intent to prevent the use of alternative statutes to obtain relief).

[101] *See* Ruth, *supra* note 5, at 209 (noting the Court's shift from the test in *Cannon* to the use of congressional intent to ascertain whether an implied private right of action exists under a statute); Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 887 (1996) (stating that congressional intent to provide a private right of action can usually be found explicitly in the language of the statute or in the legislative history); *see also* Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 76 (1992) (Scalia, J., concurring) (noting that the "search for" Congress's intent for a private cause of action is "unlikely to succeed" because the right was not expressly created by Congress but rather implied by the Court in prior cases).

[102] *See* 20 U.S.C. § 1682 (2012) (stating that the sole mechanism for enforcement in the statute is ceasing federal funds where a violation of Title IX is found, and lacking any private right of action); Ruth, *supra* note 5, at 217 (noting that the limited legislative history supports a finding that Congress did not intend to allow any private right of action for employment discrimination under Title IX). *But*

The legislative history of Title IX does not provide clear evidence of Congressional intent to create a private right of action for employment discrimination under Title IX.[103] Rather, the Higher Education Amendments of 1972 both enacted Title IX and repealed an exemption for education institutions under Title VII.[104] Intentionally subjecting educational institutions to Title VII's scheme demonstrated Congress' intent to rectify gaps in Title VII, rather than to create a redundant avenue of relief under Title IX.[105]

The language of Title IX does not provide clear evidence of Congressional intent to allow a private right of action for employment discrimination.[106] Under Title IX, there is no explicit private right of action and the sole method of enforcement is an administrative procedure to withdraw federal funding from institutions in violation of the statute.[107] In the Supreme Court's 1979 decision in *Cannon v. University of Chicago Cannon*, the Court found an implied private right of action in Title IX to enable a key purpose of the act: protecting individuals from educational discrimination.[108] Title VII, in contrast, does not leave individuals without a remedy.[109] The Third Circuit therefore improperly expanded Title IX's implied private right of action to include employees because Title VII already provided employees with comprehensive avenues of relief.[110]

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*see* Stabile, *supra* note 101, at 887–88 (noting that the failure to address existence of a private right of action cannot be used as evidence that Congress meant to entirely exclude private rights of action).

[103] *See* Ruth, *supra* note 5, at 217 (noting the limited legislative history surrounding Title IX); Lewis, *supra* note 29, at 1050 (noting that the limited availability of Title IX legislative history is due to the act's conception as a floor amendment, thereby producing no committee reports).

[104] *See* Ruth, *supra* note 5, at 217 (stating that a key consequence of passing Title IX in conjunction with the Higher Education Amendments of 1972 was making educational institutions subject to the purview of Title VII).

[105] *See id.* at 218–19 (inferring that if Congress wanted Title IX to include private claims of sex-based employment discrimination, Congress would not have repealed the exemption for educational institutions under Title VII); *see also* 118 CONG. REC. 7563 (1972) (stating that the EEOC should only bring an action in court if conciliation fails); 117 CONG. REC. 31,960 (1971) (noting support for primary administrative enforcement of Title VII issues because of the familiarity and knowledge required in addressing intricate employment discrimination issues).

[106] *See* 20 U.S.C. § 1682 (stating that the sole mechanism for enforcement in the statute is ceasing federal funds where a violation of Title IX is found); Ruth, *supra* note 5, at 211 (noting that the language of Title IX provides no indication of congressional intent to allow a private cause of action).

[107] *See* 20 U.S.C. § 1682.

[108] *See* Cannon v. Univ. of Chi., 441 U.S. 677, 704–06 (1979) (finding an implied private right of action in Title IX because the sole enforcement mechanism within the statute, withdrawal of federal funds, did not provide an effective remedy for individuals).

[109] *See* 42 U.S.C. § 2000e-5(f)(1) (stating that even where the EEOC decides not to sue, is unable to sue, or the claimant is unsatisfied with the outcome of the conciliation process, the claimant, after receiving notice from the EEOC, may file a suit within ninety days); Kim M. Cafaro et al., *supra* note 20, at 89 (noting that individuals are allowed to bring private causes of action under Title VII after satisfaction of the statute's administrative remedial scheme).

[110] *See* Ruth, *supra* note 5, at 219 (noting it is unlikely Congress brought education institutions within the purview of Title VII to then permit evasion of its administrative schemes by recognizing claims under Title IX). *Contra Mercy II*, 850 F.3d at 560, 562.

The language and legislative history of Title IX do not provide clear evidence of Congressional intent to create additional avenues to evade Title VII's remedial scheme; thus, plaintiffs should not be able to bring their claims under Title IX.[111]

### *B. The Third Circuit Should Have Followed the Fifth Circuit's Reasoning and Holding in* Lakoski

The Fifth and Seventh Circuits correctly held that Title VII's concurrent applicability prevented plaintiffs' private causes of action under Title IX for employment discrimination.[112] The Fifth Circuit case, *Lakoski*, most closely resembles the facts of *Mercy II*.[113] The plaintiffs in both *Lakoski* and *Mercy II* claimed sex-based employment discrimination but did not file charges with the EEOC as required under Title VII's administrative scheme.[114] As recovery under Title VII was prevented due to failure to comply with the statute's administrative procedures and timeframe, the plaintiffs attempted to evade Title VII by bringing claims under Title IX directly in court.[115] It is unlikely that Congress intended to create a bypass of Title VII's remedial scheme by allowing plaintiffs to subsequently bring these claims instead under Title IX.[116]

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[111] *See* Ruth, *supra* note 5, at 217 (noting that the limited legislative history supports a finding that Congress did not intend to allow any private right of action for employment discrimination under Title IX); Stabile, *supra* note 101, at 887 (stating that congressional intent to provide a private right of action can usually be found expressly in the language of the statute or in the legislative history).

[112] *See* Waid v. Merrill Area Pub. Sch., 91 F.3d 857, 861–62 (7th Cir. 1996) (holding that Title VII's "comprehensive statutory scheme" prevents private Title IX claims); Lakoski v. James, 66 F.3d 751, 753 (5th Cir. 1995) (holding that the plaintiff did not have the right to ignore Title VII's administrative remedial procedures by instead bringing a claim of sex-based employment discrimination under Title IX).

[113] *See Mercy II*, 850 F.3d at 549–50, 552 (stating that a medical resident, who worked in a hospital that accepted federal funds, claimed sex-based employment discrimination after reporting her superior's advances); *Lakoski*, 66 F.3d at 752 (stating that a university professor claimed sex-based employment discrimination by her employer because she was denied tenure).

[114] *See* 42 U.S.C. § 2000e-5(e)(1) (stating that plaintiffs must file charges with EEOC within 180 days of claimed discriminatory act); *id.* § 2000e-5(b) (stating that EEOC must pursue unofficial methods of "conference, conciliation, and persuasion."); *Mercy II*, 850 F.3d at 552; *Lakoski*, 66 F.3d at 753.

[115] *See Mercy II*, 850 F.3d at 552; *Lakoski*, 66 F.3d at 753.

[116] *See McCarthy*, 503 U.S. at 144–45 (stating that under the principle of "exhaustion," claimants must pursue all administrative avenues prior to bringing a claim in court); *Nat'l Sea Clammers Ass'n*, 453 U.S. at 20 (noting that the existence of "sufficiently comprehensive" remedial procedures in a statute can evidence congressional intent to prevent a plaintiff's cause of action under § 1983 of the Civil Rights Act); Ruth, *supra* note 5, at 219 (reasoning that it is unlikely Congress brought education institutions within the purview of Title VII to then permit evasion of its administrative schemes by recognizing claims under Title IX).

### *C. The Third Circuit Incorrectly Combined Several Supreme Court Holdings to Support Its Conclusion*

The conflict between Title VII's administrative remedial scheme and Title IX's implied private right of action was not at issue in the Supreme Court cases *Cannon*, *North Haven Board of Education v. Bell*, and *Jackson v. Birmingham Board of Education*.[117] In *Cannon* and *Bell*, neither of the plaintiffs had a claim under Title VII because the plaintiffs were not employees.[118] In *Jackson*, the plaintiff was not the direct victim of sex-based discrimination and therefore likely did not have a claim under Title VII.[119] Accordingly, these cases did not have to address whether employees bringing claims of sex-based employment discrimination are able to use either Title VII or Title IX as avenues of relief where both statutes are concurrently applicable.[120] The Third Circuit weakly addressed this issue by stating that all individuals, including both employees and students, can bring discrimination claims under Title IX, whether or not Title VII applies.[121] Here, the Third Circuit noted that discrimination claims under Title IX extend to all individuals, not merely those who do not have a right of action under Title VII.[122] Despite the Supreme Court's attempt to ex-

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[117] *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 172 (2005) (noting that the plaintiff, a high school coach, was not the direct victim of sex-discrimination but complained on behalf of his students; thus, he likely did not have a remedy under Title VII). Notably, neither the claims in *Cannon* nor in *Bell* were brought by an employee. *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 517 (1982) (noting that the plaintiffs were federally funded public school boards); *Cannon*, 441 U.S. at 680 (1979) (stating that the plaintiff was a prospective student applying to medical school); *see also* Johnson v. Ry. Express Agency Inc., 421 U.S. 455, 459 (1975) (holding that a private sector employee is not prevented from bringing claims of race-based employment discrimination under § 1981 of the Civil Rights Act due to the concurrent applicability of Title VII). The plaintiff in *Johnson* claimed employment discrimination based on race; therefore, the conflict between Title IX and Title VII for claims of sex-based employment discrimination in educational institutions was not at issue in *Johnson*. *See* 421 U.S. at 459 (holding that the scope of Title VII does not preclude private-sector employees from choosing to bring claims under § 1981 for race discrimination in employment).

[118] *See* 42 U.S.C. § 2000e-2(a)(1) (stating it is unlawful for an employer to adversely impact or deprive an individual of employment opportunities for discriminatory purposes); *Bell*, 456 U.S. at 517 (not discussing Title VII because it did not apply to the plaintiffs who were public school boards); *Cannon*, 441 U.S. at 680 (not discussing Title VII because, as a prospective student, Title VII did not apply to the plaintiff).

[119] *See Jackson*, 544 U.S. at 172 (noting that the plaintiff, a high school coach, was not the direct victim of sex-discrimination but complained on behalf of his students; thus, he likely did not have a remedy under Title VII).

[120] *See id.* (noting that the plaintiff likely did not have a remedy under Title VII); *Bell*, 456 U.S. at 517 (not discussing Title VII because it did not apply to the public school board plaintiffs); *Cannon*, 441 U.S. at 680 (not discussing Title VII because Title VII did not apply to the plaintiff—a prospective student). *Contra Mercy II*, 850 F.3d at 560 (holding that the plaintiff could bring claims under either Title VII or Title IX where both statutes applied).

[121] *See Mercy II*, 850 F.3d at 563 (referencing *Jackson* to support the court's statement that Title IX should be interpreted to include an expansive scope of individuals).

[122] *See id.* (relying on *Jackson* for the proposition that Title IX should be interpreted to include an expansive scope of individuals).

pand the breadth of Title IX, *Cannon*, *Bell*, and *Jackson* do not combine to provide employees of federally-funded educational institutions with the choice to circumvent the administrative scheme of Title VII.[123] In cases where Title VII and Title IX both apply, plaintiffs should not be able to evade Title VII's remedial scheme by bringing claims of sex-based employment discrimination under Title IX; thus, the Third Circuit's holding was incorrect.[124]

## CONCLUSION

Although the trajectory of Supreme Court decisions has been to expand claimants' rights under Title IX, Congress did not intend to supplant Title VII as the comprehensive employment discrimination statute. This intent is evidenced by Congress' intentional inclusion of extensive remedial schemes in Title VII, the legislative history of Title IX, and the direct language of both statutes. Therefore, the Third Circuit's holding in *Mercy II* was incorrect and should have been decided using the reasoning of the Fifth and Seventh Circuits. Accordingly, in cases where Title VII and Title IX are concurrently applicable, plaintiffs should not be able to circumvent Title VII's remedial scheme by bringing claims of sex-based employment discrimination in federally-funded educational institutions under Title IX.

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[123] *See Jackson*, 544 U.S. at 173 (reasoning that the language of Title IX requires a broad scope to cover anyone subjected to intentional sex discrimination); *Bell*, 456 U.S. at 520 (upholding the validity of HEW regulations that extended Title IX to claims of sex-based employment discrimination because they conformed to the nature of Title IX); *Cannon*, 441 U.S. at 717 (holding that there is an individual private right of action under Title IX but remaining silent on whether the right existed specifically for employment discrimination claims); Ruth, *supra* note 5, at 217 (noting that the limited amount of legislative history supports a finding that Congress did not intend to allow any private right of action for employment discrimination under Title IX); *see also Johnson*, 421 U.S. at 459 (holding that a private sector employee is not prevented from pursuing remedial avenues other than Title VII when provided with alternative rights under § 1981 of the Civil Rights Act).

[124] *See Myers*, 303 U.S. at 50–51 (noting that a plaintiff is not entitled to judicial relief until he or she has pursued all required statutory administrative remedies); *Bonds*, 629 F.3d at 379 (holding that plaintiff must pursue all administrative procedures required by Title VII before bringing a claim in court); *Shikle*s, 426 F.3d at 1317 (noting that a plaintiff must first pursue all Title VII administrative requirements); *Waid*, 91 F.3d at 861–62 (holding that Title VII's "comprehensive statutory scheme" prevents private Title IX claims); *Lakoski*, 66 F.3d at 753 (holding that Congress intended Title VII to be the exclusive avenue for relief for plaintiffs claiming sex-based employment discrimination in federally funded educational institutions); Ruth, *supra* note 5, at 219 (reasoning that it is unlikely Congress brought education institutions within the purview of Title VII to then permit evasion of its administrative schemes by recognizing claims under Title IX). *Contra Mercy II*, 850 F.3d at 560, 562 (relying on *Jackson*, *Bell*, *Cannon*, and *Johnson* to delineate four principles that, when satisfied, allow an employee of a federally funded educational institution to bring claims of sex-based employment discrimination under Title IX as an appropriate avenue of relief).