

## Does The Continuing Violations Doctrine Apply To Title IX?

By **Kayleen Egan**

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In *Keel v. Delaware State University*, the U.S. District Court for the District of Delaware issued a report and recommendation to grant a university's motion to dismiss a Title IX claim based on the statute of limitations. Although the court ultimately declined to rule on the issue, *Keel* raised an important question that has remained undecided in the Third Circuit — whether the continuing violations doctrine applies to Title IX claims.



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### Background of the Continuing Violations Doctrine

Under the continuing violations doctrine, “discriminatory acts that [are not] individually actionable may be aggregated to make out a Title VII hostile work environment claim.”[1] In other words, “[p]rovided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.”[2]

Because a hostile work environment claim is composed of a series of actions, it “cannot be said to occur on any particular day.”[3] Additionally, hostile work environment claims are usually “based on the cumulative [effect] of individual acts.” Accordingly, the cause of action may not accrue until the cumulative effect of the individual acts is felt.[4]

When the continuing violations doctrine applies to a cause of action, the statute of limitations does not begin to run until the last alleged violation occurs.[5] However, in order for the continuing violations doctrine to apply, the acts “must be part of the same unlawful employment practice ... meaning [the acts] involved ‘similar conduct by the same individuals suggesting a persistent, ongoing pattern.’”[6] If the final alleged violation cannot be said to be part of the same “persistent, ongoing pattern” then the continuing violations doctrine will not save a stale claim.

The continuing violations doctrine has also been applied to claims arising under Section 1983,[7] the Americans with Disabilities Act[8] and the Age Discrimination in Employment Act.[9] Indeed, the continuing violations doctrine has been referred to as “a generic feature of federal employment law.”[10] However, it is questionable whether the doctrine can or should be applied to Title IX claims.

## **Keel v. Delaware State University Board of Trustees**

In *Keel v. Delaware State University Board of Trustees*, a former student brought Title IX claims against a university based on its handling of her alleged sexual assault by a fellow student.[11] Keel asserted that she was sexually assaulted by another student in November 2013.[12] Keel reported the assault to a professor and the alleged assailant agreed not to contact the plaintiff.[13] In February 2015, after the alleged assailant continued to contact Keel, she reported the incident to campus police and the alleged assailant was arrested.[14] The matter was referred to the University's Title IX office in February 2015, which opened its investigation and held hearings in March 2015.

At the end of March 2015, the panel determined that the alleged assailant had not violated the university's code of conduct.[15] Keel appealed this decision, a new hearing was granted, and in May 2015, the panel determined that the assailant was "responsible" for sexually assaulting Keel.[16] Because Keel was already a senior at the time of the May 2015 decision, the Title IX panel determined that the assailant should only be suspended for the 2015 to 2016 school year.[17] The university assured Keel that her assailant would not be allowed on-campus during his suspension.[18]

Nevertheless, during the assailant's suspension, in September 2015, Keel saw her assailant in her adviser's office.[19] Keel alleged that she reported this incident to the university's Title IX Office and the university's Judicial Affairs Office and neither office took any action.[20] She further alleged that following her encounter with her assailant in September 2015, she feared for her safety until she graduated in December 2015.[21]

Although the suspension was supposed to last until the end of the Spring 2016 semester, after Keel graduated in December 2015, her assailant was readmitted to the university in January 2016.[22] In December 2017, Keel brought her Title IX claim[23] against the university. She alleged that she endured a hostile education environment and the university acted with "deliberate indifference" by mishandling her allegations of sexual assault.[24]

The university moved to dismiss the complaint based on the statute of limitations.[25] As noted, the complaint was filed in December 2017 and the university argued that it was untimely because almost every allegation occurred prior to December 2015, beyond the two-year statute of limitations. Keel asserted that the statute of limitations did not begin to run until December 2015, that is, when she graduated, because she experienced a hostile educational environment until her graduation. Keel asserted the University's deliberate indifference to her complaints was part of a continuing violation on the part of the university.

The court first examined whether the continuing violations doctrine is applicable in the Title IX context. The court noted that there are significant disagreements between various courts as to whether it should apply and that it remains "an open question in" the Third Circuit[26] and ultimately declined to resolve the issue.

The court then determined that the claims were "time barred regardless of whether the court applie[d] the continuing violations doctrine in this matter." [27] First, the court reasoned that the final alleged act of re-admitting the plaintiff's assailant could not support the plaintiff's hostile educational environment claim because the plaintiff had graduated.

After the assailant was suspended in May 2015, the university ensured that the plaintiff “could continue her education and feel as though she is matriculating in a safe and secure academic environment[.]”[28] Accordingly, the assailant’s readmission following her graduation was of no consequence with respect to her Title IX claim. Then, according to the court, the chance encounter with her assailant in September 2015 could not save the plaintiff’s claim because the conduct was not sufficient similarly to the previous alleged conduct for the continuing violations doctrine to apply.[29]

Although the court did not resolve the issue, the Keel case raises a question that has not been definitively answered in the Third Circuit: Does the continuing violations doctrine apply to Title IX claims?

### **The Continuing Violations Doctrine in Other Courts**

Recently, a number of federal courts have determined that the continuing violations doctrine should apply to Title IX claims. In March 2018, the U.S. District Court for the District of Columbia addressed the issue in *Cavalier v. Catholic University of America*.<sup>[30]</sup> The Cavalier court reasoned that the doctrine should apply because the Title IX claims are similar in nature to Title VII hostile work environment claims. Like Title VII hostile work environment claims, many Title IX claims are not based on discrete acts, but rather arise from ongoing, repeated conduct.<sup>[31]</sup>

Moreover, like Title VII claims, in order to determine if a plaintiff has stated a viable Title IX claim, “the Court must consider ‘all the circumstances,’ including ‘the frequency of the’ alleged harassment, ‘its severity,’ and whether it interfered with the [the plaintiff’s] right to obtain equal educational opportunities.”<sup>[32]</sup> Based on the similarities between Title VII and Title IX claims, the court in Cavalier determined that the continuing violations doctrine was applicable to Title IX claims.

The U.S. District Court for the District of Rhode Island took a similar approach in *Doe v. Brown University*, noting that courts in the First Circuit consistently look to Title VII for guidance in interpreting Title IX and holding, based on the similarities between Title VII and Title IX claims, that the continuing violations doctrine applied to the plaintiff’s Title IX claims.<sup>[33]</sup><sup>[34]</sup>

There are, however, strong arguments against applying the continuing violations doctrine to Title IX claims. First, the continuing violations doctrine is an equitable tolling doctrine. Equitable tolling is intended to be applied sparingly.<sup>[35]</sup> Additionally, the U.S. Supreme Court has been reluctant to extend Title IX protections.<sup>[36]</sup>

To illustrate, in *Folkes v. New York College of Osteopathic Medicine*, the U.S. District Court for the Eastern District of New York found that the continuing violations doctrine “may well be a poor fit with the goals of Title IX.”<sup>[37]</sup> Specifically, the court reasoned that unlike Title VII, Title IX “condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.”<sup>[38]</sup> In contrast, Title VII is “an outright prohibition” and “applies to all employers.”

While Title VII’s goal is to compensate discrimination victims, “Title IX ‘focuses more on protecting individuals from discriminatory practices carried out by recipients of federal funds.’”<sup>[39]</sup> The court further noted that the Supreme Court has been reluctant “to extend the reach of Title IX beyond that imposed by Congress.”<sup>[40]</sup> Based on that reluctance and the difference in fundamental purpose between Title VII and Title IX, the court questioned whether the continuing violations doctrine was applicable to Title IX claims.<sup>[41]</sup>

Additionally, two courts in the U.S. District Court for the Eastern District of Pennsylvania have declined to apply the continuing violations doctrine to Title IX claims. In *Gjeka v. Delaware County Community College*, the court agreed with the rationale set forth in *Folkes* and declined to extend the continuing violations doctrine to the plaintiff's Title IX claims.<sup>[42]</sup> Similarly in *Moore v. Temple University*, the court dismissed a plaintiff's Title IX claim, determining that the continuing violations doctrine is inapplicable to Title IX claims.<sup>[43]</sup>

It remains to be seen whether the Third Circuit will directly address whether the continuing violations doctrine applies to Title IX cases. Institutions and entities in the Third Circuit subject to Title IX should monitor developments regarding the continuing violations doctrine. If the doctrine is ever applied by an appellate court, then such institutions and entities should be aware that if one action, which can be viewed as part of the same persistent, ongoing pattern, occurred within the statute of limitations, then the entire claim will be viable.

Because it is possible that the continuing violations doctrine could apply to Title IX claims, universities and other Title IX institutions should not view complaints in a vacuum. If someone is complaining about conduct that could possibly be viewed as ongoing or persistent, then the conduct should be investigated and considered in the context of all of the allegedly violative activity.

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[1] *Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 545, 566 (3d Cir. 2017).

[2] *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002).

[3] *Id.* at 115.

[4] *Id.* at 118.

[5] *Burnette v. City of Phila.*, No. 02-5369, 2003 U.S. Dist. LEXIS 1305, at \*7 (E.D. Pa. Jan. 14, 2003).

[6] *Doe*, 850 F.3d at 566 (quoting *Mandel v. M & O Packaging Corp.*, 706 F.3d 157, 165 (3d Cir. 2015))

[7] *Sameric Corp. of Del. v. City of Phila.*, 142 F.3d 582, 599 (3d Cir. 1998).

[8] *Chedwick v. UPMC*, 619 F. Supp. 2d 172, 180 n.3 (W.D. Pa. 2007).

[9] *McGuckin v. Brandywine Realty Trust*, 185 F. Supp. 3d 600, 610-11 (E.D. Pa. 2016).

[10] *O'Connor v. City of Newark*, 440 F.3d 125, 128 (3d Cir. 2005).

[11] *Keel v. Del. State Univ. Bd. of Trs.*, No. 17-1818, 2018 U.S. Dist. LEXIS 199387, at \*3 (D. Del. Nov. 26, 2018).

[12] Id. at \*3.

[13] Id.

[14] Id.

[15] Id. at \*4.

[16] Id.

[17] Id. at \*4-5.

[18] 1:17-cv-01818-MN-SRF, ECF No.1, at ¶ 39 (Dec. 19, 2017).

[19] Keel, 2018 U.S. Dist. LEXIS 199387, at \*10. It is unclear from the opinion and the plaintiff's pleadings why the assailant was on campus during his suspension.

[20] 1:17-cv-01818-MN-SRF, ECF No.1, at ¶ 42 (Dec. 19, 2017).

[21] 1:17-cv-01818-MN-SRF, ECF No.1 at ¶ 44 (Dec. 19, 2017).

[22] Id. at \*5.

[23] The plaintiff also asserted claims under the equal protection clause of the 14th Amendment pursuant to 42 U.S.C. § 1983. Id. at \*5.

[24] Id. at \*12.

[25] All parties agreed that the applicable statute of limitations was two years because "Title IX is subject to the respective state's statute of limitations government causes of action for personal injuries[,]" which is two years in Delaware. Id. at \*7 n.2.

[26] Id. at \*8.

[27] Id.

[28] Id. at \*8-9.

[29] Id. at \*10. The court also went on to examine the merits of the plaintiff's Title IX claims and determined that she had failed to state a claim upon which relief could be granted.

[30] 306 F. Supp. 3d 9 (D.D.C. 2018).

[31] Id. at 43.

[32] Id. at 43 (quoting Morgan, 536 U.S. at 116).

[33] 327 F. Supp. 3d 397, 408 (D.R.I. 2018).

[34] The court in Doe also determined that the continuing violations doctrine should apply to the plaintiff's Title VI claims. *Id.*

[35] *Morgan*, 536 U.S. at 113.

[36] See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998).

[37] 214 F. Supp. 2d 273, 279 (E.D.N.Y. 2002).

[38] *Id.* (quoting *Gebser*, 524 U.S. at 286).

[39] *Id.* (quoting *Gebser*, 524 U.S. at 287).

[40] *Id.*

[41] *Id.* at 289. The court ultimately concluded that it was unnecessary to make a definitive ruling on the issue based on the facts of the case. *Id.*

[42] No. 12-4548, 2013 U.S. Dist. LEXIS 73054, at \*15 (E.D. Pa. May 22, 2013).

[43] No. 13-5079, 2016 U.S. Dist. LEXIS 99231, at \*19 n.2 (E.D. Pa. July 29, 2016).