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Recommended Citation

Cari Stern, *Title VII and Title IX: A 30,000 Foot View*, 9 DePaul J. Sports L. & Contemp. Probs. (2013)
Available at: <https://via.library.depaul.edu/jslcp/vol9/iss2/6>

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TITLE VII AND TITLE IX: A 30,000 FOOT VIEW

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TRANSCRIPT FROM DISCUSSION AT
DEPAUL SPORTS LAW SYMPOSIUM
MARCH 8, 2013

Ms. Stern: My name is Cari Stern and I teach sports law at The John Marshall Law School. I am excited to talk to you about one of, perhaps, the most overlooked aspects of sports law.

By a show of hands, how many of you have taken sports law before? And for those of you who have taken sports law, how many of you in your respective sports law classes spent significant time studying gender equity in sports?

Speaker 1: It's my class; I teach sports law.

Ms. Stern: How much of your class time did you devote towards gender equity?

Speaker 1: One class in timeline.

Ms. Stern: One class? Just one class? I teach sports law and the semester is so short, I do not even have time to cover gender equity. Unfortunately, this phenomenon is prevalent in a number of sports law courses.

Besides being overlooked and the “forgotten sports law topic,” there is also a misconception as to what “gender equity in sports” entails. First, there is more to gender equity than Title IX of the Education Amendments of 1972 (“Title IX”). Gender equity in sports spans a number of topics, some of which we will cover today. The main statutes we will be covering are Title IX, Title VII of the Civil Rights Act of 1964 (“Title VII”), the Equal Pay Act and the Equal Protection Clause (“EPC”) of the Fourteenth Amendment to the Constitution.

As we probe the relatively fresh gender equity jurisprudence, I want everyone to ask themselves why did Congress and state legislatures

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have to mandate compliance and equality via legislation in order to give females the same opportunities and rights as males?

Historically, societal expectations about appropriate feminine roles, as well as numerous legal impediments, severely limited women's active participation in sports. Until the late 19th and early 20th century, the societal view was that women needed to be graceful rather than assertive. There were also legal obstacles for women even voting or owning land. Because of these societal and legal restrictions, when women did participate in sports (and that was rarely), they participated in graceful and "ladylike" sports like tennis, golf and swimming. They did not participate in NFL Combines.

This, of course, changed over time, but not until the 1970s. Before the 1970s, can anyone estimate what percentage of high school athlete participants were women?

Speaker 1: Ten percent?

Ms. Stern: Close. Seven percent. Seven percent of high school athletes were women. Before the 1970s, can anyone estimate what percentage of college athlete participants were women?

Speaker 2: Eight percent?

Ms. Stern: A little bit higher. Sixteen percent. There was extremely low female involvement in sports.

Now, I'm not the best athlete, by any means, but I do know there are great psychological and physical benefits if you play sports. In particular, there are bonds that you form with your teammates, which you can obtain only when you play sports. All of this changed—the percentages of females participating and working in sports—in 1972, and as a result of Title IX. Today, we will be discussing Title IX's impact on female participation.

In addition to participation, there are other ways that female athletes or male athletes can be discriminated against on the basis of sex, such as in the form of scholarships, other benefits and sexual harassment. Moreover, Title IX is not the only recourse discriminated athletes have at their disposal to help vindicate their rights. To illustrate, both Title IX and Title VII protect women from sexual harassment at schools and the workplace, respectively; we will be discussing the shortcomings of both statutes. Finally, with whatever time we have left, I am going to talk about the Equal Pay Act and how women have historically been paid less than their male counterparts that work in the sports industry. Let's begin. Any questions before we start?

Okay, let's jump right into it.

Under the EPC, students, male or female, have the possibility of challenging certain school practices that discriminate against them on the basis of their sex. The EPC of the Fourteenth Amendment provides that “no state shall . . . deny to any person within its jurisdiction the equal protection under the laws”. What does this mean?

There may be schools, that for one reason or another, have gender classifications. A school may have a rule such as “no female can try out for any soccer team.” On its face, such gender classification could potentially be challenged as discriminatory under the EPC. A school may also have a rule that has a discriminatory impact. For example, if a school has a requirement that only those over 6 foot 7 can try out for the bowling league team, such rule is not stating on its face that only male students can try out, but there probably will not be too many females able to try out for the bowling league team.

Importantly, courts scrutinize EPC claims under intermediate scrutiny; in other words, separate but equal could potentially save a school from being liable. There are also two caveats to keep in mind with EPC Claims. First, one can only bring a claim under the EPC if there is state action. Thus, if a student attends private school, he/she cannot use the EPC to state a claim. Second, courts have held there is a contact sport exception; thus, it is not a violation of the EPC, necessarily, if a school were to forbid female students from playing football (a contact sport).

The EPC is one source of law both genders can use to challenge discrimination in sports, but I would argue it is not the most effective. Also, the plaintiffs have to bear the costs of the litigating EPC lawsuits. There is no federal agency that is going to litigate the matter on a plaintiff’s behalf.

That brings us to Title IX.

Title IX was passed in 1972, at a time when, as I just mentioned, there was not a high percentage of females participating in sports. Title IX, importantly, does not just deal with sports; that is a misunderstanding that people tend to think. Title IX deals with education, period. Before 1972, women had an extremely hard time getting into graduate schools and colleges. Title IX was passed to prohibit discrimination on the basis of sex. To eradicate discrimination, Title IX provides that schools may be cut off from federal funding if any school that receives federal funding, or any program in such school, discriminates on the basis of sex.

Recently, Penn State has gotten into legal trouble as a result of reported instances of sexual assault and sexual harassment committed by Jerry Sandusky. When the media began reporting about the San-

dusky allegations, there was speculation that some of the victims may file Title IX lawsuits against Penn State. To date, there have been no Title IX claims filed. But with Title IX, remember, a school can lose its federal funding if it is found to have violated Title IX. That could have been a death toll for Penn State had there been some Title IX charges. So far today, Penn State is still receiving federal funds.

The federal agency that is in charge of investigating, moderating and issuing regulations with respect to Title IX is the Department of Education (“DED”). The division within the DED called the Office of Civil Rights (“OCR”), will facilitate and investigate the charges. They will determine if there is any merit to a claim and if there is, OCR will sue on behalf of a plaintiff. OCR will also issue regulations from time to time because there is constant confusion over the meaning of Title IX. For example, there is constant litigation over what is a sport and whether cheerleading is a sport. We will be discussing in today’s presentation the ambiguity concerning what is a sport and what should be counted as a sport in meeting Title IX compliance.

With respect to sports, the scope of Title IX can be divided into a few main areas: (1) equitable participation, (2) equitable scholarships, (3) other benefits and (4) sexual harassment.

Equitable Participation. Title IX is important because you want to make sure that females are participating. That’s what you think when you tend to hear anything in the news about Title IX. In reality, the test for equitable participation is whether: the interest and ability of both genders are being accommodated. What does that mean?

It’s a little bit confusing. It’s a little bit ambiguous. So OCR (again, that’s the federal agency which is in charge of implementing regulations and guidance as to what this act even means) put forth a three prong test in determining whether the “interests and abilities of both genders are being accommodated.” No one really understood what these prongs meant until a case called *Cohen vs. Brown*.

Cohen stems from a dispute in the 1990s. Brown University had a gymnastics team. They, like most schools, were struggling with funds. What did they do? They decided to cut their funds by cutting the women’s gymnastics team, the women’s volleyball team, the men’s water polo team and the men’s golf team.

Amy Cohen, one of the gymnasts, became outraged and along with some of her teammates brought a class action lawsuit alleging that Brown was not in compliance with Title IX. Cohen alleged there was not equitable participation opportunities and that the three pronged test set forth by OCR was not satisfied.

Let's go over this three pronged test. The first prong mandates that a school is compliant with its participation requirement if essentially the ratio of females to males in the student body equals the ratio of participants in athletics. What does this mean? This means that if 25% of the student body is female, then there needs to be about 25% of the athletes at that school that need to be female. The OCR has said, if it's greater than a one percentage point differential, then it is presumed that a school is not in compliance, and has violated Title IX. In *Cohen*, there was greater than a one percent differential, and Brown was found to have violated Title IX's equitable participation mandate when it cut women's gymnastics and volleyball.

A similar situation arose in a recent case against Quinnipiac University. In *Biediger v. Quinnipiac University*, Quinnipiac had cut its women's volleyball team and argued it was still in compliance with prong one, because its student body was 62% women as was its percentage of female athlete participants. What is interesting here is that in reaching that 62% figure, does anyone know what activity Quinnipiac counted as a sport?

Speaker 1: Cheerleading.

Ms. Stern: Cheerleading. Essentially, Quinnipiac counted their cheerleaders towards their athlete participation count. They also double counted the cross country track players. They thought they could count them twice, for whatever reason, and get away with it. Federal Judge Underhill ruled you can't double count, and moreover, cheerleaders don't even count towards the ratio since cheerleading is not a sport.

Once there was no double counting and cheerleaders were no longer considered in the calculation, Quinnipiac had a greater than three percent disparity between females in the student body and females participating in sports; thus, Quinnipiac was found to have violating prong one.

So that's prong one. Prong one is a safe harbor.

Prong two states you need to have a "history and continuing practice of adding new teams to accommodate the interests and abilities of the students." What does this mean?

What this means is, let us say, hypothetically, that at a university, 80% of the athletes are on men's teams and 20% are on women's teams. Over the past 20 years, that university has been adding a new team here and there and they have goals. They have plans that set forth that they have future plans to add more female teams so that the 80%-20% ratio becomes more like 50%-50%. That would be how prong two is satisfied.

Prong two rarely works. No one ever satisfies prong two. It is too hard. There has been one school, for those of you who are Big East fans here —there has been one school that has actually been able to satisfy that and that is Syracuse.

That brings us to the third and final prong. The third prong requires a school to “fully accommodate the interests and abilities of the underrepresented gender.” What does that even mean, to fully accommodate? .

OCR has put forth guidelines about what it means to “fully accommodate.” In order for a school to satisfy this prong, the burden is truly on the underrepresented gender (which is usually females) to prove that the school is not compliant. What needs to happen? The school will put forth surveys. They will send out surveys, asking students whether they are interested in forming a new team. Do you think most people respond to these surveys? How many times do you get emails from your school, from your employer and you just do not feel like responding?

Exactly. The survey is really not that indicative of what females are interested in forming a team.

Nonetheless, in order for this third prong now to be met, all a school really needs to do is show, it had a survey, it sent it out, no females said they wanted to form a new team, so the school is in compliance. Then, the burden would shift to the underrepresented gender to prove by a preponderance of evidence, that there is not only an interest in forming a new varsity team, but there is also an ability by the underrepresented gender to participate on such new varsity team. Finally, the underrepresented gender would then have to actually come up with comparable teams in the area that illustrate how other schools field a similar team.

The burden now is really on the female athletes who tend to comprise the underrepresented gender. Question for you, do men have to prove this when they want to start a team?

Usually not. Thus, there has been a huge uproar from a ton of women’s groups that the third prong is not helpful for the underrepresented gender. In a nutshell, that’s Title IX in terms of participation.

In terms of equitable scholarships, the rule is that with respect to the percentage of athletes that are participating, the ratio of scholarships given to male and female athletes cannot be greater than one percent; otherwise, schools will be found to have violated Title IX.

Now, Title IX does not just cover participation and scholarships, it covers “other benefits” as well. For example, if no female teams are

provided coaches or if no female teams are provided any source of transportation but male teams are, there is a possible Title IX violation.

One other thing I just want to point out is Title IX is not only applicable to address athlete discrimination. It also can be utilized by administrators and by coaches. For example, a little staggering statistic: in 1972, when Title IX was passed, 90% of coaches of female teams were females. Anyone want to guess what the percentage is today of female coaches of female teams?

45%. Why has this gone down?

Speaker 1: Because female sports like female basketball have gotten more competitive, and schools feel that they can put a better team on the floor with a male coach for whatever reason.

Ms. Stern: Okay. What do we know about athletic directors of colleges and high schools? Not to stereotype, but, more often than not, what gender do they also tend to be?

Speaker 3: Male.

Ms. Stern: Male. A few arguments have been put forth to justify why there has been a decrease in women's coaches of women's teams. First, there's been a growth in female opportunities because of Title IX. It might just be that there are not enough qualified coaches that are women. Another argument is since men tend to be athletic directors, they're placing their buddies (i.e., their male counterparts), as coaches of women's teams.

Speaker 3: So under Title IX, there would be a cause of action for a female coach? Has anyone successfully sued?

Ms. Stern: Yes. In 2007, for example, Fresno State lost a Title IX case brought by a fired former female volleyball coach, who claimed she was fired for gender equity reasons. The fired coach went on to win \$5.85 million in damages.

We just covered a broad overview of Title IX. Title IX is the bread and butter of athletic opportunities in sports. We're going to jump back into Title IX in a few minutes.

For now, I would like to discuss Title VII. Title VII prohibits a number of forms of discrimination in employment, one form of discrimination being on the basis of sex. The Equal Employment Opportunity Commission ("EEOC"), is the federally appointed agency authorized to investigate charges of discrimination and also, to issue and promulgate regulations and interpretations with respect to Title VII.

If the EEOC finds merit in a charge, they will bring a suit against an employer on such individual's behalf. The EEOC will mediate, conciliate and try to settle a dispute. If the EEOC finds there is no reasonable cause of discrimination, it will issue a charging party a "Right To Sue" letter. A charging party then has 90 days to then go to court and sue on his/her behalf.

Interestingly, on its face, Title VII does not mention sexual harassment or prohibit sexual harassment. But the EEOC is the federal agency that issues regulations, just like OCR issues regulations for Title IX. EEOC, in its regulations, has stated that sexual harassment is a form of sex discrimination. The EEOC has defined sexual harassment as unwelcome conduct that involves sexual advances or comments that can either lead to adverse employment action or can create a pervasive and hostile environment.

There are two forms of sexual harassment : (1) quid pro quo and (2) hostile environment. In quid pro quo harassment, an individual gets fired or loses some sort of benefit. There's an adverse employment action that is taken against an employee. In hostile environment harassment, there is unwelcome conduct that creates a severely unpleasant environment for an individual to work in —based on the totality of the circumstances.

What does "totality of the circumstances" mean? Let's assume an alleged plaintiff is female and she claims she is being sexually harassed at the workplace. Is she showing up in a dress that barely covers her? Is she flirting back? Is she inviting the harassers over to her place late at night? You need to look at the totality of the circumstances. In terms of hostile environment harassment, you need to look at it from the objective and a subjective standard. Is the person really sensitive? Did she have a bad day or is it something that all of us would really find such behavior to be hostile and offensive?

The one thing I do want to point out about sexual harassment under Title VII (because it differs from sexual harassment under Title IX) is that if a supervisor is found to have sexually harassed an employee, the employer is liable based on the doctrine of respondeat superior. Because of respondeat superior, Title VII plaintiffs have the potential to win huge damages through settlement or trial.

If you're from the New York area, you may have heard of Isiah Thomas (not the basketball player that's currently in the NBA- but the Isiah Thomas who used to work in the New York Knicks front office). Does anyone know what happened with the Knicks a few years back?

Speaker 3: Isiah Thomas was found guilty of sexual advances and whatnot and saying a couple of comments to Anucha Browne Sanders.

Ms. Stern: In a nutshell, Anucha Browne Sanders was the only woman in the entire front office of the Knicks. Keep in mind how studies show when you're underrepresented in some sort of gender environment, there more often tends to be instances of sexual harassment. So Anucha Browne Sanders was the one woman in the Knicks front office. She was sexually harassed. She complained to management at the Knicks and what did they do? You know what they did? They fired her. Under Title VII, you can't fire someone or can't retaliate against someone for complaining about harassment. There was a big lawsuit. They reached a settlement after only two years of litigation. She ended up getting paid \$11.5 million.

A different example is NASCAR. NASCAR, for many years, has had somewhat of a reputation of harassment and racism. In the 1990s, there was an inspector, Mauricia Grant, and she claimed 25 counts of sexual harassment. She sued under Title VII and won \$225 million. Yes, \$225 million. As I said earlier, under Title VII, some plaintiffs have a real chance to win some hefty damages for wrongdoing.

Title IX is not so easy for sexually harassed plaintiffs. In fact, you rarely, if ever, see those types of awards under Title IX.

As mentioned earlier, Title IX prohibits sexual harassment. We talked before about how Title IX protects athletes in terms of opportunities. Now, we are going to talk about sexual harassment. It is essentially the same as Title VII. Title IX prohibits unwelcome conduct that is sexual in nature—but instead of dealing with the employment setting—Title IX prohibits any unwelcome sexual conduct that could interfere with the enjoyment of educational facilities or programs. There is also quid pro quo where a coach maybe cuts a player after the player didn't want to go through with the sexual advances.

There is also hostile environment where a student just can't function anymore in the academic setting because of the sexual harassment.

UNC is known for having one of the most infamous cases of sexual harassment at the collegiate level. UNC still has to this day a soccer coach named Anson Dorrance, who is actually the most winningest female soccer coach in the nation. He was about 45 when sexually harassment allegations against him first arose in 1998.

Melissa Jennings was a walk on soccer player at UNC and she felt sexually harassed by her coach. Constantly, Anson would ask Jennings and all the other players, "who are you sleeping with? Who did

you hook up with last weekend?” Inappropriate questions. Allegedly, when his team would travel, he would invite the players one on one to his hotel room and touch them inappropriately. So Melissa and the co-captain brought a lawsuit against UNC and Anson Dorrance in *Jennings v. UNC*.

The litigation lasted 10 years. What’s interesting is Melissa complained of her harassment to officials at UNC and got cut from the team. UNC did nothing. Do you think she’s still at UNC trying to play soccer? No. It took too long for her to get her day in court. Ultimately, a settlement was reached. Her case didn’t even reach the jury. She sued for \$12 million. Anyone want to take a guess what she won?

Speaker 1: \$350,000.

Ms. Stern: Pretty close, \$325,000 and that covered mostly legal fees of her attorneys. I don’t know how knowledgeable some of you are in terms of discrimination in professional sports but if any one of you have taken a sports law class or labor law class, you may know that when there’s a player that is part of the union and the player maybe feels discriminated against by the team, he/she may filed an unfair labor practice charge against the team. Do you think that player is mocked or criticized by his peers or by his teammates? Maybe, maybe not, but the player probably still is able to play for at least a different team. Melissa Jennings underwent ridicule. She was harassed after filing her harassment lawsuit. She ended up winning \$325,000. And she never got to play again at UNC or elsewhere. What sort of deterrent effect does Title IX really have with respect to sexual harassment?

That’s something to think about after today: is sexual harassment in school sports settings being adequately addressed by Title IX?

Finally, the one remaining law that men and women can utilize to address gender discrimination in sports is the Equal Pay Act. The Equal Pay Act prohibits discrimination in wages if two workers are doing the same kind of core tasks and are in the same working environment. But there’s one catch: an employer has a defense to pay discrimination if he can show some sort of non-discriminatory reason why he’s paying a male worker more than a female worker, for example.

This came up *Marianne Stanley vs. USC* in the late 1990s. Marianne Stanley, for those of you that don’t know her, is a well known women’s basketball coach. She had a contract for a number of years at USC. She was up for a new contract. She kept trying to negotiate

with USC to get a similar salary as the men's coach, George Raveling, and the school denied her offers.

Ultimately, USC pulled back its offer and Stanley found herself unemployed. What did she do? She brought a lawsuit under the Equal Pay Act. In her claim, she argued she had the same common core tasks as the head men's basketball coach and shared the same working environment at USC. However, USC had a great defense: the men's coach had more seniority. Remember, before the 1970s, women didn't have the same opportunities in terms of coaching.

For employers to successfully defeat Equal Pay Act allegations, employers only need to show an employee with more seniority is getting paid more, and that's a defense. The employers won't have to pay any damages. It's sort of counter-intuitive, right? Because you have Title IX which is supposed to address this past discrimination. You potentially have male coaches who may have more experience because they had more opportunities before Title IX existed, and under the Equal Pay Act, that's a valid defense.

After hearing this broad overview about the EPC, Title IX, Title VII and the Equal Pay Act, do you think all laws, and in particular, Title IX, are still needed today?

The opportunities for women in sports have gone up. There's even a female speaker this year at this Symposium. So do we really need Title IX? Is it still necessary?

Speaker 1: If Title IX went away, things would just slide back to where they were in 1972. Maybe not as bad but they would slide backwards.

Ms. Stern: I'd like to hear from one of the few women in attendance at this Symposium.

Speaker 2: I like Title IX. I played soccer in college because of Title IX.

Ms. Stern: We have unfortunately run out of time, but I hope each of you now have a broad understanding of what "gender equity in sports" encompasses, and what laws are available to discriminated individuals. Feel free to reach out to me after this presentation with any questions.

