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**FEDERAL COURT ALLOWS TITLE IX CLAIM TO PROCEED BASED UPON ALLEGATIONS THAT STUDENT HARASSED BY PEERS FOR FAILURE TO CONFORM TO GENDER NORMS**

*Russell Bittendender, et ux. v. Bangor Area School District, Case No. 15-6465 (E.D. Pa. 2017).* The United States District Court for the Eastern District of Pennsylvania refused to dismiss a complaint alleging that a school district violated Title IX for failing to address harassment of a student by her peers for failing to conform to female gender norms.

**SUMMARY AND FACTUAL BACKGROUND**

According to a complaint filed in federal district court by her parents, a female student (S.B.) alleged that she suffered offensive verbal sexual harassment and physical assault by other students while attending Bangor Area School District between the third and eighth grades. The student alleged that the harassment began when she was in third grade but became a "serious" problem during her fourth grade year. S.B. stated that she was called offensive terms and pushed because she did not conform to the harassers' perception of female gender norms. This included being called a "slut" or "lesbian" when she played football with male students. S.B. reported the harassment to a guidance counselor and her teacher.

Prior to the start of S.B.'s fifth grade year, S.B.'s parents conversed with and sent a letter to the principal about the offensive conduct. S.B. asserts that during the fifth grade, the offensive

conduct diminished in the classroom but continued elsewhere. She contends that "the sex-based comments" increased, with persistent commentary about S.B.'s sexual orientation. There were continued instances of physical assault. S.B. spoke to the guidance counselor about creating a bullying prevention club because S.B. was a victim of bullying.

During her sixth grade year, S.B. gave a speech in front of the school board about her bullying experience. The principal of S.B.'s elementary school was present for this speech. During her seventh grade year and the following summer, S.B. alleges that the frequency and severity of bullying increased with continuing comments about her sexuality. S.B. organized a student club to combat bullying and consulted the guidance counselor about the sexual harassment she was experiencing during this process. S.B. alleges that the sexual harassment persisted through the summer before and during her eighth grade year.

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On one occasion during her eighth grade year, the sexual harassment required S.B. to remove herself from class and go to the main office to speak with the principal, guidance counselors, and school psychologist. S.B. alleges that she shared with them the details of the bullying at this meeting, including what was said to her and the effects on her. At one point, S.B. signed into the Lehigh Valley Hospital Behavioral Health Unit for ten days of treatment because she was contemplating suicide. On September 27, 2013, S.B.'s parents developed a "safety plan" with school officials. On November 12, 2013, however, the school informed S.B.'s parents that it was removing the escort protection provided to S.B. under the safety plan. Subsequently, S.B.'s parents relocated to New Jersey where S.B. now attends school.

In February 2016, S.B. filed a complaint alleging that she was subject to sexual harassment and discrimination and that the school district and various school officials violated Title IX by failing to address the ongoing harassment of S.B. by her peers. The school district filed a motion to dismiss S.B.'s complaint, contending that she failed to state a viable Title IX claim. The federal district court denied the school district's motion and allowed the student to proceed with her claim.

### DISCUSSION

Title IX (20 U.S.C. § 1681(a)) provides that "No person...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." As recipients of federal funds, public school districts are subject to Title IX.

In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the United States Supreme Court concluded that, pursuant to Title IX, a school and school officials may be held liable for severe and

pervasive student-on-student harassment or abuse where the school had knowledge of harassment but failed to take reasonable steps to address or prevent continued abuse. Whether student-on-student sexual harassment rises to the actionable level of "severe and pervasive" depends upon a "constellation of surrounding circumstances, expectations, and relationships...including, but not limited to, the ages of the harasser and the victim and the number of individuals involved." To support a Title IX sexual harassment claim, a plaintiff must demonstrate that the alleged "conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination because of sex." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

The court concluded that S.B. alleged adequate facts to demonstrate that the harassment suffered was of a sexual nature. The alleged verbal harassment was premised upon her sexual orientation and gender with comments regularly targeting her because she did not conform to female gender stereotypes and because the harassers believed she was lesbian. In these circumstances, sexuality was the crux of the harassment that lead to repeated comments such as "slut," "lesbian," "gay," and "you have a disease because you're a lesbian."

A plaintiff asserting a Title IX violation also must demonstrate that an "appropriate person" had actual notice of the alleged conduct and the appropriate person failed to respond adequately to the discrimination. Actual notice occurs when an appropriate person at the school has information sufficiently indicating a significant danger to the student so that the school can reasonably be said to be aware of the danger. An appropriate person is, at a minimum, a school official having the ability to take remedial action and terminate the discrimination. The Third Circuit has recognized a principal of a school as an appropriate person for Title IX purposes.

S.B. alleged that she and her parents informed various teachers, guidance counselors, principals, a school psychiatrist, school security and the superintendent that she was experiencing harassment. Accordingly, the court concluded that S.B. sufficiently pleaded that an appropriate person was informed of the harassment.

### PRACTICAL ADVICE

The *Bittenbender* decision is demonstrative of the trend of courts' interpretation of the term "sex" in federal discrimination statutes to encompass transgender and sexual orientation. Since the 1980's, in employment contexts, courts have held that adverse action prompted by the failure of an employee to conform to gender stereotypes can be the basis of a sexual harassment or discrimination claim. The interpretation of the term "sex" as used within Title IX is a logical extension of a similar rationale.

When peer harassment among students is observed or reported, school employees have the obligation to report such incidents to school administration. School administrators are responsible for the investigation of any such reports and the development and implementation of reasonable remedial actions to mitigate against the continuation of abuse. Periodic reinforcement of these obligations through school staff in-service is a prudent investment against institutional indifference or unresponsiveness to student complaints of harassment and potential liability for schools and school officials.



### DISTRICT COURT PERMITS TRANSGENDER PERSON DIAGNOSED WITH GENDER DYSPHORIA TO SUE UNDER AMERICANS WITH DISABILITIES ACT

*Blatt v. Cabela's Retail, Inc.*, No. 5:14-CV-04822, 2017 WL 2178123, at \*2 (E.D. Pa. May 18, 2017). District Court for the Eastern District of Pennsylvania denies employer's motion to dismiss failure to accommodate and retaliation claims brought under the Americans with Disabilities Act ("ADA") by a former employee diagnosed with Gender Dysphoria.

### SUMMARY AND FACTUAL BACKGROUND

The plaintiff, Blatt is a transgender individual who is diagnosed with Gender Dysphoria, a condition that substantially limits one or more of her major life activities, including, interacting with others, reproducing, and social and occupational functioning. Blatt claimed that shortly after she was hired by Cabela's, Cabela's began to discriminate against her on the basis of her sex and her disability, in violation of the ADA and other federal laws, and that Cabela's retaliated against her for opposing this discrimination. Blatt further alleged that Cabela's terminated her employment based on her sex and disability, Gender Dysphoria.

The stated purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). In pursuit of this purpose, Congress broadly defined "disability" as "a physical or mental impairment that substantially limits one or more major life activities of [an] individual." *Id.* § 12102(1)(A). However, there are exceptions to the ADA's coverage. Specifically, 42 U.S.C. § 12211, excludes from ADA coverage approximately one dozen conditions, including "gender identity disorders." The main issue before the Court was whether Gender Dysphoria is a "gender identity disorder" and,

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therefore, beyond the scope of the ADA. The secondary issue was whether Blatt set forth a claim under the ADA.

## DISCUSSION

Cabela's moved to dismiss Blatt's ADA claims, arguing that the term "gender identity disorders," as used in 42 U.S.C. § 12211, encompasses Blatt's Gender Dysphoria. This argument was supported by the fact that Blatt alleged in her complaint that she was diagnosed with "Gender Dysphoria, also known as Gender Identity Disorder." Moreover, the Court acknowledged that Cabela's position was consistent with the accepted medical definition of Gender Identity Disorder when the ADA was enacted.

However, the Court rejected Cabela's interpretation of "gender identity disorders" as used in Section 12111 of the ADA. First, the Court found that the exceptions listed in § 12211 fall into two distinct categories: 1) non-disabling conditions that concern sexual orientation or identity (e.g., homosexuality, bisexuality); and 2) disabling conditions that are associated with harmful or illegal conduct (e.g., pedophilia, pyromania, compulsive gambling). Next, the Court noted that the term, "gender identity disorders," if it included Gender Dysphoria, would not fit into either category because Gender Dysphoria is a disabling condition that is not associated with harmful or illegal conduct.

Therefore, the Court concluded that the term "gender identity disorders" had to be interpreted narrowly "to refer to only the condition of identifying with a different gender, not to encompass (and therefore exclude from ADA protection) a condition like Blatt's Gender Dysphoria, which goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments that may be disabling."

Based on this narrow interpretation, the Court rejected Cabela's argument that Blatt's condition was not a disability within the scope of the ADA.

The Court also rejected Cabela's argument that Blatt failed to allege that she engaged in protected activity by opposing disability discrimination in her workplace.

To state an ADA retaliation claim, a plaintiff must allege that: 1) she engaged in a protected activity; 2) she experienced an adverse employment action following the protected activity; and 3) there is a causal link between the protected activity and the adverse employment action. A causal connection may be shown by: 1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or 2) a pattern of antagonism coupled with timing to establish a causal link. A "pattern of antagonism" is a consistent and continuous pattern of conduct, which can include a constant barrage of written and verbal warnings as well as disciplinary action.

The Court found that Blatt's allegations that she continually reported to her superior that she was subject to degrading and discriminatory comments on the basis of her disability, that she requested a female nametag and uniform and use of the female restroom as accommodations for her disability, and that as a result of requesting these accommodations she was subjected to a "pattern of antagonism" prior to her termination sufficiently set forth an ADA retaliation claim. The Court, therefore, denied Cabela's motion to dismiss.

## PRACTICAL ADVICE

This case emphasizes the importance of employers being sensitive to the needs of its employees with nontraditional sexual or gender identities and highlights the risks of failing to do so. Generally

speaking, if an employee is diagnosed with a disability, the employee is covered by the ADA unless the disability is associated with enumerated harmful or illegal conduct set forth in Section 12111 of the ADA. Moreover, courts will interpret the exceptions set forth in Section 12111, especially those related to gender or sexual identity, narrowly.

Moreover, the exceptions set forth in Section 12111 of the ADA may be vulnerable to a Constitutional challenge. Blatt argued that if her condition was covered by the “gender identity disorders” exception, then Section 12111 unconstitutionally violated her equal protection rights. The Court was able to avoid this issue by holding that Gender Dysphoria was not covered by the “gender identity order” exception, but this issue may surface in future cases.

Therefore, because this area of law is uncertain and evolving, school districts should consult with their solicitor before making any employment decisions based on gender or sexual identity or any disabling condition not associated with harmful or illegal conduct.



### **PENNSYLVANIA COURTS SPLIT OVER SEXUAL ORIENTATION DISCRIMINATION**

A recent decision by Judge Jan E. DuBois in *Coleman v. Amerihealth Caritas*, No. 16-3652, 2017 U.S. Dist. LEXIS 85319 (E.D. Pa. June 2, 2017) demonstrates that Pennsylvania courts remain divided as to whether Title VII of the Civil Rights Act of 1964 (“Title VII”) prohibits sexual orientation discrimination by employers. Pennsylvania courts likely will continue to reach different rulings until this question is resolved by a higher court, such as the Third Circuit Court of Appeals or the U.S. Supreme Court.

In *Coleman*, a Philadelphia man named Justin Coleman alleged that his former employer, Amerihealth Caritas, used gay slurs against him, punched him, and spread false rumors about his gender and sexuality. Coleman sued Amerihealth Caritas for sexual orientation discrimination under Title VII. The company moved to dismiss Coleman’s claim. It argued that federal law does not prohibit sexual orientation discrimination by employers.

Judge DuBois agreed with Amerihealth Caritas. She ruled that although Amerihealth Caritas’s behavior was unacceptable, “Title VII does not prohibit discrimination based on sexual orientation.” Judge DuBois thus dismissed Coleman’s sexual orientation discrimination claim with prejudice.

This decision directly conflicts with a ruling eight months earlier by Judge Cathy Bissoon, a federal judge in the Western District of Pennsylvania. Under similar facts in *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834 (W.D. Pa. 2016), Judge Bissoon refused to dismiss the plaintiff’s sexual orientation discrimination claim. She found that Title VII barred sexual orientation discrimination because such discrimination inevitably involves judgments or stereotypes about how a person should behave based on their sex.

Pennsylvania courts are not the only ones that continue to issue different rulings on this issue. Judges across the United States have issued conflicting decisions as to whether Title VII prohibits sexual orientation discrimination. Many legal experts thus believe that the U.S. Supreme Court will eventually decide one of these cases to bring clarity and finality to this area of the law. But until that day arrives, employers should keep a close eye on how Pennsylvania judges rule on workplace sexual orientation discrimination claims so that they understand their legal obligations.



**SHARP PENCIL NOT A WEAPON UNDER PENNSYLVANIA SCHOOL CODE**

*S.A. v. Pittsburgh Pub. Sch. Dist.*, 2017 Pa. Commw. LEXIS 152 (Pa. Commw. Ct. May 1, 2017).

**SUMMARY AND FACTUAL BACKGROUND**

S.A. was a 10th grade student at Barack Obama International Academy, a high school in the Pittsburgh Public School District (PPS). She was sitting in class when another student threw the cap of a cologne bottle at her. When a third student came to retrieve the bottle cap, S.A. would not return the bottle cap and an argument ensued. During the course of the argument S.A. stabbed the third student in the neck multiple times with a sharpened pencil. This student was treated by the school nurse and sent home for the day. The nurse subsequently testified that the injury could have been worse had the pencil punctured an artery.

PPS charged S.A. with violating Rule 6 of the PPS student code of conduct which prohibited possessing, handling or transmitting a weapon while on school property. Rule 6 was modeled after Section 1317.2 of the Pennsylvania School Code. Section 1317.2 prohibits the possession of a weapon, defined as “any knife, cutting instrument, cutting tool, nunchaku, firearm, shotgun, rifle and any other tool, instrument or implement capable of inflicting serious bodily injury.” Rule 6 contains a similar definition of a weapon, but also includes an “explosive” and “mace” within the list of specified items.

After a formal disciplinary hearing, the PPS Board voted to expel S.A. for one year. S.A. then appealed to the trial court, which reversed the school board. The trial court reasoned that a pencil did not come within the definition of a weapon under the language of Rule 6. PPS appealed this determination

to the Pennsylvania Commonwealth Court, which affirmed the trial Court.

**DISCUSSION**

The sole issue before the Commonwealth Court was the definition of a “weapon” under Rule 6 of the PPS student code of conduct and section 1317.2(g) of the Pennsylvania School Code.

The Commonwealth Court explained that whether a given item is a weapon in this context depends on how the item is typically intended to be used in a school setting. The fact that an item is used to commit an act of violence should have no bearing on whether the item is a weapon. Instead, “the inquiry must focus solely on the object in isolation (in a vacuum, so to speak) and its inherent operational capabilities; that is, what the object is intended to do in the practical and functional sense.” A pencil, because it is typically used as a writing implement, is not a weapon under the Court’s formulation. A pellet gun on the other hand, would have no purpose in a school environment other than to inflict injury on another. Therefore, the Court explained that a pellet gun does come within the definition of a weapon.

The Court drew a distinction between Section 1317.2(g) of the School Code and Section 2301 of the Pennsylvania Crimes Code, which defines a deadly weapon as follows:

*[a]ny firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or serious bodily injury, or any other device or instrumentality which, in the manner in which it is used or intended to be used, is calculated or likely to produce death or serious injury.*

The italicized language in the previous paragraph from the Crimes Code expands the definition of a

deadly weapon to an item which, because of the manner in which it is used, is “calculated or likely to produce death or serious bodily injury.” This definition would potentially include a pencil used to inflict serious bodily injury. However, the Commonwealth Court pointed out that neither Rule 6 nor Section 1317.2(g) includes the type of broad language included in the Crimes Code. The Commonwealth Court declined to include a pencil within the definition of a weapon, explaining that if it were to do so, “then a classroom full of students taking a multiple choice exam would all be in violation of Rule #6 and, eventually, there would be no students in attendance at school.”

### PRACTICAL ADVICE

An item (such as a pencil) that does not typically function as a weapon may not support student discipline for possession of a weapon under the Pennsylvania School Code, even when the item is used to inflict injury on another. A school district confronted with such an incident should consider assault charges under its code of student conduct, in addition to weapons possession charges.



### SCHOOL EMPLOYEE WHO RESIGNED AFTER HER HOSPITALIZATION COVERAGE WAS REDUCED ENTITLED TO UNEMPLOYMENT COMPENSATION

*Forbes Road School District v.  
Unemployment Compensation Board Of Review  
Commonwealth Court of Pennsylvania  
Case No. 1814 C.D. 2016*

Claimant was hired as a paraprofessional at \$10.15 an hour. She completed health insurance paperwork requesting coverage for herself and her spouse, coverage which the School District inadvertently

granted, even though paraprofessionals were entitled only to individual coverage under their collective bargaining agreement. The School District discovered its error and informed the employee that she would receive employee and spouse coverage for the balance of the school year, but would receive only individual coverage in the future. At the end of the school year, the employee was informed that she would have to pay an additional \$947.16 a month to maintain coverage for her spouse.

Claimant resigned and filed for unemployment compensation. The Office of Unemployment Compensation Benefits and an Unemployment Compensation referee both ruled Claimant ineligible for benefits because she voluntarily resigned. On appeal, however, the Unemployment Compensation Board of Review in Harrisburg reversed, finding that the Claimant was eligible for benefits, because she had “necessitous and compelling reason” for resigning her employment.

The Commonwealth Court of Pennsylvania affirmed the Board’s ruling explaining that when Claimant was initially hired, she understood she would receive coverage for her spouse and, in fact, such coverage was extended for an entire school year. The Court reasoned that payment of \$947.16 per month by an employee earning only \$10.15 per hour represented “a substantial change in the terms of her employment.”

The Commonwealth Court rejected the School District’s argument that the Claimant “failed to take reasonable steps to preserve her own employment.” According to the Court, the employee met her responsibility by offering to remain in her position if the School District would continue to provide hospitalization for her spouse on the same terms as the previous year.



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