No. 19-3342

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN DOE
Plaintiff-Appellant,

v.

OBERLIN COLLEGE
Defendant-Appellee

Appeal from the United States District Court for the Northern District of Ohio, Case No. 1:17-cv-01335-SO

JOHN DOE'S RESPONSE TO OBERLIN COLLEGE'S PETITION FOR REHEARING EN BANC

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INTRODUCTION

Oberlin's petition for rehearing seeks a second bite at the apple under the guise of *en banc* review. It asserts that the majority "lowered the binding pleading standard" in this Court "in two ways": (1) by acknowledging that a "'gravely' erroneous" outcome can itself supply some evidence of gender bias, and (2) by adopting a causation standard that requires no evidence of bias to be sourced from the temporal confines of a plaintiff's own proceeding. Petition for Rehearing En Banc ("Pet.") at 4. But neither of those things lower the Court's pleading standard; Oberlin just says so to manufacture a reason for *en banc* review.

Oberlin's first argument has nothing to do with the pleading *standard* at all. It does not "bypass," Pet. at 4, or even weaken, the requirement that plaintiffs establish a causal connection between gender bias and a wrongful outcome. It does what courts have been doing for more than 40 years: recognizing that procedural irregularities in an organization's decision-making, *as well as decisions that "strongly" depart from the evidence and standards before it*, can *establish* a causal connection between bias and the decision. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (Equal Protection claim) (emphasis added). That principle is being widely applied in Title IX cases,

including by three federal circuit courts and a number of district courts.[1] It does not "bypass" the requirement that bias be shown to have caused the outcome; it just points out a source from which causation evidence is regularly drawn.

Oberlin's second argument also has nothing to do with a change in the pleading standard. *Doe v. Baum* blessed the idea that gender bias can be plausibly alleged when none of it is sourced from a plaintiff's own proceeding. *Baum* cited five cases as illustrating the kinds of allegations that suffice to state a claim of gender bias; in two of them, the evidence of bias was found *entirely* outside the plaintiffs' proceedings. *Doe v. Baum*, 903 F.3d 575, 586-87 (6th Cir. 2018) (citing *Doe v. Lynn Univ., Inc.*, 235 F. Supp. 3d 336, 1340-42 (S.D. Fla. 2017) and *Doe v.*

[1] *See, e.g., Schwake v. Arizona Bd. of Regents*, --- F.3d ---, 2020 WL 4343730, at *6 (9th Cir. July 29, 2020) (procedural irregularities can show gender bias); *Menaker v. Hofstra Univ.*, 935 F.3d 20 (2d Cir. 2019) (decisions strongly contrary to evidence, and clear procedural irregularities, can show bias); *Doe v. Purdue Univ.*, 928 F.3d 652, 669 (7th Cir. 2019) ("perplexing" basis of decision supported inference of gender bias); *Oliver v. UT-Southwestern Medical School*, 3:18-cv-549, 2019 WL 536376, at *18 (N.D. Tex. Feb. 11, 2019) (failure to address exculpatory facts in expulsion letter supplied evidence of bias); *Doe v. Grinnell Coll.*, No. 4:17-cv-79 (S.D. Iowa July 9, 2019) (attached as Ex. 1 to Dkt. No. 20) at 23 (failure to address critical evidence in decision supplied evidence of bias); *Doe v. Syracuse Univ.*, No. 5:18-cv-377-DNH, 2019 WL 2021026 (N.D.N.Y. May 8, 2019) (outcome "contrary to the weight of the evidence" was evidence of gender bias).

Amherst Coll., 258 F. Supp. 3d 195, 223 (D. Mass. 2017)). Other courts have done the same, as has this Court in a related context.[2] That is not an end run around the pleading standard; it is a common-sense acknowledgement that causation can be pled even when the evidence of bias is found outside the proceeding.

Oberlin wants this Court to apply special pleading rules to Title IX cases that apply in no other antidiscrimination context. But "[t]here is no heightened pleading standard for Title IX claims." *Schwake*, --- F.3d ---, 2020 WL 4343730, at *6. Oberlin's special rules would shield schools from Title IX liability unless they discriminated in the most obvious ways, ways that clever people rarely do. That Oberlin might want such rules is not surprising, but they have no basis in law.

ARGUMENT

I. THE MAJORITY DID NOT ALTER THE PLEADING STANDARD.

A. Procedural and Substantive Departures From the Norm Are Often Used to Establish Causation in Antidiscrimination Law.

It is well-settled that significant departures from an organization's stated procedures or substantive guidelines can help show that bias motivated its actions. That principle was articulated more than 40 years ago in *Village of Arlington*

[2] *See, e.g., Doe v. George Washington Univ.*, 366 F. Supp. 3d 1, 13 (D.D.C. 2018); *Doe v. The Trustees of the Univ. of Pennsylvania*, 270 F. Supp. 3d 799, 823 (E.D. Pa. 2017; *Robinson v. Runyon*, 149 F.3d 507, 509 (6th Cir. 1998) (exclusion of evidence about non-decisionmaker outside disciplinary process warranted new trial in Title VII case even with no evidence of bias in process).

Heights, which listed several factors for courts to consider in weighing whether bias caused a given outcome—including "[d]epartures from the normal procedural sequence" and "[s]ubstantive departures too . . ., particularly if the factors usually considered important by the decisionmaker *strongly favor a decision contrary to the one reached*." 429 U.S. at 267 (emphasis added). As noted at footnote 2, this is settled law, not a lower pleading standard.

The Second Circuit's *Menaker* decision did not make new law; it simply explained, in a particularly clear (and thus quotable) way, how the *Village of Arlington Heights* standard applies to erroneous outcome claims under Title IX:

> "[W]hen the evidence substantially favors one party's version of a disputed matter, but an evaluator forms a conclusion in favor of the other side (without an apparent reason based in the evidence), it is plausible to infer (although by no means necessarily correct) that the evaluator has been influenced by bias."

935 F.3d 20, 34 (2d Cir. 2019) (quoting *Doe v. Columbia Univ.*, 831 F.3d 46, 57 (2d Cir. 2016). The greater the disconnect between the evidence and the conclusion, the less evidence of bias required to plausibly state a claim. *See id.* ("clear procedural irregularities" require only "*minimal* evidence of pressure on the university to act on invidious stereotypes" to state a claim). When an error seems like a close call, it might be innocent. But when the error is grave, it becomes plausible to infer that something like bias may be at work. That is the common-sense intuition behind the principle.

Here, the finding against Mr. Doe was "arguably inexplicable." Slip Op. at 12. It required Mr. Doe's hearing board to ignore that Ms. Doe's *own witnesses* saw no signs of incapacity as she went to Mr. Doe's room; that *by Ms. Roe's own admission*, the two of them coherently texted, talked, and had intercourse for *an hour and 15 minutes* with no outward signs of her intoxication, let alone incapacity; that *by Ms. Roe's own admission*, the only outward sign of her intoxication to Mr. Doe, after all of that, was the bare statement, "I am not sober." *See generally* Slip Op. at 6-7. Concluding that the statement alone should have somehow told Mr. Doe that Ms. Roe now "lack[ed] conscious knowledge" of what she was doing or was "physically helpless" when she agreed to perform oral sex on him, Slip Op. at 3, is truly inexplicable. And it required the board to ignore Ms. Roe's 11th hour claim at the hearing that Mr. Doe physically forced her to perform oral sex on him—a change in her story so striking that Oberlin's own outside investigator said it was the only contradiction from either party, yet a change the board didn't even bother to mention in its decision letter.[3] When one combines all of that with the delays in the proceeding, Mr. Doe's being given an advisor who always believes *accusers*, the intense external pressure, and a 100% conviction rate, surely it is clear why the majority thought Mr. Doe was entitled to discovery.

[3] *Oliver*, 2019 WL 536376, at *18 (failure to address exculpatory facts in expulsion letter supplied evidence of bias); *Grinnell* (Ex. 1 to Dkt. No. 20) at 23 (same).

Oberlin and the dissenting opinion suggest that employing this principle runs afoul of this Court's rejection of the lower pleading standard adopted by the Second Circuit in *Columbia*. *See* Pet. at 4; Slip Op. at 15 (Gilman, J., dissenting). What this Court rejected, however, was the lower *quantum* of evidence required in that Circuit to state a claim of gender bias. *Doe v. Miami Univ.*, 882 F.3d 579, 588-89 (6th Cir. 2018). *Baum*, on the other hand, actually relied on *Columbia* as one of its five cases illustrating the *kinds* of evidence from which bias can be inferred. *Baum*, 903 F.3d at 588. Even if this principle were somehow tethered to Second Circuit jurisprudence, there would be nothing improper about looking to that court for guidance on the *kinds* of allegations that can supply evidence of bias.

Oberlin also suggests that requiring courts to parse "grave" doubts about an outcome from merely "articulable" ones is "an unworkable, subjective framework." Pet. at 5. But distinguishing "clear" or "grave" errors from closer calls is something courts do all the time. *See, e.g.*, *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 267 (6th Cir. 2001) (describing "abuse of discretion" as review for decisions that are "clearly unreasonable"). It is the work of *judging*.

B. Title IX Does Not Require Evidence of Bias From the Disciplinary Proceeding Itself.

Even if Title IX required evidence of bias to be sourced from a plaintiff's own proceeding, it would not matter to the outcome here. The majority identified at least three sources of bias from Mr. Doe's proceeding, including its

extraordinary delay, the appointment of a biased and indifferent advisor, and the inexplicable decision itself. But it wouldn't matter if all of the evidence of gender bias did arise outside the proceeding, because that is exactly what happened in *Lynn University* and *Amherst College*, both of which *Baum* cited approvingly. In *Lynn University*, the evidence of gender bias consisted of (1) generic nationwide pressure upon schools by the Education Department, and (2) a news report and parental criticism about the handling of a separate allegation of assault months earlier. 235 F. Supp. 3d at 1340-41. In *Amherst College*, it consisted in pressure from a student-led reform movement in which the complainant was involved. 238 F. Supp. 3d at 223. In neither case did the court identify evidence of bias *from within the proceeding*. The rule Oberlin seeks is foreclosed by *Baum* and at odds with the broader body of law—and with common sense. It would close discovery even in cases where hearing panelists were trained with overt bias, as long as they did not refer to that bias at the hearing or in their decisions. That is one reason why a decision strongly divorced from the evidence can supply evidence of bias.

II. OBERLIN'S REMAINING ARGUMENTS BOTH SEEK ANOTHER BITE AT THE APPLE AND FAIL ON THEIR OWN TERMS.

Oberlin's remaining complaints do not state a valid basis for *en banc* review. They simply rehash arguments that the majority has already rejected.

A. Delayed Proceedings. Oberlin asserts that the extreme delay in Mr. Doe's proceedings fails to show bias because Oberlin failed to notify both parties

of the reason for the delay. Pet. at 11-12. But Mr. Doe is the only one who asked about it and expressed genuine grief over it, yet was met with silence. When a female Oberlin student similarly complained about the length of her proceeding, the opposite occurred. Slip Op. at 2. The majority reasonably concluded that the delay, in the light of the rest of the evidence, was some evidence of gender bias.

B. External Pressure. Oberlin caricatures the majority opinion as holding that external government pressure alone can "suffice" to support an inference of bias. Pet. at 12-13. It held no such thing; it simply coupled that pressure with evidence of bias from many other sources, as noted above. Oberlin just disagrees about what those other sources show. That is not what *en banc* review is for.

C. Statistical Evidence of Bias. Oberlin and the dissenting opinion attack the significance of Oberlin's glaring 100% conviction rate in Title IX hearings in three unsupported ways. They first argue that since Mr. Doe does not present the full range of pattern evidence that was presented in *Miami*, his statistics are somehow meaningless. *See* Slip Op. at 17 (Gilman, J., dissenting). That kind of "all or nothing" approach is unfounded and was recently rejected by the Ninth Circuit when it was presented with the same argument.[4]

[4] *See Schwake*, 2020 WL 4343730, at *6 (fact that statistical allegations "lack the detail of the allegations in [*Miami*] does not render [them] conclusory or insufficient. There is no heightened pleading standard for Title IX claims.").

The dissenting opinion also suggests that Oberlin *may* have had a hand in resolving 80% of its cases short of the formal process that had the 100% conviction rate. Slip Op. at 19 (Gilman, J., dissenting). But it is Mr. Doe who gets the benefit of any doubt at the motion to dismiss stage. *Cf. Baum*, 903 F.3d at 588 (Gibbons, J., concurring) (criticizing dissenting opinion for "analytical approach" suited to summary judgment). When Oberlin's Campus Climate Report, in explaining how its 100 cases were resolved, stated that "[m]ost parties . . . request that the College take no disciplinary action," Slip Op. at 19 (Gilman, J., dissenting), it was presumably justifying why it did nothing in those cases. Contemporaneous reports incorporated into the Amended Complaint likewise suggest that the path to resolution was a choice left to *complainants*, not Oberlin. *See* RE 21-2, Amended Complaint, PageID #529 (stating, in article interviewing Dr. Raimondo, that complainants "can then choose between two types of resolution," formal and informal). Oberlin should not get credit for a decision it did not make.

Oberlin takes a similar "all or nothing" approach in asserting that its record of 10 convictions in seven months is not statistically significant, and therefore that it lacks *any* evidentiary force. Pet. at 13. But that would also render the statistics in *Miami* meaningless, as that case involved just 20 convictions. *See Miami Univ.*, 882 F.3d at 593. The statistics here arguably are *more* probative than in *Miami* of whether there was bias *at the time of the relevant proceeding*, because the 20

convictions there were spread over a three-year period, *id.*, for a rate of just under seven per year. Oberlin's convictions covered a timeframe much closer to Mr. Doe's proceeding, and came at a rate ofe *17* per year.

4. Dr. Raimondo's Statements. Dr. Raimondo, who likely trained Mr. Doe's panelists, *see* Dkt. No. 20 (Reply Brief of John Doe) at 8-9, believes that conceiving of "grey areas of consent" discredits "particularly women's experiences of violence," *see* Slip Op. at 4. It is at least plausible to infer that she places a thumb on the complainant's scale when the complainant is a woman who claims violence in a grey-area case like this one. Oberlin and the dissenting opinion respond that Ms. Raimondo has no broader "anti-male" bias because she also acknowledges that men report assaults and that not *every* respondent (most of whom are men) will necessarily be found responsible (even though that never happened at Oberlin at this time). Pet. at 14; Slip Op. at 18 (Gilman, J., dissenting). That may be. But a bias toward female complainants is gender bias all the same. It is at least plausible to infer that when she analyzes consent in grey-area cases, she places a thumb on the complainant's scale when the complainant is a woman, no matter the respondent's gender. That, too, is gender bias.

CONCLUSION

For the foregoing reasons, John Doe respectfully requests that Oberlin's Petition for Rehearing En Banc be denied.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with this Court's order that Mr. Doe's response to Oberlin's Petition for Rehearing En Banc not exceed 10 pages.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I certify that on August 7, 2020, I electronically filed John Doe's Response to Oberlin College's Petition for Rehearing En Banc with the Clerk of the Court using the CM/ECF system, which sent electronic notification to counsel of record for Oberlin College:

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