UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DOE, Plaintiff-Appellant, vs. OBERLIN COLLEGE, et al., Defendants-Appellees.	**Civil Action No. 20-3482** **On Appeal from the United States District Court for the Northern District of Ohio, Case No. 1:20-cv-00669**

DEFENDANTS-APPELLEES' REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL AS MOOT

Doe acknowledges that his "claims for injunctive relief became moot during the pendency of this appeal as a result of" the hearing panel's July 2, 2020 determination that he did not violate the Policy.[1] (Brief in Opposition to Motion to Dismiss Appeal as Moot ("Brief in Opp."), p. 15, ECF No. 25) His sole argument against dismissal for mootness is that there is a "case and controversy" as it relates to his request for money "for the harm and damages" Oberlin caused him by simply conducting a federally mandated sexual misconduct investigation and subsequent hearing. (*Id.* p. 3.) This argument fails, and the appeal is moot.

As explained in Oberlin's Motion to Dismiss, Title IX mandates that colleges and universities investigate reports of sexual misconduct. To allow a

[1] Capitalized terms have the meanings set forth in Oberlin's Motion to Dismiss Appeal as Moot (the "Motion to Dismiss", ECF No. 23-1) unless otherwise specified.

student to sue his institution for an investigation and disciplinary process that the institution is *required* to undergo would create the sort of absurd result courts should avoid. Thus, Doe's claims for monetary damages cannot render this moot appeal justiciable because Doe cannot plausibly be considered to have been harmed by a mandatory Title IX investigation.

Even if the mandatory investigation requirement of Title IX did not moot Doe's allegations of harm and requests for damages, Doe's argument still fails because (i) Doe's 42 U.S.C. § 1983 due process claim was properly dismissed by the district court, (ii) Doe's selective enforcement claim fails as a matter of law, and (iii) Doe has waived any objection to the dismissal of his other federal and state law claims by failing to raise them in his Appellant Brief. Thus, Doe cannot show that he has been harmed in any financially compensable way that would prevent this appeal from being considered moot.

In sum, Doe's argument that his claim for money damages creates a "case and controversy" for this Court to decide fails. Doe has been absolved of wrongdoing in the disciplinary proceeding and this appeal should be dismissed as moot, no matter the relief sought.

LAW AND ARGUMENT

I. Damages claims do not render this moot appeal justiciable because Doe cannot suffer redressable harm from a mandatory investigation.

As discussed in the Motion to Dismiss, to comply with Title IX, colleges

and universities must investigate reports of sexual misconduct or risk potential liability from student-victims for failure to do so. (Motion to Dismiss, pp. 9-10.) The seriousness of this requirement to investigate complaints under Title IX is underscored in *Doe v. University of Notre Dame Du Lac,* No. 3:17CV690-PPS, 2018 WL 2184392 (N.D. Ind. May 11, 2018). In *Notre Dame*, a female student was sexually assaulted by a male football player. *Id.* at *1. The female student wanted to handle the issue privately, but university authorities found out about the alleged assault from a third party and opened a Title IX investigation. *Id.* The court noted that the case presented an "unusual circumstance in which the alleged victim wanted the school, even after notice of the attack, to stand down and take no action, in deference to her wishes." *Id.* at *3.

The *Notre Dame* court found not only that the university's initiation of an investigation was "not unreasonable," but also that failure of the university to open an investigation would have been "potentially actionable under Title IX . . . ." *Id.* at *2. The school was deemed to have "an obligation to the larger community to investigate the matter" and, relying on a decision from the Southern District of New York, the court found that "the university has an independent obligation to investigate allegations of sexual misconduct." *Id.* at *3 (quoting *Tubbs v. Stony Brook University,* No. 15 Civ. 0517 (NSR), 2016 WL 8650463, at *7 n. 6 (S.D.N.Y. Mar. 4, 2016)). The court held that "Title IX does not support liability

for a university's undertaking its investigation obligation" even where it is "the ***alleged victim*** [who] does not want an official investigation." *Id.* (emphasis added).

Doe, the party that was accused of assault, argues that this appeal is not moot because he has somehow been financially harmed by what he frames as the "decision" by Oberlin to investigate Roe's allegations of sexual misconduct in the first place. (Brief in Opp., pp. 3, 5-6, 10.) But Oberlin did not make a discretionary choice to investigate Roe's allegations. After Roe reported the alleged violations of the Policy, Oberlin was *required* to investigate or else face potential liability to Roe. Oberlin cannot be found to have harmed Doe by fulfilling its mandatory duties under Title IX, particularly considering Oberlin's fulfillment of those duties led to Doe's absolution at the end of the disciplinary process. Doe cites no authority to the contrary.

Accepting Doe's argument would create "[a]bsurd results" which "are to be avoided." *United States v. Fitzgerald,* 906 F.3d 437, 447 (6th Cir. 2018) (quoting *United States v. Turkette,* 452 U.S. 576, 580 (1981)). "[C]ourts should not construe a statute" like Title IX "to produce an absurd result that" it is "confident Congress did not intend." *Id.* (quoting *United States v. Underhill,* 813 F.2d 105, 112 (6th Cir. 1987)). According to Doe, the responding party in every Title IX investigation could immediately run to court to assert claims for harm and damages against the

institution despite (i) the institution's obligation to conduct the investigation in the first place, and (ii) that the investigation and disciplinary hearing process are ongoing with the possibility of absolution of the responding party still on the table, as happened here. If allowed, the responding party in every sexual misconduct investigation could weaponize the mandatory Title IX investigation requirement by suing and claiming financial harm from the very fact of the investigation itself—an absurd result. Oberlin's duty to conduct a fair and impartial investigation exists even where—as here—a reporting party initially requests an informal resolution, but then requests a formal resolution process.

In sum, nothing—including protests from the victim, as in *Notre Dame*—can excuse an institution from having to undertake its Title IX mandated investigation into allegations of sexual misconduct. Permitting damages claims by an alleged accuser for this required investigation would produce absurd results that no reasonable person could intend. For this reason, Doe's argument that his claim for monetary damages saves this matter from being moot fails.

II. Even if Title IX did not mandate an investigation, this appeal would still be moot because Doe cannot show that he has been harmed.

Doe cannot show that he has been harmed so as to be entitled to monetary damages because (i) his 1983 due process claim was properly dismissed by the district court, (ii) his selective enforcement claim fails as a matter of law, and (iii) he has waived his remaining state and federal law claims.

A. Due process claims under 42 U.S.C. § 1983 are not available against private colleges and universities.

"The Fourteenth Amendment, which prohibits the states from denying federal constitutional rights and which guarantees due process, applies to acts of the ***states***, not to acts of private persons or entities." *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982) (emphasis added). Thus, the Fourteenth Amendment's due process guarantees are "triggered only in the presence of state action . . . ." *Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir. 2000).

This is particularly true in the Title IX context, where "not one" federal court has "recognized such a claim" under 42 U.S.C. § 1983. *Heineke v. Santa Clara Univ.*, 965 F.3d 1009, 1014 (9th Cir. 2020) (citations omitted). *See also Faparusi v. Case W. Reserve Univ.*, 711 Fed.Appx. 269, 276 (6th Cir. 2017) (dismissing student's due process claims against private university because university could not be deemed a state actor); *Doe v. Case W. Reserve Univ.*, No. 17CV414, 2017 WL 3840418, at *10 (N.D. Ohio Sept. 1, 2017) ("Despite extensive research, the Court has not found a single case in which a court has determined that a private school's compliance with Title IX's regulations make that entity a state actor for purposes of a Fourteenth Amendment due process claim, nor has Plaintiff cited any such decision.")

Indeed, every court to consider the issue has held that seeking to abide by Title IX does not constitute state action so as to expose a private school to potential

liability for a Fourteenth Amendment due process claim. Doe's 1983 claim was properly dismissed by the district court.

Thus, Doe cannot rely on the monetary relief sought with his 1983 claim to argue that this appeal is justiciable.

B. Doe's selective enforcement claim fails as a matter of law.

Doe argues that his selective enforcement claim prevents this appeal from being moot. (Brief in Opp., pp. 6-7) Doe's selective enforcement claim is based on (i) Oberlin's only investigating Roe's claim when Doe was also allegedly drinking during their encounter, and (ii) Oberlin's alleged failure to investigate Doe's complaint that Roe violated the Policy by informing third parties of the investigation. (*Id.*) These arguments fail.

First, Doe does not allege in his Complaint that Roe sexually assaulted him, or that he lodged an official complaint against Roe. His argument is that Oberlin should have investigated Roe's role based solely on Roe's allegedly reporting that she and Doe were both drinking on the night of the incident. Without an allegation of sexual misconduct or a complaint from Doe, and with no evidence to suggest that Doe was assaulted, Oberlin had no legal duty to investigate under Title IX.

Second, Roe did not violate the Policy by informing third parties of the investigation. There is nothing in the Policy that would have prevented Roe from discussing the investigation with other students. There cannot, therefore, be a

cognizable claim for selective enforcement arising out of Roe's conversations with other students about Doe.

C. Doe's remaining claims cannot support a justiciable claim for monetary damages because those claims have been waived.

"The failure to present an argument in an appellate brief waives appellate review." *Middlebrook v. City of Bartlett, TN*, 103 Fed.Appx. 560, 563 (6th Cir. 2004) ("[w]hile [appellant] has listed five issues which he desires to raise on appeal, he has not offered any argument or citations in support of those issues" and thus "waives appellate review") (citing *Buziashviili v. Inman* 106 F.3d 709, 719 (6th Cir.1997)). *See also Bose v. Bea*, 947 F.3d 983, 988, 993 (6th Cir. 2020) (appellant waived an argument on an issue by not raising it in her opening brief in this Court).

Doe's remaining state and federal claims are discrimination under Title IX, breach of contract, breach of the covenant of good faith and fair dealing, negligence, and promissory estoppel. While Doe's Appellant Brief has a section purporting to assign error for the district court's dismissal of these claims, he does not actually address them. Instead, that section focuses on the ripeness of his 1983 due process claim. Doe Appellant Br., at pp. 39-50. Doe did not try to establish the merits of his remaining federal and state law claims or address how the district court purportedly erred by dismissing them because they were premature. Doe has waived those claims. *See id.* at pp. 47-50 (discussing only his due process claim).

And even if he has not waived the remaining state and federal claims, those claims were dismissed without prejudice—Doe could simply refile them should he suffer actual harm.

Thus, Doe is foreclosed from making any argument that this case is justiciable because of the availability of damages for his remaining state and federal claims.

III. The cases Doe cites in opposition to the Motion to Dismiss support Oberlin's mootness arguments.

Doe cites a series of cases in his Brief in Opposition for the proposition that the mootness of a claim for injunctive relief will not affect a claim for damages. (Brief in Opp., p. 11.) These decisions broadly hold that a case with a plaintiff seeking injunctive relief and monetary damages is not per se moot by a finding of mootness on the claims seeking injunctive relief. (*Id.*) Oberlin generally agrees with this statement of black letter law. But Doe omits an important—if not obvious—caveat from these cases: the claimant still has to have cognizable, redressable harm to support a claim which would entitle him to damages.

For instance, Doe cites *KNC Investments* (and the cases cited by *KNC Investments*) for the proposition that "where a claim for injunctive relief is moot, relief in the form of damages . . . is not affected." (Brief in Opp., p. 11.) *KNC Investments, LLC v. Lane's End Stallions, Inc.*, 579 Fed. Appx. 381, 384 (6th Cir. 2014) (citations omitted). The portion Doe elided from the quotation says that

where a claim for injunctive relief is moot, relief in the form of damages "***for a past constitutional violation*** is not affected." *KNC Investments, LLC,* 579 Fed.Appx. at 384 (emphasis added). As discussed above, Doe has no claim for a past constitutional violation because Oberlin is a private institution that cannot be held liable for his 1983 due process claim.

Doe then cites *Hood,* and similar cases, for the proposition that "[c]laims for damages or other monetary relief automatically avoid mootness." (Brief in Opp., p. 11.) *Hood v. Keller,* 229 Fed.Appx. 393, 400 (6th Cir. 2007). Like *KNC,* the Sixth Circuit in *Hood* tempers this concept by noting that the remaining claim for damages cannot be "so insubstantial or so clearly foreclosed by prior decisions that . . . the case may not proceed." *Hood,* 229 Fed.Appx. at 399 (quoting *Memphis Light, Gas & Water v. Craft,* 436 U.S. 1, 9 (1978)). Again, for the reasons explained above, Doe's 1983 claim is unavailable, and he has waived his remaining state and federal law claims. Thus, the request for damages attendant with those claims "is so clearly foreclosed" that this "case may not proceed." *Id.*

Powell, which Doe discusses at length, likewise does not render this moot appeal justiciable. (Brief in Opp., pp. 13-15.) *Powell v. McCormack,* 395 U.S. 486 (1969). Like the cases above, *Powell* also recognizes that "where one claim has become moot and the pleadings are insufficient to determine whether the plaintiff is entitled to another remedy, the action should be dismissed as moot." *Powell,* 395

U.S. at 499 (citing *Alejandrino v. Quezon*, 271 U.S. 528 (1926)). Unlike this case, the plaintiff in *Powell* could plead a plausible claim for damages for lost salary as a result of being temporarily excluded from Congress by an allegedly unconstitutional resolution. *Powell*, 395 U.S. at 496. Doe has no claim for lost salary or monies withheld from him as a result of the investigation or the hearing. *Powell* does not help him here.

Thus, Doe's blanket statement that a claim for damages will save an otherwise moot appeal fails. The cases cited in support of that proposition make clear that the claim for damages must still be based on actionable conduct. Doe has no such claims here. The decision by the Oberlin hearing panel in Doe's favor mooted Doe's claims, both for injunctive and monetary relief.

CONCLUSION

For these reasons, and the reasons in the Motion to Dismiss, Defendants-Appellees Oberlin College, the Oberlin College Board of Trustees, and Rebecca Mosely respectfully request that the Court dismiss Doe's appeal.

Dated: September 8, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This reply complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because the word-processing system used to prepare the reply, Microsoft Word, indicates that this brief contains 2,572 words, excluding the parts of the reply exempted by Fed. R. App. P. 32(f).

This reply 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 this reply has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Reply in Support of Motion to Dismiss Plaintiff-Appellant's Appeal as Moot was filed this 8th day of September, 2020, via the CM/ECF system, which will serve all counsel of record.

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