11-2288

United States Court of Appeals for the Sixth Circuit

GERALDINE A. FUHR,
Plaintiff-Appellant,

v.

HAZEL PARK SCHOOL DISTRICT,
Defendant-Appellee.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, CIVIL ACTION NO.2:08-11652-BAF, HON. BERNARD A. FRIEDMAN

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF DEFENDANT-APPELLEE IN SUPPORT OF AFFIRMANCE

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 11-2288 Case Name: Fuhr v. Hazel Park School District

Name of counsel: Lawrence J. Joseph

Pursuant to 6th Cir. R. 26.1, Eagle Forum Education & Legal Defense Fund
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on March 28, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Lawrence J. Joseph
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, submits this *amicus* brief with the accompanying motion for leave to file.[1] Founded in 1981, Eagle Forum has consistently defended federalism and supported autonomy in areas (like education) of predominantly local concern. Eagle Forum has a longstanding interest in applying Title IX consistent with its anti-discrimination intent, while providing schools the flexibility to adopt educational programs that reflect the sexes' different interests. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

In the "common allegations" incorporated into all of her substantive claims, plaintiff-appellant Geraldine Fuhr ("Fuhr") alleges that her employer School District of the City of Hazel Park (the "School") retaliated against her not only for her prior litigation against

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

the School, First Am. Compl. at 3, ¶11, but also because she "complained of unequal facilities for … female athletes." *Id.* at 4, ¶11(H).[2] In Count II, Fuhr alleges that the School retaliated against her under Title VII. *Id.* at 6, ¶¶25-31. In Count VII, Fuhr alleges that the School retaliated against her under Title IX. *Id.* at 9-10, ¶¶55-60.

The School moved for summary judgment, addressing the various slights and other issues raised by Fuhr, and Fuhr seeks to defeat the summary-judgment motion through her testimony as to her Principal's alleged admission:

> A.... I said, ever since I got placed or I won the lawsuit and got placed in this position, I have been harassed and undermined. I said, first it's Tom Pratt internally in the building. And I went through a bunch of things that he had done.
>
> And then I said, and then it's Clint Adkins in the community. And he screamed, Clint Adkins, he thinks he is the community.... He said—he said they are doing—this is a good old boys network. They are doing this to you to get even, you know. Yes, they are doing this to you to get even with you because—I can't remember exactly. They are doing this to you to get even because you stood up for your rights. They are doing this to you to get back at you for winning the lawsuit.

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[2] Without an allegation of intentional sex-based discrimination, "unequal facilities" might violate the Title IX regulations but would not violate Title IX. 45 C.F.R. §86.41(c)(7); 34 C.F.R. §106.41(c)(7).

Slip Op. at 9-10. The district court granted the School's summary-judgment motion with respect to both Counts II and VII. *Id.* at 16.

Constitutional Background

Under Article III, appellate courts review jurisdictional issues *de novo, Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94-95 (1998), and "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary,* 501 U.S. 312, 316 (1991). Parties cannot grant jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990), "[a]nd if the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect" and dismiss the action. *Id.*

The Fourteenth Amendment's Equal Protection Clause prohibits states' "deny[ing] to any person within [their] jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV §1, cl. 4. The Fourteenth Amendment covers only intentional discrimination, with no "disparate-impact" component. *Pers. Adm'r v. Feeney,* 442 U.S. 256, 272 (1979). The Fourteenth Amendment provides Congress the "power to enforce, by appropriate legislation, the provisions" of that Amendment. U.S. Const. amend. XIV, §5.

Statutory Background

Modeled on Title VI of the Civil Rights Act of 1964, Title IX prohibits sex-based discrimination in federally funded education. 20 U.S.C. §1681(a). Like Title VI, Congress enacted Title IX under only the Spending Clause, not under the Fourteenth Amendment. *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 181 (2005). Similarly, like Title VI and the Equal Protection Clause, Title IX prohibits only intentional discrimination (*i.e.,* action taken *because* of sex, not merely *in spite of* sex), *Alexander v. Sandoval,* 532 U.S. 275, 282-83 & n.2 (2001), and authorizes all funding agencies to issue regulations to effectuate Title IX's prohibition of intentional discrimination.[3] 20 U.S.C. §1682.

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[3] In 1974, Senator Tower introduced an amendment to the Education Amendments of 1974 to exempt revenue-producing intercollegiate athletics from Title IX and to require the Commissioner of Education to publish proposed Title IX regulations within 30 days. 120 CONG. REC. 15,322-23 (1974). Although he believed that Title IX did not apply to sports, his amendment clarified that – *if a court found Title IX to apply to sports* – it would exempt revenue-producing sports. *Id.* The requirement to publish proposed rules was "not intended to confer on [the Department of Health, Education and Welfare ("HEW")] any authority it does not already have under the act." *Id.* The Tower Amendment passed the Senate, but was amended in conference (becoming the "Javits Amendment") to require HEW's Secretary (instead of the Commissioner of Education) to publish proposed regulations and to replace the revenue-sport exemption with a requirement to "include with respect to intercollegiate athletic activities

In *Jackson,* the Supreme Court recently found that Title IX includes a cause of action for retaliation for championing the Title IX rights of others. *Jackson,* 544 U.S. at 178. Specifically, relying on *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229 (1969), the Court held that 42 U.S.C. §1982 provides a white lessor "his *own* private cause of action under §1982 if he could show that he was 'punished for trying to vindicate the rights of minorities.'" 544 U.S. at 176 n.1 (emphasis in original).

Regulatory Background

In 1975, HEW issued regulations under Title IX. In its most familiar aspect, these regulations required equal opportunity in athletics:

> A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

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reasonable provisions considering the nature of particular sports." *Compare* H.R. 69, §536 (Tower Amendment), *reprinted in* 120 CONG. REG. 15,444, 15,477 (1974) *with* PUB. L. NO. 93-380, §844, 88 Stat. at 612. The committee otherwise left the Senate bill unchanged. S. CONF. REP. 93-1026, *reprinted in* 1974 U.S.C.C.A.N. 4206, 4271.

> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
>
> (2) The provision of equipment and supplies;
>
> (3) Scheduling of games and practice time;
>
> (4) Travel and per diem allowance;
>
> (5) Opportunity to receive coaching and academic tutoring;
>
> (6) Assignment and compensation of coaches and tutors;
>
> (7) Provision of locker rooms, practice and competitive facilities;
>
> (8) Provision of medical and training facilities and services;
>
> (9) Provision of housing and dining facilities and services;
>
> (10) Publicity.

45 C.F.R. §86.41(c); 34 C.F.R. §106.41(c). In addition, to counter Senator Tower's assertion that Title IX did not apply to athletics, the regulations also incorporate the statutory anti-discrimination standard into the athletics regulations. 45 C.F.R. §86.41(a); 34 C.F.R. §106.41(a). HEW's regulations also included a discrete subpart on employment in education. 45 C.F.R. pt. 86, subpt. E; 34 C.F.R. pr. 106, subpt. E.

Consistent with Title IX's legislative history and its Title VI

template, these Title IX regulations incorporate Title VI's procedural provisions. 45 C.F.R. §86.71 ("[t]he procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference"); 34 C.F.R. §106.71 (same).[4] Two aspects of these incorporated Title VI regulations are relevant here.

First, the regulations prohibit retaliation not only for asserting statutory anti-discrimination rights but also for participating in regulatory proceedings or complaints:

> No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

45 C.F.R. §80.7(e); 34 C.F.R. §100.7(e). With regard to Title IX, the reference to Title VI's "section 601" refers to Title IX's analogous "section 901(a)." 20 U.S.C. §1681(a).

Second, the Title VI regulations also address the procedure associated with regulatory claims. "If there appears to be a failure or

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[4] 118 CONG. REC. 5803 (1972) (Title IX has the same procedural protections afforded under Title VI) (Sen. Bayh); *id.* at 5808 ("These provisions parallel Title VI of the 1964 Civil Rights Act") (Sen. Bayh).

threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or *by any other means authorized by law*." 45 C.F.R. §80.8(a) (emphasis added); 34 C.F.R. §100.8(a) (same).

Significantly, the regulations prohibit filing a regulation-based lawsuit – assuming *arguendo* that regulations-based lawsuits were "authorized by law" – until the agency determines that compliance cannot be achieved voluntarily and the funding recipient receives ten days' written notice of its noncompliance and the plan to effect compliance:

> *No action to effect compliance* by any other means authorized by law *shall be taken until* (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

45 C.F.R. §80.8(d) (emphasis added); 34 C.F.R. §100.8(d) (same).

SUMMARY OF ARGUMENT

Fuhr's complaint asserts retaliation under Title IX based on both her asserting statutory anti-discrimination rights and regulatory advocacy. The two classes of alleged retaliation require different modes of analysis.

With respect to the regulation-based retaliation, neither the United States nor third-party beneficiaries like Fuhr can enforce Title IX's regulations without the regulatory conditions precedent (*e.g.*, attempts at voluntary compliance and notice), which undermines Fuhr's standing and ability to state a claim for relief (Sections I.A-I.C). Although Title IX regulations that exceed the scope of the statutory prohibition of intentional discrimination are not privately enforceable as a merits question (Section I.C), this Court also lacks jurisdiction to consider such claims because plaintiffs lack standing to enforce non-vested rights of the United States (Sections I.A-I.B).

With respect to the statute-based retaliation (Section II), Fuhr's cryptic testimony that "they" did "this" to her in retaliation for her prior litigation fails to identify "them" and "this," which is fatal at summary

judgment. To defeat summary judgment, Fuhr needed direct evidence of discrimination, which shows discrimination without requiring any inferences. Here, the factfinder must infer *who* did *what*. Moreover, to the likely extent that "they" were not School agents with authority over Fuhr's removal, their doing whatever they did would not qualify as direct evidence of retaliation, even if Fuhr had identified them. Finally, the result here differs from the result in the analogous *Jackson* litigation based on the different procedural postures. Although the Supreme Court in *Jackson* assumed intentional discrimination at the motion-to-dismiss phase, such inferences and assumptions have no place at summary judgment.

ARGUMENT

I. FUHR LACKS STANDING TO ENFORCE THE ATHLETICS, RETALIATION, AND EMPLOYMENT REGULATIONS

Under the plain terms of the regulations, "[n]o action to effect compliance by any … means authorized by law shall be taken" until certain regulatory preconditions have been met. Fuhr's failure to meet those regulatory preconditions denies her either prudential standing or statutory standing to the extent that her complaint alleges retaliation for her advocacy for regulatory issues that do not rise to the level of

statutory discrimination. *See, e.g., Loren v. Blue Cross & Blue Shield of Mich.,* 505 F.3d 598, 606 (6th Cir. 2007) ("a plaintiff must possess both constitutional and statutory standing in order for a federal court to have jurisdiction"); *TCG Detroit v. City of Dearborn,* 206 F.3d 618, 622 n.2 (6th Cir. 2000) (distinguishing statutory and constitutional standing); *Roberts v. Hamer,* 655 F.3d 578, 580-81 (6th Cir. 2011) (same).[5] Either way, Fuhr cannot enforce the regulations.

A. Federal Agencies Lack Vested Rights to Enforce Regulations with Unmet Conditions Precedent

Courts analogize Spending-Clause programs to contracts struck between the government and recipients, with the public as third-party beneficiaries. *Barnes v. Gorman,* 536 U.S. 181, 186 (2002); *U.S. v. Miami Univ.,* 294 F.3d 797, 809 (6th Cir. 2002); *Bossier Parish School Bd. v. Lemon,* 370 F.2d 847, 850 (5th Cir. 1967). To regulate recipients based on their accepting federal funds, however, Congress must express Spending-Clause conditions unambiguously. *Gorman,* 536 U.S. at 186.

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[5] Although the failure to satisfy regulatory conditions precedent negates both Fuhr's constitutional standing and statutory standing, this Court may address statutory standing first. *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 830-31 (1999). If the failure implicated *only* statutory standing, this Court would treat it as a merits issue. *Hamer,* 655 F.3d at 580-81.

Indeed, "[t]he legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of th[at] 'contract.'" *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1, 17 (1981). Relying on *Pennhurst,* the Supreme Court recently reaffirmed that "when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously.'" *Arlington Cent. School Dist. Bd. of Educ. v. Murphy,* 548 U.S. 291, 296 (2006).

With the required notice, recipients face enforcement for violations of the *statute. Gorman,* 536 U.S. at 187-89. As indicated in Section I.C, *infra,* no similar provision even authorizes private enforcement of the regulations:

> The distinction between an intention to benefit a third party and an intention that the third party should have the right to enforce that intention is emphasized where the promisee is a governmental entity.

Astra USA, Inc. v. Santa Clara County, Cal., 131 S.Ct. 1342, 1348 (2011) (*quoting* 9 J. Murray, Corbin on Contracts §45.6, p. 92 (rev. ed. 2007)). Federal agencies, of course, are bound by their own regulations, which prevent enforcement before the agencies determine that

compliance cannot be secured voluntarily, notify recipients of planned actions, and provide ten days' notice. 45 C.F.R. §80.8(d); 34 C.F.R. §100.8(d). None of that happened here. Instead, Fuhr proposes to "spawn a multitude of dispersed and uncoordinated lawsuits by [beneficiaries]," *Astra,* 131 S.Ct. at 1349. Recipient schools never agreed to that, and federal law does not sanction it.

Assuming *arguendo* that the relevant Title IX regulations create enforceable individualized rights, a plaintiff still cannot enforce the regulations without satisfying the regulatory conditions precedent. When a regulation under Spending-Clause legislation defines schools' obligations, the *entire* regulation constitutes schools' bargain that agencies (or third-party beneficiaries) can enforce. *Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.,* 550 U.S. 45, 59 (2007); *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000). Accepting the regulations as implementing the statute dooms Fuhr's regulation-based Title IX claims.

Under traditional principles of contract and statutory interpretation, third-party beneficiaries like Fuhr cannot "cherry-pick" the specific regulatory provisions that they wish to enforce. *Silverman*

v. Summers, 28 Fed.Appx., 370, 374 (6th Cir. 2001) (no "cherry picking" in statutory construction); *In re United Airlines, Inc.,* 368 F.3d 720, 725 (7th Cir. 2004) ("[d]ebtors in bankruptcy can't cherry-pick favorable features of a contract to be assumed"); *Thompson v. Goetzmann,* 337 F.3d 489, 501 (5th Cir. 2003) ("litigants cannot cherry-pick particular phrases out of statutory schemes simply to justify an exceptionally broad – and favorable – interpretation of a statute"). Moreover, "[a] third-party beneficiary generally does not have *greater* enforcement rights than the original promisees to a contract." *Joint Administrative Committee of Plumbing and Pipefitting Industry in Detroit Area v. Washington Group Intern., Inc.,* 568 F.3d 626, 631 (6th Cir. 2009) (emphasis in original); *United Steelworkers of Am. v. Rawson,* 495 U.S. 362, 375 (1990) (same); *Stillman v. Goldfarb,* 172 Mich.App. 231, 238, 431 N.W.2d 247, 251 (Mich. App. 1988) ("third-party beneficiary to a contract has the same right to enforce that contract as the promisee"). Here, no federal agency can enforce its regulations in court without meeting the regulatory prerequisites. *What agencies cannot do directly, plaintiffs cannot do as third-party-beneficiaries.*

Under Title VII, such pre-litigation notice is a procedural

prerequisite to filing suit. *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 398 (1982). Under the environmental statutes' analogous notice requirements for citizen suits, the "purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance … and thus ... render [private enforcement] unnecessary." *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.,* 528 U.S. 167, 174-75 (2000) (interior quotations omitted). "Accordingly, … citizens lack statutory standing … to sue for violations that have ceased by the time the complaint is filed." *Id.* at 175; *see* Section I.C, *infra.* Regardless of "whether the notice provision is jurisdictional or procedural," Fuhr's regulatory claims are "barred" and "must be dismissed." *Hallstrom v. Tillamook County,* 493 U.S. 20, 32-33 (1989).

B. Fuhr Lacks Standing to Enforce Non-Vested Regulatory "Rights"

As explained in Section I.A *supra* and Section I.C *infra,* the failure to meet a condition precedent affects both standing under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6). But even if lack of conditions precedent implicated only Rule 12(b)(6) *for federal agencies,* it nonetheless implicates jurisdiction for third-party beneficiaries because third-party beneficiaries lack standing to enforce non-vested

claims.

"[F]ederal law governs questions involving the rights of the United States arising under nationwide federal programs." *U.S. v. Kimbell Foods, Inc.,* 440 U.S. 715, 726 (1979). Although "[f]ederal law typically controls when the Federal Government is a party to a suit involving its rights or obligations under a contract," *Boyle v. United Tech. Corp.,* 487 U.S. 500, 519 (1988), a uniform federal rule of decision is not required in *private enforcement* of a federal contract or program if the claim "will have *no direct effect upon the United States or its Treasury*." *Boyle,* 487 U.S. at 520 (*quoting Miree v. DeKalb County,* 433 U.S. 25, 29 (1977)) (emphasis in *Boyle*). Indeed, "[t]he prudent course … is often to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *Empire Healthchoice Assur., Inc. v. McVeigh,* 547 U.S. 677, 691-92 (2006) (internal quotation omitted). In other words, notwithstanding that federal law applies, the federal rule of decision could be "*See the state rule.*" For example, under *Miree,* 433 U.S. at 28, federal courts can look to state law for third-party beneficiaries' standing to enforce obligations under federal contracts.

Michigan law ties the vesting of third-party beneficiaries' rights to

any conditions precedent in the underlying contract: "[t]he rights … shall be deemed to have become vested, subject always to such express or implied conditions, limitations, or infirmities of the contract to which the rights of the promisee or the promise are subject." M.C.L.A. §600.1405(2)(a); *see also Stillman,* 172 Mich.App. at 238 (quoted *supra*); *Ganley v. Mazda Motor of America, Inc.,* 367 Fed.Appx. 616, 627 n.5 (6th Cir. 2010) (looking to state law to determine third-party beneficiary's standing). Without the conditions precedent to regulatory enforcement, Fuhr lacks a legally protected interest in regulatory enforcement and thus lacks standing for failure to exhaust the promisee's required administrative procedures. *Rudolph Steiner School of Ann Arbor v. Ann Arbor Charter Tp.,* 237 Mich.App. 721, 737-39, 605 N.W.2d 18, 27 (Mich. App. 1999) ("[b]ecause plaintiff failed to exhaust its administrative remedies with the boundary commission, the trial court lacked jurisdiction").[6] Whatever federal agencies may say, schools plainly never signed up for private regulatory enforcement, especially

[6] Federal common law would provide the same result. *Palma v. Verex Assur., Inc.,* 79 F.3d 1453, 1458 (5th Cir. 1996); *Karo v. San Diego Symphony Orchestra Ass'n,* 762 F.2d 819, 822-24 (9th Cir. 1985); *Seguin v. City of Sterling Heights,* 968 F.2d 584, 592 (6th Cir. 1992).

without the regulatory conditions precedent. If the schools did not agree to such enforcement, then that enforcement is not part of the agreement.

To the extent other courts have assumed jurisdiction without addressing this issue, "drive-by jurisdictional rulings" that reach merits issues without considering a particular jurisdictional issue "have no precedential effect" on that jurisdictional issue. *Steel Co.,* 523 U.S. at 94-95; *Waters v. Churchill,* 511 U.S. 661, 678 (1994) ("cases [cited by Fuhr] cannot be read as foreclosing an argument that they never dealt with"). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Industries, Inc. v. Aviall Services, Inc.,* 543 U.S. 157, 170 (2004) (interior quotations omitted). Courts that never *considered* a jurisdictional issue plainly never *decided* it.[7]

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[7] Title IX decisions that Fuhr might cite either predate or fail to address *Sandoval.* As such, they fail to distinguish between enforcing the regulations and enforcing the statute. Because those other courts never considered the additional impediments to enforcing Title IX's regulations, as distinct from enforcing the statute, this Court cannot rely on their holdings to enforce the regulations.

C. Fuhr Cannot Litigate Regulatory Violations that Are Not Statutory Violations

No one can credibly dispute that Title IX statutorily prohibits only intentional, sex-based discrimination. *Jackson,* 544 U.S. at 173-74. It would be "absurd" to contend otherwise. *Sandoval,* 532 U.S. at 282 & n.2. By introducing the distinction between regulatory violations and statutory violations, *Sandoval* undermined – indeed, impliedly overruled – numerous prior decisions that did not consider that distinction.[8] *Jackson,* 544 U.S. at 178 ("plaintiffs may not assert claims under Title IX for conduct not prohibited by that statute"). The question for this Court is the extent to which Fuhr can litigate retaliation claims that are regulatory, but not statutory.

Jackson involved a motion to dismiss for failure to state a claim, on the theory that *Sandoval* precluded the coach there from asserting a

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[8] For example, this Circuit's *Horner* litigation involved an effort to establish a new interscholastic sport for girls. By denying relief under the Equal Protection Clause in *Horner v. Kentucky High Sch. Athletic Ass'n,* 43 F.3d 265 (6th Cir. 1995) ("*Horner I*"), but allowing it under the a Title IX regulatory provision in *Horner v. Kentucky High Sch. Athletic Ass'n,* 206 F.3d 685 (6th Cir. 2000) ("*Horner II*"), this Court allowed the plaintiffs there to enforce the "equal opportunity mandate" in the regulations, *Horner II,* 206 F.3d at 694, which exceeds the statutory prohibition of intentional discrimination (i.e., discrimination because of sex). *Horner I,* 43 F.3d at 276. After *Sandoval,* that result is untenable.

Title IX *regulatory* claim for retaliation. Similarly, the decisions that the Supreme Court cited as raising a circuit split also involved regulatory claims of discrimination. *See Jackson,* 544 U.S. at 173 (*citing Lowrey v. Texas A & M Univ. System,* 117 F.3d 242, 252 (5th Cir. 1997) *and Preston v. Virginia ex rel. New River Community College,* 31 F.3d 203, 206 (4th Cir. 1994)). Nonetheless, the Supreme Court rejected the regulations as the basis for its finding a Title IX cause of action for third-party retaliation (*e.g.,* retaliation against a coach for championing the rights of athletes):

> We do not rely on regulations extending Title IX's protection beyond its statutory limits; indeed, we do not rely on the Department of Education's regulation at all, because the statute itself contains the necessary prohibition.

Jackson, 544 U.S. at 178. Instead, the Court "interpret[ed] Title IX's text to clearly prohibit retaliation for complaints about sex discrimination." *Id.* Obviously, a statute that does not itself prohibit non-statutory regulatory violations does not render such violations as prohibited *statutory* "sex discrimination."

Unlike the statute – which prohibits intentional retaliation for advocating against intentional sex discrimination – the regulations

prohibit not only that but also "interfering with any right or privilege secured by … [the regulations], or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under [the regulations]." 45 C.F.R. §80.7(e); 34 C.F.R. §100.7(e). Thus, someone retaliated against for Title IX regulatory issues is not without any remedy, but the remedy lies in the Title IX regulatory process.[9]

As indicated in Sections I.A-I.B, *supra,* Title IX's regulations impose several conditions precedent on regulatory enforcement – *e.g.,* agencies' attempting voluntary resolution, ten days' written notice – that remain unmet here. Under federal common law, failure to meet conditions precedent can render third-party beneficiaries unable to state a claim for relief. *See, e.g., Shaw Constructors v. ICF Kaiser Engineers, Inc.,* 395 F.3d 533, 540 & n.15 (5th Cir. 2004); *Kane*

[9] By contrast, Title VII's express retaliation remedy includes participation in regulatory proceedings. 42 U.S.C. §2000e-3(a). In *CBOCS West, Inc. v. Humphries,* 553 U.S. 442, 455-56 (2008), and *Burlington N. & S.F.R. Co. v. White,* 548 U.S. 53, 63 (2006), the Supreme Court recognized that "Congress might have wanted its explicit Title VII anti-retaliation provision to sweep more broadly (*i.e.,* to include conduct outside the workplace) than its substantive Title VII (status-based) antidiscrimination provision." *CBOCS,* 553 U.S. at 456.

Enterprises v. MacGregor (USA) Inc., 322 F.3d 371, 375 (5th Cir. 2003). Alternatively, Fuhr lacks standing as a third-party beneficiary to the federal contracts because the regulations' enforceability has not vested. *See* Section I.A, *supra.* Either way, Fuhr cannot prevail on her Title IX regulatory claims. Assuming *arguendo* that this defect – the lack of a vested, enforceable regulatory interest – is *not* jurisdictional, it nonetheless precludes a plaintiff's stating a claim for regulatory relief.

II. FOR STATUTORILY BASED TITLE IX RETALIATION, FUHR FAILED TO DEFEND AGAINST THE SCHOOL'S SUMMARY JUDGMENT MOTION

The district court addressed retaliation under both Title IX (Count VII) and Title VII (Count II) with the same analysis, relying primarily on decisions under Title VII. Slip Op. at 4-7. The parties do not appear to dispute that the Title VII standard governs the retaliation claims before this Court on appeal. *Compare* Fuhr Br. at 29-31 *with* School Br. at 35-36; *see also Davis v. Monroe County Board of Education,* 526 U.S. 629, 640 (1999) (relying on Title VII to interpret Title IX); *Bonnell v. Lorenzo,* 241 F.3d 800, 810 n.6 (6th Cir. 2001) (same); *Nelson v. Christian Bros. Univ.,* 226 Fed.Appx. 448, 454 (6th Cir. 2007) (same). For its part, however, the School argues that Fuhr "is not appealing the

lower court's grant of summary judgment as to her Title IX claims, state law claims, her gender discrimination claims, or her hostile environment claims; rather, [she] is only pursuing an appeal as to her retaliation claim under Title VII." School Br. at 30. On the chance that Fuhr will dispute the School's argument, *amicus* Eagle Forum briefs Title IX retaliation issues. To the extent that Title IX retaliation and Title VII retaliation share the same analysis, *see* note 10, *infra,* this would be a distinction without a difference.

If the Court reads the complaint, opinion, and notice of appeal as indicating that Fuhr has appealed the judgment against her on Title IX retaliation (*i.e.,* Count VII), the Court should reject that Title IX claim.[10] To the extent that Fuhr has raised statutory claims of retaliation for

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[10] In a concurrence, Chief Judge Batchelder has expressed the view that Title VII's employment remedies preempt Title IX's overlapping remedies. *Arceneaux v. Vanderbilt Univ.,* 25 Fed.Appx. 345, 349 (6th Cir. 2001) (Batchelder, J., concurring in judgment). As have several other Circuit panels in unpublished decisions, however, the majority there addressed the Title IX issue because the parties did not dispute the existence of a Title IX claim and evaluated that claim under the same burden-shifting framework as the Title VII claim. *Arceneaux,* 25 Fed.Appx. at 346-47; *Ivan v. Kent State Univ.,* 92 F.3d 1185, 1996 WL 422496, 1 (6th Cir. 1996); *Weaver v. Ohio State Univ.,* 1999 WL 824677, 1 (6th Cir. 1999); *Johnson v. City of Clarksville,* 186 Fed.Appx. 592, 595 (6th Cir. 2006).

her having previously asserted statutory claims of discrimination, Fuhr's claims must fail for the same reason that her Title VII claims must fail: she has not produced any direct evidence of such discrimination in response to the School's motion for summary judgment, and she has not rebutted the School's proffered non-discriminatory justifications for its actions.

The result here differs from the result in *Jackson* because of the different procedural posture of this appeal. Allegations and inferences may be enough to survive a motion to dismiss, but they are not enough to survive a motion for summary judgment. Thus, in *Jackson,* the courts *assumed* that the Board retaliated against Jackson for complaining about Title IX violations. *Jackson,* 544 U.S. at 171-72.[11] "Retaliation for Jackson's advocacy of the rights of the girls' basketball team in this case is 'discrimination' 'on the basis of sex,' just as retaliation for advocacy

[11] Under the supervening decision in *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 562-63 (2007), it is unclear whether the *Jackson* plaintiff could have survived a motion to dismiss today, in light of the conclusory nature of his complaint and the need to plead that the school acted because of sex. Before *Twombly,* a plaintiff could survive a motion to dismiss unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

on behalf of a black lessee in *Sullivan* was discrimination on the basis of race." *Id.* at 176–177. Under *Sandoval,* 532 U.S. at 281, 288-89, however, schools do not violate Title IX by violating the equal-opportunity regulations, and those regulations do not confer rights.

As the district court held, Fuhr's evidence – a disputed admission that "they did this" to her in retaliation for the prior litigation – is not direct evidence. Slip Op. at 9-11. It is entirely unclear who "they" are and what "this" is. Direct evidence "proves the existence of a fact without requiring any inference." *Grizzell v. City of Columbus,* 461 F.3d 711, 719 (6th Cir. 2006). Here, the factfinder must infer who "they" are and what they did.

Moreover, it is entirely possible – and indeed probable – that the "they" were not people with authority over Fuhr. If so, that evidence would not prove anything. *Carter v. Univ. of Toledo,* 349 F.3d 269, 273 (6th Cir. 2003) ("comments made by individuals who are not involved in the decision-making process regarding the plaintiff's employment do not constitute direct evidence of discrimination"); *Hopson v. DaimlerChrysler Corp.,* 306 F.3d 427, 433 (6th Cir. 2002) (comments by manager lacking involvement in the decision-making process do not

constitute direct evidence); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir.1998) ("[a]n isolated discriminatory remark made by one with no managerial authority over the challenged personnel decisions is not considered indicative of age discrimination"). Fuhr's testimony cannot substitute for her establishing the existence of genuine issues of material fact in response to the School's methodical refutation of her claims of sex-based discrimination. Allowing this case to proceed to trial would defeat the entire premise behind summary judgment motions.

CONCLUSION

For the foregoing reasons and those argued by the School, this Court should affirm the denial of relief to Fuhr.

Dated: March 28, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. The foregoing complies with FED. R. APP. P. 32(a)(7)(B)'s type-volume limitation because the brief contains 5,282 words excluding the parts of the brief that FED. R. APP. P. 32(a)(7)(B)(iii) exempts.

2. The foregoing complies with FED. R. APP. P. 32(a)(5)'s type-face requirements and FED. R. APP. P. 32(a)(6)'s type style requirements because the brief has been prepared in a proportionally spaced type-face using Microsoft Word 2010 in Century Schoolbook 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2012, I electronically submitted the foregoing document (together with the accompanying motion for leave to file the brief) to the Clerk for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

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