The Availability of Title IX Damages for Employees after *Franklin v. Gwinnett County Public Schools*

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THE AVAILABILITY OF TITLE IX DAMAGES FOR EMPLOYEES AFTER FRANKLIN V. GWINNETT COUNTY PUBLIC SCHOOLS

I. INTRODUCTION

Title IX of the Education Amendments of 1972\(^1\) seeks to eliminate gender discrimination in educational institutions.\(^2\) To meet this goal, Congress authorized all government agencies that award funds to educational programs to enforce Title IX by all lawful means, including the ultimate penalty of fund termination.\(^3\) Title IX does not expressly grant private enforcement, such as the right to bring a cause of action and to collect damages. The Su-

1. 20 U.S.C. §§ 1681-88 (1988). The directive is expressed as follows: “No person in the United States 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 . . . .” Id. at § 1681(a).


3. 20 U.S.C. § 1682 (1988) states as follows:

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with the achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken . . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding . . . . of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law . . . .
The Supreme Court, however, has found implied rights to bring private causes of action and to collect damages for intentional violations of the statute.

While the issue of whether there is private right of action for damages under Title IX is settled, who has standing to bring a claim for damages under Title IX remains unclear. Specifically, whether an employee of a federally assisted education program may bring suit for damages under Title IX is unsettled. The Supreme Court has held that employees of these education programs are protected by Title IX, but has not expressly determined whether they may seek damages under Title IX. Franklin v. Gwinnett County Public Schools, involving a student’s claim for damages for intentional violation of Title IX, remains the Court’s only statement on whether damages are available under Title IX. Since the Franklin decision, two district courts have recently reached opposite conclusions. Bowers v. Baylor University held that employees of federally funded education programs do have a private right of action for damages while Wedding v. University of Toledo held the opposite.

Several issues are raised by these differing views. First, does Title IX allow employees of education programs a right of action in circumvention of the Title VII administrative procedures that other employees must follow before bringing a suit for damages? Second, if education program employees may bring direct suits for damages under Title IX, are the substantive standards for proving gender discrimination the same under both Titles VII and IX? Finally, are Title IX damage awards subject to any caps similar to those imposed on Title VII damage recoveries?

This Comment examines the issue of whether employees have

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6. See North Haven Board of Education, 456 U.S. at 535-36. For further discussion, see infra notes 60-62 and accompanying text.
8. Id. at 145.
10. Id. at 204.
11. 42 U.S.C. § 2000e-5 (1988) describes the steps that must be followed before an aggrieved party may bring suit for employment discrimination. For further discussion, see infra notes 99-103 and accompanying text.
12. 42 U.S.C.A. § 1981a (West 1994) allows damage remedies for employees who suffer intentional discrimination and places caps on the available compensatory and punitive damages. For further discussion, see infra notes 108-10 and accompanying text.
a private right of action for damages under Title IX. Part II explores the implied right to damages granted in Franklin and presents the facts and analyses in Bowers and Wedding. Part III critiques the rationale of both cases and explains why the Bowers decision is a better application of Supreme Court precedent. Finally, Part III focuses on the issues created by granting employees of federally assisted education programs a right to damages under Title IX and concludes that these employees should not be excepted from the rules of Title VII.

II. THE IMPLIED RIGHT TO DAMAGES UNDER TITLE IX

A. Cannon v. University of Chicago

In Cannon, the Court first held that a private right of action exists under Title IX. Geraldine Cannon brought Title IX gender discrimination claims against the University of Chicago and Northwestern University medical schools after being denied admission to both schools. The Court of Appeals held that Title IX does not provide a private cause of action, and the Supreme Court reversed. However, the question of whether Title IX supports a private right of action for damages was not before the Court, as Cannon sought only equitable relief.

B. Franklin v. Gwinnet County Public Schools

1. The Facts and Procedural History of Franklin

In Franklin, the Supreme Court held that an implied right of action under Title IX supports a claim for monetary damages in cases of intentional violations. Christine Franklin was a student at North Gwinnett High School in Gwinnett County, Georgia, from September 1985 through August 1989. The Gwinnett County Public School System operated the high school and received federal funding. Franklin filed a complaint in December 1988 alleging

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13. See supra note 4 and accompanying text.
14. Id. at 680.
15. Id.
16. Id.
17. See supra notes 4-6 and accompanying text.
18. See supra note 5 and accompanying text.
20. Id.
that she had been sexually harassed on a continual basis since the fall of 1986 by Andrew Hill, a sports coach and teacher at the school.\textsuperscript{21} According to the complaint, Hill engaged Franklin in sexually explicit conversations, forcibly kissed Franklin in the school parking lot, and ultimately subjected Franklin to coerced sexual intercourse.\textsuperscript{22} The complaint further alleged that school officials became aware of and investigated Hill’s sexual harassment of Franklin and other students, but took no steps to stop the behavior and discouraged Franklin from pressing charges.\textsuperscript{23} Hill resigned on April 14, 1988 upon the condition that all legal matters pending against him be dropped, and the school subsequently closed its investigation.\textsuperscript{24}

The United States District Court for the Northern District of Georgia dismissed Franklin’s complaint on the grounds that monetary damages are not available under Title IX.\textsuperscript{25} The Court of Appeals for the Eleventh Circuit affirmed.\textsuperscript{26} The Court of Appeals based its decision on three grounds. First, the court noted that the analysis of Title IX and Title VI\textsuperscript{27} had developed similarly, and binding precedent existed within the Eleventh Circuit holding that Title VI does not support a claim for damages.\textsuperscript{28} Thus, the court felt obliged to hold that Title IX also does not allow claims for damages.\textsuperscript{29} Second, the court reasoned that Title IX was enacted pursuant to Congress’ Spending Clause power and that such statutes frequently limit remedies to equitable relief. Finally, the court stated that absent clear direction from Congress or the Supreme Court on this issue, it was reluctant to authorize the award of damages in Title IX actions.\textsuperscript{30}

\begin{thebibliography}{9}
\bibitem{21} Id.
\bibitem{22} Id.
\bibitem{23} Id. at 64.
\bibitem{25} Id.
\bibitem{26} Franklin v. Gwinnett County Pub. Sch., 911 F.2d 617, 618 (11th Cir. 1990).
\bibitem{27} 42 U.S.C. § 2000d (1988). Title VI prohibits discrimination on the basis of “race, color, or national origin” by “any person or activity receiving Federal financial assistance.” Id. Title VI’s enforcement provision is substantially similar to that of Title IX. \textit{Id.} § 2000d-1; see also note 3.
\bibitem{28} Franklin, 119 F.2d at 620-21.
\bibitem{29} Id.
\bibitem{30} Id. at 622.
\end{thebibliography}
2. Holding and Rationale of the Supreme Court

As stated above, the Supreme Court reversed and held that Title IX does support a private right of action for damages.\textsuperscript{31} The Court first stated that the question of available remedies for a statutorily granted right of action is "analytically distinct" from the question of whether an underlying right of action exists.\textsuperscript{32} Having found in Cannon that a private right of action under Title IX exists, the Court proceeded to analyze the issue before it under the presumption that, absent an express indication by Congress to the contrary, all remedies are available under a granted right of action.\textsuperscript{33}

The Court examined whether Congress intended to limit available Title IX remedies by focusing on both the "state of the law" prior to the enactment of Title IX and congressional action subsequent to the Cannon decision.\textsuperscript{34} Since Title IX is silent on whether a private right of action exists and what remedies are available for any suits, reliance on express legislative intent was deemed fruitless by the Court.\textsuperscript{35} Instead, the Court noted that both before and after the enactment of Title IX, it had consistently held that where Congress was silent on whether a remedy is available, denial of remedies was the exception rather than the rule.\textsuperscript{36} Within the decade immediately preceding the enactment of Title IX, the Court upheld an implied right of action on six occasions and approved a damages remedy in three of these cases.\textsuperscript{37} Since Congress was operating with full knowledge of the Court's presumption in favor of finding rights of action and all available remedies, the absence of any limiting language in Title IX suggested that the legislative

\begin{itemize}
\item \textsuperscript{31} See supra note 17 and accompanying text.
\item \textsuperscript{32} Franklin, 503 U.S. at 65-66.
\item \textsuperscript{33} Id. at 66. The Court cited a long line of precedent beginning with English common law and ending with Bell v. Hood, 327 U.S. 678 (1946). Id at 1033. The Hood decision looked approvingly on this line of precedent in enunciating the principle that where a right of action exists under the Constitution or federal law, the federal courts have the power to grant appropriate relief. Id.
\item \textsuperscript{34} Id. at 71.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id.
\end{itemize}
branch did not intend to limit remedies under the statute.\textsuperscript{38}

The Court buttressed this conclusion by analyzing congressional activity after the \textit{Cannon} decision.\textsuperscript{39} Congress passed two amendments to Title IX after \textit{Cannon}.\textsuperscript{40} The Civil Rights and Remedies Equalization Amendment\textsuperscript{41} was read as validating \textit{Cannon} by providing that "remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a state" in Title IX actions.\textsuperscript{42} While Congress did not expressly state the nature of the available remedies, it was also silent as to any limits on remedies. The Court assumed that Congress did not intend to limit available remedies in Title IX because it did not explicitly do so. Congress enacted the amendment with full knowledge of both the Court's finding an implied right of action under Title IX and the presumption that all remedies are available for causes of action absent the expression of contrary intent.\textsuperscript{43}

The Civil Rights Restoration Act of 1987\textsuperscript{44} also gave support to the Court's conclusion.\textsuperscript{45} The Act did not alter existing rights of action under Title IX although it broadened the scope of coverage afforded by Title IX and other antidiscrimination statutes.\textsuperscript{46} Once again, no limits were placed on remedies, allowing the Court to conclude that since Congress knew of the presumption in favor of granting all remedies for a statutory right of action, it did not intend to limit available remedies under Title IX.\textsuperscript{47}

Having concluded that Congress did not intend to limit remedies available in Title IX actions, the Court rejected three arguments against extending the presumption in favor of all forms of relief to Title IX cases.\textsuperscript{48} The Court first rejected the argument that by awarding damages, federal courts were impermissibly tread-
ing into areas of power reserved for the executive and legislative branches of government. The Court stated that the congressional grant of a right to a cause of action grants the judiciary the power to hear a case; the discretion to award appropriate relief does not increase the jurisdictional reach of the judiciary. It was next argued that since Title IX was enacted pursuant to Congress’ Spending Clause power, it was appropriate to limit remedies for even intentional violations of the statute. The Court rejected this argument on the grounds that remedies are limited only for unintentional violations of Spending Clause statutes. Damages are not permitted for unintentional violations because the defendant lacks notice that it will be liable for a monetary award; in the case of an intentional violation, adequate notice is served that monetary liability may attach. Finally, it was argued that Title IX remedies should be limited to backpay and prospective relief. The Court rejected this argument on two grounds. First, before using equitable remedies, the adequacy of remedies at law must be determined. Second, neither suggested remedy would suffice in this case since Franklin was a student who had already graduated.

Justices Scalia concurred in the judgment and was joined by Chief Justice Rehnquist and Justice Thomas. Scalia argued that congressional silence as to remedies is irrelevant in cases where the Court implies rights of action because in such situations Congress does not know it is creating rights of action, so it should not be expected to enumerate remedies. Scalia further argued that if rights of action are implied by the judiciary, nothing restricts judicial power to limit the availability of remedies. Although disagreeing with the majority’s reasoning, he concurred in the result based on the enactment of the Civil Rights Remedies Equalization Amendment of 1986, which he viewed as an implicit acknowledgment by Congress that damages are available in actions arising

49. Id. at 1037.
51. Id. at 74.
52. Id. (citing Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 28-29 (1981)).
53. Id.
54. Id. at 75.
56. Id.
57. See id. at 77 (Scalia, J., concurring in the judgment).
58. See id.
The implication that damages are available was evident from the withdrawal of states' Eleventh Amendment immunity from Title IX and other antidiscrimination suits and the availability of damages in law or equity from states to the same extent that these damages are available under Title IX from private citizens. By stating that damages for Title IX violations are available against states to the same extent as they are from private citizens, Congress effectively acknowledged that a right to damages exists under Title IX.

C. Applying Franklin in the Employment Context

In North Haven Board of Education v. Bell, the Supreme Court held that Title IX allows an employee who directly participates in or directly benefits from federal programs, grants, loans, or contracts to bring a private right of action for gender discrimination. The issue of whether an employee may bring a Title IX suit for damages was not before the Court, although this issue was tangentially addressed ten years later in Franklin. Since Franklin, two district courts have examined this issue and have reached opposite conclusions.

1. Bowers v. Baylor University

Pam Bowers was hired as the coach of the Baylor University women's basketball team. Bowers initially contacted the Office of Civil Rights of the U.S. Department of Education in March of 1989 to complain about the disparate resource allocation between the men's and women's basketball programs, including the differing terms and conditions of employment of the men's and wom-

59. Id. at 78.
61. Id. (citing 42 U.S.C. § 2000d-7(a)(2) (1988)).
63. Id. at 520-21.
64. North Haven dealt with the validity of employment regulations governing sex discrimination issued by the former Department of Health, Education, and Welfare. Id. at 517-20. The Court held that Title IX was intended to ban employment discrimination at federally-funded education programs. Id. 535-36. Therefore, HEW [now Department of Health and Human Services] has the authority to promulgate sex discrimination in employment regulations under the Title. Id. at 538.
66. Id at 143.
en's basketball coaches. Baylor was aware of Bowers' grievances at approximately the time of the complaint to the OCR.

In 1993, Baylor fired Bowers. Immediately after Bowers filed a complaint with both the Office of Civil Rights and the Equal Employment Opportunity Commission, Baylor notified Bowers that she would be reinstated under either the employment terms that had existed since 1979 or a two year-written contract. After fruitless negotiations over the written contract, Bower was rehired under the same terms by which she had been employed since 1979. Bowers continued her employment complaints with the federal agencies after being reinstated.

In an employment evaluation given on August 30, 1993, Baylor told Bowers that a winning season was a prerequisite for her continued employment. Bowers was given written notification on or about March 28, 1994 that her employment would be terminated on May 31, 1994 due to a losing record during her career with Baylor. Bowers subsequently brought a suit based exclusively on alleged Title IX violations by Baylor and requested remedies at both law and equity.

Baylor filed a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. Specifically, Baylor argued that Title IX does not grant employees a private right of action for damages. The district court briefly stated the facts and holdings of Cannon, North Haven, and Franklin and concluded that based on this line of precedent, the Supreme Court would uphold the right of employees to bring private suits for damages under Title IX. While the district court suggested it might agree with Baylor's reasoning on this issue, it felt that the pattern of Supreme Court precedent necessitated a finding of an employee's private right of action for damages under Title IX and

67. Id.
68. Id.
69. Id.
71. Id.
72. Id.
73. Id.
74. Id.
76. Id. at 144.
77. Id.
78. Id. at 144-45.
therefore denied Baylor’s 12(b)(6) motion. 80

2. Wedding v. University of Toledo81

In Wedding, court considered the University of Toledo’s Rule 12(b)(6) motion to dismiss Mary Ellen Wedding’s claims of Title IX gender discrimination, age discrimination under an Ohio statute, and common law deceit. 82 Wedding sought damages under Title VII for gender discrimination and additional damages under Title IX. 83 The University of Toledo argued that Title IX does not support an employee’s private right of action for damages because Title IX is preempted by Title VII in the area of employer sex discrimination. 84

The district court stated the facts and holdings of both Cannon and North Haven, but ignored Franklin and its implications on this issue. 85 The court then examined both Title VII and Title IX, noting that while both prohibited gender discrimination, only Title VII provided “a comprehensive scheme for an aggrieved individual to enforce the prohibition of employment discrimination.” 86 The court further observed that while an employee has an express private right of action for damages under Title VII, the preferred method of enforcement is to exhaust all available administrative remedies before filing suit. 87 The court concluded that Title VII preempts Title IX on the grounds that if the implied right of action under Title IX allowed employees to assert claims for damages, then the “very comprehensive, detailed, and express provisions of Title VII could be completely avoided,” a result not intended by Congress in enacting Title IX. 88

The court buttressed its conclusion by examining the legislative history of Title VII. 89 Citing a House Report on the 1972 Amendments 90 which stated that the Amendments did not alter

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80. Id.
82. Id. at 202. Wedding also filed a gender discrimination claim under Title VII and a claim for the intentional infliction of emotional distress, which the defendant did not challenge with a 12(b)(6) motion to dismiss. Id.
83. Id.
84. Id.
85. Id. at 202-03.
87. Id. (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974)).
88. Id.
90. Along with enacting Title IX, the 1972 Amendments made Title VII applicable to
existing rights granted to individuals by previous legislation, the court reasoned that since Title VII existed before Title IX, it was not altered by Title IX and remained the sole statute under which employees have a private right of action for damages.91

III. MANDATORY AUTHORITY AND POLICY ANALYSES OF BOWERS AND WEDDING

A. Bowers and Wedding: Following Precedent

The Supreme Court has decided three cases in the area of suits and remedies available under Title IX — Cannon, North Haven Board of Education, and Franklin. Each case successively has broadened the scope of Title IX. In order for a lower federal court properly to decide an issue in this area, this broadened scope must be considered. While the Bowers court reflected on the Supreme Court holdings and analyses of these three cases,92 the Wedding court ignored Franklin and its implications for whether employees have a private right of action for damages under Title IX. While Wedding accurately depicted the legislative intent underlying Title VII, by ignoring Franklin it failed to comprehend the broad scope that Congress intended for Title IX. Moreover, the Wedding court failed to adhere to binding precedent.

The logic of the Franklin opinion as to whether a private right of action for damages exists under Title IX applies with equal force to employees or nonemployees. Under the majority's reasoning in Franklin, if there is a private right of action, then damage remedies are available unless a contrary legislative intent has been expressed.93 The Court found in North Haven that employees are entitled to bring suits under Title IX.94 Nothing in Title IX limits available remedies nor does Title VII state that it is the exclusive means of redress for an employee who suffers gender discrimination.95 Thus, under the basic logic of the Franklin ma-

94. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 520 (1982) (focusing on the use of "person" in Title IX rather than a more narrow term such as "student").
95. See Storey v. Board of Regents of Univ. of Wisconsin System, 600 F. Supp. 838 (W.D. Wis. 1985), which discussed the availability to employees of remedial measures
iority, damage remedies are available to employees who bring Title IX suits.

Additional support for this conclusion can be found by looking to congressional activity subsequent to *North Haven*, just as the Court looked to such activity subsequent to *Cannon* to support its holding in *Franklin*. Both the Civil Rights Remedies Equalization Amendment of 1986 and the Civil Rights Restoration Act of 1987 were enacted by a Congress having full knowledge of both the *Cannon* and *North Haven* holdings and the presumption that absent express congressional intent to the contrary, all remedies are available for a cause of action. Since these statutes do not limit the right to bring suit or available remedies, the *Franklin* majority cited their enactment as an affirmation of *Cannon* and an implicit acknowledgment by Congress that damages are available under Title IX.66 By the same reasoning, since Congress knew of *North Haven* and did not seek to deny employees the right to bring Title IX suits or limit their remedies in either of the subsequent statutes, damage remedies must exist for employees under Title IX.

The same result is reached under the reasoning of the *Franklin* concurrence, which saw the Civil Rights Remedies Equalization Act of 1986 as an implicit acknowledgment by Congress that damages are available under Title IX.77 This implicit acknowledgment was not coupled with restrictions against employees, and since the goal of the statute was to broaden the scope of Title IX,78 it follows that Congress intended for employees to also have a right to damages under Title IX.

The *Wedding* court made some compelling arguments against the right of employees to sue for damages under Title IX. By ignoring *Franklin*, however, it ignored the broad scope that Congress intended for Title IX. When *Franklin* is properly considered

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67. *Id.* at 78 (Scalia, J. concurring in the judgment).
68. *Id.* at 72-73 (discussing how the amendments to Title IX subsequent to *Cannon* and *North Haven* sought to expand the restrictive view of Title IX taken by the Supreme Court in Grove City College v. Bell, 465 U.S. 555 (1984)).
along with *Canon* and *North Haven*, the result becomes clearer. The *Wedding* court may disagree with the congressional policy of broad Title IX application, but it should have avoided substituting its judgments for what it deemed to be the ill-advised policy of the legislature. As the *Bowers* court found, the logic of *Canon*, *North Haven*, and *Franklin* in interpreting congressional intent for Title IX leads to the unavoidable conclusion that employees may sue for damages under Title IX.

**B. Bowers and Wedding: Policy Considerations**

Supreme Court interpretations of Title IX and congressional amendments to the statute indicate the expansive nature of Title IX. Several issues are raised by the overlap between Titles VII and IX in coverage of employees of federally assisted education programs. By adhering to full Supreme Court precedent on this matter, the *Bowers* court did not analyze any of these issues. In reaching its conclusion, the *Wedding* court considered only the issue of preemption by Title VII over Title IX.

The first issue raised by the overlap between Titles VII and IX is whether employees of federally assisted education programs should be able to avoid the administrative procedure requirements of Title VII to which all other employees must adhere. As stated above, such an interpretation fails to consider both congressional and Supreme Court actions that have greatly expanded the coverage of Title IX.

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99. The *Wedding* court made some reference to the expansive nature of Title IX. *Wedding* v. University of Toledo, 862 F. Supp. 201, 203 (N.D. Ohio 1994) (noting how Title IX had been interpreted to forbid discriminatory actions of educational institutions against their employees). However, the court felt that the scope of Title IX was limited by Title VII. *Id.* at 203-204. As stated above, such an interpretation fails to consider both congressional and Supreme Court actions that have greatly expanded the coverage of Title IX. See supra notes 87-93 and accompanying text.

100. See e.g., *Furman* v. Georgia, 408 U.S. 238, 410-11 (1972) (Blackmun, J., dissenting) (stating that “we should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action to guide our judicial decision . . . ”); *Id.* at 383 (Burger, C.J., dissenting) (stating that “in a democratic society legislatures, not the courts, are constituted to respond to the will and consequently moral values of the people.”); *Berman* v. *Parker*, 348 U.S. 26, 32 (1954) (stating that “the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be the Congress . . . or the States.”).

101. 42 U.S.C. § 2000e-5 (1988) sets forth the procedure that an aggrieved employee must follow in an action against the employer. In general, an employee may not bring a private suit until they have first filed a complaint with the EEOC, which then investigates and attempts to remedy any wrongs through “conference, conciliation, and persuasion” before deciding whether or not to bring suit. See *id.* at § 2000e-5(b),(f)(1).
VII, which was expressly created to attack racial, ethnic, religious, and gender discrimination in employment. 102 The Court noted that Congress established the Equal Employment Opportunity Commission (EEOC) under Title VII to provide every possible chance of settling a claim of discrimination short of litigation. 103 Allowing employees to claim damages under Title IX frustrates the congressional intent expressed in Title VII to control the number of employment discrimination lawsuits. The EEOC is not charged with handling Title IX claims, thus allowing an employee freely to file suit for damages under Title IX without first seeking settlement through administrative channels as Congress intended for Title VII claims. The expansive nature of Title IX encourages the very increase in litigation that Congress sought to avoid in Title VII.

Second, if such Title IX claims are allowed, the question arises whether the substantive standards for establishing gender discrimination in employment are the same under Titles VII and IX. Unlike Title VII, the text of Title IX does not set forth how an employee may establish gender discrimination by his or her employer. Similarly, there is a great deal of case law further explaining how an employee may establish a claim of gender discrimination under Title VII; there is no such interpretive case law regarding employees suing under Title IX. However, a lack of clarity in the standards necessary to prove a Title IX claim of gender discrimination in employment is not a serious impediment to allowing employees damages for such claims. The standards that are used for gender discrimination claims under Title VII could be applied to Title IX cases dealing with gender discrimination in employment. 104 Title VII standards have been applied to other statutes

102. "It shall be an unlawful employment practice for an employer to fail or refuse to hire or discharge or to otherwise discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such person's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2 (1988). Id. § 2000e-2(a)(1).


104. See e.g., Lipsett v. University of Puerto Rico, 864 F.2d 881, 896 (1st Cir. 1988) (holding that disparate-impact analysis of proving discrimination under Title VII is applicable to Title IX); Mabry v. Board of Community Colleges & Occupational Educ., 813 F.2d 311, 316-17 (10th Cir. 1987) (stating that substantive standards which govern Title VII claims should also govern Title IX claims); O'Connor v. Peru State College, 781 F.2d 632, 642 n.8 (8th Cir. 1986) (implying that the substantive standards controlling Title VII claims also control claims under Title IX). It should be noted that these cases discuss importing Title VII substantive standards to Title IX in general. Thus, no distinction is
that seek to eliminate discrimination in employment.\textsuperscript{105} While there has been some hesitancy to apply Title VII standards to these other statutes,\textsuperscript{106} such concerns are irrelevant here because both Title VII and Title IX seek to eliminate gender discrimination, and proof which establishes such a claim under Title VII should suffice under Title IX as well.\textsuperscript{107} Thus, while no express standards for proving gender discrimination in employment exist under Title IX, this problem can be easily avoided by importing the standards of Title VII.

A final issue raised by this matter is the amount of damages that are recoverable under Title IX as opposed to Title VII. Congress allowed Title VII claimants to recover compensatory and punitive damages in the Civil Rights Act of 1991.\textsuperscript{108} In the Act, Congress was very specific as to when an aggrieved party would have a right of recovery for damages,\textsuperscript{109} and placed limits on the recovery of these damages.\textsuperscript{110} Title IX is void of any discussion

\textsuperscript{105} See also James S. Wrona, Eradicating Sex Discrimination in Education: Extending Disparate-Impact Analysis to Title IX Litigation, 21 PEPP. L. REV. 1 (1993) (discussing how Title IX suits should use disparate-impact analysis in addition to disparate-treatment analysis in finding gender discrimination).

\textsuperscript{106} Id. at § 1981a(a)(1) (emphasis added). Since Franklin only allowed Title IX damages for intentional discrimination, it is assumed that compensatory and punitive damages would only be available for intentional discrimination against an employee covered by Title IX.

\textsuperscript{107} See id. at 18-20 (discussing cases which have applied Title VII substantive standards to Title IX claims due mainly to the fact that both statutes seek to eliminate gender discrimination).


\textsuperscript{109} See id. at 21-22 (discussing the view that since the ADEA allows employers to make policies based on "reasonable factors other than age," that discrimination under the ADEA may be proved only through disparate treatment analysis).

\textsuperscript{107} See id. at 18-20 (discussing cases which have applied Title VII substantive standards to Title IX claims due mainly to the fact that both statutes seek to eliminate gender discrimination).

\textsuperscript{106} Section 1981a states:


\textsuperscript{108} See Wrona, supra note 104, at 20 (listing several cases which have applied the substantive standards of Title VII, particularly disparate impact analysis, to the Age Discrimination in Employment Act, 29 U.S.C. § 623 (1988)).

\textsuperscript{109} Section 1981a(b)(3) (West 1994) states:

The sum of the amount of compensatory damages under this section awarded for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party-
as to limits on available damages; presumably, they could exceed
the limits placed on damages under Title VII. By enacting this
statute, Congress has expressed a clear intent not only to limit the
amount of employment discrimination litigation,\textsuperscript{111} but to also
limit the amount of recoveries from such litigation. The overlap be-
tween Titles VII and IX conceivably allows employees covered by
Title IX to avoid the limits on damages that apply to all other
aggrieved employees.

IV. CONCLUSION

In an area of law as important as gender discrimination in
employment, Congress should clarify whether employees of feder-
ally assisted education programs may receive damages under Title
IX as well as Title VII. The pattern of legislative and judicial
activity expanding Title IX coverage conflicts with the underlying
intent of Title VII to restrict both litigation and damages. This has
cau sed unnecessary confusion in the judiciary, which in turn creates
the likelihood of ineffective enforcement of the gender antidiscrim-
ination laws. Rather than remaining silent, Congress should ex-
pressly declare whether employees are entitled to damages in ac-
tions brought under Title IX. Unless some meaningful justification
is made as to why employees covered by Title IX may elect to
avoid the strictures of Title VII, Congress should specify that they
must follow Title VII's comprehensive scheme of redress and
limits on damages. This is necessary in order to avoid the wasteful
costs of increased litigation and excess damages, costs which Con-
gress sought to limit through Title VII and the Civil Rights Act of
1991. Therefore, the Court or Congress should expressly limit
employees covered by Title IX to Title VII damages.

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(A) in the case of a respondent who has more than 14 and fewer
than 101 employees . . . $50,000;
(B) in the case of a respondent who has more than 100 and fewer
than 201 employees . . . $100,000;
(C) in the case of a respondent who has more than 200 and fewer
than 501 employees . . . $200,000; and
(D) in the case of a respondent who has more than 500 employ-
ees . . . $300,000.

111. See supra notes 102-03 and accompanying text.

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