

TANG MOOT COURT COMPETITION
FALL 2022

(ORDER LIST: 597 U.S.)

FRIDAY, JULY 8, 2022

CERTIORARI GRANTED

21-0578 ZHANG, MEIHUA, HARJO, PAULI V. TANG UNIVERSITY

The petition for writ of certiorari is granted limited to the following questions:

1) Whether Title(s) VI and/or IX recognize a claim for discrimination based on combined race-gender stereotypes?

2) Whether Title VII preempts retaliation claims under Title IX and Title VI and, if it does not, what analytical standard applies to such claims under Titles IX and VI?

Appendix A – Opinion of the 13th Circuit Court of Appeals

United States Court of Appeals
For the Thirteenth Circuit

MEIHUA ZHANG, PAULI HARJO
Plaintiffs-Appellants

v.

TANG UNIVERSITY
Defendant-Appellee

Appeal from the United States District Court of
Apalsa in CV 2021-0578, CV-2021-0117

Decided: June 1, 2022

Before CHANDY, NGUYEN, and TERADA, *Circuit Judges*.

NADIA CHANDY, *Circuit Judge*.

Plaintiff-Appellant Meihua Zhang is a graduate student at Tang University and Plaintiff-Appellant Dr. Pauli Harjo is a tenured Associate Professor in Sociology at Tang University (collectively, “Plaintiffs-Appellants” or “Appellants”). In 2021, each Plaintiff-Appellant filed a separate action asserting that Tang University discriminated against them in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (“Title IX”) and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (“Title VI”). Tang University moved to dismiss all the claims brought by Ms. Zhang and Dr. Harjo-pursuant to Rule 12(b)(6).

The district court granted Tang University’s motion to dismiss after determining that neither Title VI nor Title IX applied to claims for discrimination based on both sex and race and that Title VII preempts the Title IX retaliation claim of Dr. Harjo.

Meihua Zhang and Pauli Harjo appealed. We reverse the district court’s decision to grant Tang University’s motion to dismiss.

FACTUAL ALLEGATIONS

The following facts taken from the complaints are presumed to be true and read in the light most favorable to the nonmovant Plaintiffs-Appellants.

Ms. Meihua Zhang is a third-year Ph.D student in Tang University’s Department of Computer Science. Tang University is a private university in the State of Apalsa that receives

funding from the federal government. Ms. Zhang was born in Apalsa after her parents emigrated from Singapore and considers herself to be a non-white woman of Asian descent.

Tang University has an academic consortium agreement with Ming University, which has a campus adjacent to Tang University. Students, alumni, and employees of the two universities move around the two campuses as if they were a single campus. Under the consortium agreement, Tang University and Ming University students can—and regularly do—attend courses at the university in which they are not enrolled.

On September 9, 2020, Ms. Zhang went to a local day spa. After getting a massage, Ms. Zhang went to the café next door to the spa to get a coffee. As Ms. Zhang stood in line, she looked at a flyer advertising a book talk on *A Pictorial History of Malaysia* to be held at the café the next week. Dr. Duke Angeli, a professor in Ming University's Brain Sciences department, stood behind her in line and began conversing with Ms. Zhang about traveling in Malaysia and other parts of Southeast Asia. Ms. Zhang expressed her interest in the book.

The next week, Ms. Zhang and Dr. Angeli met a second time when they both attended the book talk. Dr. Angeli asked Ms. Zhang to go out to dinner on September 21. Ms. Zhang agreed. Ms. Zhang gave Dr. Angeli her number and he gave her his business card. Upon reading his business card, Ms. Zhang realized that Dr. Angeli was a Ming University faculty member.

The day before the scheduled dinner, Dr. Angeli sent Ms. Zhang a text message with explicit instructions for how he expected her to prepare for their “date,” which alluded to Ms. Zhang's Asian race and ethnicity in sexual terms. Ms. Zhang interpreted these instructions as an indication that Dr. Angeli believed their “date” was an appointment for paid sex, even though Dr. Angeli did not indicate that he planned to pay Ms. Zhang for the “date” or specify how much he would pay. Sickened by the language used in the text and the implication that Ms. Zhang was engaged in the sex trade, Ms. Zhang sent a text in response: “I am no longer interested in going to dinner with you. Please do not contact me again.” She then blocked his number on her phone, so she does not know if he tried to text again.

Over the following weeks, Ms. Zhang started seeing Dr. Angeli on Tang University's campus with increasing frequency. On October 13, 2020, Dr. Angeli approached Ms. Zhang while she was reading on a bench in the Tang University quad. He explained that he had thought she was an employee of the day spa because, on the day they first met at the café, he had seen her exit from the spa before entering the café. Dr. Angeli then asked if Ms. Zhang would reconsider going on a date with him, but did not apologize for his text message. Ms. Zhang inferred from his explanation that Dr. Angeli thought the day spa, where most of the employees are either recent Asian Pacific Islander immigrants or Asian Pacific American (APA) women, operates as a front for selling sex. However, Ms. Zhang knew that Dr. Angeli's assumption that the spa was a front for prostitution was untrue and attributed his assumption to the same racialized sex stereotyping that led Dr. Angeli to assume she was engaged in sex work because she is an APA woman. Not wanting to interact any further with him, Ms. Zhang said, “I am not interested in dating you or talking further—do not approach me again,” and walked away.

Over the remainder of the month, Ms. Zhang saw Dr. Angeli even more often. On several occasions, Dr. Angeli tried to speak with her, but each time, Ms. Zhang did not respond and walked away. Ms. Zhang then made an appointment with Tang University's Vice President

of Equal Education/Employment and Title IX Coordinator, Jordan Mitchell. At that appointment, she told Mr. Mitchell that she wished to file a complaint against Dr. Angeli for harassment, which she said was both gender- and race-based. One of the remedies she sought was an immediate no-contact order covering both campuses to prevent Dr. Angeli from stalking her.

Ms. Zhang also informed Mr. Mitchell that she wanted Tang University to investigate her claims so Dr. Angeli could face disciplinary action. She was confident that any investigation would substantiate her claims because she had the text messages that she and Dr. Angeli had exchanged. She had also told friends about her interactions with Dr. Angeli after his invitation to dinner via emails and texts.

Mr. Mitchell advised Ms. Zhang that Tang University could do nothing regarding Dr. Angeli because he is an employee of Ming University, not Tang University. When Ms. Zhang pointed out that Tang University has the power to bar Dr. Angeli from its campus, Mr. Mitchell protested, stating, “Professor Angeli is an up-and-coming neurobiologist—as well as a really charming and impressive guy—who is bringing in a lot of grant money to Ming University.” He explained that “barring him from Tang University’s campus would raise problems under the consortium agreement.” Expressing skepticism regarding Ms. Zhang’s account, he repeatedly asked for third-party witnesses and whether security cameras might have captured footage of Dr. Angeli following Ms. Zhang and underscored the difficulty of proving Ms. Zhang’s “he said-she said case” without corroborating evidence. When Ms. Zhang showed him Dr. Angeli’s text, Mr. Mitchell minimized its significance, saying, “Well, that’s before you told him that you were not a spa employee,” and “Why do you go to that spa? We all know its reputation.”

Because Tang University (through Mr. Mitchell) would not assist Ms. Zhang, she appealed to the Title IX Coordinator at Ming University, seeking to file a complaint against Dr. Angeli and asking for a stay-away order. Ming University’s Title IX Coordinator told Ms. Zhang that she could not file a complaint because Ms. Zhang was not a Ming University student.

Due to the lack of support from both Title IX Coordinators and because she saw Dr. Angeli almost every time she was on campus, Ms. Zhang began adjusting her daily activities to avoid Dr. Angeli. She stopped attending two classes she had been taking at Ming University, both of which were held near Dr. Angeli’s office and classroom. She ultimately withdrew from both classes. As a result, Ms. Zhang was unable to take her comprehensive exams. Ms. Zhang also took precautions to make sure that she was not followed, including asking her landlord and the other residents at her apartment building to notify her if they saw Dr. Angeli inside or around the building and buying a security web camera for the door to her apartment. Unsettled by her experience, Ms. Zhang sought counseling but had to pay for sessions out-of-pocket after exhausting the limited number of free counseling sessions provided by Tang University. Lastly, Ms. Zhang stopped going to the café where she had first met Dr. Angeli, as well as to the day spa next door, after she learned from her friend at the spa that Dr. Angeli had been coming into the spa frequently and had been seen sitting on a bench across the street from the spa on multiple occasions.

In November, Ms. Zhang attended a joint Tang University and Ming University Take Back the Night rally sponsored by the Sociology Departments of both institutions and the Tang University Coalition for Intersectional Justice. Dr. Pauli Harjo, an Associate Professor in Tang

University's Sociology Department and the Coalition's faculty sponsor, presented an intersectional analysis of the types of discrimination directed at non-white women, describing gender- and race-based harassment similar to Dr. Angeli's behavior towards Ms. Zhang. After hearing the speech, Ms. Zhang asked Dr. Harjo for a meeting.

At that meeting, Dr. Harjo advised Ms. Zhang to consult a lawyer and referred her to the Times Up Legal Defense Fund and National Women's Law Center's legal assistance networks. In addition, she encouraged Ms. Zhang to file a complaint with the Office for Civil Rights in the Department of Education and offered to help Ms. Zhang draft a complaint. With Dr. Harjo's assistance, Ms. Zhang wrote and filed the complaint in January 2021. The complaint accused Tang University and Ming University of engaging in both sex and race discrimination in violation of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.

Dr. Harjo's speech motivated Ms. Zhang to speak at the Take Back the Night rally about her experiences with Dr. Angeli, without naming him, as well as her escalating fear of his ongoing stalking and the Title IX Coordinators' refusal to respond. Ms. Tammy Ngov and Mr. Sunil Farooq, President and Vice President of the Tang University and Ming University Pan-Asian Pacific American Student Associations (PAPASA), respectively, approached Ms. Zhang after the Take Back the Night event and asked for permission to hold protests relating to her case. Ms. Zhang consented and the joint Tang University and Ming University PAPASA groups invited Dr. Harjo to speak at the protests, which both student and local press covered.

After helping Ms. Zhang file her complaint with the Office for Civil Rights, Dr. Harjo alleges in her complaint that Tang University retaliated against her for providing such assistance. She also alleges discrimination in employment because of her racial and cultural background. As a member of the Northern Cheyenne Tribe and a descendant—on her mother's side—of enslaved Africans, Dr. Harjo is the second non-white faculty member tenured in her department, as well as the third tenured woman professor. Because votes on tenure and promotion are kept secret so that no one can see how others voted, Dr. Harjo does not know which faculty members voted to award her tenure five years before. However, a more senior faculty mentor expressed his frustration over the vote and disclosed to Dr. Harjo that she just barely received the two-thirds of the faculty vote required for tenure (fourteen of the twenty faculty members entitled to vote on tenure decisions in the Tang University Sociology Department voted to award her tenure).

That faculty member also shared that some of the White and/or male faculty members in the department did not appreciate Dr. Harjo's research on non-white women's experiences with gender-based violence. The faculty mentor said that another faculty member (Professor A) had criticized her scholarly focus as unnecessarily narrow and not sufficiently rigorous in its methodology. When a different faculty member (Professor B), who liked Dr. Harjo's work, implied that Professor A was racist, nearly one-third of the voting faculty rallied around Professor A in what Dr. Harjo's mentor described as a "white male fragile" response.

Nevertheless, in the five years since earning tenure, Dr. Harjo made clear her intention to pursue full professor status and has worked to fulfill Tang University's requirements for promotion. She was assured on multiple occasions by Tang University's Sociology Department chair, Dr. Graham Madison, that her work met the promotion criteria. When Dr. Madison heard

about Dr. Harjo's speeches at Take Back the Night and the PAPASA protests, he inquired further, learning about Ms. Zhang's case and that Ms. Zhang had been observed visiting Dr. Harjo's office on multiple occasions. He then called Dr. Harjo and warned that her collaboration with student activists and Ms. Zhang could negatively affect her full professor vote. Dr. Harjo persisted in both activities.

Promotion to full professor at Tang University comes with a significant raise (\$20,000/year increase in base salary) and enhanced voting rights. In the last five years, one white woman and one African American man were promoted to full professor out of the ten full professors in Dr. Harjo's department. At the secret ballot vote regarding Dr. Harjo's promotion, which occurred shortly after Ms. Zhang filed her complaint with the Office of Civil Rights, six of the ten full professors voted in favor of Dr. Harjo's promotion, just one person short of the two-thirds she needed for promotion.

PROCEDURAL HISTORY

Ms. Zhang filed an action against Tang University for subjecting her to a hostile environment based on her race and sex as a non-white woman in violation of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. She bases her claims on the university's refusal, via its Title IX Coordinator, to investigate her complaints about Dr. Angeli's racialized sexual harassment or to offer her any accommodations such as issuing a stay-away order, providing additional free counseling, or offering any assistance with the various academic problems that developed after Dr. Angeli began stalking her.

Dr. Harjo separately sued Tang University under Title VII for engaging in gender and race discrimination against non-white women faculty when the university failed to promote her to full professor. She timely filed a complaint with the Equal Employment Opportunity Commission and, after receiving a "right to sue" letter, filed her action against Tang University asserting claims under Titles VI, VII and IX alleging that Tang University's refusal to promote her to full professor was in retaliation for assisting Ms. Zhang with filing her Office for Civil Rights complaint.

After the district court granted the parties' joint motion to consolidate the two actions pursuant to Rule 42, Tang University filed a motion to dismiss both Ms. Zhang's and Dr. Harjo's complaints for failure to state a claim pursuant to Rule 12(b)(6). Tang University contends that "non-white women" is not a class protected under Titles VI, VII, or IX. Tang University also argues that Dr. Harjo cannot state a claim for failure to promote because Title VII preempts Title IX and, under Title VII's standard, Dr. Harjo's assistance to Ms. Zhang was not the "but-for" cause for Tang University's decision to deny Dr. Harjo's promotion to full professor.

The district court granted Tang University's motion to dismiss. Ms. Zhang and Ms. Harjo subsequently filed this appeal.

STANDARD OF REVIEW

An appellate court reviews *de novo* a district court's decision to grant a motion to dismiss under FRCP 12(b)(6). *Thompson v. Deutsche Bank Nat'l Trust Co.*, 775 F.3d 298, 302 (5th Cir. 2014). We accept all well-pleaded facts as true and view all facts in the light most favorable to the non-movant Plaintiffs-Appellants. *Thompson v. City of Waco*, 764 F.3d 500, 502 (5th Cir. 2014). Our task is to determine whether the Plaintiffs-Appellants have stated a legally cognizable claim, not to evaluate the Plaintiffs-Appellants' likelihood of success. *Doe v. Covington Cnty. Sch. Dist.*, 675 F.3d 849, 854 (5th Cir. 2012).

DISCUSSION

A. MS. ZHANG'S CLAIM

In its motion to dismiss, Tang University contends that Ms. Zhang cannot establish that "non-white women" is a protected class under Titles VI and IX. Title IX, 20 U.S.C. § 1681 *et seq.* provides:

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

Title IX, 20 U.S.C. § 1681.

Title VI, 42 U.S.C. § 2000d *et seq.*, provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title VI, 42 U.S.C. § 2000d.

To establish a hostile environment harassment claim under these relevant statutory provisions, a plaintiff must allege: (1) that he or she was a member of a protected class; (2) that he or she was subject to severe, pervasive, and objectively offensive harassment; (3) that the harassment caused the plaintiff to be deprived of educational opportunities or benefits; (4) that the funding recipient knew of the harassment in its programs or activities; and (5) the funding recipient was deliberately indifferent to the harassment such that its response or lack thereof is clearly unreasonable in light of the known circumstances. *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

Tang University argues that because each statute mentions one form of discrimination, race in the case of Title VI and sex in the case of Title IX, the category of "non-white women" describes a class that claims protection from both race and sex discrimination, which neither Title VI nor Title IX can or does provide. Tang University also asserts that Congress never intended either statute to include protections against other unspecified forms of discrimination. Additionally, Tang University points to the lack of cases involving claims of both sex and race

discrimination that have analyzed the existence of race and/or sex discrimination together under either Title VI or Title IX or both statutes combined.

Lastly, Tang University argues that because there is no statutory protection for classes of persons who assert claims of multiple forms of discrimination at the same time (in Ms. Zhang's case, both alleged race and gender discrimination), Ms. Zhang's experiences must be analyzed separately under Title VI and Title IX. Therefore, if there are male Tang University students (of any race) who have experienced treatment similar to Ms. Zhang's, Tang University contends that Ms. Zhang has no Title IX claim; likewise, if there are non-Asian students who have experienced treatment similar to Ms. Zhang's, Ms. Zhang has no Title VI claim. Also, Tang University points to its general policy and view that it has no responsibility for disciplining or otherwise protecting Tang University students or employees from harassment by non-Tang University students, alumni, or employees who come onto campus. Tang University argues that Ms. Zhang has failed to identify any instances in which white women or men of color have been sexually or racially harassed by an off-campus person or that Tang University has intervened in any way that it refused to do in Ms. Zhang's case.

We conclude that the district court and Tang University misunderstand the nature of the harassment Ms. Zhang claims to have suffered and how the University's response or inaction can constitute a violation of Titles VI and/or IX. Ms. Zhang's complaint contains factual allegations that Mitchell, Tang University's Title IX Coordinator, failed to respond appropriately to Ms. Zhang's report of Dr. Angeli's stalking because he did not recognize that the conduct directed at Ms. Zhang amounts to statutorily-prohibited harassment and discrimination. We note that Ms. Zhang's complaint contains factual allegations that support her claims of a hostile environment. Legal scholars have postulated how multiple stereotypes about non-white women and girls, as well as stereotypes about gender-based violence victims, can converge to create greater disbelief when these non-white women and girl victims report gender-based violence to others. *See, e.g., NANCY CHI CANTALUPO, And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 Harv. J.L. & Gender 1 (2019). Based on this legal theory, we conclude that the district court erred by analyzing Ms. Zhang's claim under Titles VI and IX separately and ignoring the interconnection of racial- and gender-based stereotyping. By treating Ms. Zhang's claim as a separate race-based claim and a separate gender-based claim, we conclude that the district court erred when it dismissed the complaint.

Under Title VII, courts have long recognized stereotyping as a form of discrimination. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded in part by statute*, Civil Rights Act of 1991, §107, 105 Stat. 1075, *as recognized in Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1017 (2019), the Supreme Court made clear that sex stereotyping is prohibited by Title VII. Since *Price Waterhouse*, in which a woman advertising executive was not promoted due to her "masculine" behavior, numerous courts have recognized sex stereotyping as evidence of discrimination under Title VII when an employer's decisions can be shown to have been infected by stereotypes. Critically, in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which does not squarely address the issue of stereotyping, the Supreme Court cited *Price Waterhouse* with approval, and referred to sex stereotyping several times as an example of an accepted Title VII violation. *Bostock*, 140 S. Ct. at 1741, 1749.

Stereotypes about working mothers have also been recognized as a form of discrimination violating Title VII by circuit courts outside the Thirteenth Circuit. *See Chadwick*

v. WellPoint, Inc., 561 F.3d 38, 42 n.4 (1st Cir. 2009); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 126 (2d Cir. 2004); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1043 (7th Cir. 1999). Although courts have focused on stereotyping as an indication of gender discrimination, some have recognized stereotyping evidence as indicating race discrimination in the workplace. See *Thomas v. Eastman Kodak*, 183 F.3d 38, 59 (1st Cir. 1999) (crediting the plaintiff's presentation of evidence of race discrimination that included racial stereotypes under the "Price Waterhouse framework"). Moreover, in *Kimble v. Wisconsin Dept. of Workforce Development*, 690 F. Supp. 2d 765 (E.D. Wis. 2010), the court recognized an intersectional race and gender discrimination claim based on the stereotyping by plaintiff's supervisor of plaintiff as incompetent. *Id.* at 770-71.

Although this is a novel issue and there is no precedent in our circuit, we now recognize the theory of intersectional discrimination in the Title VII context and hold that Ms. Zhang may assert claims of both race and gender discrimination under Titles VI and IX. In reaching this conclusion, we follow the reasoning of the Ninth Circuit in *Lam v. University of Hawaii*, 40 F.3d 1551 (9th Cir. 1994), which reversed dismissal of the claims of a woman of Vietnamese descent alleging that the defendant discriminated on the basis of race, gender, and national origin in its hiring process. The Ninth Circuit rejected the district court's determination that there was no discrimination because the defendant had favorably considered a white woman and an Asian man. *Id.* at 1562. As the Ninth Circuit pointed out, the discrimination faced by Plaintiff "cannot be neatly reduced to distinct components[, and] . . . the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences." *Id.* The Fifth Circuit similarly decided in *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980), that Black women could allege intersectional race and gender discrimination. *Id.* at 1032.

Furthermore, while most courts deciding intersectional gender and race discrimination cases in education have analyzed the Title IX and Title VI claims separately, not all have. For example, in denying the school district's motion to dismiss in *Sewell v. Monroe City School Board*, 974 F.3d 577 (5th Cir. 2020), the Fifth Circuit acknowledged the intersectional nature of the discrimination alleged by the plaintiff. *Id.* at 583-85. The *Sewell* court described plaintiff as alleging discrimination "not just because he is African American or male, but because he is both." *Id.* at 583. Citing facts pled by the plaintiff that a school official asked if he "was gay with 'that mess' in his head," the Fifth Circuit found there was "plausible [evidence] of a discriminatory view that African American males should not have two-toned blonde hair" and of "stereotypical notions of masculinity." *Id.* at 584.

Whether evidence of stereotyping indicates discrimination under Title IX is an open question, but we follow the First Circuit's approach and look to Title VII for guidance in interpreting Title IX. See *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 65 (1st Cir. 2002) (looking to Title VII in considering a Title IX claim of sexual harassment involving a plaintiff and defendant of the same gender). Similarly, we will apply this extension to Title VI as well. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998) (noting that Title IX "was modeled after Title VI . . . which is parallel to Title IX except that it prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs"). Likewise, we apply the reasoning in those Title VII cases to the sexual harassment claims asserted here under Titles VI and IX that are alleged to be directed against an Asian Pacific American, non-white woman due to racialized sex stereotypes. We hold

that the factual statements in Ms. Zhang’s complaint suffice to support a plausible claim that not only did Dr. Angeli assume that Ms. Zhang was a sex worker but that Mr. Mitchell, Tang University’s Title IX Coordinator, also agreed enough with Dr. Angeli to refuse to investigate.

In sum, we recognize the theory of intersectional discrimination here and hold that Ms. Zhang, an Asian Pacific American woman, has alleged sufficient facts to state a plausible claim that she is entitled to protection under Titles VI and IX as a member of the class of non-white women. Not recognizing such protections risks leaving Ms. Zhang without a remedy under either statute. We decline to do so and thus reverse the district court’s decision.

B. DR. HARJO’S CLAIMS

Dr. Harjo asserts various claims under Titles VI, VII, and IX. In its motion to dismiss, Tang University challenges only the claims that Tang University retaliated against Dr. Harjo in violation of Titles VI and IX when Tang University denied her promotion. Tang University argues that Dr. Harjo may not claim retaliation under Title IX and, by extension, Title VI, because Title VII preempts both Titles VI and IX. Tang University argues further that Dr. Harjo cannot satisfy the Title VII standard for causation because her assistance to Ms. Zhang was not the “but-for” cause of the denial of Dr. Harjo’s promotion. The district court determined that Title VII preempts Dr. Harjo’s claim. We reverse.

Our circuit has not yet addressed the issue of whether Title VII preempts the claims of a University employee brought under Title IX and Title VI. While the district court resolved this issue by adopting the reasoning of the Fifth, Seventh, and Eighth Circuits, we agree with the other circuits that have reached the opposite conclusion. As the First, Third, Fourth, Sixth, and Tenth Circuits have held, Title IX is not preempted by Title VII. *See Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 545, 560 (3d Cir. 2017) (“Title VII’s concurrent applicability does not bar Doe’s private causes of action for retaliation and *quid pro quo* harassment under Title IX”); *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 896 (1st Cir. 1988) (permitting claims against a teaching hospital to proceed under both Titles IX and VII); *Preston v. Va. ex rel. New River Com. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994) (holding that Title IX’s private cause of action “extends to employment discrimination on the basis of gender by educational institutions receiving federal funds”); *Hiatt v. Colo. Seminary*, 858 F.3d 1307, 1315 (10th Cir. 2017) (allowing both Title VII and Title IX claims to proceed in the same suit because Title IX “includes a prohibition on employment discrimination in federally funded educational programs”); *Ivan v. Kent State Univ.*, No. 94 Civ. 4090, 1996 WL 422496, at *2 (6th Cir. July 26, 1996) (applying the *McDonnell-Douglas* framework for employment discrimination to a claim of employment discrimination made under Title IX).

Because Dr. Harjo claims retaliation for assisting Ms. Zhang with filing a complaint regarding Tang University’s alleged Title IX violations, rather than claiming retaliation arising from any underlying discrimination in employment, we will allow Dr. Harjo to bring her Title IX retaliation claim. Although Dr. Harjo’s Title VI retaliation claim may be duplicative of the Title IX claim, we follow the holdings of courts that have permitted plaintiffs to pursue claims for race discrimination under 42 U.S.C. § 1981 in addition to Title VII. *See Mercy*, 850 F.3d at 560-61, discussing *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) and *Brown v. General Services Administration*, 425 U.S. 820 (1976).

Had we agreed with the district court on preemption by Title VII, the causation standard established by the Supreme Court in *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013), would clearly apply to this case. Having reached the opposite conclusion, however, we next address the appropriate standard for reviewing Dr. Harjo’s Title IX retaliation claims and whether *Nassar*’s “but-for” or the “motivating factor” causation standard governs.

Circuit courts that have confronted this question agree generally that a plaintiff must provide evidence that: (1) she engaged in a protected activity under the statute; and (2) she suffered an adverse action. However, the circuits split as to the third prong. Some circuits require the plaintiff to show that “there was a causal connection between the two [the protected activity and the adverse action],” essentially adopting the “motivating factor” test. *See Mercy*, 850 F.3d at 564; *Gordon v. Traverse City Area Pub. Schs.*, 686 F. App’x 315, 320 (6th Cir. 2017) (applying pre-*Nassar* criteria for causation from *Fuhr v. Hazel Park Sch. Dist.*, 710 F.3d 668 (6th Cir. 2013) to Title IX retaliation claim). Other circuits require under the third prong a showing of “but-for causal connection between the two,” *Burton v. Bd. of Regents*, 851 F.3d 690, 695 (7th Cir. 2017) (asserting, without discussion, that *Nassar* applies to Title IX retaliation claim); *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 694 (4th Cir. 2018) (expressing willingness to apply the Title VII but-for causation analysis but specifying that its decision did not turn on a causation analysis); *Baldwin v. New York State*, 690 Fed. Appx. 694 (2d Cir. 2017) (assuming the but-for standard without discussion). Neither the Supreme Court nor the Thirteenth Circuit have yet decided this question.

We conclude that Dr. Harjo’s complaint sets out facts satisfying the first two prongs of the test because Dr. Harjo’s public support for and assistance to Ms. Zhang in protecting her rights under Titles VI and IX are protected activities and Dr. Harjo’s denial of promotion to full professorship is an adverse action. As to the third prong, Dr. Harjo argues that Sociology Department Chair Madison’s advice after he learned about Dr. Harjo’s speeches and support for the protests and about Dr. Harjo’s meetings with Ms. Zhang, shows that retaliation was a “motivating factor” for the denial of Dr. Harjo’s promotion. Tang University counters that other reasons for the faculty votes on the promotion, including views of the voting full professor faculty regarding the quality of Dr. Harjo’s scholarship, keep any alleged retaliation from reaching the level of “but-for” causation. Tang University also points to Dr. Madison’s vote in favor of Dr. Harjo’s promotion, even after warning her of potential negative consequences of her assisting Ms. Zhang, as evidence of non-retaliatory faculty voting.

Although the Court in *Nassar* discusses Title IX, it did not address the question presented here: whether the test for causation in Title IX retaliation cases is the “motivating factor” or “but-for” test. However, in differentiating Title VII from Title IX, the *Nassar* observed that “[u]nlike Title IX, § 1981, § 1982, and the federal-sector provisions of the Age Discrimination in Employment Act or ADEA, Title VII is a detailed statutory scheme . . . [that] enumerates specific unlawful employment practices.” *Nassar*, 570 U.S. at 356 (emphasis added). More recently, the Supreme Court in *Babb v. Wilkie*, 140 S. Ct. 1168 (2020), which dealt with ADEA, did not mention either Title IX, nor did the Court discuss the ADEA language at the center of the decision that provides that “personnel actions” affecting individuals aged 40 and older “shall be made free from any discrimination based on age.” *Id.* at 1171.

Nevertheless, *Nassar*’s differentiation of Title VII from Title IX is sufficiently persuasive for us to reject the “but-for” causation test for Title IX retaliation cases. Further, we

note the significance of the structural difference between the two statutes: retaliation and discrimination claims brought under Title VII are considered separate causes of action, whereas retaliation cases are considered a subset of discrimination claims when brought under Title IX. *Jackson*, 544 U.S. at 173. Therefore, absent binding authority or statutory interpretation in support of the “but-for” approach, we conclude that the “motivating factor” standard remains the appropriate test for causation for retaliation claims brought under Titles VI and IX. Thus, we reverse the district court’s decision.

CONCLUSION

For the foregoing reasons, the district court’s decision granting Defendant Tang University’s motion to dismiss Ms. Zhang’s and Dr. Harjo’s complaints is **REVERSED**. This case is **REMANDED** to the district court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

/s/ Judge Nadia Chandy
JUDGE NADIA CHANDY
13th Circuit Court of Appeals Judge

**Appendix B –
District Court of Apalsa
Opinion**

UNITED STATES DISTRICT COURT
STATE OF APALSA

----- X

Meihua Zhang,)
)
 Plaintiff,)
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 v.)
) Case No.: CV-2021-0578
 Tang University,)
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 Defendant.)

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Pauli Harjo,)
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 Plaintiff)
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 v. -) Case No.: CV-2021-0117
)
 Tang University,)
)
 Defendant.)

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MEMORANDUM DECISION AND ORDER

MICHAEL PARKER, Apalsa District Judge

Before us is Defendant Tang University’s Motion to Dismiss Plaintiff Mei Hua Zhang’s (“Zhang”) Complaint and Defendant Tang University’s Motion to Dismiss Dr. Pauli Harjo’s Complaint. We have reviewed the Motions, Plaintiffs’ Responses, and Defendant’s Replies, the record in this case, and have held oral argument. For the following reasons, we grant Defendant’s Motions.

[Background and Facts sections omitted for length as they are duplicative of the Appellate Court’s Background and Facts]

LEGAL STANDARD

Under Rule 12(b)(6), a court must grant a motion to dismiss when the factual allegations in the Complaint cannot support the asserted cause of action. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A court must accept the well-pleaded facts as true, but need not accept the truth of legal conclusions masquerading as facts. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

A. Plaintiff Zhang’s Claims

Plaintiff Zhang alleges that Tang University discriminated against her as a “non-white woman.” To establish a prima facie case of hostile environment harassment under Title VI or Title IX, a plaintiff must prove that: 1) she is a member of a protected class; 2) the harassment was based on race, color, or national origin; 3) the defendant had actual knowledge and was

deliberately indifferent to the harassment; and 4) the harassment was so severe, pervasive, and objectively offensive that it deprived plaintiff of access to the educational benefits and opportunities provided by the school. *Bryant v. Indep. Sch. Dist. No. 1-38*, 334 F.3d 928, 934 (10th Cir. 2003) (relying on *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999), for guidance on what a plaintiff must allege in a Title VI hostile environment case).

Tang University contends that courts considering allegations of intertwined or intersectional race and sex discrimination in education have analyzed allegations of discrimination by considering each form of discrimination separately under the applicable, single-form-of-discrimination statute, Title IX for gender discrimination and Title VI for race discrimination. *See, e.g., Doe v. Brown Univ.*, 505 F. Supp. 3d 65, 75-79, 79-81 (D.R.I. 2020) (analyzing gender discrimination claims under Title IX and race discrimination claims under Title VI); *N.K. v. St. Mary's Springs Acad. of Fond Du Lac Wis., Inc.*, 965 F. Supp. 2d 1025, 1034 (E.D. Wis. 2013) (noting as to the Asian Pacific American male plaintiff's claims under Title VI and Title IX that "some of the comments were directed at N.K.'s race, and would therefore be actionable under Title VI" and that "much of the harassers' rhetoric seems to have been based upon N.K.'s failure to conform to gender stereotypes. . . ."); *Doe v. Galster*, 768 F.3d 611, 616-17 (7th Cir. 2014) (discussing gender-based slurs directed at plaintiff and national origin-based insults separately and expressing skepticism about the district court's decision that ". . . no reasonable jury could find that any of the bullying Doe suffered was based on her national origin or gender"); *Walker v. Univ. of Tenn. Health Sci. Ctr.*, No. 2:13-CV-2337-SHM-CGC, 2014 WL 1576853, at *3 (W.D. Tenn. Apr. 18, 2014) (accepting facts alleged by pro se African American woman plaintiff that she had been discriminatorily dismissed for educational deficiencies that had not led to dismissals of either white women or black men).

In response to Defendant's contention that the alleged harassment was not "based on race, color, or national origin," Plaintiff Zhang argues that the harassment was based on her status as a "non-white, Asian woman." However, we agree with Defendant that Title VI applies to race-based discrimination and, "as a matter of plain language, [] does not address discrimination on the basis of sex or gender. *Foster v. Mich.*, 573 Fed. Appx. 377, 387 (6th Cir. 2014); *see also Alexander v. Sandoval*, 532 U.S. 275, 297 (2001) (referring to Title IX as the "gender based-twin" of Title VI). It would be improper to consider Plaintiff Zhang's claim under Title VI based on her allegations that she is "a non-white, Asian woman." Rather, we must consider whether the conduct of Defendant created a hostile environment based on her race. *See Galster*, 768 F.3d at 617 ("Title VI only protects students from discrimination if it is based on race, color, or national origin . . .").

None of the comments made by Dr. Angeli reference Plaintiff Zhang's race, color, or national origin. Dr. Angeli's presumption that the spa was a front for sex work is not based on a general racial stereotype because he would not have made similar comments to an Asian male student. Because Dr. Angeli's comments do not constitute harassment based on race, color, or national origin, we grant Defendant Tang University's motion to dismiss Plaintiff Zhang's Title VI claims.

Similarly, we conclude that Title IX protects against discrimination based solely on sex or gender; race discrimination is not actionable under Title IX. *Cf. Gebser v. Lago Vista Indep.*

Sch. Dist., 524 U.S. 274, 286 (1998) (holding that Title VI “is parallel to Title IX except that it prohibits race discrimination, not sex discrimination”); see *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) (“ . . . Title IX implies a private right of action to enforce its prohibition on intentional sex discrimination.”). Indeed, when a plaintiff attempts to bring a claim based on race and gender under Title IX, it is proper to dismiss all claims based on race discrimination. See *Cabrea-Diaz v. Penn Kidder Campus Jim Thorpe Sch. Dist.*, 2010 U.S. Dist. LEXIS 141684, at *13 (M.D. Pa. 2010) (dismissing discrimination claims based on race when a plaintiff brought a Title IX claim based on race and gender); *McNally v. Univ. of Haw.*, 780 F. Supp. 2d 1037, 1053 (D. Haw. 2011) (granting summary judgment in favor of defendant to the extent that plaintiff asserted Title IX claim based on race). In evaluating Plaintiff Zhang’s claim, we must consider only whether Defendant created a hostile environment based on her sex.

Although Dr. Angeli’s comments are similar to comments found actionable under Title IX, Plaintiff Zhang also alleges that the harassment she suffered was based on her race and gender, as well as her status as a non-white Asian woman. Read together, these allegations do not amount to a claim under Title IX because we cannot consider claims based on her race. Because Title IX protects against sex discrimination but does not protect against race discrimination, we grant Defendant Tang University’s Motion to Dismiss Ms. Zhang’s claims under Title IX.

B. Plaintiff Harjo’s Claims

We next consider Defendant Tang University’s contention that Title VII preempts Title IX with regard to employment discrimination claims, an issue not yet decided by the Thirteenth Circuit. However, we find the reasoning of the Seventh and Eighth Circuits persuasive.

Plaintiff argues that she may bring claims under any of the anti-discrimination statutes. However, “when rights and their attendant remedies overlap, a cause of action under one may preempt the pursuit of a cause of action under another.” *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 861 (7th Cir. 1996). When Congress creates a comprehensive statutory scheme for protecting a right, doing so may imply that the scheme is exclusive. *Id.* Because Title VII is a comprehensive statutory scheme for protecting against discrimination in employment, Title VII preempts claims for which it provides a remedy. *Id.* at 861-62. As the Eighth Circuit held, “when the same set of facts supports a Title VII claim and a non-Title VII claim against a federal employer, Title VII preempts the non-title VII claim.” *Mathis v. Henderson*, 243 F.3d 446, 451 (8th Cir. 2001); see also *Lakoski v. James*, 66 F.3d 751, 758 (5th Cir. 1995) (“ . . . we hold that individuals seeking money damages for employment discrimination on the basis of sex in federally funded educational institutions may not assert Title IX”).

Thus, we conclude that Title VII preempts Dr. Harjo’s claims here. Dr. Harjo argues that the retaliation was not related to her employment, but, instead, was tied to her objections to non-employment-related Title IX violations. See *Taylor-Travis v. Jackson State Univ.*, 984 F.3d 1107, 1118 (5th Cir. 2021). However, we find persuasive the fact, as Dr. Harjo concedes, that she was a faculty sponsor of the Take Back the Night Rally. We also note that Dr. Harjo is the advisor of the Tang University Coalition for Intersectional Justice (“The Coalition”), which is a sponsored university group. The group receives university funding and Dr. Harjo receives a faculty course release for being the club’s sponsor. The Coalition provides advice and support to women and racial minorities in seeking protection from discrimination at the school. Given

these circumstances, we view Dr. Harjo's actions as tied to her employment and conclude that Title VII preempts her claims.

Because we hold that Title VII preempts Dr. Harjo's claim and that Dr. Harjo is unable to meet the "but-for" causation standard under the Title VII applicable here, we grant Defendant Tang University's Motion to Dismiss Dr. Harjo's Complaint for failure to state a claim.

CONCLUSION

For all the reasons discussed above, the Court grants Defendant's Motions to Dismiss and hereby dismisses the complaints of Plaintiffs Meihua Zhang and Dr. Harjo.

DATED: January 19, 2021

BY THE COURT:

/s/ Judge Michael Parker
Judge Michael Parker
Apalsa District Judge