No. 22-1369

TENTH CIRCUIT COURT OF APPEALS

John Doe v. Rocky Mountain Classical Academy, et al

On Appeal from

THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

THE HONORABLE JUDGE DANIEL D. DOMENICO

1:19-cv-03530-DDD-STV

APPELLANT'S OPENING BRIEF

Oral Argument is requested.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT REGARDING PRIOR OR RELATED APPEALS

There are no prior or related appeals in this case.

STATEMENT OF JURISDICTION

The District Court had jurisdiction in this case pursuant to 28 U.S.C. § 1331 over claims arising under the laws and Constitution of the United States, including claims pursuant to the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983 and Title IX of the Education Amendments of 1972.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. This is an appeal from a final order and judgment. The final order and judgment in this case were issued on September 30, 2022 and October 3, 2022. Plaintiff-Appellant filed a timely Notice of Appeal on October 25, 2022.

STATEMENT OF THE CASE

1. Factual Background

At all times relevant to this action, Plaintiff-Appellant John Doe ("Mr. Doe") was a minor student at Defendant-Appellant Rocky Mountain Classical Academy ("RMCA" or "School"). Aplt. App., 32. Prior to enrolling in RMCA, Mr. Doe had pierced ears. *Id.* at 33. While attending academic evaluations by RMCA, and prior to his kindergarten placement, Mr. Doe wore earrings. *Id.* At no point was Mr. Doe or his mother, Ms. Doe, informed that the earrings would be of concern. *Id.*

RMCA has a dress code that includes a prohibition on "jewelry other than watches for boys or girls, and small earrings on girls…". *Id.* RMCA's dress code facially discriminates against boys. *Id.* at 39; *See id.* at 116-18. The dress code requires that "earrings must be limited to one earring per ear. Large, dangling, or hoop-type earrings are not allowed." *Id.* at 33, 118. The earrings Mr. Doe wore to RMCA were small, blue studs. *Id.* at 33. Mr. Doe would have been allowed to wear the earrings consistent with RMCA's dress code had Mr. Doe been female, but because Mr. Doe is male, the earrings violated the dress code. *Id.*

On August 27, 2019, Ms. Doe was contacted by Mr. Doe's kindergarten teacher, who informed her that Mr. Doe was not allowed to wear earrings at school because the dress code prohibited boys from wearing earrings at school. *Id.* Ms. Doe requested a formal meeting with the principal to discuss the dress code and the School's non-discrimination policy. *Id.* Nicole Blanc, ("Ms. Blanc"), Dean of Students at RMCA, emailed Ms. Doe informing her of the dress code's prohibition on male students wearing earrings at school. *Id.* at 33-34. On August 28, Ms. Doe reached emailed members of the RMCA Board to raise concerns that the dress code's earring policy constituted unlawful gender discrimination. *Id.* at 34.

On August 30, 2019, Ms. Doe, along with Mr. Doe's teacher and RMCA Executive Principal Cullen McDowell ("Mr. McDowell") met to discuss the policy, but the meeting was did not resolve Ms. Doe's concerns regarding whether

the dress code policy was discriminatory. *Id.* On September 4, 2019, Mr. McDowell informed Ms. Doe that it was RMCA's position that the dress code's earrings requirements were not discriminatory. *Id.* Mr. Doe continued to wear earrings at school, and on October 22, Ms. Blanc informed Ms. Doe that he was violating the dress code. *Id.* Mr. Doe received several "Oops Slips" indicating that he was not complying with the dress code. *Id.* at 35.

At a December 3 Board meeting, the Board decided to maintain the dress code. *Id.* Mr. Doe continued to wear earrings to school. *Id.* On December 5, Mr. McDowell informed Ms. Doe that Mr. Doe would be required to comply with the dress code by Monday, December 9. *Id.* On December 11, Mr. Doe wore his earrings to school, and he was suspended and removed from the school for the remainder of the day. *Id.* at 36. Mr. Doe was sent home on December 12, 2019, and RMCA began the process of dis-enrolling Mr. Doe. *Id.*

2. Procedural History

Mr. Doe filed his Complaint on December 13, 2019 and his Amended Complaint on December 18, 2019. On December 18, 2019, Mr. Doe filed a motion for temporary injunctive relief. A hearing on Mr. Doe's motion for temporary injunctive relief was held on January 14, 2019, and the Court denied Mr. Doe's motion on January 20, 2020. Defendant-Appelllees filed a motion to dismiss on February 14, 2020. The Court granted the motion to dismiss in an order dated

September 30, 2022, and final judgment was issued on October 3, 2022. Mr. Doe filed a timely notice of appeal on October 25, 2022.

STATEMENT OF THE ISSUES

Did the District Court err when granting the 12(b)(6) Motions to Dismiss by determining that the Amended Complaint failed to state claims for relief pursuant to the Equal Protection Clause and Title IX? Specifically did the District Court err when determining that the Amended Complaint failed to state a plausible claim that RMCA's dress code's earrings requirement constituted unlawful sex discrimination and that the Amended Complaint failed to state a plausible retaliation claim?

SUMMARY OF ARGUMENT

This Court should reverse the District Court's order granting the Motion to Dismiss. The District Court misapplied the clearly established law of this Circuit and the United States Supreme Court. The District Court erred in concluding that RMCA's dress code could not constitute sex discrimination because it imposed comparable burdens on both male and female students. Furthermore, even assuming only for the sake of argument that the District Court's comparable burden analysis applied, the District Court did not properly apply the deferential standard applicable to motions to dismiss pursuant to Rule 12(b)(6). The District

Court erred in concluding that Mr. Doe did not adequately plead a claim for retaliation.

STANDARD OF REVIEW

An appellate court reviews a dismissal pursuant to Fed. R. Civ. P. 12(b)(6) based on qualified immunity *de novo*. *Truman v. Orem City*, 2021 U.S.App.LEXIX 16727 at *8 (10th Cir. June 4, 2021).

ARGUMENT

In resolving a Motion to Dismiss, the Court must accept as true all factual allegations in a complaint and view those allegations in the light most favorable to the Plaintiff. *Id.*, at *9; *Smith v. U.S.*, 561 F.3d 1090, 1098 (10th Cir. 2009); *Arnold v. McClain*, 926 F.2d 963, 965 (10th Cir. 1991). While a complaint is required to provide "more than labels and conclusions," it "does not need detailed factual allegations." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint satisfies the pleading requirement to state a claim to relief that is plausible on its face when the complaint "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The District Court erred by concluding that the allegedly comparable burdens imposed by RMCA's dress code shields the sex-based earring prohibition from challenge under the Equal Protection Clause and Title IX.

The Equal Protection Clause of the Fourteenth Amended provides that no state may "deny to any person…the equal protection of the laws." U.S. Const. Amdt. XIV, § 1. "Classifications that distinguish between males and females are 'subject to scrutiny under the Equal Protection Clasue.'" *Craig v. Boren*, 429 U.S. 190, 197 (1976)(quoting *Reed v. Reed*, 404 U.S. 71, 75 (1971)). "Today, heightened scrutiny attends all gender-based classifications." *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 800 (10th Cir. 2019)(internal quotations omitted). "Classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig*, 429 U.S. at 198. To justify classification based on gender, the proffered justification must be "exceedingly persuasive." *United States v. Virginia*, 518 U.S. 515, 533 (1996). "The burden of justification is demanding, and it rests entirely on the State." *Id.* "The State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* (internal quotations omitted). "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigations. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences males and females." *Id.*

The District Court misapplied this straightforward, clearly established precedent in multiple ways. First, the District Court viewed a series of appellate decisions as requiring a deferential approach to school dress codes. These cases included *Freeman v. Flake*, 448 F.2d 258 (10th Cir. 1971), *New Rider v. Bd. of Educ.*, 480 F.2d 693 (10th Cir. 1973), and *Hatch v. Goerke*, 502 F.2d 1189 (10th Cir. 1974). While the court in these cases failed to find a constitutional violation for school policies, none of these cases provide helpful guidance for deciding Equal Protection challenges to sex-based classifications under current, controlling Supreme Court precedent. All of these cases were decided before the Supreme Court squarely decided how sex-based classifications should be analyzed under the Equal Protection class, and in none was the court analyzing a sex-discrimination claim. In *New Rider* and *Hatch* the plaintiffs challenged the male hair length restriction on grounds that it discriminated on the basis of race, religion, and national origin. *See New Rider*, 480 F.2d at 695; *Hatch*, 502 F.2d at 1191. Crucially, however, the hair length policies at issue in both of those cases were neutral with respect to race, religion, and national origin. In sum, this early line of cases is inapposite, and while the District Court acknowledged the limited applicability of these cases, it erred in concluded that they imposed any special deference requirement on its analysis.

Second, the District Court erred by finding the dress code lawful because it imposed comparable burdens on both male and female students. First, nothing in *Hayden v. Greensburg Cmty. Sch. Corp.*, and cases developed in the employment discrimination context can displace the requirement that sex-based classifications be subjected to heightened scrutiny. In *Hayden*, the Seventh Circuit discussed a line of cases developed in the employment context, that suggests a sex-specific dress or grooming policy is permissible so long as it is "just one component of a set of grooming standards that impose comparable, although not identical, responsibilities" on the sexes. 743 F.3d 569, 580 (7th Cir. 2014). However, even the *Hayden* court questioned the continued validity of this line of cases in light of *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) which held that employers may not demand employees conform to sex stereotypes associated with their gender.

The Fourth Circuit, in *Peltier v. Charter Day Sch. Inc.*, 37 F.4th 104, 125 n. 13 (4th Cir. 2022) recently emphatically rejected the application of the comparable burden approach to sex-based dress policies. As the Fourth Circuit explained, these cases applying the comparable burden framework "rely heavily on precedent from the 1970s affirming the validity of dress codes based on 'traditional' notions of appropriate gender norms." *Id.* Furthermore, the Fourth Circuit properly concluded that its analysis of the government's justification for the sex-based

classification must focus on the sex-based classification being challenged and not the dress code as a whole. *Id.* at 125. As the Fourth Circuit explained, a school cannot justify a sex-based requirement by pointing to other burdens imposed on the other sex in the policy. *Id.* "A state actor's imposition of gender-based restrictions on one sex is not a defense to that actor's gender-based discrimination against another sex." *Id.*

Accordingly, the District Court's reliance on the allegedly comparable burdens imposed by RMCA's dress code as a whole is reversible error. The District Court departed from the clearly established precedent dating back to *Craig* and culminating in *Virginia* that all sex-based classifications are subjected to heightened scrutiny. *See id.* at 124 (stating "for many years, the Supreme Court…ha[s] applied a heightened level of scrutiny to sex-based classifications…"). Because the Amended Complaint pleads a sex-based classification, it plausibly pleads a claim for sex discrimination in violation of the Equal Protection Clause and Title IX, and the District Court erred by dismissing the action and failing to hold RMCA to its burden to provide an exceedingly persuasive justification for the earring requirement.

Even assuming only for the sake of argument that the District Court was correct to consider the burdens imposed by the entirety of RMCA's dress code, the District Court erred by concluding that at the motion to dismiss stage, the Amended

Complaint failed to plead a plausible claim for sex discrimination under the Equal Protection Clause and Title IX. The Amended Complaint pleads that the dress code "does not impose comparable burdens on the sexes" and it "imposes greater burdens on male students." Aplt. App., 39. The dress code, while imposing several restrictions that apply equally to both male and female students, every sex-specific restriction in the dress code imposes greater restrictions on male students than female students. *Id*. at 116-18. The District Court even noted that "RMCA imposes greater restrictions on male students than female students." *Id.* at 158-59. At this stage, the District Court must accept as true the factual allegations in the complaint and draw all reasonable inferences in favor of Mr. Doe. *See Truman*, 2021 U.S.App.LEXIX 16727 at *8. By acknowledging that RMCA imposes greater restrictions on male students than female students but then concluding that the burdens were comparable, the District Court's order demonstrates that the District Court failed to draw all reasonable inferences in favor of Mr. Doe as required at this stage of the proceedings. Mr. Doe plausibly alleged that RMCA's dress code did not impose comparable burdens on male and female students, and RMCA's dress code policy, properly considered at this stage of the proceedings supports the plausibility of Mr. Doe's allegations. The District Court erred by

dismissing Mr. Doe's claims even assuming the comparable burden analysis was proper[1].

The District Court erred in dismissing Mr. Doe's retaliation claim.

Title IX prohibits retaliation for protected activity, and a Plaintiff must allege that: 1) they engaged in protected activity; 2) defendant had knowledge of the protected activity; 3) materially adverse school-related action was taken against them; and 4) there was a causal connection between the protected activity and the adverse action. *Tackett v. University of Kansas*, 234 F.Supp.3d 1100 (D. Kan. 2017). To establish a causal connection, a plaintiff must show "evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." *Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079, 1091 (10th Cir. 2007).

Mr. Doe has adequately pleaded a claim for retaliation. The Amended Complaint pleads that following Mr. Doe's and Ms. Doe's complaints to RMCA officials and Board about the discriminatory nature of the dress code, Mr. Doe was subjected to disciplinary actions including an increasing number of suspensions, and ultimately disenrollment. Aplt. App., 40-41. The District Court erred in concluding that it would be unreasonable to conclude that the adverse disciplinary

[1] The District Court and the Parties below all agreed that the same substantive standards governed Mr. Doe's Title IX discrimination claim. *See* Aplt. App., 154. Therefore, the District Court erred by concluding RMCA did not engage in sex discrimination under Title IX for the same reasons the District Court erred in concluding the earring policy did not violate the Equal Protection Clause.

actions were imposed because of the attempts to raise concerns about the discriminatory nature of the dress code. The allegations demonstrate that the disciplinary actions escalated in severity from Oops slips to suspensions and disenrollment, and that the escalation closely followed the protected activity. *See id.* at 34-36. Taking all the allegations in true and viewed in the light most favorable to Mr. Doe, it would be reasonable to infer that the escalation in severity of disciplinary was because of the protected activity. Mr. Doe adequately pleaded a claim for retaliation under Title IX.

CONCLUSION

The District Court erred in granting Defendants' 12(b)(6) Motion to Dismiss. The District Court erred in determining that Mr. Doe failed to plausibly allege violations of the Equal Protection Clause and Title IX. The District Court erred by considering the allegedly comparable burdens of RMCA's dress code as a whole. Even assuming the burdens imposed by the policy as a whole should be considered, the District failed to properly apply the deferential standard in analyzing Rule 12(b)(6) motions. The District Court erred in dismissing Mr. Doe's retaliation claim. The District Court's order dismissing all of Mr. Doe's claims should be reversed.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested because it is reasonably believed that oral argument will significantly aid the decisional process.

DATED: December 19, 2022

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that all privacy and redaction requirements of Fed. R. App. P. 25(a)(5) and 10th Cir. R. 25.5 have been complied with.
2. I hereby certify that the hard copies to be submitted to the court are exact copies of the version submitted electronically.
3. I hereby certify that the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Opening Brief complies with the type volume limitations of Fed. R. App. P. 32. The foregoing Appellant's Opening Brief complies with the type volume limitations because it contains 2701 words excluding the items excluded from the length by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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