University of Baltimore Law Review

Volume 12
Issue 3 *Spring 1983*

Article 7

1983

Casenotes: Employment Discrimination — "Person" in Title IX of the 1972 Education Amendments Includes Employees of Federally Funded Programs — HEW Regulations to Enforce Title IX Are Valid. North Haven Board of Education v. Bell, 456 U.S. 512 (1982)

Cathleen N. Cawley
University of Baltimore School of Law

EMPLOYMENT DISCRIMINATION — "PERSON" IN TITLE IX OF THE 1972 EDUCATION AMENDMENTS INCLUDES EMPLOYEES OF FEDERALLY FUNDED PROGRAMS — HEW REGULATIONS TO ENFORCE TITLE IX ARE VALID. *North Haven Board of Education v. Bell,* 456 U.S. 512 (1982).

In 1972 Congress, under Title IX of the Education Amendments, banned discrimination against beneficiaries on the basis of sex in federally funded educational programs.[1] In 1974 the Department of Health, Education, and Welfare (HEW) interpreted Title IX to include faculty and other personnel as beneficiaries of the federal funds.[2] Complainants, Elaine Dove and Linda Potz, were employed by the Connecticut public school system, which is a recipient of federal funds.[3] The women each filed separate complaints with HEW alleging that they were victims of sex discrimination.[4] Elaine Dove, a teacher, filed her complaint when the North Haven Board of Education refused to rehire her after a one year maternity leave.[5] Linda Potz, a counselor, filed her complaint when the Trumbull Board of Education allegedly discriminated against her with respect to her working conditions, her assignments, and her contract renewal.[6] HEW investigated these complaints and concluded that both school boards violated Title IX by discriminating against these employees.[7] Subsequently, the school boards filed separate actions in Connecticut's federal district court charging that the HEW regulations, extending Title IX to employees of federally funded programs, were invalid because Congress never intended to include employees within Title IX's definition of "person."[8] The district court, in separate decisions, granted summary judgment for the plaintiff

1. The Education Amendments of 1972, 20 U.S.C. § 1681 (1976), provide, in part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." *Id.*
2. HEW promulgated regulations to enforce Title IX under authority granted it by Congress under the Education Amendments of 1972, 20 U.S.C. § 1682 (1976). In 1979, HEW's functions under Title IX were transferred to the Dept. of Education through the Dept. of Education Organization Act, 20 U.S.C. § 3441(a)(3) (Supp. V 1981). The *North Haven* case and all prior decisions arose under HEW's application of these regulations; therefore, both agencies are referred to in this article as HEW. It should be noted that since the creation of the Dept. of Education, HEW has been renamed the Dept. of Health and Human Services (HHS). 20 U.S.C. § 3508 (1976).
3. North Haven Board of Education v. Bell, 456 U.S. 512, 517-18 (1982). In the North Haven District, approximately 47% to 67% of the federal funds received were used for salaries. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 518. The Board failed to renew her contract.
7. *Id.* at 517-18.
8. These regulations originally appeared at 45 C.F.R. § 86, but were recodified at 34 C.F.R. § 106 (1982) in connection with the establishment of the Dept. of Education.

school boards.[9] The two cases were consolidated on appeal and reversed by the United States Court of Appeals for the Second Circuit.[10] The Supreme Court granted certiorari[11] and affirmed the Second Circuit's decision.[12] In so holding, the Court found that while the statutory language of Title IX was inconclusive, legislative and post-enactment history indicated Congress' intent to include employees within the definition of person and, consequently, employees are protected under Title IX.[13]

The questions concerning the HEW regulations stem from the fact that the 1972 Education Amendments went through Congress in the form of a package.[14] The package included provisions to expand Title VII to include teachers[15] and to extend coverage of the Equal Pay Act to include professionals in educational institutions.[16] It is clear that employees of federally funded programs are protected under Title VII and the Equal Pay Act; the dispute between HEW and the lower federal courts arose over whether employees were also covered under Title IX.[17]

Many lower courts held that HEW misinterpreted Title IX when it read into the statute a congressional intent to protect employees.[18]

---

9. North Haven Bd. of Educ. v. Hufstedler, 629 F.2d 773, 775-76 (2d Cir. 1980), *aff'd sub nom.* North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982).
10. 629 F.2d at 786.
11. 450 U.S. 909 (1980).
12. 456 U.S. 512 (1982).
13. *Id.* at 535-40. In *North Haven* the Supreme Court also held that the remedial provisions of the regulations are valid. On their face, the regulations appear to allow HEW to terminate federal funds to an entire institution because of discrimination practiced in one program.

    Prior decisions that involved Title IX discrimination invalidated the regulations because they were considered too broad and not in line with congessional intent to terminate the funds of only the discriminating program. *See* Rice v. President of Harvard, 663 F.2d 336 (1st Cir. 1981); Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981); Grove City College v. Harris, 500 F. Supp. 253 (W.D. Pa. 1980).
14. For an excellent discussion of Title IX's legislative history, see Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction,* 65 GEO. L.J. 49, 58-59 (1976).
15. *Id.* at 59. Title VII legislation was ultimately dropped from the Title IX package prior to passage because a similar provision was enacted under the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 21(1), 86 Stat. 403, § 2 (codified at 42 U.S.C. § 2000e-1 (1976)).
16. Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction,* 65 GEO. L.J. 49, 59 (1976); *see* 20 U.S.C. § 206(b) (1976).
17. The complainants in North Haven did have remedies under Title VII and the Equal Pay Act, which include reinstatement and back pay. 42 U.S.C. § 2000e-5(g) (1976) (Title VII); 29 U.S.C. § 203 (1976) (Equal Pay Act). If protected under Title IX the complainant's remedy would be termination of funds to the discriminating institution. *See* 20 U.S.C. § 1682 (1976).
18. *See, e.g.,* Seattle Univ. v. Department of Educ., 621 F.2d 992 (9th Cir. 1980), *vacated,* 456 U.S. 986 (1982); Kneeland v. Bloom Tp. High School Dist. No. 206, 484 F. Supp. 1280 (N.D. Ill. 1980); University of Toledo v. HEW, 464 F. Supp. 693 (N.D. Ohio 1979); Junior College Dist. of St. Louis v. Califano, 455 F. Supp.

These courts invalidated the regulations by emphasizing different portions of the legislative and post-enactment history to conclude that Congress did not intend to afford employees the protection of Title IX. In *Islesboro School Community v. Califano*[19] the school districts challenged HEW's regulations when they were ordered to alter their policy regarding maternity leave for employees or else face a termination of funds.[20] Although it is obvious that the language of the statute does not explicitly include employees, HEW maintained that employees were impliedly protected under it since it did not expressly exclude them.[21] Unconvinced, the First Circuit delved into the legislative and post-enactment history of Title IX in an effort to ferret out who Congress intended to protect. The *Islesboro* court, the first to invalidate the regulations, interpreted statements made by the bill's sponsor, Senator Birch Bayh, as an indication of Congress' intent to exclude employees from coverage.[22] The court examined Bayh's statements and concluded that he differentiated between students under Title IX and employees under Title VII and the Equal Pay Act.[23] Consequently, the court deemed the regulations invalid because it found that HEW exceeded its authority to promulgate them when it extended Title IX's coverage to include employees.[24]

Several other lower courts have emphasized other parts of the legislative and post-enactment history and have likewise held the regulations invalid.[25] These excerpts of legislative and post-enactment history include: a congressional resolution, issued shortly after the forty-five day period alloted for objections to HEW's regulations, which expressly denied any inference of approval of the regulations;[26] Congress' explanation for the absence of a section in Title IX which

---

1212 (E.D. Mo. 1978), *aff'd,* 597 F.2d 119 (8th Cir.), *cert. denied,* 444 U.S. 972 (1979); Brunswick School Bd. v. Califano, 449 F. Supp. 866 (D. Me. 1978), *aff'd,* 593 F.2d 424 (1st Cir.), *cert. denied,* 444 U.S. 972 (1979); McCarthy v. Burkholder, 448 F. Supp. 41 (D. Kan. 1978); Romeo Comm. School v. HEW, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd,* 600 F.2d 581 (6th Cir.), *cert. denied,* 444 U.S. 972 (1979).

19. 449 F. Supp. 866 (D. Me. 1977), *aff'd,* 593 F.2d 424 (1st Cir. 1979).
20. 449 F. Supp. at 869.
21. 593 F.2d at 426.
22. *Id.* at 427.
23. *Id.* at 428. Senator Birch Bayh consistently divided his analysis of the bill into separate categories. As the *Islesboro* court noted, portions dealing with students referred to Title IX; the portions dealing with employees referred to Title VII and the Equal Pay Act. *Id.*
24. *Id.* at 430.
25. *See, e.g.,* Seattle Univ. v. Department of Educ., 621 F.2d 992 (9th Cir. 1980), *vacated,* 456 U.S. 986 (1982); Romeo Comm. School v. HEW, 600 F.2d 581 (6th Cir.), *cert. denied,* 444 U.S. 972 (1979); University of Toledo v. HEW, 464 F. Supp. 693 (N.D. Ohio 1979).
26. 20 U.S.C. § 1232(d)(1) (1976). *See, e.g.,* Romeo Comm. School v. HEW, 438 F. Supp. 1021, 1030 (E.D. Mich. 1977), *aff'd,* 600 F.2d 581 (6th Cir.), *cert. denied,* 444 U.S. 972 (1979).

corresponds with section 604 of Title VI;[27] the breakdown of Senator Bayh's summary of his bill as published in the Congressional Record;[28] and, most pervasively, the presence of more remedial measures protecting employees under Title VII and the Equal Pay Act.[29]

Some courts also invalidated the regulations by disregarding HEW's analogy to the infection theory. HEW drew this argument from the Fifth Circuit's decision in *Board of Public Instruction of Taylor County v. Finch.*[30] In *Taylor County,* the court interpreted Title VI of the Civil Rights Act of 1964[31] to prevent HEW from terminating funds to an entire school district because some programs were racially discriminatory.[32] Dictum in this opinion suggested that it was possible to envision a situation where discrimination in a program which did not receive federal money would create a discriminatory environment which might affect the intended beneficiaries of other federally funded programs.[33] HEW extended this argument to Title IX and urged that the discrimination of faculty in institutions covered under Title IX would create the same infectious environment which would ultimately affect the student. Lower courts, while slightly more receptive to this analogy, have refused to apply it for lack of a sufficient nexus between faculty and students.[34] Even given such a nexus, one court has concluded that the possibility of such a discriminatory infection did not, by itself, authorize HEW to regulate employment practices.[35]

The lone appellate decision finding employees protected under Title IX, previous to the current one, was *Dougherty County School System v. Harris.*[36] The plaintiff school districts allegedly violated Title IX

27. Rep. James G. O'Hara, Chairman of the 1975 House Subcommittee on post-Secondary Education and Labor, noted that the provision similar to section 604 of Title VI was eliminated in Title IX to avoid a drafting error since Title IX's package included Title VII and Equal Pay Act legislation. *Title IX Regulation: Hearing on H.R. Con. Res. 330 Before the Subcomm. on Equal Opportunities,* 94th Cong. 1st Sess. 409 (1975) (statement of James G. O'Hara, member). *See, e.g.,* Romeo Comm. School v. HEW, 438 F. Supp. 1021, 1030 (E.D. Mich. 1977), *aff'd,* 600 F.2d 581 (6th Cir.), *cert. denied,* 444 U.S. 972 (1979).
28. 118 CONG. REC. 5807 (1972). *See, e.g.,* Romeo Comm. School v. HEW, 600 F.2d 581, 585 (6th Cir.), *cert. denied,* 444 U.S. 972 (1979).
29. *See supra* note 17 and accompanying text. *See, e.g.,* Romeo Comm. School v. HEW, 600 F.2d 581, 585 (6th Cir.), *cert. denied,* 444 U.S. 972 (1979); Kneeland v. Bloom Tp. High School Dist. No. 206, 484 F. Supp. 1280, 1282 (N.D. Ill. 1980).
30. 414 F.2d 1068 (5th Cir. 1969).
31. 42 U.S.C. § 2000(d) (1976).
32. *Taylor County,* 414 F.2d at 1078.
33. *Id. See* Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction,* 65 GEO. L.J. 49, 67-69 (1976).
34. *E.g.,* Islesboro School Comm. v. Califano, 593 F.2d 424, 430 (1st Cir. 1979); Romeo Comm. School v. HEW, 438 F. Supp. 1021, 1034 (E.D. Mich. 1977), *aff'd,* 600 F.2d 581 (6th Cir.), *cert. denied,* 444 U.S. 972 (1979).
35. Romeo Comm. School v. HEW, 438 F. Supp. 1021, 1035 (E.D. Mich. 1977), *aff'd,* 600 F.2d 581 (6th Cir.), *cert. denied,* 444 U.S. 972 (1979).
36. 622 F.2d 735 (5th Cir. 1980), *vacated sub nom.* Bell v. Dougherty County School Sys., 456 U.S. 986 (1982).

when they paid salary supplements to industrial arts teachers but not to home economics teachers. None of the supplements were allocated from federal funds. The school system challenged the HEW regulations after HEW threatened to terminate all funding because of alleged discrimination in teacher's salaries. The Fifth Circuit refused to enforce the HEW regulations, as no federal funds were involved, but suggested that if the employees had been in programs which received federal aid, the regulations would have been enforced.[37] However, the *Dougherty County* opinion glossed over the legislative history of Title IX and relied on a single, isolated statement made by Senator Bayh.[38] Consequently, the Fifth Circuit concluded, *inter alia,* that a female teacher who receives less pay than a male teacher for the same work under a federally funded program is subjected to discrimination and can seek the protection of Title IX.[39]

After nearly seven years of litigation in the lower federal courts, the Supreme Court finally accepted certiorari on two cases concerning the validity of the HEW regulations. One lower court held that the regulations were valid,[40] the other held that they were invalid.[41] The Supreme Court's affirmance of the former undoubtedly came as a surprise to many commentators.[42] In *North Haven Board of Education v. Bell,*[43] the Court went through a detailed analysis of the statute and concluded that Congress did indeed intend for employees to be protected under Title IX. In an approach similar to that used by the lower courts, the Supreme Court initially examined the language of the statute and noted that its exclusionary provisions[44] exempting certain insti-

37. 622 F.2d at 738.

38. *Id.* Sen. Bayh's remarks appear at 118 CONG. REC. 5807 (1972). The *Dougherty County* court neglected to note that immediately prior to the excerpt quoted the Senator made specific references to the parallels between Titles VI and IX. Also, the quoted excerpt apparently refers to section 1005 of the Title IX Education Amendment; section 1005 includes the Title VII provisions which clearly deal with employment. The court's opinion neglects to make clear the reference to section 1005. The majority in *North Haven* dismissed the reference to section 1005 as an "inadvertent" error. *North Haven,* 456 U.S. at 525-26 n.15.

39. *Dougherty County,* 622 F.2d at 738.

40. North Haven Bd. of Educ. v. Hufstedler, 629 F.2d 773 (2d Cir. 1980), *aff'd sub nom.* North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982).

41. Seattle Univ. v. Department of Educ., 621 F.2d 992 (9th Cir. 1980), *vacated,* 456 U.S. 986 (1982).

42. *See, e.g.,* Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction,* 65 GEO. L.J. 49, 58-59 (1976); Salomone, *Title IX and Employment Discrimination: A Wrong in Search of a Remedy,* 9 J. LAW & ED. 433 (1980). *Cf.* Friedman, *Congress, The Courts, and Sex-Based Employment Discrimination in Higher Education: A Tale of Two Tiles,* 34 VAND. L. REV. 37 (1981) (employers clearly protected under Title IX).

43. 456 U.S. 512 (1982).

44. Congress exempts the following programs or institutions from adherence to Title IX: recently instituted co-educational programs; religious schools; military schools; post-secondary, undergraduate, single-sex public institutions; fraternities, sororities and voluntary youth service organizations; boys/girls, state/nation con-

tutions and groups from Title IX's application could by inference be interpreted to include employees.[45] However, because the statute did not expressly include employees, the Court turned to Title IX's legislative and post-enactment history for an expression of Congress' intent.[46] Justice Blackmun's majority opinion concluded that statements made by Senator Bayh during floor debates were indicative of an intent, at least by the bill's sponsor, for Title IX to protect employees.[47] The majority relied on these remarks as the only "authoritative indication of Congressional intent regarding the scope of [Title IX]."[48]

Justice Blackmun also noted that Congress failed to object to the HEW regulations within the forty-five day period allotted for such objection.[49] The majority, however, properly conceded that silence did not imply approval since it was not long after this period that Congress passed a resolution stating that its failure to object to the regulations was not to be construed as approval.[50] Finally, by its own admission, the majority relied on evidence of post-enactment history, which could not be given the weight of contemporary legislative history, concerning Congressional failure to limit the scope of Title IX.[51] In dissent, Justice Powell, noting that it was the intent of the 1972 Congress which was at issue, properly chastised the majority for relying solely on "truncated legislative history" which, like the statute, was susceptible to contrary interpretations.[52]

In addition, the majority concluded that the absence of a section analogous to section 604 of Title VI,[53] which specifically excludes employees of federally funded programs from the protection of Title VI, indicated a conscious decision to include employees under Title IX's protection.[54] Justice Powell, in his dissent,[55] dismissed this absence as

---

ferences; father-son, mother-daughter programs at public institutions; and scholarships received in "beauty" pageants. 20 U.S.C. § 1681(a)(2)-(9) (1976).

45. *North Haven,* 456 U.S. at 522.
46. *Id.* at 523-35.
47. The majority cites portions of Sen. Bayh's summary of Title IX, his prepared statements, and floor discussions between Sen. Bayh and Sen. Pellin. *Id.* at 524-26; *see also* 118 CONG. REC. 5807 (1972).
48. *North Haven,* 456 U.S. at 527.
49. *Id.* at 532. This "laying before" provision, contained in 20 U.S.C. § 1682 (1976), mandates that regulations for Title IX be placed before Congress for a period of 45 days for review. The regulations are to become effective if Congress does not disapprove of them within that time. It appears from a recent Supreme Court opinion, however, that this legislative veto device may be unconstitutional. *See* INS v. Chadha, 103 S. Ct. 2764 (1983).
50. *North Haven,* 456 U.S. at 534.
51. *Id.* at 535.
52. *Id.* at 551 (Powell, J., dissenting).
53. *See* 42 U.S.C. § 2000d-3 (1976).
54. *North Haven,* 456 U.S. at 528.
55. Justice Powell's dissent questions the scope of the majority's holding. He agrees with the majority to the extent that "employees who directly participate in a federal program, *i.e.,* teachers who receive a federal grant are . . . protected by Title IX." *Id.* at 546 n.3. (Powell, J., dissenting). This position appears to conform

an administrative decision to correct a newly discovered drafting error and to avoid confusion with other provisions of the amendments which clearly apply to employees.[56] The dissent also noted specific references made by Senator Bayh that indicated that Title IX is parallel to Title VI in both its intent and protection.[57]

The Court's decision in *North Haven,* while reaching an essentially just result, appears to fly in the face of Congressional intent to the contrary. The Court relies solely upon legislative history which is as susceptible to other interpretations as the language of Title IX itself. Senator Bayh's statements had been construed by other federal courts to find no Congressional intent to protect employees. Moreover, the practical consequences of this decision are ignored by the majority.[58] As the dissent correctly points out, the Court has found the intent to include employees under Title IX despite the lack of any congressional plan that establishes procedures for handling employee complaints.[59]

Cathleen N. Cawley

---

with the parallels drawn to section 604 of Title VI which makes the employment practices of recipients subject to Title VI in only limited circumstances. *See supra* note 44.

56. *North Haven,* 456 U.S. at 547 (Powell, J., dissenting). *See supra* note 17.
57. *North Haven,* 456 U.S. at 549 (Powell, J., dissenting). "Discrimination . . . is already prohibited by Title VI of the 1964 Civil Rights Act but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of Title VI." 118 CONG. REC. 5807 (1972) (statement of Sen. Bayh). This provision is noticeably absent from the majority's excerpt of the Bayh statements. *See id.* at 525.
58. The Court's interpretation of Title IX provides for a choice of remedies which, while not at all uncommon, places the administration of the most far-reaching remedy in the Dept. of Education, the agency least experienced in employment matters. *See* Brief for Federal Respondents at 37, n.6, *North Haven,* 456 U.S. at 528.
59. The Dept. of Labor and the Equal Employment Opportunity Commission are charged with administering Title VII and the Equal Pay Act. Congress, in passing Title VII, also legislated the administrative procedures which were to be followed in the event of a grievance. *See* 42 U.S.C. § 2000e-5 (1976). No such plan was provided for under the Title IX legislation.