1979 WL 285
United States District Court; D. Connecticut.

North Haven Board of Education et al., Plaintiffs
v.
Joseph A. Califano, Jr. et al., Defendants.

Civil Action No. N-78-165
|
April 24, 1979

Opinion

BURNS, D.J.

***1** Plaintiff school board seeks declaratory and injunctive relief against the defendants for threatened termination of federal aid. Before the court at this time are defendants' motion to dismiss or, in the alternative, for summary judgment and plaintiff's cross motion for summary judgment. In light of the unusual unanimity among the federal judiciary with regard to the issue at hand, defendants' motion for summary judgment is denied and plaintiff's cross motion for summary judgment is granted.

[Statement of Facts]

The facts alleged by plaintiff are as follows: Plaintiff North Haven Board of Education (hereinafter Board) is a duly elected municipal body of the Town of North Haven and of the State of Connecticut, charged with the responsibility of operating all public schools within the town. Defendant Califano is the Secretary of the United States Department of Health, Education and Welfare (hereinafter HEW). Defendant John G. Bynoe, Director of the Office for Civil Rights, Region I of HEW, sent a letter, dated January 10, 1978, to plaintiff stating that a complaint had been filed against the board for alleged discrimination with respect to hiring and child care leave.[1] On three occasions in February, March, and April, 1978, plaintiff asked the defendants either to dismiss the complaint for lack of jurisdiction or to hold it in abeyance pending court resolution of the underlying complaint. Letters dated April 19, 1978 and April 27, 1978 sent from defendants to plaintiff both stated the board's failure to provide certain information indicated the possibility of administrative enforcement. Federal financial aid from HEW to plaintiff for the academic years 1975-76, 1976-77, and 1977-78 was $95,269, $86,905, and $111,212, respectively. Plaintiff alleges that the administrative regulations under which HEW proceeded are invalid, void, and of no effect whatsoever.

[Law & Regulations]

This suit arises under the Education Amendments of 1972 (hereinafter Title IX), codified at 20 U.S.C. §§ 1681-1686. 20 U.S.C. § 1681 provides in pertinent part:

> (a) 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 . . .

Several exceptions, not relevant here, are permitted.[2] 20 U.S.C. § 1681 gives statutory authority to HEW to promulgate "rules, regulations, or orders of general applicability" to achieve the objectives of Title IX. In accordance with this authority, HEW issued regulations entitled "Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance," effective July 21, 1975. These regulations are found at 45 C.F.R. §§ 86.1 to 86.71. At issue in this case is Subpart E, entitled "Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited," 45 C.F.R. §§ 86.51 to 86.61, especially 45 C.F.R. § 86.57, dealing with marital or parental status.[3]

***2** The validity of Subpart E has been before the federal judiciary on eight different occasions, and in each case, the promulgation of these regulations was held to be beyond the statutory authority of HEW because the purpose of Title IX is the prohibition of sex discrimination against students and other direct beneficiaries of federal educational assistance funds and therefore Title IX does not cover the employment

practices of educational institutions which receive these funds. *Isleboro School Committee v. Califano*, No. 78-1302 (1st Cir. Mar. 9, 1979), [19 EPD P 9019] *aff'g sub nom. Brunswick School Board v. Califano*, [16 EPD P 8242] 449 F.Supp. 866 (D.Me. 1978); *Auburn School District v. HEW*, Civil No. 78-154 (D.N.H. Mar 29, 1979) [20 EDP P 30,146]; *Board of Education of the Bowling Green City District v. HEW*, No. C 78-177 (N.D.Ohio Mar. 14, 1979) [2 EPD P 30,085]; *University of Toledo v. HEW*, No. C 77-235 (N.D.Ohio Jan. 31, 1979) [19 EPD P 9133]; *Junior College District of St. Louis v. Califano*, [18 EPD P 8927] 455 F.Supp. 1212 (E.D.Mo. 1978); *Dougherty County School System v. Califano*, No. 78-30-ALB (M.D.Ga. Aug. 22, 1978); *Seattle University v. HEW*, No. C 77-6315 (W.D.Wash. Jan. 3, 1978) [16 EPD P 8241], appeal docketed, No. 78-1746 (9th Cir. Apr. 6, 1978); *Romeo Community Schools v. HEW*, [14 EPD P 7704] 438 F.Supp. 1021 (E.D.Mich.), *appeal pending* Nos. 77-1691 & -1692 (6th Cir. May 18, 1977). Although none of these cases originated within this circuit, this court is persuaded by the reasoning of the opinions and adopts it as its own.[4]

[Legal Analysis]

The most detailed analysis of 20 U.S.C. § 1681 and these regulations is found in *Romeo Community Schools v. HEW, supra*. The court's decision was premised upon five basic grounds. First, the court took a broad view of the entire Title IX legislative package. Comparisons were made between Title VI of the Civil Rights Act of 1964, codified at 42 U.S.C. §§ 2000d to 2000d-5. However, one important difference between Title VI and Title IX was observed: Title VI contains a provision explicitly excluding discrimination in employment, found in 42 U.S.C. § 2000d-3.[5] HEW attributed significance to the absence of a specific exclusion in Title IX. The district court rejected this construction, finding that

(T)his discrepancy must be traced to the fact that Title IX was enacted as part of a larger legislative program which also included an amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., enlarging the scope of *that* provision to include sex discrimination in employment, as well as an amendment to the Equal Pay Act, giving the Secretary of Labor authority to regulate sex discrimination in educational employee compensation. 29 U.S.C. § 206(d). A provision similar to (42 U.S.C. § 2000d-3) was left out of this package in order to avoid the inherent contradiction between such a provision and these amendments.

***3** 438 F.Supp. at 1030 (footnote omitted) (emphasis in original). Second, the court focused solely upon the statutory language of 20 U.S.C. § 1681 and held that the section addressed itself only to sex discrimination against the participants in and the beneficiaries of federally assisted education programs:

Section 1681 must therefore be read to protect from sex discrimination only those persons for whom the federally assisted education programs are established, and this can only mean the school children in those programs. As a reference to faculty employees, the language of § 1681 is indirect, if not obscure. Teachers participate in these programs only to the extent that they may teach and help administer some of them; teachers benefit from these programs only to the extent that the funds for them may be used to pay their salaries; teachers are "subjected to discrimination *under*" these programs, (emphasis added), only to the extent that the programs themselves may be established and operated in an employment-related discriminatory way. Teachers, in short, are hard pressed to fit themselves within the plain meaning of § 1681's prohibitory language, general as it may appear on its face.

Id. at 1031-32. A third factor was that the express exclusions in subsection 1681(a) relate solely to student activity or enrollment.[6]

The fourth and fifth grounds concentrated upon the enforcement mechanism of Title IX. 20 U.S.C. § 1682 provides in pertinent part:

> 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 on the record, after opportunity for hearing, 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: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

Termination of federal funds is the only sanction authorized. As the court observed, the termination of a school program penalizes the students, but Congress apparently had engaged in a cost-benefit analysis to determine that any benefit that students might derive from the education programs funded by HEW was more than outweighed by the sex discrimination in those programs. *Id.* at 1032. However, the termination weapon would be ineffective against sex discrimination in employment, having no enforcement value: "The court doubts that Congress would resort to such an arbitrary enforcement measure where alternative methods of prohibiting employment discrimination, more effective and less costly than this, are readily available." *Id.* at 1032-33. The second aspect of § 1682 is that the termination is "limited in its effect to the particular program, or part thereof, in which such non-compliance has been found." This "program specificity" rule requires HEW to make a program-by-program analysis. As the court found,

> ***4** Regulation of employment practices, however, is inherently non-"program specific." An educational institution's employment policies are general in nature, covering, by and large, all faculty employees involved in all of an institutions's education programs, whether federally funded or not . . ... Compliance with HEW's regulations under Subpart E will inevitably require modifications of employment policies which apply generally to all faculty employees and education programs throughout the system. Yet the federal interest involved here, as defined by the scope of §§ 1681 and 1682, is much narrower and does not appear to justify this kind of regulatory leverage.

Id. at 1033. Thus the court concluded that Subpart E was "patently overbroad." *Id.*

The *Romeo* decision has been extended to HEW's capacity to investigate alleged sex discrimination in *Board of Education of the Bowling Green City District v. HEW, supra*, and *University of Toledo v. HEW, supra*. In these nearly identical opinions, Judge Walinski ruled that HEW lacks the authority to investigate the employment practices of the plaintiff in order to determine an educational institution's *overall* compliance with Title IX. In the absence of jurisdiction to *regulate* employment practices, HEW similarly had no jurisdiction to *investigate* such practices. Slip ops. at 4-5.

[Defendant's Cases Distinguished]

Defendants' reliance upon *Piasick v. Cleveland Museum of Art*, [13 EPD P 11,474] 426 F.Supp. 779 (N.D.Ohio 1976) and *United States v. City of Chicago*, [9 EPD P 10,085] 395 F.Supp. 329 (N.D.Ill.), *aff'd mem.*, 525 F.2d 695 (7th Cir. 1975), is misplaced. The First Circuit effectively disposed of these cases in *Islesboro School Committee v. Califano, supra*. The *Islesboro* opinion correctly observed that whatever comments were made in *Piasick* were dicta at best. Slip op. at 9-10, *construing* 426 F.Supp. at 780-81 n. 1. The *Chicago* case was inapposite as it concerned financial aid granted under the federal revenue sharing programs, which "embod[y] an entirely different legislative scheme from the Education Act and its Amendments." Slip. op. at 10-11.

[Infection Theory Rejected]

Lastly, defendants invoke what is called the "infection theory," having its genesis in *United States v. Jefferson County Board of Education*, 372 F.2d 836, 884-86 (5th Cir. 1977), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied sub nom. Board of Education of City of Bessemer v. United States*, 389 U.S. 840 (1967) and in *Board of Public Instruction of Taylor County Florida v. Finch*, 414 F.2d 1068, 1078 (5th Cir. 1969). In these Title VI cases,

the courts stated that HEW administrative action may be warranted if it has been demonstrated that the elimination of discrimination against students is impossible without also eliminating discrimination against faculty. However, the court in *Romeo* explicitly rejected the "infection theory" in a Title IX context: "Whatever its validity or significance, however, the possibility of such a discriminatory infection does not authorize HEW to regulate employment practices for their own sake, and that quite clearly is what HEW purports to do through Subpart E of its Title IX regulations." 438 F.Supp. at 1035. The *Isleboro* court agreed, adding that there must be a clear nexus between the sexual discrimination against employees and its effect upon students. Slip op. at 11.

***5** Accordingly, it is

Ordered that defendants' motion to dismiss or, in the alternative, for summary judgment, is denied.

It is Further Ordered that plaintiff's motion for summary judgment is granted.

It is Further Ordered that the regulations set forth in 45 C.F.R. §§ 86.51 to 86.61, inclusive, are declared invalid, void, and of no effect whatsoever.

It is Further Ordered that defendants, their agents, employees, and persons acting in concert or participation with them are permanently enjoined from terminating or refusing to grant, or attempting to terminate or refuse to grant, federal financial assistance to plaintiff for any alleged noncompliance with said regulations.

So Ordered

All Citations

Not Reported in F.Supp., 1979 WL 285, 19 Fair Empl.Prac.Cas. (BNA) 1505, 20 Empl. Prac. Dec. P 30,198

Footnotes

[1] The complainant, Elaine Dove, alleged that after receiving tenure as a teacher of special education with the plaintiff North Haven Board of Education, she left her position following the birth of her second child. One year later, she applied for a position similar to the one she previously had held; when the job was given to another applicant, Dove complained of discrimination on the basis of her parental status and leave for pregnancy. A lawsuit has been filed in this court. *Dove V. North Haven Board of Education*, Civil No. B77-501 (D.Conn., filed Dec. 23, 1977).

[2] Briefly, the following are exempted from 20 U.S.C. § 1681: admissions to educational institutions other than vocational education, professional education, graduate higher education, and public undergraduate higher education (subsection (a)(1)); admission to educational institutions in the process of changing from a single-sex to a co-educational admissions policy (subsection (a)(2)); religious schools if the application of Title IX would be contrary to the organization's religious tenets (subsection (a)(3)); military academies (subsection (a)(4)); admissions to public institutions of undergraduate higher education which traditionally have admitted members of only one sex (subsection (a)(5)); membership in social fraternities and sororities (subsection (a)(6)(A)); membership in voluntary service organizations which traditionally have been limited to members of one sex, such as the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, and Camp Fire Girls (subsection (a)(6)(B)); conferences (and promotions and selections therefor) such as Boys State, Girls State, Boys Nation, and Girls Nation (subsection (a)(7)); father-son, and mother-daughter activities at educational institutions (subsection (a)(8)); and scholarship awards in "beauty" pageants (subsection (a)(9)).

[3] 45 C.F.R. § 86.57 reads in full:

(a) *General*. A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy*. A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability*. A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave*. In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

[4] Many of the arguments presented in these opinions were forecast in Kuhn, "Title IX: Employment and Athletics are Outside HEW's Jurisdiction," 65 *Geo. L.J.* 49, 50-62 (1976).

[5] 42 U.S.C. § 2000d-3 provides in full: Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

[6] *See* note 2 *supra*.

19 Fair Empl.Prac.Cas. (BNA) 1505, 20 Empl. Prac. Dec. P 30,198