No. 74-1318

In the Supreme Court of the United States

OCTOBER TERM, 1975

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL., PETITIONERS

v.

KATIE MAE ANDREWS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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It has come to our attention that on January 26, 1976, this Court granted the motion of the National Education Association for leave to file a brief as *amicus curiae* and that the NEA brief suggests that the writ of certiorari in this case be dismissed as improvidently granted or, in the alternative, that the judgment below be affirmed on the basis of supervening regulations which the United States Department of Health, Education, and Welfare promulgated under Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U.S.C. (Supp. IV) 1681 *et seq.* We are filing this *amicus* memorandum in light of the clear federal interest in the Title IX issue. Since we agree that future cases concerning policies such as the one at issue in this case are likely to be litigated within the context of Title IX and its regulations, 45 C.F.R. Part 86, we

concur in NEA's suggestion that the existence of that statute diminishes the need for resolving the broad constitutional issues briefed by the parties.

1. Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U.S.C. (Supp. IV) 1681 *et seq.*, which became effective on July 1, 1972, provides in relevant part that (20 U.S.C. (Supp. IV) 1681(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 * * *.[1]

As directed by that statute (20 U.S.C. (Supp. IV) 1682), the Department of Health, Education, and Welfare promulgated regulations which were signed by the President and reviewed by the Congress (45 C.F.R. Part 86, as added, 40 Fed. Reg. 24128), and which became effective on July 21, 1975, while this Court had under consideration the petition for certiorari filed by the school district in this case. Certain of those regulations would be applicable to a school district policy such as that at issue here.

Section 86.52 of the Regulations (40 Fed. Reg. 24143) provides:

> A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:
>
> (a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

[1]The record reflects that Drew Municipal Separate School District receives federal assistance in the administration and execution of its educational program (App. 11, 14).

> (b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

In our view, a policy which unqualifiedly excludes, from employment in education, all persons who are parents of illigitimate children has a demonstrable "disproportionately adverse effect" on women; and where, as in the present case, that criterion for exclusion from employment is not validated as a predictor of successful job performance, its use is prohibited under Title IX. As recognized by the Chief Justice in his opinion in *Stanley* v. *Illinois,* 405 U.S. 645, 665:

> In almost all cases, the unwed mother is readily identifiable, generally from hospital records, and alternatively by physicians or others attending the child's birth. Unwed fathers, as a class, are not traditionally quite so easy to identify and locate. Many of them either deny all responsibility or exhibit no interest in the child or its welfare; and, of course, many unwed fathers are simply not aware of their parenthood.[2]

Also applicable to a policy such as the one at issue here is Section 86.57(a)(1) (40 Fed. Reg. 24144), which states:

[2]The district court here, using the same reasoning, found that an unwed parent rule inevitably has an adverse effect on women and illustrated that point with references to the record in this case. The Superintendent conceded the difficulties of identifying unwed fathers and admitted that he had not alerted the staff member who administered the policy to these difficulties (App. 39-40). That staff member thereafter testified that she knew that a certain male teacher's aide was not the father of an illegitimate child, "because he is married" (App. 55). A disparate sexual effect is thus inevitable even though the rule itself professes neutrality.

(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; * * *

To the extent that the effect of an employment policy such as that applied by Drew Municipal Separate School District is to treat unmarried females differently from unmarried males, it would also violate this provision.[3]

2. Although Title IX has not been interpreted in any court action of which we are aware, the regulations under that Title generally follow the Equal Employment Opportunity Commission's Sex Discrimination Guidelines which have been upheld in other factual contexts by several courts of appeals.[4] Those guidelines, which are promulgated under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e *et seq.*, indicate that an employer may not use employment criteria which restrict the employment opportunities of women on the basis of marital status but are not equally applicable to

[3]In addition, Section 86.60(a) of the Regulations (40 Fed. Reg. 24144) prohibits a recipient of federal financial assistance from making pre-employment inquiry as to the marital status of an applicant, including whether the applicant is "Miss or Mrs."

[4]*Gilbert* v. *General Electric Co.*, 519 F.2d 661 (C.A. 4), certiorari granted, Nos. 74-1589 and 74-1590 (argued January 19 and 20, 1976); *Wetzel* v. *Liberty Mutual Insurance Co.*, 511 F.2d 199 (C.A. 3), certiorari granted, No. 75-1245 (argued January 19, 1976); *Communications Workers of America* v. *American Telephone and Telegraph Co.*, 513 F.2d 1024 (C.A. 2), petition for certiorari pending, No. 74-1601; *Hutchison* v. *Lake Oswego School District*, 519 F.2d 961 (C.A. 9); *Farkas* v. *Southwestern City School District*, 506 F.2d 1400 (C.A. 6), affirming 8 E.P.D. par. 9619 (S.D. Ohio); *Holthaus* v. *Compton & Sons, Inc.*, 514 F.2d 651 (C.A. 8). See also *Tyler* v. *Vickery*, 517 F.2d 1089 (C.A. 5).

men.[5] Of course, under Title VII, an employment policy involves a discrimination on the basis of sex even though it applies only to some women if it does not apply to men. See, *e.g.*, *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542; *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (C.A. 7), certiorari denied, 404 U.S. 991.[6] Moreover, under Title VII, an employment criterion which has a substantial statistically disparate effect against a protected class is in *prima facie* violation of the Act. *E.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424.

CONCLUSION

Since it is likely that the specific provisions of Title IX and its regulations will be dispositive of future cases concerning fact situations similar to those of this case and may well govern the instant case, we agree with the suggestion of *amicus* NEA that it would be appropriate

[5]See 29 C.F.R. 1604.4(a), which provides as follows:

> The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

[6]The Title VII sex discrimination guidelines provide that an employment policy which excludes from employment applicants or employees because of pregnancy is in *prima facie* violation of the statute. 29 C.F.R. 1604.10(a). That guideline does not distinguish between married and single women, and it has been held that Title VII prohibits discrimination against pregnant single women equally with such discrimination against pregnant married women. *Doe* v. *Osteopathic Hospital of Wichita*, 333 F. Supp. 1357 (D. Kan.). While that guideline is not directly applicable to the facts of this case, the policy at issue would seem to apply to an unwed female who became pregnant during the period of employment or at the time of application.

for the Court to dismiss the writ of certiorari as improvidently granted.

Respectfully submitted.

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Equal Employment Opportunity Commission.

FEBRUARY 1976.