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ABSTRACT

Discrimination against women in public employment may soon be coming to an end. Since 1972, when the Equal Opportunity Act was expanded to include public schools, the cause of women's rights has been gaining momentum. Today, although there are no quotas for women and men in education, many districts are under affirmative action mandates to move toward full equality of women with men. The recent cases cited here lead to the conclusion that any difference in treatment between male and female teachers will be regarded as discrimination and vigorously prosecuted by the courts. Such differences in the standards applied to the conduct of teachers outside the classroom have opened up other questions related to sexual behavior and sexual choice by educators. The old common-law rules permitted teachers to be held to high moral standards even in their out-of-school behavior on the theory that the teacher was a moral exemplar in the community. Recent decisions seem to indicate a departure from this rule, and its replacement by one holding that the only basis for dismissal of a teacher is conduct adversely affecting the capacity to perform his or her inschool duties. (Author)

A Legal Memorandum

NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS
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GENDER AND SEXUAL MORES IN EDUCATIONAL EMPLOYMENT

Moving in on the coattails of the civil rights revolution, the women's liberation movement scored a major breakthrough in 1972 with wide-ranging legislation and court decisions for educational employment and educational opportunity. We will be considering here only the former, since the latter applies to women's rights in higher education.

Major Breakthrough in Women's Rights

In an Idaho case[1] the Supreme Court held that a state statute that said when individuals were equally qualified to administer decedents' estates, males should be given preference before females was violative of the equal protection of the laws. Then, in March of 1972, the Congress extended for the first time the provisions of Title VII of the federal Civil Rights Act of 1964 to schools and colleges. Among other things, the legislation makes it unlawful for an employer to discriminate against anyone with respect to compensation, terms, conditions or privileges of employment, or with respect to promotions on account of race, color, religion, sex or national origin. With respect to education, the President's Task Force on Women's Rights concluded in 1969: "Discrimination in education is one of the most damaging injustices women suffer. It denies them equal education and equal employment opportunity, contributing to second-class self-image." Today, under Title IX of the Education Amendments of 1972, any district that discriminates against women in employment or promotion will risk losing its federal funds pending investigation of the charges. For example, a board of education may not legally advertise under sexually-different columns for a teacher if the work can be done equally well by either sex. (Under the Act, a male who applied for the job of "stewardess" was "aggrieved" when he was denied employment because he was a male.) And the teacher who was told she must lengthen her mini-skirt was discriminated against because of the double standard in a district where no such provisions on dress were applied to male teachers.

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1 *Reed v. Reed*, 92 S.Ct. 251, 1971.

Distinctions in employment can be made only when the requirements of the job bear a reasonable relationship to the work assignment. A New York district required prospective audiovisual technicians to pass a test demonstrating ability to lift 25 pounds with one hand and 20 pounds with the other. When women applicants objected to the test, the district was able to show that the job required lifting audiovisual equipment, and the test, while perhaps favoring men, was nevertheless constitutionally applied to women applicants.[2]

Child-bearing, Child-rearing Leaves

One source of particular complaint in education for many years has been the school rule that requires a female pregnant teacher to take mandatory leaves of absence for child-bearing. To the probationary teacher, such a rule resulted in loss of the position, while for tenured teachers, the loss of a year without pay and re-application for employment was not unusual. In 1974, however, the Supreme Court found the practice of applying a blanket rule to all pregnant teachers unsupportable and a substantive denial of due process of law.[3]

Each pregnancy, said the Court, is "sui generis" (the only one of its kind), and any attempt by the board of education to set an arbitrary termination or return date for all pregnant teachers must give way to more logical constraints. Pregnancy is not a "disability" unless it actually results in lowered employment competency. The board is entitled to call a physician for periodic reports on the employability of the teacher, but it cannot presume that pregnancy, per se, is grounds for discrimination against a female teacher.

On the same basis, a male teacher who challenged a district's exclusively female maternity leave policy was successful in obtaining paternity leave on an equal basis.[4] "Child-rearing" leave has thus become an item for negotiations between teachers' associations and boards of education in an increasing number of school districts.

Promotions

Despite the single salary schedule, female teachers have been often discriminated against in education, doing the same work in many instances as men, but at lower salaries. The courts have directed school districts to repair such inequities and, further, to work toward a more realistic balance between men and women in school administrative positions. Under affirmative action orders, school districts are now being directed to open all employment

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2 *Sontag v. Bronstein*, 335 N.Y.S. 2d 182, 1972.
3 *LaFleur v. Bd. of Educ., Cohen v. Chesterfield Co.*, 74 S.Ct. 791, 1974.
4 *Danielson v. Bd. of Higher Educ.*, 4 FEP Cases 885, 1972.

categories to both sexes. While there are no "quota" figures so far for men/women in school administration, such as on racial minorities, the mandate is nevertheless clear that women must be accorded the opportunity to catch up with men in this respect. Districts have been ordered to provide in-service opportunities for women in direct proportion to their discriminatory practices in the past. A means of channeling complaints about sex bias must be available to every staff member, and that means well-publicized. Freedom from sex bias must also be incorporated into the district's evaluation forms for all employees. Periodic reports of the district's progress toward full equality between the sexes are routinely required in most districts.

One obvious area of discrimination is that of higher standards of moral conduct for female than for male teachers. In Nebraska, the board terminated a female teacher "for conduct unbecoming a teacher," though all the evidence against her was circumstantial. Testimony revealed that, on several occasions, young single men and women and married couples--friends of the teacher's married son who lived nearby--stayed overnight in her apartment, since hotel accommodations were scarce in the community. There was no proof of impropriety, said the court. Idle speculation does not provide a sound factual basis for the board's inference that "there was a strong potential for sexual misconduct." Nor had the board shown the connection, if any, between the teacher's alleged conduct and her teaching competency, which was not at issue. Such accusations on the part of the board invaded the teacher's rights of privacy and association. The court ordered the teacher paid for loss of time and trouble in defending her name against unsubstantiated charges by the board.[5]

By contrast, a male teacher in Iowa, father of two, became involved in an affair with a female teacher and was discovered in a compromising situation by the latter's husband. Upon his offer to resign, the board voted unanimously not to accept his resignation. The state board of education, however, by a split vote moved to revoke the teacher's certificate. The Iowa Supreme Court reversed the state board, using in part this line of reasoning:

> The board contends the fact that [the teacher] admitted adultery is sufficient in itself to establish unfitness to teach. This assumes such conduct automatically and invariably makes a person unfit to teach. We are unwilling to make that assumption . . . Overwhelming and uncontroverted evidence of local regard and support for [the teacher] is a remarkable testament to the ability of a community to understand, forgive and reconcile. [Witnesses including the minister, parents, and administrators had all vouched for the teacher's character and fitness to teach.][6]

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5 *Fisher v. Snyder*, 346 F.Supp. 396, 1972.
6 *Erb v. State Board of Education*, 216 N.W.2d 339, 1974.

Historically, the socially differing roles of men and women have worked to require a higher level of conduct from female than from male teachers. The courts are asserting that boards may not enforce a double standard of conduct requiring more circumspect behavior for women than for men on the same faculty.

Homosexuals as Teachers

The question of what conduct is sufficiently immoral before the law to cost a teacher his job came before a federal court in Oregon in 1973 in an unusual case. A female teacher, who admittedly was competent in the classroom, was dismissed shortly after the beginning of her second year. Although there was no allegation that she was derelict in the classroom, the teacher was dismissed because she was "a practicing homosexual." The board based its action upon a section of the law permitting boards to dismiss teachers for "immorality," which in this case was not further defined. The federal district court found the statute unconstitutionally vague, and said:

> Immorality means different things to different people, and its definition depends on the idiosyncrasies of the individual school board members. It may be applied so broadly that every teacher in the state could be subject to discipline. The potential for arbitrary and discriminatory enforcement is inherent in such a statute . . . (Quoting with approval from an earlier case:) "It would certainly be dangerous if the legislature could set a net large enough to catch all offenders, and leave it to the courts to step inside and say who would be rightfully detained and who should be set at large."[7]

The board lost its case when it admitted that the classroom competency of the teacher was not at issue. It appears, however, that a teacher may become so notorious in advocating equal rights for homosexuals that his employment with the state may be placed in jeopardy.

In Maryland, the board transferred a male homosexual teacher to a post outside the classroom, and he brought action to be reinstated. The federal district court held that mere knowledge that one is a homosexual is insufficient to justify transfer or dismissal. But where a teacher goes beyond the needs of his defense in promoting on radio, television, and in public the rights of homosexuals as a class, a refusal by the board to rehire him was not arbitrary or capricious. On appeal, the additional question of fraud was introduced. (The teacher in filling out an application blank for employment in the district had neglected to cite his homosexuality.) Said the Fourth Circuit Court of Appeals in denying the teacher relief:

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7 *Burton v. Cascade School Dist.*, 353 F. Supp. 255, 1973.

> We hold that Acanfora's public statements (about homosexuality) were protected by the First Amendment. We conclude, however, that he is not entitled to relief because of material omissions in his application for a teaching position. Consequently, without reaching Acanfora's claim that his denial of a teaching position is unconstitutional, we affirm the district court, but on different grounds.[8]

Because his appearances on television and radio had not resulted in substantial impairment of his capacity as a teacher, the teacher's statements were protected and did not justify the action taken by the board. But one charged with fraud may not challenge the constitutionality of the statute which required him to furnish the information that he misrepresented. Even though he knew that his application would be rejected if he admitted his homosexuality, Acanfora was under a duty to reveal his own homosexuality, and in failing to do so on the application blank, he had purposely misled the school officials who later found out. As a result, he could not invoke court assistance because he did not come into court with clean hands.

A teacher may become unemployable where surgical changes result in a male becoming a female, as happened in New Jersey. The evidence established that retaining the teacher in the school system following sex-change surgery would result in potential emotional harm to students aged 10 to 12. The board was ruled to have acted within its rights in dismissing the teacher based on "incapacity," that term being directly related to fitness to teach.[9]

Conclusions

Discrimination against women in public employment throughout our nation's history may soon be coming to an end. Since 1972, when the Equal Opportunity Act was expanded to include public schools, the cause of women's rights has been gaining momentum. Today, although there are no quotas for women and men in education, many districts are under affirmative action mandates to move toward full equity of women with men. The recent cases cited in this Memorandum lead to the conclusion that any difference in treatment between male and female teachers will be regarded as discrimination and vigorously prosecuted by the courts.

Such differences in the standards applied to the conduct of teachers outside the classroom have opened up other questions as well, related to sexual behavior and sexual choice by educators. The old common law rules permitted teachers to be held to high moral standards even in their out-of school

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8 *Acanfora v. Bd. of Education of Montgomery County*, 491 F.2d 498, 499, 1973. cert. denied. U.S., October, 1974

9 *In re Grossman*, 316 A. 2d 39, 1974.

behavior on the theory that the teacher was a moral exemplar in the community.[10] Recent decisions seem to indicate a departure from this rule, and its replacement by one which holds that the only basis for dismissal of a teacher is that conduct which adversely affects his capacity to perform his in-school duties.

While this may still mean that, in some instances, a teacher's sexual proclivities may be cause for dismissal, it certainly shifts the burden of proof to the school in such cases, making such dismissals far more difficult to sustain.

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10 See e.g. *Horosko v. School Dist. of Mt. Pleasant Township*, 6 A. 2d 866 (Pa. 1939).

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