2-19-1980

Appellant's Brief

Lewis M. Steel '63

80-7013

To be argued by:

LEWIS M. STEEL

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CARMEN V. RODRIGUEZ,

Plaintiff-Appellant,

-against-

BOARD OF EDUCATION OF EASTCHESTER UNION FREE SCHOOL DISTRICT, ROBERT W. YOUNG, Superintendent of Schools of the Eastchester Union Free School District, and RONALD S. LOCKHART, President of the Board of Education of Eastchester Union Free School District,

Defendants-Appellees.

APPELLANT'S BRIEF

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From the desk of
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use in reply

Marshall v Kirkland.
5th Cir 1979

20 FEP 1437

1. gender based discrim
unconstitutional - 1983
claim

20 FEP at 1448-9

2. Atty fees for pro se
case. 20 FEP at 1451
under §1983 -

→ under §1988 (Atty fees)

See also Jepsen v Florida Bd of Regents 610 F2d 1379 (5th 1980)
Standard is not Administrator's "Abuse of discretion."

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Jepsen cites ~~a~~ 2d Cir Case. Case should be treated like all FHCL matters

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STATEMENT OF THE ISSUES

1. Whether officials of a public school system may, consistent with Title VII and 42 U.S.C. § 1983, transfer a teacher within the system on the basis of sex.

2. Whether the District Court erroneously dismissed appellant's complaint.

3. Whether appellees had a good faith basis for renewing their motion to dismiss after it had initially been denied by the court below.

4. Whether this Court should award appellant attorney's fees and the costs of this appeal.

PRELIMINARY STATEMENT

This is an appeal from an order* dismissing appellant Carmen V. Rodriguez' complaint which alleges that she was discriminated against on the basis of her sex. The order was entered before the appellant had the opportunity to engage in discovery and before trial.

Dr. Rodriguez alleges in this action that the appellees (hereinafter collectively referred to as the "Board of Education") discriminated against her on the basis of sex by transferring her from the single public junior high school operated by the Board of Education where she had taught for the past 21 years, to an elementary school in the district.

Prior to the dismissal of this action, Dr. Rodriguez, an art teacher, had submitted affidavits to the court below which affirmed that she was more qualified to teach art in the junior high school than the male art teachers who were not transferred. Moreover, affidavits were submitted to the court below in which it was asserted that the Board of Education only employed females as art teachers in its elementary schools and that this pattern of sexual employment was the result of administrative preference. Despite these evidentiary submissions, which will be detailed in this brief, the court below dismissed the complaint on the ground that it failed to state a cause of action.

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* Memorandum Decision, 79 Civ. 3619 (HFW), November 20, 1979 (NP #653), Henry F. Werker, D.J.

Appellant contends in this brief that the decision below should be reversed and that the court should be instructed to proceed with this case expeditiously and in conformity with the teachings of this Court in Robinson v. 12 Lofts Realty, Inc., ___ F.2d ___, Docket No. 79-7437 (2d Cir. decided Nov. 21, 1979). Appellant also contends she is entitled to attorney's fees and the costs of this appeal.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

This civil rights action was commenced by order to show cause dated July 12, 1979. On the basis of the moving affidavits and attached exhibits as well as the verified complaint, the Board of Education was ordered to show cause why it should not be preliminarily enjoined from transferring Dr. Rodriguez from her position as a junior high school art teacher to an elementary school within the district (A7).* In response, the Board of Education cross moved for an order dismissing the action (A40).

At the hearing on the motion for preliminary injunction, Dr. Rodriguez testified. In opposition to the motion, the Board of Education submitted affidavits. At the conclusion of the hearing, the district court denied the

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* (A __) refers to a page in the Joint Appendix.

preliminary injunction. At the same time the court denied the Board of Education's motion to dismiss the complaint. In its ruling, the court stated that if Dr. Rodriguez could provide it with vaild statistics, "there may be a cause of action" (A88).

Approximately two weeks thereafter, appellant served and filed her first interrogatories and request for production of documents. Among other things, the interrogatories requested statistical information designed to meet the court's objections to the statistical data submitted in support of the preliminary injunction motion. One month later, the Board of Education responded by filing a "motion for protective order and to strike demand for damages" (A103). In the Wherefore clause of an affirmation in support of that motion, appellees' counsel asked that the complaint be dismissed (A106).

On November 20, 1979, the court below issued a memorandum decision and order in which it dismissed the complaint. Although the decision stated that the motion to dismiss for failure to state a claim was made pursuant to Fed. R. Civ. P. 12(b), the memorandum contains a discussion of the testimony, affidavits and exhibits which had been submitted to the court. In effect, therefore, the district

court apparently converted the Rule 12 motion into a Rule 56 summary judgment motion. Appellant filed a timely notice of appeal from the court's order.

THE CONTENTS OF THE RECORD AT THE TIME THE COURT BELOW RULED

1. The Verified Complaint

The verified complaint invokes jurisdiction under 42 U.S.C. §2000(e), et seq. and 42 U.S.C. §1983. The complaint alleges that, "defendants have engaged in unlawful discrimination against plaintiff by transferring her from her position as an art teacher in the district's public junior high school to the position of art teacher in one of the district's elementary schools on the basis of her sex" (A4) (emphasis added). The complaint seeks injunctive relief (restoration to her regular teaching position at the junior high school), monetary damages and other ancillary relief as provided for by statute.

The complaint also alleges that an appropriate charge was filed with the Equal Employment Opportunity Commission (A4). As the court below noted, the Commission issued its "right to sue" letter prior to the hearing on the preliminary injunction (A86, A113).

2. The Affidavits and Exhibits in Support of the Preliminary Injunction Motion

A. Appellant's Qualifications. Dr. Rodriguez was hired by the Board of Education in September 1958, to teach seventh grade general art. She has, since that time, taught art in the single junior high school in the district (A8).

In 1959, in order to better equip herself to teach art to middle school students, Dr. Rodriguez entered Columbia University and obtained a Master of Arts degree. Ten years later, the Board of Education granted her two sabbaticals to begin an in-depth study of art programs for middle school students. This study, encompassing an examination of junior high school art programs throughout the country, culminated in a doctoral dissertation entitled "A Model Arts Program for the Middle School of Eastchester School District Number 1." In 1979, Dr. Rodriguez received her doctoral degree in art and art education from Columbia University (A8).

The evaluations Dr. Rodriguez has received for her teaching performance have been uniformly excellent (A30-1). In the words of the junior high school Principal Savage, Dr. Rodriguez "is able to discover and develop to the fullest the talents of her students" (A31).

B. The Communications Between the Parties Concerning the Transfer. Dr. Rodriguez was notified on April 5, 1979 that she was going to be transferred to an elementary school to teach art to grade school children (A8). At that time, the junior high school principal, Dr. Mary Savage, told Dr. Rodriguez that the action was being taken because of a projected decrease in student population in the middle school. As a result, Savage said only two art teachers would be needed. Dr. Rodriguez asked why she was chosen for transfer instead of one of her male colleagues. Savage responded by saying that "they wouldn't have a male grade school art teacher" (A9).

Dr. Rodriguez immediately wrote to the president and members of the School Board, the Superintendent of Schools and the Board attorney protesting the transfer. Her letters, however, evoked no explanation for the proposed action (A9). Counsel for the Board merely replied that if appellant wanted any citations or authority in regard to the Board's powers, she should contact her own lawyer (A18).

On April 29, 1979, appellant again wrote appellees, informing them that another male art teacher, Mr. Veldhuis, who taught in the high school, should also be considered as an alternate possibility for transfer (A19). At the same

time, Dr. Rodriguez submitted materials attesting to her professional standing and expertise in the middle school area, including newspaper articles and commendation letters from parents, administrators and former students (A9-10).

Five days later, Dr. Rodriguez learned that Mr. Veldhuis, in fact, was going to be transferred to the junior high school as its third art teacher. Veldhuis had 11 years seniority, approximately half that of Dr. Rodriguez. Appellant immediately wrote a letter of protest (A20). On May 7, 1979, she received formal notification of transfer (A21).

C. The Comparative Qualifications of the Junior High School Art Teachers. The preliminary injunction moving papers contain proof that comparatively, Dr. Rodriguez is far more qualified to teach in the junior high school than the male teachers. This proof comes from two sources, the affidavit of Professor Bette Acuff of the Department of Art and Education, Teachers College (A32-3), and the affidavit of Water Dzubak, who was the junior high school's guidance counselor from 1962 to 1978 (A37-9).

The Dzubak affidavit compares Dr. Rodriguez' ability to the two male teachers who have remained in the school, Mr. Michael Petti and Mr. Ralph Chestnut, as well as the one male teacher who is being transferred into the junior high school, Mr. Joseph Veldhuis. Among other things,

Mr. Dzubak states that "Dr. Rodriguez' classes cover a broad spectrum of the requirements for both 7th and 8th grade general art at 7th grade level. These activities include drawing, painting, a variety of crafts and a broad cultural program including art history and color and design concepts. Hers is a unique, interdisciplinary approach to art education relating art to the totality of the adolescent's experiences" (A37).

By contrast, Mr. Dzubak points out that the three male teachers in question are basically crafts teachers who do not have the broad spectrum of knowledge possessed by Dr. Rodriguez (A37).

Given the disparity of skills between Dr. Rodriguez and the three males who are presently scheduled to teach in the junior high school this fall, Mr. Dzubak concludes:

> An expecially disturbing aspect of this transfer is the fact that Dr. Rodriguez is a woman and the three teachers who remain in art in the junior high school are all men. Such a transfer can only be explained by administrative yielding to sex sterotyping in putting a woman to teach art in the grade schools. All of the art teachers are licensed in K-12 art certification but we have only one teacher in the entire system with Dr. Rodriguez' credentials, ability and experience at the middle school-junior high school level. (A38-9)

Professor Acuff in her evaluation of the junior high school program also was able to make a comparison between Dr. Rodriguez' work and that of the two male

teachers who were working at the junior high school level prior to the conclusion of the past school year. Professor Acuff concluded:

> Dr. Rodriguez's art program and work at the junior high school was exceptional, and much better suited to the needs of the junior high school students than the other programs, as evidenced by the student work I saw prepared under the direction of the other art teachers in the school. (A32)

The views of Professor Acuff and Mr. Dzubak are fully supported by the letter of Louis N. D'Ascoli to Board president Lockhart, dated April 29, 1979 (A24-5). Dr. D'Ascoli was the principal of the combined Eastchester Junior and Senior High School from approximately 1972 to 1977 (A11). Dr. D'Ascoli states in his letter that Dr. Rodriguez' transfer would create "a major void" in the secondary school art program. The letter makes clear that Dr. Rodriguez' skills are particularly needed at the junior high school level and further that the skills of the other art teachers in the junior high school would be more in keeping with the needs of the elementary school students. After analyzing in somewhat technical terms Dr. Rodriguez' abilities as they relate to the junior high school program, Dr. D'Ascoli concludes:

> By keeping her at the junior high school level the entire K-12 art program would keep its necessary continuity and the broadening range of developing skills in art would be enhanced. (A25)

D. Statistics. Dr. Rodriguez was the only female out of three art teachers in the junior high school. She is being transferred to one of the elementary schools. Since Dr. Rodriguez' association with the school district, a male art teacher has never taught in any of the elementary schools in the district (A11). Moreover, Dr. Rodriguez is being replaced in the junior high school by another male art teacher (A10).

In the district's three elementary schools, the teachers are overwhelmingly female. In the last school year, for example, 95% of the Waverly School's teachers were female. Only one man taught in that school. The Greenvale Elementary School had only two male teachers; 94% of that school's teachers were women. At the Anne Hutchinson School, 66% of the teachers were women. Overall, 84% of the elementary school teachers throughout the system were women. By contrast, the junior high school had 54% female teachers. At the high school level, women were in the minority. Thirty-four out of that school's sixty-five teachers, or 52% of the staff, were men (A11).

E. The Irreparable Harm Flowing from the Transfer. In her affidavit in support of this motion, Dr. Rodriguez states how she would be harmed if transferred:

> My transfer to an elementary school at this time would cause me severe professional and emotional harm. I have trained for years to

> become a competent teacher of middle school children and all of my advance work has been aimed toward this goal. For me to start all over again on an elementary school level would require another life-time of effort. Given all of my training, this transfer is in effect a demotion for me and is viewed that way by my colleagues. My colleagues, since hearing of my transfer, have expressed their regret at my loss of position. (A12)

Mr. Dzubak's affidavit supports Dr. Rodriguez assertions. He states: "The transfer would be especially damaging to Dr. Rodriguez who has spent more years than most expanding her education and skills to educate the adolescent she has known for 20 years. To transfer her to an elementary school which does not need these skills would have a harsh effect on her personally and professionally. Since the transfer has no professional justification and ignores the generally accepted rights of seniority, it is viewed within the school system as a demeaning and unjustified demotion" (A38).

3. The Board's Motion to Dissmiss the Complaint

Appellees responded to the moving papers by filing a motion to dismiss. The motion alleged certain jurisdictional defects (A42-3) which were rejected by the court below (A113), and asserted that the complaint failed to state a claim upon which the relief requested could be granted (A42).

Before the return date of the preliminary injunction motion, appellees also filed an affidavit from Superintendent of Schools Young.* This affidavit pointed out that Dr. Rodriguez' transfer did not violate New York's tenure laws which were on a district-wide kindergarten through twelfth grade basis, nor did the transfer diminish the appellant's salary, benefits or seniority rights. According to Superintendent Young, "[t]he difference is the site of her work and the age of her pupils" (A53).

Young then asserted that a conflict "seems to exist under the surface between Dr. Mary Savage and the plaintiff, Dr. Carmen Rodriguez" (A54). Further the Superintendent stated that he received a recommendation from Dr. Savage to have Dr. Rodriguez transferred from the junior high school to the Anne Hutchinson Elementary School (A55). Superintendent Young also stated that at the time, he knew that one art teacher throughout the system would no longer be needed due to a drop in art enrollment. The Superintendent pointed out that the art teacher with the lowest seniority worked in one of the elementary schools. Therefore, that art teacher would

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* Superintendent Young was not in New York at the time the affidavit was filed. Appellees' counsel therefore filed a covering affidavit stating that Young's unsigned affidavit reflected his views. When Young returned to New York, he executed a copy of the affidavit and filed it with the Court (A59).

be replaced by an art teacher from the junior or senior high school. Moreover, Superintendent Young asserted that the elementary school principal was asked who he wished to have in his school, and stated that his choice was Dr. Rodriguez (A56).

In conclusion, Superintendent Young stated that he understood Dr. Rodriguez considered the transfer an imposition. But he said, the matter involved what he believed was "sibling rivalry" between sisters (A57). Having stated this, Superintendent Young then asserted that he did not make his decision based on these considerations but rather on other factors, including Dr. Rodriguez' special skill in the field of two-dimensional art, which was needed in the elementary school system (A57).

4. The Testimony at the Preliminary Hearing

At the preliminary hearing Dr. Rodriguez testified. Because Superintendent Young had raised some question as to her qualifications in crafts, the appellant testified with regard to her background in that field, stating that she had studied crafts including jewelry, the lost-wax process, casting, welding, metalwork, ceramics, and silk screen printing at Columbia University, and that she had also studied crafts at the California College of Arts & Crafts and had studied garment construction and design at the

Traphagen School of Fashion (A65). Then, in her testimony, Dr. Rodriguez described the sophisticated nature of her junior high school art classes (A67-70).

Additionally, Dr. Rodriguez testified that she was never told by anyone that she was being transferred because she could not hold her own in the junior high school in the area of crafts (A71), nor had anyone ever told her that the reason for her transfer was a personality conflict with the junior high school principal (A72).

On cross examination, Dr. Rodriguez testified that she was the art teacher in the District who was a specialist in the middle school child, and that it had been her responsibility to ensure that in the field of art, children made the transition from elementary school to high school (A78-9). Moreover, Dr. Rodriguez testified that at one point in the past, the principal of the high school tried to have her transferred to his school, but Savage resisted, claiming she needed Dr. Rodriguez' expertise in the middle school (A79). Additionally, Dr. Rodriguez testified that the Anne Hutchinson Elementary School principal told her he had not requested that she be assigned to his school (A79-80).

Asked what her damages were on cross examination, Dr. Rodriguez answered that the transfer was a traumatic experience because all of her specialized training was being

shunted aside (A83). She analogized the situation to one in which a heart specialist was asked to become a pediatrician (A83).

5. The Findings of the Court Below at the Close of the Preliminary Hearing

After hearing Dr. Rodriguez' testimony, the court found: "I think it is without doubt for a person of Dr. Rodriguez' sensitivity and her ability a great and traumatic shock that she should be transferred" (A88). The court, however, did not see "any irreparable injury," and felt there was "very little chance of success on the merits." The court continued by stating that it had, "A basic feeling [. . .] that we should leave to Superintendents of Schools the problem of running the schools." Nonetheless, the court declined to dismiss the complaint in order to give the appellant the opportunity to present "valid statistics" (A88).

6. Appellant's Interrogatories and the Appellees' Response

Appellant's interrogatories, filed shortly after the above ruling, specifically sought information which could be employed to develop a statistical analysis of the Board of Education's assignment of teachers by sex throughout its

school system.* The questions also sought to elicit information by which counsel could objectively compare the qualifications of the junior high school art teachers, including appellant and those who were not transferred (A94). Information was also sought which would enable a finder of fact to determine whether the Board of Education in the past had made transfers from junior high school to elementary school in conformity with seniority (A95). The Board of Education was also asked to state who else was considered for transfer other than appellant and answer specific questions concerning the consideration given to these other persons (A96). Appellees were requested to reveal specific information concerning the mechanics of appellant's transfer and to identify all documents relating thereto (A96-7). Other questions in the interrogatories were designed to enable a finder of fact to determine whether the defenses raised at the time of the preliminary injunction hearing were pretextual.

In response, appellees filed a motion for a protective order and claimed in their supporting brief that, "plaintiff's interrogatories as a whole are improperly

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* At the hearing the court stated it would need to know the grade level certificates of the various teachers in order to determine which schools they were employable in (A87-8). The interrogatories sought this information (A93-5).

designed to prepare her case," and argued that "before the defendants should be put to the expense of preparing answers to interrogatories, the plaintiff should first establish she has a case."* Additionally, appellees' counsel estimated that it would take at least 90 hours to answer the interrogatories (A106).**

The moving affidavit also asked, without asserting any reasons, that the complaint be dismissed (A106).

7. The District Court's Memorandum Decision

In its November 20, 1979 decision, the court below rejected appellees' jurisdictional attack upon the complaint (A113). Despite the fact no discovery had taken place due to the outstanding motion for protective order, the district court launched into an evidentiary analysis of the case.

In this analysis, the court stated that appellant's only evidence of discrimination was her statistical evidence

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* This document is entitled "Memorandum of Law in Support of Defendants' Motion For a Protective Order and to Strike Demand for Damages". It is part of the Record on Appeal (Document 9). The reference appears at p. 4.

** In its moving papers, appellees did not allege that they attempted to negotiate with appellant's counsel concerning the interrogatories consistent with Local Rule 9(f) of the Rules of the Southern District of New York. The failure to make such an allegation is consistent with the facts.

(A114). Additionally, the court pointed out that "the only injury alleged by Dr. Rodriguez is severe professional and emotional trauma since her training is geared to middle school children" (A114).

The court, for purposes of deciding this motion, also accepted as true the Board of Education's explanation of why appellant was transferred. Despite the fact that the Superintendent was never subjected to cross examination, nor had he been required to turn over any documentation relating to his actions, the court found that he acted on the recommendation of the junior high school principal (A112), and that he considered certain factors in coming to his decision, including appellant's alleged lack of rapport with her principal (A117, fn4).

Basically, however, the court dismissed the complaint because it believed under Title VII and under 42 U.S.C. §1983, a cause of action would not arise unless a teacher could show that an adverse administrative action caused "loss of salary, benefits, seniority or tenure" (A114). The court concluded:

> Even if plaintiff's sex was one of the factors considered by [the superintendent] in reaching his determination, the transfer of a woman for valid educational reasons without any accompanying adverse economic impact on her and without any indication or allegations of bad faith does not warrant the interference of a court in the decision-making process of a school system. (A116)

Appellant asserts that the court below erred by engaging in a fact finding process at this stage of the proceedings. It compounded this error by overlooking appellant's factual submissions and by applying erroneous legal standards to Title VII and 42 U.S.C. §1983 complaints.

ARGUMENT

I.

APPELLANT'S COMPLAINT SHOULD NOT HAVE BEEN DISMISSED UNDER EITHER RULE 12 OR RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

The court below in its memorandum decision stated that it was being presented "with a renewed motion to dismiss for failure to state a claim and for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)" (A111). Under this rule the complaint must be construed in the light most favorable to plaintiff and its allegations must be taken as true. Jenkins v. McKeithen, 395 U.S. 411, 421-2 (1969).

Here, appellant alleged she was transferred from the Board's junior high school to one of its elementary schools "on the basis of her sex." The following proscriptions against discrimination are contained in 42 U.S.C. §2000e-2(a):

> It shall be an unlawful employment practice for an employer -

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex or national origin.

Transfers clearly fall within the scope of these sections which prohibit discrimination not only in hiring and firing and with respect to compensation, but also with respect to "terms, conditions, or privileges of employment." Moreover, the statute prohibits discriminatory actions which "would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [her] status as an employee." As far as counsel is aware, no court has held that an employer is free to discriminate with regard to transfers. Instead, the courts, applying traditional civil rights standards with regard to burdens of proof, have attempted to determine in each transfer case whether in fact discrimination exists. E.g., United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Whack v. Peabody & Wind Engineering Co., 452 F.Supp. 1369 (E.D. Pa. 1978).

In this case, the court apparently converted appellees' Rule 12(b) motion, sub silentio, into one for a summary judgment. The decision of the court below takes note of factual material submitted to it outside of the pleadings. Having done this, the court was required under Rule 56(c) to deny the motion if there was a genuine issue as to any material fact. Moreover, the court must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought. Jaroslawicz v. Seedman, 528 F.2d 727 (2d Cir. 1975); Judge v. City of Buffalo, 524 F.2d 1321 (2d Cir. 1975); Heyman v. Commerce and Industry Insurance Co., 524 F.2d 1317 (2d Cir. 1975). A trial court simply cannot summarily try the facts. Lemelson v. Ideal Toy Corp., 408 F.2d 860 (2d Cir. 1969).

In this case, appellant has introduced evidentiary materials into the record which bar the granting of summary judgment. These materials include inter alia:

1. Appellant's affidavit that she was told by her own principal in a discussion as to why she was being transferred that, "they wouldn't have a male grade school art teacher." (A9)

2. Affidavits which assert that appellant was the most qualified junior high school art teacher. (A32, A37)

3. Affidavits which state that appellant was the only female junior high school art teacher and that after her transfer she was replaced in the junior high school by a third male art teacher. By contrast, appellant's affidavit states that all the elementary art teachers are female and have been females for the past 20 years. (All, A38-9)

Given this state of the record, appellant is certainly entitled to full discovery on her claims and a trial on the merits. Olson v. Philco-Ford, 531 F.2d 474 (10th Cir. 1976), cited by the court below as authority that Dr. Rodriguez failed to state a claim, in fact highlights the error below. In that case, the court ruled that the plaintiff was "given full opportunity to prove her case. No request for discovery was denied" (531 F.2d at 478). Put simply, the appellant in Olson failed to meet her burden of proof. Here, the district court did not even allow the appellant to attempt to meet her burden of proof.

In justification of its action, the court below advanced three theories. These theories and why they do not comport with law are as follows:

A. The Court Below Erroneously Believed a School Superintendent Could Consider a Teacher's Sex to Her Detriment When Determining Whether to Transfer Her, as Long as He Had Other Valid Educational Reasons

The court below specifically stated in its opinion:

> Even if plaintiff's sex was one of the factors considered by Dr. Young in reaching his determination, the transfer of a woman for valid educational reasons without any accompanying adverse impact on her and without any indication or allegation of bad faith, does not warrant the interference of a court in the decision-making process of a school system. (A116)

Focusing for the moment only on the question whether the consideration of sex passes muster as long as other non-discriminatory factors are also considered, it is clear that the district court's thinking was out of step with civil rights decisional law. See, Robinson v. 12 Lofts Realty, Inc. ___ F.2d _____, Docket No. 79-7437, (2d Cir. decided Nov. 21, 1979) [Title VIII violated if race is one of the motivating factors].

As the court said in Barnes v. Costle, 561 F.2d 983, 990-1 (D.C. Cir. 1977):

> It is clear that the statutory embargo on sex discrimination in employment is not confined to differentials founded wholly upon an employee's gender. On the contrary, it is enough that gender is a factor contributing to the discrimination in a substantial way. That this was the intent of Congress is readily apparent from a small but highly significant facet of the legislative history of Title VII. When the bill incorporating Title VII was under consideration in 1964, an amendment that would have expressly restricted the sex ban to discrimination based solely on gender was defeated on the floor of the House. Like the Fifth Circuit, we take this as an indication of Congressional awareness of the debilitating effect that such a limitation

would have had on any attempt to stamp out sex-based factors irrelevant to job competence. (Footnotes omitted)

Parenthetically, appellant notes that the court below at this stage of the proceedings was in no position to determine whether the Superintendent considered valid educational reasons in making the transfer, as he alleges.

B. The Court Below Erroneously Believed that Adverse Economic Impact is Necessary Before a Title VII Violation Can be Established

The proposition that a complainant in a Title VII matter must show monetary damages before establishing a violation is simply wrong. In this case, appellant will be entitled to injunctive relief if she prevails on the merits. But even where injunctive relief is not appropriate and where a complainant may not be able to prove damages, she is nonetheless entitled to a ruling on the merits if in fact she was discriminated against on the basis of sex. Gillin v. Federal Paperboard Co., Inc., 479 F.2d 97 (2d Cir. 1973). In Gillin this Court was faced with a situation in which the employer failed to consider a woman for a job, but later hired a man with superior qualifications. The Court found that the employer was entitled to hire the male. Nonetheless, the employer violated Title VII when it failed to consider the female applicant.

C. The Court Below Erroneously Believed that Appellant's 42 U.S.C. §1983 Claim Was Defective Because It Did Not Allege "Bad Faith"

The complaint, which seeks both injunctive relief and damages, is brought against the Board of Education and the Superintendent of Schools and Board President in their official capacities (A3-4). According to the court below, the §1983 count in the complaint was defective because it did not allege "bad faith with respect to the superintendent's decision to transfer her" (A116).* Wood v. Strickland, 420 U.S. 308 (1974) is cited for this proposition.

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* In its decision the court, citing Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), recognized that the Board is a person under §1983 A113). 42 U.S.C. §1983 provides:

> Civil action for deprivation of rights
>
> Every persons who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
>
> In this case, appellant alleges that a public body and public officials have discriminated against her on the basis of sex. This allegation makes out a §1983 claim as it alleges that she was deprived of rights protected by both the 14th Amendment to the

(footnote cont'd. on next page)

Wood, however, dealt with a matter entirely unrelated to this situation. In Wood, students of a public school were attempting to hold administrators personally liable for discharging them. The Court determined that school administrators and board members were not immune from suit, but merely were entitled to a qualified good faith immunity. Moreover, in the course of its discussion, the Court pointed out that "immunity from damages does not ordinarily bar equitable relief as well" 420 U.S. at 314 fn. 6. Here, appellant is seeking injuctive relief as well as damages. Moreover, the complaint specifically alleges that appellant was transferred on the basis of her sex. Such an allegation posits bad faith in conformity with Fed. R. Civ. P. 9(b) which permits malice, intent, knowledge and any other condition of mind to be alleged generally. Even if a specific allegation of bad faith is required in the complaint before damages can be awarded against the individual defend-

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(footnote cont'd. from page 25)

United States Constitution [E.g. Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971)] as well as by Title VII.

ants or the Board of Education,* however, the court below merely should have required appellant to file an amended pleading in conformity with Fed. R. Civ. P. 15. In short, the dismissal of the complaint on the ground that it did not specifically allege "bad faith" was totally improper.

The court below also bolstered its decision to dismiss appellant's §1983 count by citing two cases for the proposition that no cause of action arises against a school board which transfers teachers, when it has a discretionary right to do so.

The cases cited below are Kolz v. Board of Education of the City of Chicago, 576 F.2d 747 (7th Cir. 1978) and Murphy v. Board of Education of the City of St. Louis, 455 F. Supp 390 (E.D. Mo. 1978), aff'd, 594 F.2d 869, (8th Cir. 1979). Neither have any relevance to this dispute.

In Kolz, the Board of Education transferred certain teachers after being informed by the Justice Department that the transfers were necessary in order to integrate the system's faculty. Under these circumstances, the Circuit Court affirmed a denial of a motion for preliminary injunction. In Murphy, teachers were transferred pursuant to a

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* This Court's decision in Sala v. County of Suffolk, 604 F.2d 207 (2d Cir. 1979) precludes unforeseeable municipal liability. In contrast to Sala, however, all appellees in this case certainly were on notice that they could not engage in discrimination against their employees based on sex.

court ordered integration plan. In dismissing the case, the court pointed out that the teachers were given ample opportunity to intervene in the prior desegregation case, but had not done so. Neither case stands for the proprosition that teachers may not challenge racially or sexually discriminatory transfers.

II.

THIS COURT SHOULD REVERSE AND REMAND TO THE DISTRICT COURT WITH INSTRUCTIONS TO ALLOW APPELLANT TO ENGAGE IN APPROPRIATE DISCOVERY AND TO EXPEDITE THE PROCEEDINGS. THIS COURT SHOULD ALSO AWARD APPELLANT COSTS AND ATTORNEY'S FEES FOR PROSECUTING THIS APPEAL

Appellees' original motion to dismiss was denied at the preliminary hearing. By that time, the appellant had received a right to sue letter, so that any procedural objection which appellees may have had was moot. Indeed, appellees' renewed motion to dismiss merely appears as a request tacked onto the affidavit in support of appellees' motion for a protective order directed at appellant's interrogatories (A105-6).

Clearly, this renewed motion was frivolous. The district court had already ruled that it would accept statistics in support of appellant's case. At this point, appellant was entitled to engage in liberal discovery

in order to attempt to develop her statistical as well as her basic factual case. Kohn v. Royall, Koegel and Wells, 496 F.2d 1094, 1100-1 (2d Cir. 1974); Burns v. Thiokol Chemical Corp., 483 F.2d 300 (5th Cir. 1973). In fact, appellees' blunderbuss motion for a protective order, without attempting to comply with any of appellant's discovery requests, must be seen as an attempt to delay and frustrate appellant's right to have this matter expeditiously resolved. This is especially so in light of the fact that the court below denied appellant's motion for preliminary injunction. That denial meant, of course, that appellant would be transferred in September, 1979 to an elementary school. Thus, appellant had a large stake in moving this case forward so that the court could render a final determination as to whether or not she was entitled to be restored to her teaching position in the junior high school. The appellees, on the other hand, had an equally large stake in exhausting appellant in an attempt to make her accept the status quo.

The fact that the court below granted appellees' motion to dismiss does not detract from the frivolousness of the renewal of the motion. Put bluntly, the court below acted without any basis in law or in fact.

Counsel for the Board of Education simply did not have a good faith basis to renew appellees' request that

the action be dismissed. The motion was renewed for oppressive reasons. As a result, this action has been seriously delayed and appellant has been required to bear the expenses of this appeal.

Given the history of this case, this Court should award appellant attorney's fees and costs incurred in this Court. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 417 (1978) [prevailing plaintiff ordinarily entitled to attorney's fees]. Even under the restrictive American common-law rule, appellant is entitled to an award. Alyeska Pipeline Co. v. Wilderness Society. 421 U.S. 240, 258-9 (1975). Moreover this Court should reverse and remand this case to the district court with instructions that it allow appellant liberal discovery, that it expedite these proceedings and that it engage in all future fact finding in conformity with the objective standards set forth by this Court in Robinson v. 12 Lofts Realty, Inc., supra.

CONCLUSION

For all the above reasons, the order below dismissing this action should be reversed and the case should be remanded to the district court with instructions to allow the appellant to engage in liberal discovery, to expedite these proceedings and to engage in all future fact finding

in conformity with Robinson v. 12 Lofts Realty, Inc. In addition, appellant should be awarded attorney's fees and costs in this Court.

Dated: New York, New York
February 19, 1980

Respectfully submitted,

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