Sex Discrimination Topics: Employment and Education

by Ellen Vargyas, an attorney with the National Women's Law Center, 1616 P St., NW, Washington, DC 20036, (202) 328-5160. She gratefully acknowledges the contribution of Stacey A. Kraus.

Discrimination law intersects with poverty law in a number of key places. Along with so many other issues, legal services practitioners must keep apprised of prohibitions against sex discrimination in order to provide thorough and high-quality representation to their clients. It is a direct testament to the pervasiveness and seriousness of the problems caused by sex discrimination that women are disproportionately poor and represent a disproportionately high percentage of legal services clients. This article will address the implications of two key areas of federal sex discrimination law for a legal services practice: discrimination against women in employment and in education.

I. Sex Discrimination in Employment: Developments in the Law

Two developments in title VII law have had particular importance for the analysis of sex discrimination in employment. /1/ Most recently, the Supreme Court's decision in International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls laid to rest a theory that, in the name of "fetal protection," could have drastically limited a woman's right to work in a broad variety of traditionally male and well-paying jobs. /2/ A contrary decision would have returned women's legal status to the era of so-called protective legislation that characterized labor law earlier this century and that systematically denied women the opportunity to compete fairly in the labor force.

On a very different note, a series of Supreme Court decisions handed down in the spring of 1989 dramatically limited the rights of title VII plaintiffs and curtailed women's ability to make successful sex discrimination claims. These decisions, which include Wards Cove Packing Company v. Atonio, /3/ Martin v. Wilks, /4/ Price Waterhouse v. Hopkins, /5/ Lorance v. AT&T Technologies, /6/ and Patterson v. McLean Credit Union, /7/ were the subject of legislation passed by Congress, but vetoed by the President, last year. /8/ The Civil Rights Act of 1990 would have created for the first time a damages remedy under title VII parallel to the remedies available to victims of race discrimination in employment pursuant to the post-Civil War statute, section 1981. /9/ Similar legislation is being considered by Congress again this year. /10/
A. Fetal Protection Policies

Johnson Controls challenged the defendant battery manufacturer's policy of excluding fertile women from jobs that exposed them to lead. The exclusion applied to all women "except those whose inability to bear children is medically documented." /11/ No men were affected by the exclusion. The threshold question was whether this policy should be analyzed under a disparate impact or disparate treatment theory. Disparate impact discrimination refers to policies that, although neutral on their face, have a discriminatory impact on the basis of a prohibited factor. A classic example is a height and weight requirement that appears neutral but disproportionately excludes women and members of certain racial and ethnic groups. Disparate impact cases can be defended affirmatively by showing that the discriminatory practice is justified by business necessity. Disparate treatment--or intentional discrimination--cases have only the more limited affirmative defense of a bona fide occupational qualification (BFOQ). /12/

In its analysis, the Seventh Circuit determined that although the company's policy applied only to women, disparate impact analysis was appropriate. The court then found that Johnson Controls' interest in protecting the unconceived children of its employees satisfied the business necessity test. /13/ The Seventh Circuit also held that even if the discrimination was facial, the policy constituted a BFOQ. /14/ In dissenting from the Seventh Circuit's en banc decision upholding the policy, Judge Easterbrook recognized the far-reaching implications of such a policy and stated that "rigorous implementation of fetal protection policies could close more than 20 million jobs to women." /15/ The plaintiffs appealed the ruling and the Supreme Court granted certiorari.

The Supreme Court first addressed the argument that a policy excluding all women except those who could medically establish their infertility--but not any men, regardless of their fertility--raised a disparate impact claim. The Court found that "Johnson Controls' policy is facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing." /16/ The Court's conclusion relied substantially on the Pregnancy Discrimination Act of 1978 in which Congress made explicit that discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes discrimination on the basis of sex within the meaning of title VII. /17/ Recognizing that intentional discrimination does not require a malevolent motive, the Court concluded that the company's policy "does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" /18/

Having established that the case was one of disparate treatment, the Court moved to the controlling question of whether fertility is a BFOQ under title VII. Emphasizing that the BFOQ defense is a narrow one, the Court found that "in order to qualify as a BFOQ, a job qualification must relate to the 'essence' or to the 'central mission of the employer's business.'" /19/ The imposed employment requirements must be "qualifications that affect an employee's ability to do the job." /20/ The Court found that Johnson Controls' policy could not satisfy the BFOQ standard, because the safety of potential fetuses is not essential to making batteries. /21/ Moreover, the Court held that, as a general rule, title VII "forbids sex-specific fetal-protection policies." /22/
Under the Johnson Controls doctrine, employment decisions regarding women must be made on the basis of an individual woman's ability to perform the particular job. Decisions based on broad generalizations regarding a woman's ability to bear children are prohibited, even in cases involving safety issues. Some commentators have called Johnson Controls the most important sex discrimination case decided by the Supreme Court. Whether or not this judgment ultimately stands, it clearly represents a major advance in the legal battle to eradicate sex discrimination from the workplace.

**B. The Civil Rights Act of 1990**

In contrast to Johnson Controls, the rights of title VII plaintiffs were severely limited in the wake of a series of decisions handed down by the Supreme Court in the spring of 1989. Legislation designed to reverse these decisions, as well as to create for the first time a title VII damages remedy, was passed by bi-partisan majorities in both houses of the 101st Congress. /23/ However, the legislation was vetoed by the President, and the Senate failed to override the veto by a single vote. /24/ Similar legislation is being considered by the 102nd Congress during the summer of 1991. /25/ The following discussion addresses the major Supreme Court decisions, along with the substance of the Civil Rights Act of 1990. It will also examine the need for a damages remedy under title VII.

1. **Disparate Impact Discrimination**

   In 1971, the Supreme Court held unanimously in Griggs v. Duke Power Company that title VII prohibits not only intentional discrimination, but also facially neutral practices that are discriminatory in impact. /26/ At issue in Griggs was the employer's requirement that in order to be hired job applicants must either have a high school diploma or a passing score on one of two aptitude tests. The policy disproportionately excluded blacks from employment and the employer produced no evidence that either the diploma requirement or the tests related to the jobs at issue. In holding that title VII prohibited these employment practices, the Court explained that title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." /27/

   To make out a disparate impact case, the plaintiff first had to establish that as a result of an employment practice the racial, ethnic, religious, or gender makeup of successful job applicants differed significantly from the pool of otherwise qualified persons. The burden then shifted to the defendant employer to show that the employment practice could be justified by business necessity. Under Griggs, this meant both that the employment practice must "be related to job performance" and that the relationship must be "significant." /28/ Even if the employer successfully met this burden, a plaintiff could still prevail by showing that other employment practices that did not have a discriminatory effect would serve the employer's interest in securing employees who could perform the job. /29/
The Supreme Court's more recent decision in Wards Cove fundamentally altered the nature and allocation of the burdens of proof as well as the definition of business necessity. The Court held, first, that in making out a prima facie case, the plaintiff must demonstrate "that specific elements of the . . . hiring process have a significantly disparate impact." This disaggregation requirement substantially changed preexisting law, under which plaintiffs were not required to establish the separate cause and effect of every employment practice at issue. Next, the Court changed the business necessity test by holding that virtually any legitimate business reason constitutes a business necessity and can justify a practice giving rise to disparate impact. Furthermore, the Court shifted the burden of persuasion from the defendant to the plaintiff regarding the existence or lack of a business necessity. The defendant only maintained the burden of producing evidence of justification for the practice. Finally, the Court addressed the plaintiff's rebuttal showing of a less discriminatory alternative, making it clear that cost and administrative convenience are appropriate employer considerations in rejecting an alternative approach. The result has been that disparate impact cases are substantially more difficult to win than they were under the Griggs standard; employers can engage in a wide variety of practices that result in a disparate impact as long as they offer "reasonable" justification.

The Civil Rights Act of 1990 would have reversed the decision in Wards Cove and restored the Griggs standard through the codification of a disparate impact standard. It defined business necessity to mean that challenged practices must be significantly related to effective job performance. Moreover, it would have restored the prior burdens of proof, with the defendant having the burdens of both production and persuasion with regard to business necessity. The Act also would have eased the disaggregation requirement, permitting cases to proceed with regard to groups of employment practices if it was not feasible to break down the cause and effect of each individual practice.

A debate arose over whether this section of the Civil Rights Act of 1990 required quotas. Supporters of the Act argued that the standard had governed disparate impact litigation for 19 years under Griggs without a single identified case of a resulting quota. They pointed out that language elsewhere in the Act specifically addressed the issue and nothing "required or encouraged" quotas. Opponents claimed that employers would nonetheless engage in quota hiring to avoid litigation.

2. Mixed Motive Discrimination

In Price Waterhouse, the Supreme Court held that a charge of intentional discrimination can be circumvented if the employer establishes that the same employment decision would have been made despite the discrimination. The Court stated that the employer "may avoid a finding of liability by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." Before Price Waterhouse, the controlling rule was that employers were liable for intentional discrimination, even if legitimate motives were mixed in with discriminatory ones. In its Supreme Court brief, the Reagan Administration Justice Department argued that in "mixed motive" cases, in which the same employment action would have resulted from nondiscriminatory factors, the proper remedy is "an award of attorney's fees and an injunction against future discrimination."
The reasoning of Price Waterhouse has been applied to the significant detriment of discrimination plaintiffs. For example, in Equal Employment Opportunity Commission v. Alton Packaging Corporation, the plaintiff, a black man, was passed over for promotion in favor of a white man. /44/ He established at trial that the supervisor had stated that "he wouldn't hire any black people." /45/ The Court found that since the plaintiff would not have been promoted absent the discrimination, there was no violation of title VII. Similarly, in Mitchell v. Jones Truck Lines, Inc., the plaintiff established that a trucking company's refusal to give her an employment application was intentional sex discrimination. /46/ The court found, however, that she would not have been hired even absent the discrimination, because the company would have hired more experienced male drivers. Therefore, the plaintiff was not entitled to recover.

The Civil Rights Act of 1990 would have reversed this aspect of the Price Waterhouse decision, assuring that all intentional discrimination is actionable. In line with preexisting law, remedies under the Act would be limited to redressing the actual discrimination: a plaintiff would not be put in a better position than she would have been in absent the discrimination. /47/

3. Consent Decrees

Martin challenged a consent decree entered in a case involving claims of race and sex discrimination in hiring and promotions for city jobs in Birmingham, Alabama. /48/ Prior to the entry of the decree, the Birmingham Firefighters Association entered objections at the fairness hearing regarding the decree. /49/ Shortly after the decree was entered, white male firefighters commenced litigation claiming that they were the victims of reverse discrimination. The Supreme Court held that consent decrees can be challenged at any time, even years after they are entered, by anyone who claims to be affected by them. This ruling undermined the use of consent decrees, because defendants are much less likely to agree to settle cases that may not remain settled. Since the decision in Martin, numerous attempts have been made to reopen long-settled cases. /50/

The Civil Rights Act of 1990 would have assured that all parties have a right to be heard prior to the entry of a consent decree. Once a decree is entered, however, collateral attacks would be strictly limited. /51/

4. Discriminatory Seniority Systems

Lorance examined an allegedly intentionally discriminatory seniority system that adversely affected women who moved into a traditionally male job enclave at AT&T Technologies. /52/ The seniority system provided that layoffs would be determined not by plant seniority, but by seniority on a particular job. Many of the women who were finally able to move into these jobs had substantially more plant seniority than their new male colleagues. However, when a business downturn required lay-offs, the women were the first to go, because they had less seniority in the relevant jobs. In dismissing their challenge to the seniority system, the Court held that the time for challenging an intentionally discriminatory seniority system runs from the
date on which the plan was first instituted, not from the time that the plaintiff was actually
injured. Although the suit was filed more than 300 days after the time that the seniority system
was adopted, the plaintiffs would have been in full compliance with title VII requirements had
the filing time been computed from the time that they were injured. The Lorance doctrine has
been extended beyond the seniority context and beyond title VII. /53/

The Civil Rights Act of 1990 would have reversed the Lorance outcome. The Act assured that
the time for filing challenges to unlawful employment practices is computed from the time that
the person aggrieved is adversely affected. /54/

5. Remedies

Currently, title VII provides only limited remedies for cases of intentional discrimination that
do not include damages. /55/ Remedies are confined to injunctive and other equitable relief,
with the latter principally including reinstatement and back pay. /56/ These remedies address
actual lost wages and prohibit future illegal activity, but they offer no compensation for the
many nonwage injuries that often flow from employment discrimination. /57/ Title VII's
remedial scheme stands in contrast to that included in section 1981, which prohibits
discrimination on the basis of race in the making and enforcing of contracts.

Before 1989, victims of all types of intentional race discrimination in employment had access to
a full range of remedies, including both compensatory and punitive damages. /58/ In Patterson,
the Supreme Court held that section 1981 only applies to the making of contracts and does not
create a cause of action against racial harassment that occurs after the contract is in effect. /59/
Of all of the recent decisions, Patterson has had the most dramatic and immediate impact on
discrimination cases. As of February 1990, a total of 105 cases had been dismissed based on
the Court's reasoning in Patterson. /60/ That figure does not include cases subsequently
dismissed and cases that were never filed.

The Civil Rights Act of 1990 would have assured that section 1981 recovered its full pre-
Patterson vitality and that it prohibited discrimination on the basis of race in the full range of
employment relationships. /61/ The Act also would have created in title VII a parallel remedial
scheme to that in section 1981, so that all plaintiffs would have access to the same remedies.
/62/ Like section 1981, the damages remedy is limited to cases of intentional discrimination.
While the creation of a damages remedy will benefit all title VII plaintiffs, it will have a
particular impact on those not covered by section 1981--principally women and members of
certain ethnic and religious minorities. Moreover, because remedies under the Americans with
Disabilities Act are linked to those available under title VII, victims of intentional
discrimination on the basis of disability would also have access to compensatory and punitive
damages. /63/


In addition to the provisions discussed above, the Civil Rights Act of 1990 would have, in
relevant part, expanded the statute of limitations under title VII from 180 days to two years,
II. Sex Discrimination in Education: Title IX Enforcement

The principal federal statute prohibiting sex discrimination in education is Title IX of the Education Amendments of 1972 (Title IX). Title IX prohibits sex discrimination in any educational program or activity that receives federal financial assistance. This includes the overwhelming majority of public and private elementary, secondary, vocational, postsecondary, and professional education institutions nationwide. With limited exceptions, principally in the area of admissions, Title IX applies to all forms of sex discrimination in education.

In contrast to the dramatic legal developments that have characterized issues in employment discrimination, Title IX issues have remained relatively constant. Principally, they focus on the need to enforce the law that already exists. Many of these areas are directly applicable to a legal services practice. For example, approximately 40 percent of the female high school dropout rate is attributable to pregnancy or parenting, but schools, in general, and drop-out programs, in particular, often ignore this population. An enormous amount of sex segregation exists in vocational education, with females overwhelmingly concentrated in traditionally female--and traditionally low-paying--occupational programs. Sexual harassment is a widespread problem and girls and women of color face the double jeopardy of combined sex and race discrimination [See Winston, "An Antidiscrimination Legal Construct That Disadvantages Working Women of Color," in this issue.] Title IX provides protections against many aspects of these problems.

A. Enforcement and Remedies

Modeled on Title VI of the Civil Rights Act of 1964, Title IX is enforceable both through the Department of Education's Office for Civil Rights (OCR) and through a private right of action without an exhaustion requirement. Title IX's regulations prohibit disparate impact discrimination in addition to intentional discrimination. While the question has not been finally resolved, the weight of authority supports the conclusion that Title IX, itself, reaches disparate impact discrimination as well as intentional discrimination.

If the Department of Education finds a violation of Title IX, it has the statutory authority to defund a recipient of federal financial assistance. While the Department has not invoked this penalty to date, there is no reason to believe that it never will, particularly in a case of egregious discrimination. In any event, the Department regularly uses a number of other mechanisms to enforce Title IX. It has the authority to conduct compliance reviews and investigate complaints, make findings of noncompliance with the law, conciliate claims, and refer cases to the Department of Justice for judicial enforcement. Furthermore, the title IX regulations give OCR the specific regulatory authority to require a recipient of federal funding to take "such remedial action as the Assistant Secretary deems necessary to overcome the effects of [sex] discrimination."
While it is well-established that courts may grant injunctive relief and attorney fees to parties who prevail in Title IX cases, the circuits are split regarding the availability of compensatory damages. The Third Circuit recently became the first circuit to hold that monetary damages are available in cases of intentional violations of the statute. The Eleventh Circuit reached the opposite conclusion in Franklin v. Gwinnett County Public Schools, however, and a petition for certiorari is pending. The availability of a damages remedy, if upheld by the Supreme Court, will enhance enforcement efforts by attaching real liability to noncompliance with the statutory requirements.

**B. Substantive Provisions**

Title IX's substantive prohibitions against sex discrimination reach a broad range of practices. For example, Title IX's regulations specifically bar discrimination on the basis of pregnancy. They prohibit schools from excluding pregnant students from both course offerings and extracurricular activities. Recipients are permitted to operate separate programs for pregnant students only when admittance is purely voluntary and "the instructional program in the separate program is comparable to that offered to non-pregnant students." Available evidence suggests that this is often not the case. Furthermore, rules pertaining to a student's actual or potential parental, family, or marital status may not be applied differently on the basis of sex. In a recent Arizona case, the court found a Title IX violation when an unwed pregnant young woman was excluded from her high school's National Honor Society chapter, but an unwed father was not.

A related regulation prohibits recipients from discriminating in the provision of health insurance benefits and services. This includes discrimination on the basis of pregnancy. Questions have been raised about college health services and insurance plans that either exclude pregnancy and gynecological services or treat them differently from other conditions; such practices are in direct violation of Title IX. Similarly, insofar as elementary or secondary schools provide health services, they must do so in a nondiscriminatory fashion.

Title IX also prohibits discrimination in counseling and in the use of appraisal and counseling materials. These regulations are directly applicable to the widespread sex-based tracking that characterizes vocational education programs. In one of the few instances in which the regulations have been applied, OCR found that the Chicago Board of Education's Washburn Trade School violated the Title IX counseling regulations. The overwhelmingly male Washburn Trade School used inaccurate and incomplete counseling information, which adversely affected females, sex stereotyped promotional materials, and sex segregated recruiting teams.

In addition, Title IX prohibits discrimination in the provision of financial aid, including athletic scholarships. In a recent decision, the district held that New York State's reliance on SAT scores to distribute merit scholarships resulted in the discriminatory treatment of female students, who received a dramatically reduced share of the scholarships, in violation of Title IX.
Title IX also addresses sexual harassment in educational programs. /91/ Although the regulations are not explicit, OCR has interpreted the regulations as applying both inside and outside the employment relationship. Therefore, the prohibition reaches the harassment of students by teachers, administrators or other employees of the recipient, as well as the harassment of an employee by another employee. The question of whether title IX applies to student-to-student or student-to-teacher harassment is not resolved. The underlying question is whether the actions of the student may be attributed to the recipient, which is the party toward whom title IX obligations flow.

Title IX also reaches discrimination in employment. /92/ While title IX has been held to incorporate title VII standards, title IX claimants are not bound by title VII procedural requirements, including administrative exhaustion through the Equal Employment Opportunity Commission. /93/ If title IX remedies are expanded by the Supreme Court, title IX will present an attractive alternative to a claim under title VII where no damages are currently available.

In sum, title IX provides a comprehensive framework for eliminating sex discrimination from education. Advocates should become familiar with its terms and aggressively use it in the representation of their clients.

### III. Conclusion

Sex discrimination in employment and education has a direct and devastating impact on girls and women. Understanding and aggressively using the legal tools available to combat this discrimination is essential to assure appropriate representation for legal services clients.

footnotes


12. 42 U.S.C. Sec. 2000e(2)(e)(1). Under the BFOQ defense, an employer may discriminate on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." A BFOQ defense is not available in claims of racial discrimination.


14. Id.

15. Id. at 914.


17. 42 U.S.C. Sec. 2000e(k) (1981). The Pregnancy Discrimination Act was passed in response to the Supreme Court's decision in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), which held that discrimination on the basis of pregnancy did not constitute sex discrimination within the meaning of title VII.


19. Id. at 4213 (citations omitted) (quoting Dothard v. Rawlinson, 433 U.S. 321, 333 (1977), and Western Airlines, Inc. v. Criswell, 472 U.S. 400, 413 (1985)).

20. Id. at 4212.

21. Id. The Court also found support in the language of the Pregnancy Discrimination Act, which requires that, unless pregnant employees differ from others "in their ability or inability to work," they must be "treated the same" as other employees. 42 U.S.C. Sec. 2000e(k).
22. Johnson Controls, 59 U.S.L.W. at 4214. The Court addressed in dictum an employer's potential liability if a child is born with injuries traceable to workplace exposure. The Court's view was that an employer would likely face no liability in the absence of negligence.


27. Id. at 431.

28. Id. at 431, 433 & n.9.


31. Id. at 658 (emphasis added).


33. Wards Cove, 490 U.S. at 659. The Court ruled that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster."

34. Id. at 659-60.

35. Id. at 661.

36. See, e.g., Police Officers for Equal Rights v. City of Columbus, 916 F.2d 1092 (6th Cir.), reh'g denied en banc, 59 U.S.L.W. 2327 (6th Cir. Dec. 7, 1990); Bernard v. Gulf Oil Co., 890 F.2d 735 (5th Cir. 1989), cert. denied, 110 S. Ct. 3237 (1990); Evans v. City of Evanston, 881 F.2d 382 (7th Cir. 1989); Allen v. Seidman, 881 F.2d 375 (7th Cir. 1989).

37. Civil Rights Act of 1990, supra note 8, at Sec. 3.

38. Id. at Sec. 4.

39. Id. at Sec. 5.
40. Id. at Sec. 13.

41. Price Waterhouse, 490 U.S. at 228. Other aspects of the Price Waterhouse decision, principally that sexual stereotyping can be a violation of title VII, were major improvements in the law of discrimination and were not addressed by the Civil Rights Act of 1990.

42. Id. at 228.

43. Brief for the United States as Amicus Curiae at 24, Price Waterhouse, 490 U.S. 228.

44. EEOC v. Alton Packaging Corp., 901 F.2d 920 (11th Cir. 1990).

45. Id. at 922.


47. Civil Rights Act of 1990, supra note 8, at Sec. 5.


49. Lawyer's Committee, supra note 48, at 8.

50. The Lawyer's Committee has identified more than 40 challenges to consent decrees based on Martin. Id. at 2. See cases collected at id., 23-86, including, e.g., Mann v. City of Albany, 883 F.2d 999 (11th Cir. 1989); Bembenek v. Winkle, No. 90-CV-7016 (N.D. Ohio filed Jan. 16, 1990); Aiken v. City of Memphis, No. 90-2069 (W.D. Tenn. filed Jan. 23, 1990).

51. Civil Rights Act of 1990, supra note 8, at Sec. 6.

52. Lorance, 490 U.S. at 900.


54. Civil Rights Act of 1990, supra note 8, at Sec. 1.


56. 42 U.S.C. Sec. 2000e(5)(g). In some cases, courts have awarded discrimination victims "front pay" when the equitable remedy of reinstatement is not appropriate. This usually occurs
because the working conditions are exceptionally contentious and are not expected to improve with an injunction. See Thorne v. City of El Segundo, 802 F.2d 1131 (9th Cir. 1986). Front pay has also been deemed an appropriate remedy when a deserved promotion is not readily available to a plaintiff, because innocent workers would be displaced through no fault of their own. Spears v. Board of Educ. of Pike County, Ky., 843 F.2d 882 (6th Cir. 1988).

57. See, e.g., EEOC v. Service News Co., 898 F.2d 958 (4th Cir. 1990) (no damages available to plaintiff who was fired on the basis of pregnancy to compensate her for financial losses and emotional injury); Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989) (no damages available to victim of sex harassment who suffered physical and psychological injury); Swanson v. Elmhurst Chrysler Plymouth, Inc., 882 F.2d 1235 (7th Cir. 1989) (victim of sex harassment not entitled to remedy under title VII and required to pay employer's court costs); Delgado v. Lehman, 665 F. Supp. 460 (E.D. Va. 1987) (no damages to compensate victim of discriminatory discharge for injuries to health and well-being suffered as a direct result of discriminatory discharge).

58. See, e.g., Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417 (7th Cir. 1986) (race harassment plaintiff awarded $25,000 for indignity and stress and $25,000 in punitive damages); Stallworth v. Shuler, 777 F.2d 1431 (11th Cir. 1985) (race discrimination plaintiff awarded $100,000 for emotional distress in addition to $44,090 in back pay).

59. Patterson, 491 U.S. 164.

60. See Hearings on S. 2104 Before the Senate Committee On Labor and Human Resources, 101st Cong., 2d Sess. 980 (1990) (statement of Julius Levonne Chambers, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.).

61. Civil Rights Act of 1990, supra note 8, at Sec. 12.

62. Id. at Sec. 8.


64. Civil Rights Act of 1990, supra note 8, at Sec. 7.

65. Id. at Sec. 9.

66. Id. As such, it would reverse the Supreme Court's ruling in Evans v. Jeff D., 475 U.S. 717 (1986), where the court permitted defendants to condition settlement agreements on the waiver of attorney fees by the plaintiff.

67. Id. at Sec. 9. This provision addresses the Supreme Court's suggestion to the contrary in Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989).

69. Following the passage of the Civil Rights Restoration Act in 1988, title IX clearly applied to all educational programs and activities conducted by recipients of federal funds and is not confined to the particular program or activity that receives federal funds. See 20 U.S.C. Secs. 1681 note, 1687, 1687 note, 1688, and 1688 note. Title IX also applies to the educational programs and activities of other institutions in the "education business" that receive federal financial assistance. Examples include the Educational Testing Service and the College Board, both of which receive substantial federal financial support.

70. 34 C.F.R. Sec. 106.31 (1990). Title IX does not apply to the admissions practices of elementary and secondary schools, private undergraduate institutions, or public institutions of undergraduate education that have traditionally and continually from their establishment had a policy of admitting only students of one sex. 20 U.S.C. Sec. 1681(a)(1) and (a)(5) (1990). It does apply to all other practices of these institutions and to the admissions practices of vocational education, professional education, graduate higher education, and other public institutions of undergraduate higher education. For other, more limited, exceptions, see 20 U.S.C. Sec. 1681(3) (institutions controlled by religious organizations if application of title IX would be inconsistent with religious tenets); Sec. 1681(4) (military academies); Sec. 1681(6)-(9) (social fraternities and sororities, voluntary youth service organizations, beauty pageants, etc.).


74. Title IX analysis should not be limited by the contrary decision in Guardians, cited above. The Court's conclusion in Guardians, that title VI, itself, is limited to intentional discrimination, was based on the decision in University of Cal. Regents v. Bakke, 438 U.S. 265 (1978), that title VI is coextensive with the fourteenth amendment. A showing of intent is necessary to make out a fourteenth amendment violation. Washington v. Davis, 426 U.S. 229 (1976). However, because there is nothing to suggest that title IX incorporates a fourteenth amendment standard, the limitation on the interpretation of title VI should not be imported into title IX practice.


76. Title IX incorporates title VI procedures, which are set out at 34 C.F.R. Sec. 106.71 (1990).
77. Complaints do not have to be filed by the injured person but may be filed, instead, by third parties. 34 C.F.R. Sec. 100.7(b) (1990).

78. Id. at Sec. 106.3(a).


80. Pfeiffer v. Marion Center Area School Dist., 917 F.2d 779 (3d Cir. 1990).

81. Franklin v. Gwinnett County Public Schools, 911 F.2d 617 (11th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 2195 (U.S. Dec. 10, 1990) (No. 90-918). The difference of opinion is based principally on the proper construction of the Supreme Court's decision in Guardians, 463 U.S. at 582, which addressed, in addition to the question of disparate impact discrimination, the availability of damages under title VI.

82. 34 C.F.R. Sec. 106.40 (1990).

83. Id. at Sec. 106.40(b)(3).


86. Id. at Sec. 106.36.

87. Washburn Trade School Investigation, OCR Case No. 05-85-1008 (letter from Kenneth A. Mines, Regional Director, to Dr. Manford Byrd, Jr.) (Mar. 28, 1986).

88. Id.

89. 34 C.F.R. Sec. 106.37 (1990). Colleges and universities nationwide disburse hundreds of millions of athletic scholarship dollars annually. While there are no firm numbers regarding the gender-breakdown of these scholarships, evidence suggests that young women receive, at most, 25 percent of athletic scholarship dollars. Enforcing title IX prohibitions against discrimination in the award of financial aid can thus translate into access to higher education for many young women.

90. Sharif, 709 F. Supp. at 345.

91. Lipsett v. University of P.R., 864 F.2d 881 (1st Cir. 1988).

92. 34 C.F.R. Sec. 106.51-106.61 (1990). In North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982), the Supreme Court resolved a long-standing dispute over the proper scope of the title IX regulations and held that they properly extend to prohibit employment discrimination.