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TITLE IX: AN ALTERNATIVE REMEDY FOR SEX-BASED EMPLOYMENT DISCRIMINATION FOR THE ACADEMIC EMPLOYEE?

INTRODUCTION

With the enactment of Title IX of the Education Amendments of 1972, Congress committed the federal government to the eradication of sexual discrimination in the field of education.1 Section 901 of that statute prohibits sex-based discrimination in educational programs or activities receiving federal financial assistance.2 Considerable conflict has developed, however, as to the

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scope of this central provision. In particular, there has been disagreement as to whether section 901 includes educational employees within its protections. Recently, in North Haven Board of Educa-

Section 901 has fostered two controversies. First, the courts have differed as to whether section 901, which protects persons only from "discrimination under any education program or activity receiving Federal financial assistance," encompasses every program or activity conducted by an educational institution receiving federal funds notwithstanding that the discriminatory program actually receives no federal funds. Compare Dougherty County School Sys. v. Harris, 622 F.2d 735, 737 (5th Cir. 1980) and Romeo Community Schools v. United States Dep't of Health, Education and Welfare, 600 F.2d 581, 584 (6th Cir.), cert. denied, 444 U.S. 972 (1979) and Kuhn, Title IX: Employment and Athletics Are Outside HEW's Jurisdiction, 65 Geo. L.J. 49, 63-64, 71-72 (1976) and Comment, HEW's Regulation Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges, 1976 B.Y.U.L. Rev. 133, 158-68 (cases and other sources favoring a requirement that the specific program or activity be federally funded) with North Haven Bd. of Educ. v. Hufstedler, 629 F.2d 773, 785 (2d Cir. 1980) and Cox, Intercolligate Athletics and Title IX, 46 Geo. Wash. L. Rev. 34, 37-40 (1977) and Comment, Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools, 53 Tex. L. Rev. 103, 108-12 (1974) (cases and other sources favoring institutional approach). See also United States v. El Camino Community College Dist., 600 F.2d 1258, 1260 (9th Cir. 1979) (institution bears burden of showing information requested by HEW will not affect practices in program for which federal financial assistance is sought). The second major division of authority concerns the scope of the mandate of section 901 that "no person" be subjected to sex discrimination in a federally funded educational program. See note 4 and accompanying text infra.

The enforcement provisions of Title IX empower the federal agencies responsible for administering financial assistance to educational institutions to promulgate rules and regulations effectuating the prohibition of sex discrimination. 20 U.S.C. § 1682 (1976). Pursuant to this grant of authority, the Department of Health, Education & Welfare (HEW) issued regulations proscribing sex-based employment discrimination in federally funded educational institutions. See 45 C.F.R. §§ 86.51-61 (1979). The majority of courts considering the issue, however, have held that these regulations are invalid, reasoning that Title IX does not provide authority to regulate employment practices. See Seattle Univ. v. HEW, 621 F.2d 992, 993 (9th Cir. 1980) (per curiam); Junior College Dist. v. Califano, 597 F.2d 119, 121 (8th Cir.), cert. denied, 444 U.S. 972 (1979); Islesboro School Comm. v. Califano, 593 F.2d 424, 430 (1st Cir.), cert. denied, 444 U.S. 972 (1979); University of Toledo v. HEW, 464 F. Supp. 693, 695 (N.D. Ohio 1979); McCarthy v. Burkholder, 448 F. Supp. 41, 42-43 (D. Kan. 1978). But see North Haven Bd. of Educ. v. Hufstedler, 629 F.2d 773, 778 (2d Cir. 1980); Dougherty County School Sys. v. Harris, 622 F.2d 735, 737-38 (5th Cir. 1980). It should be noted that some courts have stated that Title IX prohibits employment discrimination only to the extent that discriminatory impact on students can be shown. Seattle Univ. v. HEW, 621 F.2d 992, 994 (9th Cir. 1980) (per curiam); Caufield v. Board of Educ., 486 F. Supp. 862, 883-84 (E.D.N.Y. 1979).

It should be noted that after the establishment of the Department of Education, see Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979) (codified at 20 U.S.C. §§ 3401-3510 (Supp. III 1979)), the "education-related civil rights functions" of HEW were transferred to the auspices of the newly formed department. S. Rep. No. 96-49, 96th Cong., 1st Sess. 36, reprinted in [1979] U.S. Code Cong. & Ad. News 1514, 1550; see Department of Education Organization Act, 20 U.S.C. § 3441 (Supp. III 1979). The regulations implementing Title IX, which were originally promulgated by HEW, have been adopted by the Department of Education and recodified without change in Title 34 of the
tion v. Hufstedler, the United States Court of Appeals for the Second Circuit addressed this question and held that employees of educational institutions receiving federal funds are entitled to the safeguards of Title IX.

In North Haven, the Second Circuit was presented with two cases in which suit had been commenced by a local board of education challenging the validity of certain federal regulations promulgated pursuant to Title IX. The plaintiffs asserted that these regulations, which prohibited sexually discriminatory employment practices in educational institutions receiving federal aid, exceeded the bounds of protection authorized by the statute. The district court in each case agreed that Title IX is not applicable in the employment arena and, therefore, declared the regulations in question invalid.

On appeal, a unanimous Second Circuit panel reversed the decisions entered in district court. After noting that the language of


8 629 F.2d 773 (2d Cir. 1980).
9 Id. at 786.

7 Id. at 774-75. In North Haven Bd. of Educ. v. Hufstedler, the Department of Health, Education and Welfare (HEW), the federal agency then responsible for administering Title IX, see note 4 supra, responded to a private complaint that the North Haven school district's maternity leave policy was sexually discriminatory by requesting the school district to provide certain information relating to its employment practices. 629 F.2d at 775. After North Haven refused the request, HEW advised that it would seek institution of the administrative enforcement proceedings provided by Title IX. Id. The school district then commenced this declaratory judgment action, challenging the HEW regulations on employment as promulgated "in excess of the statutory authority conferred by Congress." Id.

In Trumbull Bd. of Educ. v. Department of Educ., a female former guidance counselor in the Trumbull public school system instituted a Title IX administrative proceeding, alleging several counts of sex-based employment discrimination. 629 F.2d at 775. HEW, finding that there had been sex discrimination, ordered the district to reinstate the complainant and to take other "corrective" action. Id. The Trumbull Board of Education then commenced the present declaratory judgment action. Id.

8 The principal prohibition against sex-based employment discrimination provides:

No person shall, on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefore, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

45 Fed. Reg. 300,802, 300,962 (1980) (to be codified at 34 C.F.R. § 106.51); see note 4 supra.
9 629 F.2d at 775.
10 Id. Moreover, the district courts enjoined the Department of Health, Education and Welfare from withholding federal funds for violations of the regulations. Id.
11 629 F.2d at 786. The panel was comprised of Circuit Judges Kaufman and Oakes and
section 901 does not "clearly [encompass] employment discrimination," Judge Oakes, writing for the court, undertook a comprehensive examination of the legislative history of Title IX. As a result of this analysis the appellate court concluded that section 901 "was expressly intended to relate to employment practices."

The court of appeals, first discussing the congressional action surrounding the enactment of Title IX, found support for its conclusion in the statements of Senator Birch Bayh. Although the court noted that caution should be exercised to ensure against improper reliance on "casual statements from floor debates," the Second Circuit reasoned that the combination of statements made by the main proponent of the legislation in introducing the legislative package to the Congress, in response to specific inquiries by his colleagues, and after the passage of Title IX, clearly demonstrated that Senator Bayh's intention was that employment be covered by section 901.

The court also found the actions taken in the House of Representatives supportive of its position. In a House version of the legislation which culminated in the Education Amendments of 1972, a section that specifically excluded employment from the protective ambit of Title IX had been added. Judge Oakes found the omission of such language from the final House bill to be at least some

District Judge Tenney of the Southern District of New York sitting by designation.

11 Id. at 777. Although HEW argued that the "person[s]" protected by section 901 must include employees since none of the nine express statutory exclusions to that provision encompasses employment, see 20 U.S.C. § 1681(a)(1)-(9), the Second Circuit panel found HEW's argument unpersuasive.

12 Id. at 778-84.

13 Id. at 784.

14 See id. at 779-82.

16 Id. at 781 (citing Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring)).

17 629 F.2d at 782. The court stated that Senator Bayh's statements indicating that section 901 applied to employment "are at the very least helpful and may indeed be authoritative." Id. at 782 (citing NLRB v. Fruit & Vegetable Packer & Warehousemen, Local 760, 377 U.S. 58, 67-68 (1964); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951) (Jackson, J., concurring)).

18 629 F.2d at 782-83. The provision in the House bill, section 604 of Title VI of the Civil Rights Act of 1964, provides that:

"Nothing contained in this subchapter [Title VI of the Civil Rights Act of 1964] shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment."

indication of a congressional intent to make section 901 applicable to employees of educational institutions receiving federal financial aid.\(^\text{19}\)

Finally, the Second Circuit found significance in the congressional action taken after the enactment of Title IX. First, Judge Oakes observed that, as required by law,\(^\text{20}\) the Congress reviewed the regulations that were challenged in the \textit{North Haven} case and declined to express disapproval.\(^\text{21}\) Second, the court of appeals noted several unsuccessful attempts to limit the scope of section 901.\(^\text{22}\) These occurrences, viewed by the court "in the context of the legislative history as a whole," were found to constitute additional evidence of legislative intent to extend the protections of Title IX to the employment arena.\(^\text{23}\)

\(^{19}\) 629 F.2d at 783. The \textit{North Haven} court rejected the argument advanced by other courts of appeals, see Romeo Community Schools v. HEW, 600 F.2d 581, 584 (6th Cir.), cert. denied, 444 U.S. 972 (1979), that the original version of the House bill excluded educational employees from the coverage of Title IX to avoid inconsistency with other sections of the bill amending Title VII and the Equal Pay Act. 629 F.2d at 780; see note 1 supra; H.R. 7248, 92d Cong., 1st Sess. §§ 1006-1009 (1971); H.R. Rep. No. 554, 92d Cong., 1st Sess. 1, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 2462, 2566. Judge Oakes reasoned that if Congress were concerned merely with removing these legislative inconsistencies, it could have drafted an employment exclusion applicable only to section 901. 629 F.2d at 783.

\(^{20}\) 20 U.S.C. § 1232(d)(1) (1976). Section 1232(d)(1) provides that regulations of federal agencies will become effective "unless the Congress shall, by concurrent resolution, find that . . . the final regulation . . . is inconsistent with the Act from which it derives its authority . . . ." \textit{Id.}

\(^{21}\) 629 F.2d at 783-84. As required by law, see note 20 supra, Senator Jesse Helms introduced a concurrent resolution challenging the validity of all Title IX regulations. See S. Con. Res. 46, 94th Cong., 1st Sess., 121 CONG. REC. 17301 (1975). The resolution never passed. \textit{Id.}; 629 F.2d at 783-84. Subsequently, both Senator Helms and Senator McClure proposed amendments to limit the scope of section 901. \textit{Id.} at 784; see 121 CONG. REC. 23,845-47 (1975); 122 CONG. REC. 28136 (1976). Neither was adopted. 629 F.2d at 784. Judge Oakes recognized that the mere failure of Congress to adopt the resolution introduced by Senator Helms could not be read as evidence of congressional approval of the regulation in question. \textit{Id.;} see 20 U.S.C. § 1232(d)(1) (1976). He concluded, however, that this refusal, coupled with the other developments previously mentioned, were in combination indicative of congressional intent to include employees within Title IX's protective scheme. \textit{Id.}

\(^{22}\) See note 21 supra.

\(^{23}\) 629 F.2d at 784. The \textit{North Haven} court briefly disposed of two other arguments militating against its construction of section 901. \textit{Id.} at 785. First, it rejected the position that Congress would not penalize an entire program by withholding federal funds because one employee was a victim of sex-based discrimination by noting that HEW has this authority if only one student is a victim of discrimination. \textit{Id.} Second, the court dismissed the argument that employment discrimination is not program specific and stated that it is "no less 'program specific' than other practices recognized as subject to the provisions of Title VI and Title IX." \textit{Id.}
THE North Haven RESULT: AN ALTERNATIVE REMEDY FOR SEX-BASED EMPLOYMENT DISCRIMINATION UNDER TITLE IX

The panel deciding the North Haven case discerned a clear congressional intent to include employees within the protection of Title IX. Notwithstanding the existence of substantial authority to the contrary, investigation of the legislative history of the statute supports the North Haven result. It is clear, however, that some degree of ambiguity is present in both the language of Title IX and the events surrounding its passage. Thus, it is submitted that the court should have examined more fully the implications of its decision. An analysis of the results of North Haven, however, confirms the propriety of the decision and reveals that the Second Circuit has provided employees of federally funded educational institutions with a salutary alternative remedy for gender-based employment discrimination.

24 See note 4 supra.

25 Those courts which have held that Title IX does not safeguard educational employees from sex-based employment discrimination have employed little independent discussion of the issue. See, e.g., Seattle Univ. v. HEW, 621 F.2d 992 (9th Cir. 1980)(per curiam); Junior College Dist. v. Califano, 597 F.2d 119 (8th Cir.), cert. denied, 444 U.S. 972 (1979). The decision in Islesboro School Comm. v. Califano, 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979), frequently has been relied upon by those courts which have refused to extend Title IX's protections to educational employees. In Islesboro, the First Circuit accorded significance to the fact that Title IX was only one portion of a legislative package and reasoned that the final omission of a specific exclusion for employees was meant to avoid inconsistencies with the other sections of the legislation. 593 F.2d at 428; see note 19 supra. The Islesboro court was not persuaded by the statements of Senator Bayh, the sponsor of the Title IX legislation. Id. at 427-28. The Second Circuit in North Haven, employing a more comprehensive analysis of the relevant legislative history, reached a result contrary to that adopted by the First Circuit in Islesboro. 629 F.2d at 778-86.

26 Both the drafters' failure to define precisely the "person[s]" protected by section 901 and the fact that the legislative history of Title IX also refers to amendments to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. III 1979), and the Equal Pay Act, 29 U.S.C. § 213(a)(1) (1976 & Supp. III 1979), have contributed to the ambiguity. See 629 F.2d at 777-78.

The Next Step—An Implied Private Right of Action Under Title IX For Employment Discrimination

The North Haven court gave no indication that, as a result of its decision, an individual would be able to maintain a private action for sex-based employment discrimination against an educational institution receiving federal funds. Additionally, Title IX does not expressly provide a private right of action. Section 902 of the statute authorizes two modes of enforcement. First, voluntary compliance with the prescriptions of Title IX is sought. Second, if efforts to attain compliance fail, federal funds to the program that is in violation may be terminated. An implied private right of action under Title IX, however, recently was recognized by the Supreme Court in Cannon v. University of Chicago.

28 The court did note, however, that its decision would to some extent cause the safeguards available under Title IX to overlap with those of other federal statutes. See 629 F.2d at 784; see notes 61-63 and accompanying text infra.


Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.


20 20 U.S.C. § 1682 (1976). Voluntary compliance with the provisions of Title IX must be sought by the agency charged with enforcement of Title IX before institution of any other enforcement procedure. Id.; see, e.g., North Haven Bd. of Educ. v. Hufstedler, 629 F.2d at 785; Romeo Community Schools v. HEW, 600 F.2d 581, 583 (6th Cir.), cert. denied, 444 U.S. 972 (1979); Junior College Dist. v. Califano, 597 F.2d 119, 120 (8th Cir.), cert. denied, 444 U.S. 972 (1979).

31 20 U.S.C. § 1682 (1976); see note 29 supra.

In *Cannon* the Court held that a plaintiff who allegedly had been denied admission to medical school because of her sex could maintain a private cause of action in federal court under Title IX. Although the *Cannon* majority did not address the question whether such an implied right of action would extend to an educational employee asserting Title IX rights, nothing in the Supreme Court opinion suggests that employees of federally funded educational institutions should be excluded. Moreover, the factors utilized by the *Cannon* Court to imply a private right of action for an unsuccessful applicant to medical school apply with equal force to educational employees. Thus, it is submitted that a necessary re-

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33 441 U.S. 677 (1979). In *Cannon*, a woman applied unsuccessfully for entrance into medical programs at two private universities, both of which were recipients of federal funds. *Id.* at 680 & n.1. After each institution denied her admission, she commenced suit under Title IX and various other federal civil rights statutes in the United States District Court for the Northern District of Illinois. *Cannon v. University of Chicago*, 406 F. Supp. 1257, 1258 (N.D. Ill. 1976). Finding that Title IX "does not authorize a private right of action," *id.* at 1259, the district court dismissed the complaint, *id.* at 1260, and the Seventh Circuit Court of Appeals affirmed, *Cannon v. University of Chicago*, 559 F.2d 1063, 1083 (7th Cir. 1977). Although the court of appeals recognized that rights of action had been implied under other federal statutes, *id.* at 1072, it concluded that "[i]t is clear that no individual right of action can be inferred from Title IX in the face of the carefully constructed scheme of administrative enforcement contained in the Act," *id.* at 1073.

The Supreme Court granted certiorari and reversed the decision below. 441 U.S. at 688-89. In examining the issue before it, the Court applied the test it had promulgated previously in *Cort v. Ash*, 422 U.S. 66 (1975). In *Cort*, that test was prescribed as follows:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff “one of the class for whose especial benefit the statute was enacted,” . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?


34 *See Cannon v. University of Chicago*, 441 U.S. at 689-709. The only *Cort* factor that arguably could present difficulty in application to employees is "the threshold question . . . whether the statute was enacted for the benefit of a special class of which the plaintiff is a member." *Id.* at 689; *see note 33 supra*. Analysis of the first *Cort* factor in *Cannon*, however,
result of the Second Circuit's decision in North Haven and the Supreme Court's holding in Cannon is the existence of an implied private right of action under Title IX notwithstanding the status of the plaintiff as employee.

Other Sources of Protection Against Gender-Based Employment Discrimination

Several federal sources of redress already are available to victims of discrimination in employment because of sex. Of these alternatives the Civil Rights Act of 1964 provides the most comprehensive protective scheme. Title VII of the 1964 Act (Title VII), designed to eliminate discriminatory employment practices and to promote equal employment opportunity, makes it an unlawful employment practice for an employer "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 . . . ." Moreover, the judiciary has centered on the language of section 901, which was drafted "with an unmistakable focus on the benefited class" of "persons," instead of "simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." Cannon v. University of Chicago, 441 U.S. at 691-93. Thus, assuming the validity of the North Haven holding—that employees of educational institutions receiving federal funds are "persons" within the meaning of section 901—it is clear that after Cannon, an implied private right of action is available to educational employees as well as students.


broadly construed this prohibition of employment discrimination.\(^9\)

The substantive rights created by Title VII potentially offer effective safeguards from gender-based employment discrimination. \(^4\) Although the federal courts are given subject matter jurisdiction in Title VII actions, \(^4\) the provisions of the statute evince a clear preference for resolution of claims through an administrative process. \(^4\) Thus, before a victim of employment discrimination may institute suit, he must exhaust a complex and often burdensome administrative procedure. \(^4\) The

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Broad judicial construction of Title VII is evidenced by the ease in stating a prima facie violation of the statute through demonstrating that an employer's hiring or promotion criteria have a statistically disproportionate effect on a protected class. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); United States v. City of Chicago, 549 F.2d 415, 427 (7th Cir. 1977); Stewart v. General Motors Corp., 542 F.2d 445, 450 (7th Cir. 1976). Thus, an aggrieved individual need not show an invidious intent to discriminate. See generally Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U.L. Rev. 36 (1977).


\(^4\) In enacting Title VII, Congress did not provide for a private cause of action unless an aggrieved individual first seeks relief from the Equal Employment Opportunity Commission (EEOC), the agency created by Title VII to enforce its provisions. See 42 U.S.C. § 2000e-5(f)(1) (1976). If the EEOC fails to bring suit, dismisses the case, or is unable to achieve conciliation, the EEOC issues a right-to-sue letter to the aggrieved employee which enables him to seek judicial relief. Id.

\(^4\) 42 U.S.C. § 2000e-5(f)(b)-(f) (1976). Following the allegedly discriminatory practice, a complainant is given 180 days to file a claim with the EEOC. 42 U.S.C. § 2000e-5(e) (1976). The failure to file timely may result in a dismissal. See Hicks v. ABT Assoc., Inc., 572 F.2d 960, 963 (3d Cir. 1978); Greene v. Carter Carburetor Co., 532 F.2d 125, 126 (8th Cir. 1976). After filing, the EEOC will determine if the charge is supported by reasonable cause and will attempt reconciliation between the parties. 42 U.S.C. § 2000e-5(b) (1976). The statute, however, provides for a deferral procedure whereby individual state fair employment agen-
Title IX

The adequacy of the remedy available to a successful Title VII plaintiff also has been questioned. A prevailing party is entitled to equitable relief including back pay and reinstatement. The judiciary, however, generally has refused to award compensatory or punitive damages for violations of Title VII, notwithstanding allegations that equitable relief alone may fail fully to effect the purposes of the statute.

Section 1 of the Civil Rights Act of 1871 (current version codified at 42 U.S.C. § 1983), also has been utilized by litigants in an attempt to provide some additional measure of protection against sex-based employment discrimination. Specifically, section 1983 authorizes a private cause of action for deprivations of federal rights by persons acting under color of state law.

Section 1 of the Civil Rights Act of 1871 (current version codified at 42 U.S.C. § 1983), also has been utilized by litigants in an attempt to provide some additional measure of protection against sex-based employment discrimination. Specifically, section 1983 authorizes a private cause of action for deprivations of federal rights by persons acting under color of state law. Although the
statute initially was given a restrictive interpretation, recent liberal construction has occasioned frequent use of section 1983 to redress violations of a variety of federal rights, including discrimination in employment on the basis of sex. The coverage of the section is limited, however, since a prima facie case under the statute requires a showing of state action.

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 person injured in an action at law, suit in equity, or other proper proceeding for redress. . . .


The requirement under section 1983 that the defendant must act under color of state law, see Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970); Graseck v. Mauceri, 582 F.2d 819, 822 (8th Cir. 1978); Avar v. Conley, 465 F.2d 1382, 1388 (6th Cir. 1972), has been interpreted as equivalent to the state action requirement of the fourteenth amendment. Briley v. California, 564 F.2d 849, 855 (9th Cir. 1977); see Watson v. Kenrick Coal Co., 498 F.2d 1183, 1185 (6th Cir. 1974), cert. denied, 422 U.S. 1012 (1975). Thus, to state a prima facie violation of section 1983, the plaintiff generally must demonstrate that his federal rights were violated with knowledge of and pursuant to state law or statute. Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 326 (9th Cir.), cert. denied, 419 U.S. 1006 (1974); cf. City of Milwaukee v. Saxbe, 546 F.2d 693, 703 (7th Cir. 1976) (section 1983 does not provide redress for deprivations of rights under color of federal law). See generally Hendrickson, "State Action" and Private Higher Education, 1972 J.L. & Educ. 53, 58-76; Note, State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 Colum. L. Rev. 656 (1974).
In addition to the available statutory remedies, an individual aggrieved by sex-based employment discrimination may be able to seek redress directly under the United States Constitution. In *Davis v. Passman*, for example, the plaintiff commenced an action in federal court under the fifth amendment, claiming that her employment had been terminated solely because she was a woman. Finding that the alleged conduct of the defendant violated the equal protection component of the fifth amendment, the Supreme Court of the United States upheld the plaintiff’s right to maintain such a private cause of action. Moreover, the Court held that money damages were an appropriate remedy for the violation since there was no difficult question of valuation or causation and no available alternative forms of relief. The utility of a constitutionally based cause of action generally to redress sex-based dis-


64 442 U.S. at 231. Davis was dismissed from her job because her employer believed that it was “essential” that her position be filled by a man despite his acknowledgement that she was “able, energetic and a hard worker.” *Id.* at 230 & n.3.

67 *Id.* at 234-35 (citing Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976); Buckley v. Valeo, 424 U.S. 1, 93 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975)).

68 442 U.S. at 236-44. The Supreme Court, in reversing the Fifth Circuit, noted that the lower court erred in applying the Cort factors, see note 33 supra, to determine whether an action could be implied under the Constitution. 442 U.S. at 232-34. Noting that “the question of who may enforce a statutory right is fundamentally different from the question of who may enforce a right that is protected by the Constitution,” *id.* at 241 (emphasis in original), the Court reasoned that:

At least in the absence of “a textually demonstrable constitutional commitment of [an] issue to a coordinate political department” . . . we presume that justifiable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.

*Id.* at 242 (citation omitted).

69 *Id.* at 245-49. The Court distinguished the existence of a private right of action under the Constitution from the availability of judicial relief in such an action. Had the Court found that the relief which Davis sought was unavailable, it would have dismissed her complaint. *Id.* at 244. The Court determined, however, that damages would be obtainable if Davis prevailed on her claim, since a damages remedy is appropriate and normally available to litigants in federal court. *Id.* at 245, 248. It should be noted that the decision in *Davis* was based in part on the fact that the plaintiff had no other available remedies. *See id.* at 245 n.23, 247 & n.26; note 60 and accompanying text infra.
criminal, however, is doubtful. Although the Supreme Court decision in *Davis v. Passman* evinces a policy favoring the availability of some type of remedy for sex-based employment discrimination, it appears as though recovery directly under the Constitution may be permitted only where there is no congressionally created "equally effective alternative" remedy.60

*The Propriety of an Additional Cause of Action*

The utilization of the *Cannon* implied right of action under Title IX, in conjunction with the Second Circuit's holding in *North Haven*, provides academic employees with a more effective remedy against sex discrimination than had been previously available.61 Thus, this new remedy further implements the congressional objective of eradicating gender-based job discrimination.62 Concededly, Title VII was intended to serve as the primary means of achieving this goal, but the Supreme Court has observed that "the legislative history of Title VII manifests a congressional intent to allow an individual to independently pursue his rights under both Title VII and other applicable state and federal statutes."63 It

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60 Id. at 248; see Carlson v. Green, 446 U.S. 14, 19-20 (1980). The existence of an alternative remedy will not foreclose the availability of a private cause of action under the Constitution unless it was intended by Congress to preempt the constitutional remedy or to create an equally effective one. Id. at 14. The *Davis* decision, however, indicates that the availability of relief under Title VII would preclude suit directly under the Constitution. 442 U.S. at 246-47.

61 Although state action is a necessary element of a cause of action for sex discrimination under the Constitution or under section 1983, it is not an element of the plaintiff's cause of action under Title IX. See *Davis v. Passman*, 442 U.S. 228 (1979); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954); note 54 supra. Moreover, under Title IX, a plaintiff need not resort to an elaborate administrative process as he or she must under Title VII. See *Cannon* v. University of Chicago, 441 U.S. 677, 687 n.8, 706-07 & nn.40 & 41 (1979). See also note 43 supra.


would seem, therefore, that the existence of Title VII should not restrict the power of Congress to create new and possibly overlapping remedies.

One recent Supreme Court decision, however, arguably indicates that Title IX may be unavailable as an alternative remedy to Title VII for academic employees. In *Great American Federal Savings & Loan Association v. Novotny*, the United States Supreme Court held that section 2 of the Civil Rights Act of 1871 (codified at 42 U.S.C. § 1985(c)) may not be used to assert substantive rights already available under Title VII of the Civil Rights Act of 1964. A significant consideration of the Court in this decision was its perception that if suit under section 1985(c) was permitted as an alternative to Title VII, “the complainant could completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII.” Yet, recognition of an implied private right of action under Title IX to redress employment discrimination based on sex in federally funded educational institutions also would permit the circumvention of the administrative procedures established under Title VII. It is suggested, however, that this result is not irreconcilable with the Supreme Court’s rationale in *Novotny*. Indeed, closer inspection of the *Novotny* decision reveals that the issue of whether section

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67 378.

68 Id. at 376.

69 The *Novotny* decision may be narrowly interpreted, however, since the Court expressly limited its consideration to whether section 1985(c) could be used to circumvent Title VII. 443 U.S. at 370 n.6. It might be argued, nonetheless, that logical extension of the Court’s holding mandates disallowance of an implied right of action under Title IX since the latter also could be utilized to circumvent Title VII. See 65 CORNELL L. REV. 114, 125 (1979).
1985(c) may be used to circumvent Title VII is distinguishable from whether the private cause of action under Title IX may be used to supplement the protective scheme of Title VII.

The Novotny Court relied heavily on the remedial nature of the statute under which the suit was commenced.\(^9\) Section 1985(c) provides a private action for damages to victims of conspiracies to deprive one of the "equal protection of the laws, or . . . equal privileges and immunities under the laws," but creates no substantive rights.\(^7\) Although limiting the scope of section 1985(c), the Court in Novotny nevertheless expressly reaffirmed its previous decisions holding that Title VII and other contemporary legislation did not implicitly repeal earlier statutes which conferred "similar substantive rights."\(^7\) The Novotny holding, therefore, does not present a serious impediment to recognition of a private right of action for damages for sex-based employment discrimination under section 901 of Title IX, since that section creates an independent substantive right in favor of individuals to be free from discrimination because of sex in federally funded educational programs. Moreover, the fact that an individual's rights under Title IX may overlap with those previously possessed under Title VII presents little difficulty, since the existence of independent alternatives is wholly consistent with the congressional scheme of eliminating sex-based employment discrimination.\(^2\)

**CONCLUSION**

Relevant federal legislation for sex-based employment discrimination, while extensive, has serious limitations. The Second Circuit's decision in North Haven, however, appears to provide an effective alternative remedy for victims of sex discrimination in federally funded academic institutions. Although this remedy has not yet been subjected to scrutiny by the Supreme Court, it is sub-

\(^9\) 442 U.S. at 376-78.


\(^2\) See note 62 supra.
mitted that an examination of the pertinent legislative history supports the Second Circuit’s conclusion that Title IX was intended to reach discrimination in employment.

_Dorothy E. Murphy_