Roger Williams University Law Review

Volume 27
Issue 3 *Vol 27, Iss. 3 (Summer 2022)*

Article 13

Summer 2022

Doe v. Brown University, 253 A.3d 389 (R.I. 2021)

Katie Gradowski
Candidate for Juris Doctor, Roger Williams University School of Law

Constitutional Law, Civil Rights. *Doe v. Brown University*, 253 A.3d 389 (R.I. 2021). The antidiscrimination clause in Article I, Section 2 of the Rhode Island Constitution is not self-executing under the framework established in *Bandoni v. State,* 715 A.2d 580 (R.I. 1998), and thus does not establish a cause of action to challenge on-campus sex discrimination. In cases of on-campus assault, the Rhode Island Civil Rights Act does not establish a cause of action where the victim is a non-student and there is no evidence of intentional interference with an educational contract. Where such claims are brought by a non-student and are predicated on previously dismissed Title IX violations, issue preclusion applies.

FACTS AND TRAVEL

On November 21, 2013, Jane Doe, who was a freshman at Providence College, was drugged at an off-campus bar, transported to Brown University, and sexually assaulted by three Brown University students.[1] She reported the assault to the Providence Police Department and Brown University on February 3, 2014,[2] and search warrants of the students' phones were executed between February and May of that year.[3] On June 19, 2014, Brown notified Doe that she could file a complaint under the University's Code of Student Conduct.[4]

The school initiated an inquiry on September 5, 2014; shortly thereafter, Doe requested that the school pursue action under Title IX.[5] Brown declined to do so on the grounds that they had no formal Title IX policy in place; at the time, sex assault complaints were

1. Doe v. Brown University, 253 A.3d 389, 392–93 (R.I. 2021).
2. *Id.* at 393.
3. *Id.* These searches revealed incriminating text messages dated the day after the assault: "YO LIKE CLASSIC [Student C] THO . . . NO INVITE JUST WALKS IN AND STARTS RAPING HER," and "LMAO I died in her face, too real[.]" *Id.*
4. *Id.*
5. *Id. See* 20 U.S.C. § 1681.

adjudicated under the Code of Student Conduct.[6] On October 11, 2014, Doe filed a complaint with the United States Department of Education against Brown on the grounds that Brown had failed to redress her Title IX complaint and had not provided a "prompt, equitable, and effective response to plaintiff's sexual assault."[7]

Shortly after Doe filed her administrative complaint, Brown notified her that it planned to issue charge letters, then took no further action for a year and a half.[8] When Doe inquired as to the status of the investigation on April 20, 2016, Brown informed her that it had abandoned its investigation and had pursued no disciplinary action.[9] Doe subsequently filed two lawsuits against Brown: a federal action filed on November 14, 2016, alleging violations of Title IX, the Rhode Island Civil Rights Act (RICRA), and Article I, Section 2 of the Rhode Island Constitution (Article I, Section 2); and a state action, filed in Rhode Island Superior Court on September 28, 2017, which addressed the RICRA and Article I, Section 2 claims only.[10] In both cases, Doe alleged that Brown's failure to investigate the claim interfered with her education at Providence College, caused her to fear harassment, and ultimately caused her to withdraw from school.[11]

The United States District Court for the District of Rhode Island dismissed the federal claims on September 6, 2017, holding that, as a non-student, Doe could not pursue a private cause of action under Title IX for an on-campus sexual assault.[12] The district

---

6. *Doe,* 253 A.3d at 393; *see also* Brief of Defendants-Appellees at *5, Doe v. Brown University, 253 A.3d 389 (R.I. 2021) (No. SU-2019-0167-A), 2020 WL 12574285 (noting that during the 2013–14 academic year, Brown's sexual misconduct policies were governed by the university's Code of Student Conduct).

7. *See Doe,* 253 A.3d at 393.

8. *Id.*

9. *Id.* at 393-94.

10. *Id. See also* Doe v. Brown University, 270 F. Supp. 3d 556, 558–59 (D.R.I. 2017) (*Doe I*).

11. *Doe I*, 270 F. Supp. 3d at 559 (plaintiff alleged that Brown's inaction resulted in "substantial interference with [plaintiff's] access to educational opportunities or benefits" under Title IX); Brief of Plaintiff-Appellant at *24, Doe v. Brown University, 253 A.3d 389 (R.I. 2021) (No. SU-2019-0167-A), 2019 WL 13092471 (plaintiff alleged that Brown's inaction "interfered with Doe's contractual relationship with Providence College, which is prohibited by [RICRA].").

12. *Doe I*, 270 F. Supp. 3d at 564. Judge McConnell noted that Doe had filed the lawsuit seeking to expand the scope of the statute to include non-students but held that this was not permitted under Title IX. *Id.* at 558.

court declined to exercise supplemental jurisdiction, and the state claims were dismissed without prejudice.[13] The United States Court of Appeals for the First Circuit upheld the dismissal, holding that a private cause of action might exist for non-students but was not available to Doe as she had not alleged that she was "participat[ing] in any of Brown's educational programs or activities" as required under Title IX.[14]

After Doe refiled her claims in Rhode Island Superior Court, Brown filed a motion to dismiss, arguing that it had no control over the "hostile education environment" and thus could not have interfered with her educational contract at Providence College (a key claim under RICRA).[15] Brown further argued that issue preclusion barred consideration of the RICRA claim because it relied on the Title IX claim, which had been dismissed by the District Court and the First Circuit.[16] Finally, Brown argued that the Rhode Island Constitution did not create a private cause of action for damages for sex discrimination, and that even if it did, it would be inapplicable as Brown University was not a state actor.[17]

On February 22, 2019, the Rhode Island Superior Court held in favor of Brown, dismissing the RICRA claims on the grounds of issue preclusion and dismissing the Article I, Section 2 claim on the grounds that the Rhode Island Constitution did not create a private cause of action for damages.[18] Doe appealed on February 25, 2019, arguing error on both counts.[19] The Rhode Island Supreme Court affirmed the lower court rulings on all counts.[20]

ANALYSIS AND HOLDING

This case involved two issues of first impression: the question of how RICRA applied to on-campus sexual assaults of non-students, and the question of whether the nondiscrimination clause of

13. *Id.* at 563 (noting that the RICRA claim "raise[d] substantial question[s] of state law that are best resolved in state court") (citations omitted).
14. Doe v. Brown University, 896 F.3d 127, 131–33 (1st Cir. 2018) (*Doe II*).
15. *Doe*, 253 A.3d at 394.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 394–95.
20. *Id.* at 401.

the Rhode Island Constitution included a private cause of action.[21] Another key issue, relevant both to issue preclusion and to Doe's interference with contract claim, was the general scope of RICRA: whether the statute provided a cause of action that was broader than Title IX, or whether it was intended to closely mirror the federal statute.[22]

Doe argued for a broad interpretation, contending that the Superior Court erred in holding that the RICRA claim was precluded by the Title IX claim and also in holding that Article I, Section 2 provided no private right of action.[23] Brown argued, in response, that RICRA does not provide a cause of action that is broader than Title IX, that the RICRA claim was precluded by prior holdings, that the Rhode Island Constitution provided no private cause of action, and that if it did, it would not apply to Brown as the University was not a state actor.[24]

The Court addressed three issues in turn: first, whether the RICRA claim was properly barred under issue preclusion; second, whether RICRA's antidiscrimination protections regarding the right to "make and enforce contracts" could be interpreted broadly to sanction "a university's failure to reasonably prevent, respond to, and remedy known acts of sex discrimination . . . on its campus, by its students"; and third, whether the nondiscrimination clause of Article I, Section 2 of the Rhode Island Constitution created a private right of action.[25]

---

21. *Id.* at 396, 398–99.

22. *Id.* at 396. In the Appellant's Brief, Doe argued that RICRA provides a broader cause of action than Title IX because it is not limited to pleading discriminatory conduct in a university's "programs or activities." Brief of Plaintiff-Appellant, *supra* note 11, at *19. A supporting amicus brief noted that "[RICRA] specifically states that '*all persons* within the state [have] the same rights . . . to the full and equal benefit of all laws and proceedings,'" emphasizing that this language is broadly inclusive and not limited to sub-classes of plaintiffs. Brief for Allies Reaching for Equality et al. as Amici Curiae Supporting Plaintiff-Appellant at *2, Doe v. Brown University, 253 A.3d 389 (R.I. 2021) (No. SU-2019-0167-A), 2020 WL 12574286. Brown argued, in response, that "RICRA is intended 'to mirror the federal cause of action provided in [42 U.S.C.] § 1981,'" and that it would be a "gross oversimplification" to widen RICRA's scope beyond what is strictly outlined in its federal counterpart. Brief of Defendants-Appellees, *supra* note 6, at *23.

23. *See Doe*, 253 A.3d at 395.

24. *Id.* at 395–96.

25. *Id.* at 396–401. As a preliminary matter, the Court also noted that under Rhode Island law, a court is permitted to take notice of judicial records

A. *Claims under RICRA: Title IX and Intentional Interference with Contract*

Under RICRA, "[a]ll persons within the state, regardless of race, color, religion, sex, disability, age, or country of ancestral origin, have, except as is otherwise provided or permitted by law, the same rights to make and enforce contracts."[26] To establish the elements of a RICRA claim, the Court looked to 42 U.S.C. § 1981, which indicates that where a plaintiff is alleging discrimination under an analogous federal statute, they must show that (1) they are a member of a protected class; (2) the defendant discriminated on the basis of the protected class; and (3) the discrimination implicates an activity listed in the statute.[27]

Doe alleged two types of intentional discrimination under RICRA: first, that Brown had "a widespread policy of mishandling sexual assault on campus, which constituted an official policy of sex discrimination that increased the risk of sexual assault" (the Title IX claim).[28] Second, she alleged that Brown's delayed response was "unreasonable in light of the circumstances," and that by failing to investigate such claims, Brown had violated RICRA by interfering with her education at Providence College (intentional interference with contract claim).[29]

The Court began by outlining the standard for issue preclusion in Rhode Island. Except where the "application of the doctrine would lead to inequitable results," issue preclusion applies where (1) the parties are the same or in privity with the parties of the previous proceeding; (2) a final judgment has been entered on the merits in the previous proceeding; and (3) the issue or issues in

---

when considering a motion to dismiss, including "judgments previously entered by the court that have the effect of res judicata pleadings." *Id.* at 395 (quoting Goodrow v. Bank of Am., N.A., 184 A.3d 1121, 1126 (R.I. 2018)). As such, the Superior Court was not in error by considering plaintiff's federal district court complaint or the orders dismissing these claims. *See id.*

26. *Id.* at 396. *See also* R.I. GEN. LAWS. ANN. § 42-112-1 (West 2021).

27. *Doe*, 253 A.3d at 396 (citing Hammond v. Kmart Corp., 733 F.3d 360, 362 (1st Cir. 2013)).

28. *Id.*

29. *Id.*

question are identical.[30] The Court found that the RICRA claim was "predicated upon defendants' alleged violations of Title IX," and that Doe had relied heavily on Title IX even though the federal court held it did not apply to non-students.[31] Because the district court indisputably held that the plaintiff was not entitled to Title IX protection, and because the resolution of this issue was "essential to the judgment on the merits" on the Title IX claim, the Court held that the RICRA claim had been properly precluded.[32]

Having discussed the Title IX issues, the Court then examined whether Brown interfered with Doe's educational contract at Providence College in violation of RICRA.[33] As this was an issue of first impression, the Court drew on examples from employment caselaw in examining whether there was a prima facie claim for intentional interference with contract.[34] "[T]he aggrieved party must demonstrate (1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) his or her intentional interference; and (4) damages resulting therefrom."[35] The Court held that although Brown was certainly aware that the plaintiff had an educational contract with Providence College, its actions were too attenuated to show intentional interference as a matter of law.[36]

B. Claim under Article I, Section 2 of the Rhode Island Constitution

The bulk of the opinion focused on the third claim: whether the nondiscrimination clause of Article I, Section 2 of the Rhode Island Constitution established a private right of action to address discrimination in the absence of enabling legislation.[37] The clause states, "No otherwise qualified person shall, solely by reason of

30. *Id.* (quoting Foster-Glocester Reg'l Sch. Comm. v. Bd. of Review, 854 A.2d 1008, 1014 (R.I. 2004)).

31. *Id.* at 397.

32. *Id.*

33. *Id.* at 397–98.

34. *Id.* at 398.

35. *Id.* (quoting John Rocchio Corp. v. Pare Eng'g Corp., 201 A.3d 316, 324 (R.I. 2019)).

36. *Id.* This mirrored the reasoning of the district court, which observed that Brown could not have interfered with Doe's education at Providence College as Brown had no control over the educational programs at that school. *See Doe I*, 270 F. Supp. 3d at 562.

37. *Doe*, 253 A.3d at 398–401.

race, gender, or handicap, be subject to discrimination by the state."[38] Doe argued that the clause should be construed to create a private right of action, and that because Brown did substantial business with Rhode Island, the clause should apply.[39] As noted above, this was an issue of first impression.[40] It was a key issue, as in the absence of a constitutional claim, only RICRA clearly established a cause of action for Doe to pursue.[41]

Bandoni v. State is the seminal case that addressed whether a provision of the Rhode Island State Constitution includes an implied cause of action.[42] Examining Article I, Section 23, the victims' rights amendment, the Court in *Bandoni* held that a private cause of action only exists where a provision is self-executing, i.e., "if it supplies a sufficient rule by means of which the right may be enjoyed and protected, or the duty imposed may be enforced."[43] The Court cautioned that "principles of judicial restraint prevent us from creating a cause of action for damages in all but the most extreme circumstances."[44]

In *Bandoni*, the Court laid out a four-part framework to determine when a constitutional provision is self-executing (i.e., where an implied cause of action would exist):

> First, a self-executing provision should do more than express only general principles; it may describe the right in detail, including the means for its enjoyment and protection. . . . Second, ordinarily a self-executing provision does not contain a directive to the legislature for further action. . . . Third, the legislative history may be particularly informative as to the provision's intended operation. . . . Finally, a decision for or against self-execution must harmonize with the scheme of rights established in the constitution as a whole.[45]

---

38. R.I. CONST., art. 1, § 2.
39. *Doe*, 253 A.3d at 398.
40. *Id.* at 399.
41. *See* R.I. GEN. LAWS. ANN. § 42-112-2 (West 2021).
42. *See Doe*, 253 A.3d at 399 (quoting Bandoni v. State, 715 A.2d 580 (R.I. 1998)).
43. *Id.* (quoting *Bandoni*, 715 A.2d at 587).
44. *Id.* (quoting *Bandoni*, 715 A.2d at 595).
45. *Id.* at 400 (citing *Bandoni*, 715 A.2d at 587).

Applying this standard to the nondiscrimination clause, the Court held that Article I, Section 2 articulates general principles only and "does not set forth rules that give those principles the force of law."[46] The Court held that mandatory language ("shall") was not dispositive, and that in the absence of specific rules or any language indicating an action for damages, no cause of action was created.[47] Although the nondiscrimination clause did not include any legislative directives, the Court held that this was to be expected given its general nature.[48]

The Court then considered the legislative history, noting that "[t]he intent of the resolution[, including the antidiscrimination clause in this section,] was to include the due process and equal protection language of the 14th Amendment of the U.S. Constitution in the Rhode Island Constitution."[49] The Court also noted that the legislative history was inconclusive, and that "the delegates never indicated that the resolution would create a private cause of action for damages; rather they spoke in terms of 'clear guidance' and 'enduring affirmation[s].'"[50]

Finally, the Court considered whether finding a cause of action would "harmonize with the scheme of rights established in our constitution as a whole."[51] The Court held that it would not: the violation of a constitutional right does not, on its own, create a cause of action for damages,[52] and the Supreme Court has repeatedly held that "[t]he judiciary may not properly create a new cause of action in order to deal with a particular perceive wrong."[53] Citing principles of judicial restraint, the Court held that "the function of adjusting remedies to rights is a legislative responsibility rather than a judicial task."[54] As such, the Court affirmed the Superior Court's ruling, holding that the antidiscrimination clause was not self-

46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 399 (quoting L.A. Ray Realty v. Town Council of Cumberland, 698 A.2d 202, 218 (R.I. 1997)).
50. *Id.* at 400 (quoting Proceedings at Hearing re: R.I. Const. Convention (June 5, 1986) at 156).
51. *Id.* at 400 (quoting Bandoni v. State, 715 A.2d 580, 587 (R.I. 1998)).
52. *Id.* at 401.
53. *Id.* (quoting Cullen v. Lincoln Town Council, 960 A.2d 246, 249 (R.I. 2008)).
54. *Id.* (quoting *Bandoni*, 715 A.2d at 596).

executing and that Article I, Section 2 did not give rise to a private cause of action for damages in the absence of a statutory remedy.[55]

COMMENTARY

This case reflects long-standing principles of judicial restraint and a general unwillingness of the Supreme Court to establish new causes of action in the absence of clear statutory language. In declining to extend RICRA or establish a cause of action under Article I, Section 2, the Supreme Court's holding significantly limits the remedies available to victims of sex discrimination in Rhode Island in cases where Title IX does not apply. It also reiterates the extent to which the Court maintains strict deference to the legislature when asked to weigh in on policy matters.

Under the *Bandoni* test, Article I, Section 2 provides clear guidance as to the scope of Rhode Island's antidiscrimination law but no clear path to a remedy. The Court was largely silent as to the question of RICRA's scope, although the broader emphasis on judicial restraint suggests that the statute will be read narrowly going forward. This holding conclusively limits recovery under state law for off-campus victims of sexual assault, and the legislature may want to consider extending these provisions to address the current limitations on recovery for this class of plaintiffs.

CONCLUSION

The Rhode Island Supreme Court held that the nondiscrimination clause of Article I, Section 2 of the Rhode Island Constitution does not establish an independent cause of action for challenging sex discrimination where a university fails to police on-campus sex assault, holding that under principles of judicial restraint, constitutional remedies are best set by the legislature. The Court declined to extend the Rhode Island Civil Rights Act to include sex discrimination claims raised by a non-student against a university, holding that the statute does not apply where there is no intentional interference with contract and where the issue is precluded under Title IX.

Katie Gradowski

55. *Id.*