Florida Law Review

Volume 55 | Issue 2 Article 6

April 2003

The Right to Sue Under Section 1983

Cheryl A. Priest

CIVIL PROCEDURE: THE RIGHT TO SUE UNDER SECTION 1983

Gonzaga University v. Doe, 122 S. Ct. 2268 (2002)

*Cheryl A. Priest**

Pursuant to a request made by Respondent Doe[1] for an affidavit of good moral character from Petitioner Gonzaga University, Petitioners[2] revealed information about Respondent in apparent violation of the Family Education Rights and Privacy Act of 1974 (FERPA).[3] FERPA prohibits the federal funding of educational institutions that have a policy or practice of releasing educational records to unauthorized persons.[4] Respondent filed suit in state court under various state law claims and included a request for damages[5] under 42 U.S.C. § 1983[6] for the alleged FERPA violation.[7] A jury found for Respondent on all counts, awarding him compensatory and

---

* My thanks to my parents John and Rosalie Priest for their unwavering support, and to Aaron Ainsworth for his unconditional belief in me.

1. Respondent "is a former undergraduate in the School of Education at Gonzaga University, a private university in . . . Washington state." Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2272 (2002). "Washington at the time required all . . . new teachers to obtain an affidavit of good moral character from a dean of their graduating college or university." *Id.*

2. Petitioners are Gonzaga University and their "'teacher certification specialist,'" Roberta League. *Id.* Petitioner League overheard a student say that Respondent "engaged in acts of sexual misconduct against" a female undergraduate student. *Id.* Petitioner League launched an investigation and contacted the state agency in charge of teacher certification, identifying Respondent by name and discussing the allegations against him. *Id.*

3. 20 U.S.C. § 1232g (2000).

4. 20 U.S.C. § 1232g(b)(1). FERPA provides in relevant part:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents to any individual, agency, or organization. . . .

Id.

5. Respondent alleged violations of Washington tort and contract law. *Gonzaga Univ.*, 122 S. Ct. at 2272.

6. 42 U.S.C. § 1983 (2000). Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Id.

7. *Gonzaga Univ.*, 122 S. Ct. at 2272.

punitive damages, including $450,000 on the FERPA claim.[8] The Washington Court of Appeals reversed, concluding that FERPA does not create individual rights and, therefore, cannot be enforced under section 1983.[9] The Washington Supreme Court subsequently reversed the decision, and ordered the FERPA damages reinstated.[10] The State Supreme Court reasoned that while FERPA does not explicitly grant a private right of action, its nondisclosure provision creates a federal right enforceable under section 1983.[11] The United States Supreme Court granted certiorari,[12] and in reversing the decision of the Washington Supreme Court, HELD, that FERPA's nondisclosure provisions do not create individual rights,[13] and accordingly that FERPA is unenforceable under section 1983.[14]

Six years after Congress enacted FERPA, the United States Supreme Court recognized that section 1983 actions may be brought against state actors to enforce rights created by federal statutes as well as rights created by the Constitution.[15] However, a plaintiff alleging a violation of a federal statute cannot sue under section 1983 where "(1) 'the statute does not create enforceable rights, privileges, or immunities within the meaning of § 1983,' or (2) 'Congress has foreclosed such enforcement of the statute in the enactment itself.'"[16] In *Pennhurst State School & Hospital v. Halderman*,[17] the Court began its exploration of when a federal statute would be deemed to have created private rights.[18]

In *Pennhurst*, the Court examined whether the Developmentally Disabled Assistance and Bill of Rights Act (DDABRA)[19] created substantive rights in favor of the mentally retarded, and if so, whether the Petitioner[20] violated those rights.[21] Respondent, a resident of the Petitioner's institution, a hospital and school for the developmentally disabled, filed suit on behalf of herself and other residents of the institution alleging that conditions at the institution were unsanitary, inhumane, and

---

8. *Id.*

9. Gonzaga Univ. v. Doe, 992 P.2d 545, 549 (Wash. Ct. App. 2000), *rev'd*, 24 P.3d 390 (Wash. 2001), *rev'd* 122 S. Ct. 2268 (2002).

10. Doe v. Gonzaga Univ., 24 P.3d 390, 400 (Wash. 2001), *rev'd*, 122 S. Ct. 2268 (2002).

11. *Id.*

12. *Gonzaga Univ.*, 122 S. Ct. at 2272.

13. *Id.* at 2278.

14. *Id.* at 2279.

15. Maine v. Thiboutot, 448 U.S. 1, 4 (1980).

16. Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting Wright v. Roanoke Redevelopment & Housing Auth., 479 U.S. 418, 423 (1987)).

17. 451 U.S. 1 (1981).

18. *Id.* at 18-19, 28.

19. 42 U.S.C. § 6000 (1999) (repealed 2000).

20. Petitioner was a facility for the care and treatment of the mentally retarded. *Pennhurst*, 451 U.S. at 5.

21. *Id.* at 6.

dangerous,[22] and accordingly that their rights under the DDABRA had been effectively denied.[23] The Court held that nothing in the language, structure, or purpose of the DDABRA revealed a Congressional intent to require states to bear the burden of funding new, legislatively created, substantive rights for the developmentally disabled.[24]

In making this determination, the Court first noted that the DDABRA was voluntary and that states were given the choice of complying with its conditions or forgoing federal funding.[25] Then, the Court looked to the legislative purpose of the DDABRA, and found that rather than creating rights and obligations, DDABRA was a "mere federal-state funding statute."[26] The Court noted that the DDABRA was precatory,[27] and represented general statements of federal policy[28] rather than newly created legal duties.[29] Essentially, the Court ruled that when legislation is enacted pursuant to Congress' spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action but an action by the federal government to terminate funds to the state.[30] Specifically, the Court ruled that unless Congress demonstrates an unambiguous intent to confer individual rights, federal acts that give states the choice between complying with the act or foregoing federal funding are not a suitable basis for private enforcement under section 1983.[31]

The Court found an unambiguous intent to create private rights in *Wilder v. Virginia Hospital Ass'n.*[32] In *Wilder*, Petitioners, a nonprofit organization of public and private hospitals, brought a section 1983 action

---

22. *Id.*

23. *Id.*

24. *Id.* at 18.

25. *Id.* at 11.

26. *Id.* at 18. The Court likewise noted that the legislation was enacted pursuant to Congress' spending power and is, therefore, in the nature of a contract: in return for federal funds, the states agree to comply with federally imposed conditions. *Id.* at 17. The Court reasoned that if Congress intends to impose a condition on the grant of money, it must do so unambiguously. *Id.* Further, the Court noted that the "plain language" of the section of DDABRA at issue contained no language conditioning the receipt of federal funding on states meeting the recommendations set out in the act. *Id.* at 23.

27. "Having the nature of prayer, request or entreaty; conveying or embodying a recommendation or advice or the expression of a wish, but not a positive command or direction." BLACK'S LAW DICTIONARY 1176 (6th ed. 1990).

28. *Pennhurst*, 451 U.S. at 13. For example, "[t]he Federal Government and the States both have an obligation to assure that public funds are not provided to any institutio[n] . . . that—(A) does not provide treatment, services, and habilitation which is appropriate to the needs of such person; or (B) does not meet the following minimum standards . . . ." *Id.* (quoting 42 U.S.C. § 6010(3)).

29. *Pennhurst*, 451 U.S. at 18, 23.

30. *Id.* at 28.

31. *Id.* at 17, 28.

32. 496 U.S. 498, 509 (1990).

challenging the method by which Virginia reimbursed them[33] under the Medicaid Act.[34] Specifically, the Petitioners claimed that Virginia's reimbursement rates were unreasonable and inadequate to meet the cost of providing care to Medicaid patients.[35] The Court held that the Medicaid Act created an enforceable right to reasonable and adequate reimbursement rates by health care providers under section 1983.[36]

The Court noted that the Medicaid Act was phrased in terms benefitting healthcare providers,[37] and from this fact concluded that health care providers were the intended beneficiaries of the Act.[38] The Court found that the statutory language was cast in mandatory terms,[39] and noted that federal funds were expressly conditioned on compliance.[40] The Court stated that the "reasonableness" language of the Medicaid Act was not overly vague, and noted that while a range of reasonable rates exist, certainly some rates would fall outside that reasonable range.[41] Essentially, the Court held that reliance on section 1983 was not foreclosed simply by the existence of an administrative scheme designed to comply with the Medicaid Act's regulations, and found no indication that Congress intended[42] the administrative procedure to replace private remedies.[43]

The Court further added the requirement of explicit rights-creating language to benefit a putative plaintiff under section 1983 in *Blessing v. Freestone*.[44] In *Freestone*, the Court focused on the statutory language necessary to create individual rights.[45] Respondents, five Arizona mothers, alleged that they had properly applied for child support services under Title

---

33. *Id.* at 501.

34. 42 U.S.C. § 1396 (Supp. V 1982). Specifically, the *Wilder* Court looked at whether the Boren Amendment to the Medicaid Act, which requires reimbursement according to the "rates that a 'State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities,'" is enforceable under section 1983. *Wilder*, 496 U.S. at 501-02 (quoting 42 U.S.C. § 1396(a)(13)(A) (Supp. V 1982)).

35. *Wilder*, 496 U.S. at 503.

36. *Id.* at 509-10.

37. *Id.* at 510.

38. *Id.*

39. *Id.* at 512.

40. *Id.*

41. *Id.* at 519-20.

42. In fact, prior to the passage of the Boren Amendment, Congress required states to waive any Eleventh Amendment immunity from suit for violations of the Medicaid Act. *Id.* at 517. *See* H.R. REP. NO. 94-1122, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5649-51. While the waiver was later repealed, Congress explained that it did not intend the repeal to constrain the rights of providers of these services to seek relief in state or federal courts. *Wilder*, 496 U.S. at 517; *see also* S. REP. NO. 94-1240, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5651.

43. *Wilder*, 496 U.S. at 523.

44. 520 U.S. 329, 341 (1997).

45. *See id.* at 341-46.

IV-D of the Social Security Act (SSA),[46] and that the state agency[47] had failed to take adequate steps to obtain child support payments from the fathers of their children.[48] Respondent mothers claimed that the agency's failure[49] was attributable to certain structural defects,[50] the existence of which were in violation of Title IV-D.[51] Pursuant to the SSA, if a state fails to "substantially comply" with Title IV-D, the Secretary is authorized to penalize the state by reducing its Aid to Families with Dependent Children (AFDC)[52] grant by up to five percent.[53]

The Court noted that this "substantial compliance" standard was designed only to guide a state in structuring its system-wide efforts to enforce child support obligations, not to provide a private enforcement mechanism.[54] The Court did not foreclose the possibility that some provisions of Title IV-D may give rise to individual rights.[55] Finding too tenuous a link between staffing guidelines and individual rights,[56] the Court held that unless a plaintiff can point to a specific provision conferring a specific right, a section 1983 claim cannot stand.[57] Accordingly, the Court held that if Respondents could single out a specific provision giving rise to an individual right, the right to sue under section 1983 could not be foreclosed by any alternative remedial scheme contained

---

46. 42 U.S.C. §§ 651-669(b) (Supp. II 1994).

47. Arizona Department of Economic Security. *Freestone*, 520 U.S. at 337.

48. *Id.*

49. The Court noted that Arizona's record of child support enforcement is "less than stellar." *Id.* at 335. For example, the Court noted that in the 1989-1990 fiscal year, the state failed to collect enough money in child support payments and federal incentives to cover even the cost of administering its Title IV-D program, "1 of only 10 states to fall below that target." *Id.* Moreover, "[f]or every dollar spent on enforcement, the State collected barely two dollars—almost half the nationwide average." *Id.*

50. Such defects included: staff shortages, high caseloads, unmanageable backlogs, and deficiencies in the State's accounting methods and recordkeeping. *Id.* at 337.

51. *Id.* The structure of each state's agency must conform to federal guidelines set forth in Title IV-D, including the creation of separate units to administer the plan, § 654(3), and disbursement of collected funds, § 654(27), each of which must be staffed at levels set by the Secretary of Health and Human Services, 45 C.F.R. § 303.20 (1995). In addition, to maintain detailed records of pending cases, states must set up computer systems that meet federal standards, § 654(a), as well as enact laws designed to streamline paternity and child support actions, §§ 654(20), 666. *Id.* at 334-35.

52. 42 U.S.C. §§ 601-617 (2000).

53. *Freestone*, 520 U.S. at 335.

54. *Id.* at 344. For example, the guidelines do not give rise to individualized rights to either computer services or sufficient staffing. *Id.* at 344-45.

55. *Id.* at 345.

56. *Id.*

57. *Id.* "[T]o give each and every Arizonan" an individualized right to adequate support staff and the like, especially without guidance on what would be considered sufficient, would "certainly 'strain judicial competence.'" *Id.*

within the statute.[58]

In an attempt to clear up confusing language in *Freestone*,[59] the instant Court expressly rejected the notion that anything short of an unambiguously conferred right will support a cause of action under section 1983.[60] The instant Court emphasized that it is rights, not benefits or interests, that can be enforced under that section.[61] In defining what kinds of statutes create individual rights the instant Court, like the Court in *Pennhurst*,[62] seized upon the fact that FERPA was enacted pursuant to Congress' spending powers.[63] The instant Court noted that they had only twice found spending legislation that gave rise to enforceable rights.[64]

Distinguishing *Wilder*,[65] the instant Court noted that the language of the Medicaid Act, unlike the language in FERPA, specifically conferred rights upon healthcare providers by requiring that the entitlement be bestowed on individual healthcare providers.[66] The instant Court reasoned that for a statute to create private rights, its text must be "'phrased in terms of the persons benefited.'"[67] The instant Court noted that the initial inquiry in a section 1983 case is no different than the initial inquiry in an implied right of action case: determining whether a statute confers any right at all.[68] Using this logic, the instant Court asserted that where the text and structure of a statute provide no indication that Congress intended to create new individual rights, there is no basis for a private suit under section 1983 or under an implied right of action case.[69]

The instant Court held that FERPA is devoid of "rights-creating" language.[70] The Court reasoned that FERPA's provisions speak only to the Secretary of Education, directing what the Secretary should do if an educational institution has a prohibited policy or practice of releasing students' information to unauthorized persons.[71] As such, the instant Court

---

58. *Id.* at 348. The Court noted Title IV-D contained no private remedy, either judicial or administrative, through which aggrieved persons could seek redress. *Id.*

59. "Congress must have intended that the provision in question benefit the plaintiff." *Id.* at 340.

60. Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2275 (2002).

61. *Id.*

62. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 (1981).

63. *Gonzaga Univ.*, 122 S. Ct. at 2272-73.

64. *Id.* at 2273; *see also* Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418 (1987); Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990).

65. 496 U.S. 498.

66. *Gonzaga Univ.*, 122 S. Ct. at 2274.

67. *Id.* at 2275 (quoting Cannon v. University of Chicago, 441 U.S. 677, 690, 693 n.13 (1979)).

68. *Id.* at 2276.

69. *Id.* at 2277.

70. *Id.*

71. *Id.*

noted that the focus of the statute is "two steps removed"[72] from the interests of individual students.[73] Additionally, the instant Court likened FERPA to the statute in *Freestone*, as it has an aggregate focus, since FERPA refers to a "policy or practice."[74] As in *Freestone*, the instant Court noted that the fact that FERPA requires only "substantial compliance" is an indication that the statute was intended to serve as a mere guide for the state.[75]

Moreover, the instant Court reasoned that the enforcement mechanism that guides the Secretary of Education through a specific set of procedures to "deal with" non-compliant institutions is further evidence of a lack of individual rights.[76] The centralization of control in the hands of the Secretary of State, rather than regional offices,[77] provided even more support to the instant Court that the statute was not intended to create individual rights.[78] Judicial determinations would result in the multiple interpretations Congress sought to avoid.[79]

The instant Court, by placing emphasis on the inquiry of whether a right is unambiguously conferred in a statute by looking at the provisions of the statute, appears to simplify the issue.[80] By narrowly focusing the inquiry on the express intent of Congress, many rights may not be recognized. The laws, and their complex purposes, may prove too many and too diverse for courts to discern what Congress considers an unambiguous intent to confer a right.[81] Most problems in statutory interpretation lie in what a court will find sufficiently unambiguous.[82]

Beginning with *Pennhurst*, the Court found that nothing in the language, structure, or purpose of the DDABRA revealed a Congressional intent to require states to bear the burden of new, legislatively created, substantive rights.[83] At least an argument could be made that since the

---

72. *Id.* Specifically, the instant Court compared the language in Titles VI and IX ("'no person shall be subjected to discrimination'") with the direction to the Secretary of Education in FERPA, noting that there would be less reason to infer a private right in favor of individuals if Congress had written it simply as a ban on discrimination, without the "person" language included. *Id.* (citation omitted in original).

73. *Id.*

74. *Id.* at 2278.

75. *Id.*

76. *Id.* at 2278-79.

77. *Id.* at 2279. The instant Court reasoned that the centralization of control was an effort to avoid multiple interpretations for FERPA. *Id.*

78. *Id.*

79. *Id.*

80. *See id.* at 2275.

81. *See id.* at 2279 (Breyer, J., concurring).

82. *See id.* at 2281 (Stevens, J., dissenting) (suggesting numerous interpretations of this and other statutes).

83. *See supra* note 24 and accompanying text.

"BRA" of DDABRA stands for Bill of Rights Act, there was at least a modicum of Congressional intent to create express rights.[84] Instead, the Court, similar to its action in the instant case, broke each section of the statute down into individual components and analyzed whether any right had been conferred.[85]

FERPA contains ten subsections, many of which contain specific references to both students' rights, parents' rights, and privacy rights.[86] Yet the instant Court focused its inquiry on a single provision of that statute[87] which provides that no funds will be made available to any institution deemed to have a policy of releasing information about a student unless that policy requires that the institution first obtain written consent from the student's parents.[88] While the majority focuses on the institutional policy language,[89] finding it consistent with an aggregate focus rather than an individual focus,[90] it does not appear to address the use of the "student" or "student's parent."[91] The majority appears to refer to an individual student in the same way the instant Court addresses the use of the term "individual" in other rights-creating statutes.[92]

Additionally, the instant Court appears to stray from the tradition of surveying the legislative history of the statute to determine if it creates enforceable rights as it has done in previous cases.[93] This lack of an in-depth inquiry into the legislative underpinnings may be representative of the instant Court's emphasis on unambiguous and express Congressional word choice.[94] If extended to other cases, this emphasis on pure language may curtail the common practice of ascertaining legislative intent.

The instant Court does follow previous rulings in its determination that "substantial compliance" language in FERPA speaks in terms of institutional policy rather than individual instances of disclosure.[95] The instant Court appears to suggest that if an individual right were to be created by Congress, Congress would certainly intend that the states make more than merely a good faith effort to "substantially comply" with such

84. The Court in *Pennhurst*, however, noted that "[i]t has long been established that the title of an Act 'cannot enlarge or confer powers.'" Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 19 n.14 (1981) (quoting United States v. Oregon & California R. Co., 164 U.S. 526, 541 (1896)).

85. *See id.* at 13-14; *see also Gonzaga Univ.*, 122 S. Ct. at 2282.

86. 20 U.S.C. § 1232g; *see also Gonzaga Univ.*, 122 S. Ct. at 2281.

87. *See Gonzaga Univ.*, 122 S. Ct. at 2273.

88. *See id.*

89. *See supra* notes 68-71 and accompanying text.

90. *See supra* note 74 and accompanying text.

91. *See Gonzaga Univ.*, 122 S. Ct. 2268.

92. *See supra* note 34 and accompanying text.

93. *See supra* note 26 and accompanying text.

94. *See Gonzaga Univ.*, 122 U.S. at 2275.

95. *Id.* at 2278; *see also* Blessing v. Freestone, 520 U.S. 329, 344 (1997).

rights.[96] Thus the instant Court remains intellectually consistent with it previous rulings.[97]

The most curious aspect of the instant Court's analysis of FERPA lies in its inclusion of the centralized administrative procedure for redressing grievances.[98] In *Freestone*, the Court, noting that if individual rights were to exist they could be foreclosed by an enforcement scheme that makes a section 1983 action unnecessary,[99] appears to have imported the separate inquiry previously applied to enforcement into the initial inquiry of whether individual rights exist at all.[100] If the enforcement scheme of legislation is to become a part of the determination of whether a right exists, and not whether it is enforceable, as previously held,[101] then previous cases[102] become less useful in guiding the courts through the analysis of when individual rights are created.[103]

While the instant Court may have created an easier test for Congress to follow in the future when they intend to create rights, it may have also muddied the water by collapsing two previously separate inquiries[104] into one comprehensive scheme for determining whether a Congressional act creates individual rights, enforceable under section 1983.[105] Nonetheless, the right result may have been achieved, given the administrative headache of potential suits for such minor events as teacher evaluations, honor society recommendations, or roll call responses.[106] In the end, Congress may have to choose its words more carefully.

96. *See Gonzaga Univ.*, 122 U.S. at 2278.
97. *See, e.g., Freestone*, 520 U.S. at 344.
98. *See Gonzaga Univ.*, 122 U.S. at 2278-79.
99. *See supra* note 58 and accompanying text.
100. *See Gonzaga Univ.*, 122 U.S. at 2283 n.5 (Stevens, J., dissenting).
101. *See supra* note 16 and accompanying text.
102. *See, e.g.*, Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990).
103. *See Gonzaga Univ.*, 122 U.S. at 2283 (Stevens, J., dissenting).
104. *See supra* note 16 and accompanying text.
105. *See Gonzaga Univ.*, 122 U.S. at 2278.
106. *See id.* at 2280 (Breyer, J., concurring).