

# Courts Reluctant to Enforce Section 3

After several years of judicial inactivity involving Section 3, the fall of 2006 saw two unpublished federal court opinions addressing the issue of whether a Section 3 resident and/or business has a private right of action to seek enforcement of Section 3.<sup>1</sup> Unfortunately, both opinions conclude that there is no such right. In *McQuade*, the court reached its decision with little-to-no discussion of the underlying issues; however, in *Williams*, the court was more revealing.

## Background of Section 3 and Private Enforcement

The Department of Housing and Urban Development's (HUD) Section 3 program is intended to provide economic and employment opportunities to low-income individuals.<sup>2</sup> Specifically, Section 3 requires recipients of certain forms of HUD funding to provide job training, employment, and contracting opportunities to very low- and low-income residents and eligible businesses.<sup>3</sup> Unfortunately, Section 3 has generally failed to meet these worthwhile goals, due in large part to a lack of program monitoring and enforcement. And while earlier cases interpreting Section 3 often inferred that the statute provides individuals with a private right of action to seek redress for Section 3 violations;<sup>4</sup> under current Supreme Court precedent, such results have been less forthcoming.<sup>5</sup>

## Private Enforcement of Federal Laws: Implied Private Right of Action vs. Section 1983

As an initial matter, while the constitutional considerations associated with an implied private right of action and a Section 1983 claim are often conflated, there are distinct differences between the two. When dealing with an implied private right of action, the burden is on the plaintiff to establish that Congress either expressly or implicitly created a private right of action.<sup>6</sup> In contrast, in a Section 1983 action, the defendant has the burden of establishing that Congress has intended to preclude use of Section

1983.<sup>7</sup> On other aspects of the tests, whether the statute creates enforceable rights for Section 1983 purposes or substantive rights for implied right of action purposes, the considerations are essentially the same. In light of the Supreme Court's current interpretations of an implied private right of action and Section 1983 principles, this article will separately review each of the standards and the applicable case law.

## Implied Private Right of Action

When courts are asked to determine whether a particular statute confers a private right of action to an aggrieved individual, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."<sup>8</sup> With regard to Section 3, although Congress may have failed to provide an express private right of action for individuals seeking relief for violations, potential plaintiffs could reasonably argue that an implied private right of action could be inferred using the Court's rationale in *Sandoval*.

In *Sandoval*, the Court was asked to determine whether private individuals may sue to enforce disparate-impact regulations promulgated under Section 602 of Title VI of the Civil Rights Act of 1964. In reaching its conclusion, the Court stated that while it is well settled that private individuals may sue to enforce regulations promulgated under Section 601 of Title VI, private individuals cannot enforce regulations promulgated under Section 602.<sup>9</sup> The relationship between Sections 601 and 602 is fairly straightforward. Section 601 states a basic principle and Section 602 authorizes agencies to develop detailed plans for defining the contours of the principle and ensuring its enforcement. Despite the symbiotic relationship between Sections 601 and 602, the Court reasoned that the dissimilar textual focuses lead to dissimilar enforcement rights. Specifically, the Court stated that, "[s]tatutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons."<sup>10</sup> Therefore, Section 602 does not provide individuals with a private right of action because "[i]t focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating."<sup>11</sup>

<sup>1</sup>*McQuade v. King County Hous. Auth.*, 2006 WL 3040060 (C.A.9 (Wash) Oct. 25, 2006); *Williams v. HUD*, 2006 WL 2546536 (E.D.N.Y. Sept. 1, 2006).

<sup>2</sup>12 U.S.C.A. § 1701u(b) (2006).

<sup>3</sup>*Id.* § 1701u(c)-(d).

<sup>4</sup>*See, e.g., Ramirez, Leal & Co. v. City Demonstration Agency*, 549 F.2d 97 (9th Cir. 1976); *Drake v. Couch*, 377 F. Supp. 722 (M.D. Tenn. 1971), *aff'd*, 471 F.2d 653 (6th Cir. 1973); and *Milsap v. HUD*, 1990 U.S. Dist. LEXIS 13954 (D. Minn. 1990).

<sup>5</sup>*See, e.g., Gonzaga University v. Doe*, 536 U.S. 273 (2002); and *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>6</sup>*Gonzaga* at 284-285.

<sup>7</sup>*Id.*

<sup>8</sup>*Sandoval* at 286.

<sup>9</sup>Section 601 states, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2006). In contrast, Section 602 authorizes federal agencies "to effectuate the provisions of [§ 601]...by issuing rules, regulations, or orders of general applicability." *Id.* § 2000d-1.

<sup>10</sup>*Sandoval* at 289.

<sup>11</sup>*Id.*

The *Sandoval* rationale suggests that a prerequisite to establishing an implied right is the determination of whether the underlying statute creates a substantive right in favor of plaintiffs. Substantive rights, as contrasted with statutory goals or administrative obligations, are presumptively enforceable because the creation of the right itself implies that Congress intended it to be enforceable by the holder of the right. In terms of Section 3, aggrieved plaintiffs can point to several clauses that signal Congress's intent to create substantive rights in favor of plaintiffs. For example, the Section 3 statute expressly states that it is the policy of Congress to ensure, to the greatest extent feasible, that low- and very low-income persons are provided with training, employment, and contracting opportunities generated by HUD financial assistance for housing and community development programs.<sup>12</sup> Therefore, even though the statute does not provide plaintiffs with an absolute right to the before-mentioned training, employment, and contracting opportunities, the statute does provide plaintiffs with certain preferential training, employment, and contracting rights.

Unfortunately, even if plaintiffs can successfully demonstrate that the Section 3 statute contains rights-creating language, the plaintiffs must also demonstrate that the statute manifests an intent to create not just a private *right* but also a private *remedy*. "Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."<sup>13</sup> With regard to Section 3, this later requirement will likely be outcome determinative because the statute is silent on the question of a private remedy. Consequently, the plaintiffs' most realistic chance for private enforcement will be through a Section 1983 cause of action.

### Section 1983

The Civil Rights Act, 42 U.S.C. § 1983, has long been the primary vehicle for challenging state or local governmental actions that violate federal laws that do not contain an explicit private right of action. However, in the past few years, and especially since *Gonzaga*, the Supreme Court has made it increasingly difficult to sustain Section 1983 claims based on federal statutes and regulations.

Section 1983 provides in relevant part: "Every person who, under color of any statute...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..." In *Blessing*, the Court set forth three factors for determining whether a statute creates a

federal right.<sup>14</sup> "First, Congress must have intended that the provision in question benefit the plaintiff...Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence... Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms."<sup>15</sup>

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In *Gonzaga*, the Supreme Court addressed the *Blessing* factors as they pertained to a student's ability to sue a private university for damages under the Family Educational Rights and Privacy Act of 1974 pursuant to Section 1983.<sup>16</sup> The *Gonzaga* Court reasoned that *Blessing* had inadvertently led plaintiffs to believe that Section 1983 conferred enforceable rights so long as the plaintiff fell within the general zone of interest that the statute was intended to protect. Consequently, the *Gonzaga* Court concluded, without necessarily overturning *Blessing*, in order for a plaintiff to sustain a Section 1983 action it must be demonstrated that the federal statute unambiguously confers an individually enforceable right on the class of beneficiaries to which the plaintiff belongs.<sup>17</sup> In other words, the statute in question must contain explicit "right- or duty-creating language."<sup>18</sup> This "right- or duty-creating language" analysis is no different from the initial inquiry in an implied right of action case. Therefore, under either scenario, plaintiffs must identify statutory language that explicitly depicts Congress' intent to create substantive rights in favor of plaintiffs; if no such language exists it will be assumed that no such right exists.<sup>19</sup>

Therefore, despite the relatively clear language of Section 1983, many courts in the post-*Gonzaga* era have become

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<sup>14</sup>*Blessing v. Freestone*, 520 U.S. 329 (1997).

<sup>15</sup>*Blessing* at 340-341.

<sup>16</sup>The specific Family Educational Rights and Privacy Act provision at issue provides: "No federal funds shall be made available...to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information...) of students without the written consent of their parents to any individual, agency, or organization." Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g(b)(1)(2002).

<sup>17</sup>*Gonzaga* at 283-284.

<sup>18</sup>*Gonzaga* at 284 n.3 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 690 n.13 (1979)).

<sup>19</sup>*Gonzaga* at 283-284.

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<sup>12</sup>12 U.S.C.A. § 1701u(b) (2006).

<sup>13</sup>*Sandoval* at 286.

increasingly unreceptive to Section 1983 and other related claims, specifically in terms of their “right-creating language” analysis. Meanwhile, Section 1983 remains one of the few weapons that is still available to advocates who seek to force states to provide federally mandated benefits to our nation’s most disadvantaged populations.

### The *Williams* Decision

In *Williams*, Plaintiff, Donald Williams, a resident of the Arverne Public Housing Project since August 2001, brought suit against Defendants, the New York City Housing Authority (NYCHA) and Selectric Electric Contracting Co., Inc., an NYCHA contractor performing work in the Edgemere/Arverne Public Housing Project.<sup>20</sup> Mr. Williams applied for a laborer position with Selectric in August, September, and October of 2001; however, Mr. Williams was never hired even though he had preferential Section 3 eligibility and was promised an apprentice position under the Section 3 program. Adding insult to injury, in October 2001, Selectric hired two laborers who were not public housing residents. Shortly thereafter, Mr. Williams filed an administrative complaint against NYCHA, maintaining that Selectric violated the Section 3 program when it denied him employment in favor of non-Section 3 residents. HUD denied the claim, finding that there were no “new” hires after October 2001 when Mr. Williams was eligible for Section 3 certification.<sup>21</sup> After the denial of his administrative complaint, Mr. Williams sought judicial relief alleging that the defendants violated 12 U.S.C. § 1701u (the Section 3 statute), which is enforceable pursuant to 42 U.S.C. § 1983.

In step with the framework noted above, the *Williams* court analyzed whether the Section 3 statute has a clear individual focus that unambiguously confers a privately enforceable right. On the first point, the Court concluded that the statute’s detailed, multi-level scheme of preferences suggests an individualized, rather than an aggregate, focus. And unlike other statutes found unenforceable by the Supreme Court, the requirement focuses on individual entitlement, rather than a policy or procedure creating the entitlement. However, on the second point, the court concluded that the statute did not convey

an unambiguous right to enforce the hiring preference. Specifically, the court concluded that even though the Section 3 statute evinces more of a congressional intent of enforceability than the statute at issue in *Gonzaga*, the court will not recognize a private right of action because, “Plaintiff has provided this court with no reason to find a putative right to a hiring preference in section 1701u [the Section 3 statute] enforceable.” The court’s conclusion suggests that even if plaintiffs can establish the existence of an individual substantive right, they must also identify statutory language that allows them to individually enforce that right. This rationale appears to contradict the burden of proof standards set forth in *Gonzaga*.

In *Gonzaga*, the Court stated, “Once plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983.”<sup>22</sup> However, in *Williams*, the court interpreted *Gonzaga* to mean that even though Mr. Williams demonstrated that Section 3 conveyed him an individual right to a hiring preference, Mr. Williams, not the defendants, still had to demonstrate that the statute created an individual right to enforce the hiring preference.<sup>23</sup> The court’s rationale appears to nullify the presumptive enforceability of Section 1983 and evidences a growing, and arguably unsubstantiated, hostility towards actions premised on Section 1983.

### Conclusion

Although the *Williams* decision is disappointing, it may provide advocates with the additional support they need to effectuate legislative reform around this very issue. Earlier this spring, Congresswoman Velázquez introduced legislation that would amend Section 3 to provide for greater monitoring, reporting, and compliance. At the time it was argued that there was no need to include rights-creating language in the proposed legislative amendment because such rights were already provided for under Section 1983. Given the result in *Williams*, this proposition is clearly flawed. ■

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<sup>20</sup>HUD was also a party to the suit but, by stipulation, HUD was dismissed as a defendant. Accordingly, the action proceeded with NYCHA and Selectric as defendants.

<sup>21</sup>In this regard it is unclear why Mr. Williams did not bring an Administrative Procedure Act claim against HUD. The court noted that, “HUD’s administrative denial of Plaintiff’s complaint is undoubtedly subject to judicial review under the Administrative Procedure Act (APA)...HUD is required to ensure that housing authorities and contractors make ‘best efforts’ to give employment opportunities to public housing residents like Plaintiff. While HUD is not a current party to this case, Plaintiff’s allegation that HUD denied his administrative complaint is certainly subject to review, on the grounds of arbitrariness and capriciousness, regarding its finding of the date he became a public housing resident.” *Williams* at \*8.

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<sup>22</sup>*Gonzaga* at 285.

<sup>23</sup>It appears that a plaintiff seeking to assert a claim under Section 1983 must point to language such as, “Any person adversely affected by any final action or failure to act by State or local government or any instrumentality thereof that is inconsistent with this subparagraph may...commence an action in any court of competent jurisdiction.” *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113,117 (2005).