



10-1974

Schlesinger v. Ballard

Lewis F. Powell Jr.

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discuss

3 Jct invalidated statute
proscribing an automatic discharge
for male Navy Lts. who fail
twice to be promoted on schedule.

A different statute was more
flexible (13 years as minimum) as
to discharge of female Lts.

3 Jct found the classification
a "suspect" one (being Frontier)
requiring a compelling state interest.

PRELIMINARY MEMORANDUM Housser

Note

"Sex"
as
suspect

B

February 15 Conference

List 3, Sheet 1

No. 73-776

SCHLESINGER, Secretary of Defense

v.

BALLARD

Appeal from 3-Judge Ct
(S.D. Cal)

(Carter, Circuit Judge; East,
Schwartz, District Judges)

Federal/Civil

Timely

1. Summary: Appellants, Secretary of Defense et al, appeal
from the decision of a three-judge court (S.D. Cal.) holding unconstitutional
10 U.S.C. 6382, which requires the mandatory discharge of male Navy
officers who have been twice passed over for promotions. The SG contests

the court's holding that section 6382 constitutes invidious sex discrimination.

2. Facts: Appellee is a lieutenant in the United States Navy and has been in continuous active service since August 1962. After having twice failed to be selected for promotion to lieutenant commander, appellee was scheduled for discharge on June 30, 1972 pursuant to the mandatory provisions of 10 U.S.C. 6382(a). That section requires periodic thinning of the ranks to retain the best qualified officers and to permit orderly promotion of lower ranking officers. It provides in relevant part:

(a) Each officer on the active list of the Navy serving in the grade of lieutenant . . . shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander . . . for the second time.

On June 16, 1972, appellee filed this action contending that 10 U.S.C. 6382 was unconstitutional in requiring his discharge after (in his case) nine years of commissioned service, whereas 10 U.S.C. 6401(a) required discharge of women Navy lieutenants not on a promotion list only after 13 years of commissioned service. Section 6401(a) provides in relevant part:

(a) Each woman officer on the active list of the Navy . . . who holds a permanent appointment in the grade of lieutenant . . . shall be honorably discharged on June 30 of the fiscal year in which --

- (1) she is not on a promotion list; and
- (2) she has completed 13 years of active commissioned service . . .

A three-judge court was convened, and after a hearing, the court held that

the 13-year "selection out" provision of 10 U.S.C. 6401 favours women Navy officers and constitutes an invidious discrimination against male Navy officers mandatorily discharged under similar conditions before completing 13 years of service. Citing Frontiero v. Richardson, 411 U.S. 677, the court stated that the "compelling state interest" test applied and that the differences *what!* between 10 U.S.C. 6382 and 6401 did not satisfy that test. The court enjoined the government from discharging appellee "solely because of passovers in grade as provided for in Section 6382 prior to expiration of 13 years of commissioned service."

The government later moved for a new trial and filed an additional affidavit indicating that, of a total of 71,689 officers on active duty in the Navy, 66,456 were men and only 3,233 were women; that all male Navy lieutenants (16,585) would be guaranteed a 13-year tenure as a result of the court's order; that there are only 167 women lieutenants in the Navy who could be subject to 10 U.S.C. 6401(a); and that the effect of 10 U.S.C. 6401^(a) for women lieutenants presently had the effect of counteracting other traditional barriers to full participation and promotional opportunity for women, including previous size and promotion limitations and continuing restrictions against service by women on combat vessels and aircraft. The court denied the motion without opinion.

3. Contentions: (a) The SG first argues that sex is not a suspect classification and that the "compelling state interest" test did not command a majority of the Court in Frontiero. Moreover, he argues that the "suspect

classification" standard is inappropriate where matters affecting the organization and military readiness of the armed forces is involved. See Orloff v. Willoughby, 345 U.S. 83, 94.

(b) The SG next argues that the "selection out" procedure for male officers meets the "compelling state interest" test since it is a necessary part of a system designed to limit Navy service to the best qualified and to assure timely promotion of young officers.

Women officers, on the other hand, are promoted under a different system because they lack the combatant and sea duty of male officers and accordingly have not only less competitive advantage, but fewer command positions to which they could be promoted.

The appellee repeats the arguments of the court below.

4. Discussion:

The question presented is substantial and obvious. There are already several other granted cases involving "sex" as a suspect classification. See e.g., No. 73-78, Kahn v. Shevin; No. 73-640, Geduldig v. Aiello. Although the disposition of those cases might possibly affect the present one, I would nevertheless "note" this case.

There is a response.

January 22, 1974

Buckley

Ops in Pet br

2/15/74

Court USDC, S.D. Calif.

Argued 19...

Submitted 19...

Voted on....., 19...

Assigned 19...

Announced 19...

No. 73-776

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE, ET AL., Appellants

vs.

ROBERT C. BALLARD

11/13/73 Appeal filed.

Note

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT			MERITS		MOTION		AB-SENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G		
Rehnquist, J.				✓								
Powell, J.				✓								
Blackmun, J.				✓								
Marshall, J.				✓								
White, J.				✓								
Stewart, J.				✓								
Brennan, J.								✓				
Douglas, J.								✓				
Burger, Ch. J.				✓								

Join 3

SUMMER MEMORANDUM

No. 73-776 Schlesinger v. Ballard

A three-judge court in California, in a weak and almost juvenile opinion (in terms of analysis), invalidated 10 U.S.C. 6382, which requires that male officers of the Navy in the grade of lieutenant be honorably discharged after "having failed of selection for promotion to the grade of lieutenant commander. . . . for the second time."

The district court, applying the compelling state interest test (suspect classification), held this code section invalid as an invidious discrimination against men because 10 U.S. 6401 is more generous with respect to female officers of the Navy. As to them, they are not "selected out" - i.e. discharged automatically - until they not only have missed the promotion list but also have "completed 13 years of active commissioned service."

The three-judge court seemed to think that the sole purpose of the "discrimination" was to save taxpayers money and that this

was no justification for an "invidious discrimination" against men.

It does appear that the government (as so often happens) failed initially to put in all relevant evidence - although I think most of it is subject to judicial knowledge as a matter of statistical fact available in government publications. In any event, following the district court's opinion, but before entry of its judgment, and in support of a motion for a new trial, affidavits were filed showing as follows: of a total of 71,689 officers on active duty in the Navy, 68,456 were men, and only 3,233 were women; that all male Navy lieutenants, numbering 16,585 would be guaranteed a 13 year tenure if the district court's order should be sustained; that there are only 167 women lieutenants in the Navy who could be subject to tenure. 10 U.S. 6401 (the more favorable provision for women); that the 13 year selection out provision in Section 6401 benefits women, as it has the effect of overcoming "traditional barriers to full participation and promotional opportunities for women officers in the naval services". See SG's brief, p. 5, 6.

More fundamentally, there is an obvious rational basis for preserving appropriate limitations on the number of officers in the various grades or ranks within the military service. To "freeze" 16,585 Navy lieutenants in the regular Navy for a full 13-year in ^{service} ~~that rank~~ makes no sense whatever.

But see Table 1 SG's Br.