UNITED STATES SUPREME COURT

Patterson v. McLean Credit Union,

___U.S.___, No. 87-107, 89 D.A.R. 7697 (June 19, 1989).

Racial Harassment in Workplace Not Actionable Under Section 1981

Racial harassment relating to the conditions of employment is not actionable under 42 U.S.C. section 1981, since the statute is restricted in its scope to forbidding racial discrimination in the "mak[ing] and enforc[ement]" of contracts.

Petitioner, a black woman, brought suit against her employer, respondent credit union, alleging that respondent harassed her, failed to promote her, and discharged her, all on account of her race. The district court held that a claim for racial harassment is not actionable under section 1981. In addition, it instructed the jury that, in order to prevail on her promotion discrimination claim, petitioner must prove that she was better qualified than the white employee who was allegedly employed. The jury found for respondent and the court of appeals affirmed.

The Supreme Court, per Justice Kennedy, specifically declined to overrule its decision in *Runyon v. McCrary*, 427 U.S. 160 (1976), which held that section 1981 prohibits racial discrimination in the making and enforcement of contracts. However, the *Patterson* Court strictly interpreted the application of the statute's "right...to make...contracts," holding that it extends only to the formation of a contract; it does not extend to conduct by the employer after the contract has been established. Therefore, breach of the contract's terms or the imposition of discriminatory working conditions falls outside section 1981 protections. The "right...to...enforce contracts," on the other hand, does not extend beyond conduct by an employer which impairs an employee's ability to legally enforce his/her established contract rights.

The "same right" phrase of section 1981 cannot be interpreted to incorporate state contract law. To do so would effectively limit causes of action under section 1981 to those arising from state law. Such a limitation contradicts *Runyon*. In addition, the Court found that the argument that "severe or pervasive" racial harassment can transform a nonactionable challenge to employment conditions into a viable challenge to the employer's refusal to contract is without merit.

Justice Brennan, joined by Justice Marshall and Blackmun, dissented, strongly questioning the majority's "needlessly cramped interpretation" of section 1981 and noting powerful historical evidence of broader congressional intent.

Will v. Michigan Department of State Police,

___U.S.___, No. 87-1207, 89 D.A.R. 7745 (June 19, 1989).

State is Not "Person" Subject to Suit In State Court in Section 1983 Action

Neither states nor state officials acting in their official capacities are "persons" within the meaning of 42 U.S.C. section 1983. This finding is supported by the statute's language, congressional purpose, and legislative history.

Petitioner filed suit in Michigan state court alleging that respondents had improperly denied him a promotion in violation of section 1983. Section 1983 provides that any person who deprives an individual of his/her constitutional rights under color of state law shall be liable to that individual. The state court ruled for petitioner, finding that both respondents Department of State Police and the Director of State Police were "persons" under section 1983. The Michigan Supreme Court ruled that neither were "persons" under the statute.

The U.S. Supreme Court, per Justice White, affirmed. The statute's language does not satisfy the principle of statutory construction that intended changes in the constitutional balance between the states and the federal government be specifically and clearly stated. The doctrine of sovereign immunity is one of the well-established common law immunities and defenses that Congress did not intend to override in enacting section 1983. Finally, a suit against state officials acting in their official capacities is not a suit against the officials, but rather is a suit against the officials' offices. As such, it is no different from a suit against the state itself.

A dissent by Justices Brennan, Marshall, Blackmun, and Stevens would hold that states are "persons" within the meaning of section 1983. It points out that the "clear statement" principle employed by the majority to obviate analysis of the statute's legislative intent and history applies only to Eleventh Amendment cases, which affects only cases brought against states in federal court. Since the present case arose in state court, the principle is irrelevant. Moreover, the question whether states are "persons" under section 1983 is separate and distinct from the question whether they may assert a defense of common law sovereign immunity. The dissent would reverse the lower court decision and remand for resolution of the question whether Michigan would assert common law sovereign immunity and, if so, whether that would preclude this suit.

Pennsylvania v. Union Gas Co.,

___U.S.___, No. 87-1241, 89 D.A.R. 7725 (June 19, 1989).

States May Be Held Liable For Damages in Federal Court

This plurality opinion by Justice Brennan concluded that states may be held liable for damages in federal court under sections 104 and 106 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA).

To recoup costs of cleaning up the nation's first Superfund site, the federal government sued respondent, successor in interest of a dismantled coal gasification plant which had produced coal tar as a byproduct. Respondent, in turn, filed a third-party complaint against petitioner, the State of Pennsylvania, arguing that petitioner was partially responsible as an "owner or operator" of the hazardous waste site. The district court dismissed respondent's complaint, accepting Pennsylvania's claim of Eleventh Amendment immunity. The court of appeals held that the language of CERCLA, as amended, clearly renders states liable for monetary damages and that Congress had the power to do so when legislating pursuant to the Commerce Clause.

A majority of the Supreme Court, comprising Justices Brennan, Marshall, Blackmun, Stevens, and Scalia, concluded in Parts I and II of the opinion that the plain language of the statute authorizes suits against states in federal court. Section 101(21)'s express inclusion of states within its definition of "person," and section 101(20)(D)'s plain statement that state and local governments are to be considered "owners or operators" in all but very narrow circumstances, together establish that Congress intended

that states be liable for clean-up costs under section 107 of CERCLA.

A plurality of the Court, comprising Justices Brennan, Marshall, Blackmun, and Stevens, agreed in Part III of the opinion that Congress has the authority to render states liable for money damages in federal court when legislating pursuant to the Commerce Clause.

Mallard v. U.S. District Court,

___U.S.___, No. 87-1490,
89 D.A.R. 5678 (May 3, 1989).

Federal Court May Not Force Lawyer To Represent Indigent in Civil Case

A federal court is not authorized to require an unwilling attorney to represent an indigent litigant in a civil suit.

Petitioner was denied a motion to withdraw from a suit involving indigent inmates. Petitioner argued that forcing him to represent the inmates in a complex action would require trial skills he did not possess, and would thus force him to violate his ethical obligation to take on only those cases he could handle competently. In addition, petitioner cited 28 U.S.C. section 1915(d) for the proposition that federal courts may only "request" an attorney to represent any person claiming *in forma pauperis* status. After a magistrate denied his motion to withdraw, petitioner appealed to the district court. The court upheld the magistrate's decision, and a subsequent petition for writ of mandamus was denied by the court of appeal.

The Supreme Court, per Justice Brennan, distinguished the "request" language of section 1915(d), applicable to attorneys of *in forma pauperis* proceedings, from the "shall" language of section 1915(c), applicable to court officers and witnesses. If Congress had intended that court-appointed attorneys be required to represent indigent litigants, it would have followed the strict language of section 1915(c). Moreover, when Congress passed section 1915(d) in 1892, it chose not to replicate the language of several state statutes providing for the "appointment" or "assignment" of counsel. Rather, it chose to merely "request" that they serve. Respondent's contention that the federal courts possess inherent authority to require lawyers to serve was not considered by the Court, since the lower courts did not invoke such authority in reaching their decisions.

Missouri v. Jenkins,

___U.S.___ No. 88-64,
89 C.D.O.S. 4541 (June 22, 1989).

Attorneys' Fees in Civil Rights Cases May Be Enhanced to Account for Delay

Plaintiffs in a successful civil rights action may receive enhanced attorneys' fees under 42 U.S.C. section 1988 to compensate for delay in payment.

The underlying case involved a major school desegregation trial in Kansas City, in which the district court held for plaintiffs on the merits. The plaintiff class was represented by a private attorney (Benson) and the Legal Defense Fund (LDF) of the NAACP. Both requested attorneys' fees pursuant to 42 U.S.C. section 1988. In calculating Benson's fees, the court noted that the "market rate" for his services were $125-$175 per hour, but awarded fees based upon a rate of $200 per hour. The court used the higher rate due, in part, to the delay in payment for the services rendered. The court also took account of the delay in payment when setting the rates for Benson's associates and the LDF attorneys. Thus, the other attorneys received the current market rate for their services, not the rate prevailing at the time of the services. The court also awarded fees for law students, law graduates, and paralegals who worked on the case. Again, these rates were set at the current market rate to reflect delay in payment. The defendants contested the enhanced awards.

The Court, per Justices Brennan, Blackmun, Kennedy, Stevens, and White, held that the Eleventh Amendment does not prohibit enhancement of a fee award against a state to compensate for delay in payment and that section 1988 awards may include hourly rates for clerks and paralegals that are not limited to the out-of-pocket costs to the attorney.

The Court first rejected the contention that a state may not be compelled to pay enhanced fees due to its Eleventh Amendment immunity. Relying on *Hutto v. Finney*, 437 U.S. 678 (1978), the Court distinguished between "retroactive monetary relief" and "prospective injunctive relief." Attorneys' fees belong to the latter category, placing them outside a state's Eleventh Amendment immunity. The Court reasoned that if fees are outside the strictures of the Eleventh Amendment, so are the processes for calculating those fees.

Missouri also argued that section 1988 does not explicitly allow enhancement of fees, and the Eleventh Amendment requires specific legislative intent to allow enhanced fees. The Court rejected this argument as based upon a faulty analogy to federal immunity. In *Library of Congress v. Shaw*, 478 U.S. 310 (1986), the Court held that the federal government did not specifically waive its immunity from enhanced attorneys' fees in Title VII of the Civil Rights Act of 1964 (the "no-interest rule" case), but the present case is distinguishable. The Court found no need to determine whether Congress had addressed state immunity. Rather, the issue is a straightforward matter of statutory interpretation: whether "reasonable attorneys' fees" provided for in section 1988 includes enhancement for delay in payment. The Court found that enhancement is within the contemplation of the statute.

The Court further held that "reasonable attorneys' fees" means compensation for work product. Since law clerks and paralegals contribute to and share in work product, their contributions must be included. Since "reasonable" equates to "market rate" in the other areas of attorneys' fees, there is no reason to alter this standard for law clerks and paralegals.

UNITED STATES DISTRICT COURTS

United States v.
Hughes Helicopters, Inc.,

___F.Supp___, 89 D.A.R. 7687,
No. CV 87-1840-WDK (June 1, 1989).

False Claims Act Private Right of Action is Constitutional

The constitutionality of the False Claims Act, under which private citizens may sue government contractors, was recently upheld in a federal court ruling.

The Act, 31 U.S.C. section 3730, permits private citizens to prosecute defense contractors or other enterprises for fraud against the government. The initial civil filings remain under seal for sixty days, during which time the U.S. Department of Justice may review the facts and assume prosecution of the lawsuit. Providing that the whistleblower's information is new, he/she is entitled to a bounty from the money recovered in the civil suit, whether or not the Justice Department joins in the case.

Stillwell, a private citizen and former McDonnell-Douglas employee, sued the defense contractor on behalf of the United States, alleging the company overcharged the Army for the Apache attack helicopter by more than $175

million. The defendants asserted three arguments challenging the constitutionality of the False Claims Act based on the separation of powers doctrine, violation of the Appointment Clause (U.S. Constitution, article II, section 2), and a private citizen's lack of standing.

The court, per Judge Keller, upheld the constitutionality of the Act in that Congress has the authority to delegate the power to litigate on behalf of the United States. Moreover, the Justice Department may join the suit at any time, which leaves sufficient power in the executive branch. Thus, the Appointment Clause is not violated. The bounty provision affords a private citizen standing by according the plaintiff "a personal, identifiable interest in the litigation." Other risks, involving the danger of losing one's job or being blacklisted in the industry, also bestow standing on the False Claims Act plaintiff.

CALIFORNIA SUPREME COURT

Newman v. Emerson Radio Corp.,

___Cal. 3d___, No. L.A. 32284, 89 D.A.R. 6755 (May 25, 1989).

Foley Ban on Tort Damages in Wrongful Termination Cases Applies Retroactively

Employment cases which had not gone to trial as of January 30, 1989, will be decided using the analysis and holding in *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988), which prohibits tort damages for breach of an implied covenant of good faith and fair dealing in a wrongful termination suit. (See CRLR Vol. 9, No. 1 (Winter 1989) p. 112 for background information.)

Newman was terminated by Emerson Radio Corporation in May 1982 after ten years of service. He alleged an oral agreement to terminate his employment only upon a showing of just cause. Newman argued that prior to termination, notification and an opportunity to correct the behavior should have been extended. He asserted that Emerson's conduct violated public policy, breached an implied contract, and violated the implied covenant of good faith and fair dealing.

The Supreme Court, per Chief Justice Lucas, joined by Justices Panelli, Eagleson, and Arguelles, held that *Foley* is retroactive, and dismissed the cause of action seeking tort damages for breach of the implied covenant of good faith and fair dealing. In ruling on the *Foley* issue, the court upheld the "general rule" that judicial decisions apply retroactively while legislative decisions are proactive. The court held that torts cases giving rise to new rules of law typically receive full retroactive effect. The court also opined that applying the *Foley* ruling retroactively would reinstate "predictability" in the workplace, in that recovery for breach of contract is quantitatively more certain than a tort recovery where awards are less predictable.

CALIFORNIA COURTS OF APPEAL

Center for Public Interest Law v. Fair Political Practices Commission,

___Cal. App. 3d___, No. D008786, 89 D.A.R. 7125 (May 30, 1989).

Proposition 73 Precludes Proposition 68's Tax Checkoff for Campaigns

On May 30, the Fourth District Court of Appeal rejected the Center for Public Interest Law's (CPIL) petition for writ of mandate in its challenge to the Fair Political Practices Commission's (FPPC) interpretation of Propositions 68 and 73, two campaign finance reform initiatives which were approved by the voters in June 1988. (See CRLR Vol. 9, No. 1 (Winter 1989) pp. 111-12 for background information.)

Proposition 68 would have created the Campaign Reform Fund to subsidize legislative campaigns of qualifying candidates who agree to comply with overall campaign expenditure limitations and contribution limitations. The court found that Proposition 73's ban on the use of "public moneys" for political campaigns irreconcilably conflicts with Proposition 68's provisions establishing the Fund. The court found that the Fund consists of "public moneys", rejecting CPIL's argument that the Fund does not belong to the state because it may not be appropriated or otherwise allocated by the legislature. The court also rejected CPIL's contention that the tax checkoff provision in Proposition 68 operates as a tax credit, which is not considered to be "public moneys".

CPIL has petitioned the California Supreme Court for review of the Fourth District's ruling.

Newland v. Kizer,

___Cal. App. 3d___, No. D007649, 89 D.A.R. 4932 (Apr. 17, 1989).

State Agency May Be Forced to Promulgate Regulations Mandated By Law

The Fourth District Court of Appeal held that the California Department of Health Services (DHS) must adopt regulations governing the temporary operation of long-term health care facilities by receivers so that state decertification does not force elderly patients to make sudden, unprepared transfers from one nursing home to another.

This case materialized when federal authorities decertified the Vista Golden Age nursing home in San Diego from participation in Medicare. The plaintiffs, patient beneficiaries of Medicare, were required by law to transfer to another facility. The defendants were DHS and its director, which had failed to promulgate regulations governing receiverships under which the patients could have remained at the facility.

In reversing the superior court's denial of relief, the Fourth District, per Justices Kremer, Todd, and Froehlich, held that Health and Safety Code section 1335 affirmatively requires regulations governing receivership. The court disagreed with the defendants' contention that section 1335 involves discretionary duties immune from court interference. The court concluded that a holding for defendants would emasculate section 1335 and that a judicial mandate requiring the agency to issue regulations is appropriate, so long as the mandate does not dictate the contents of the regulations.

People v. Dollar Rent-A-Car Systems, Inc., et al.,

___Cal. App. 3d___, No. A039377, 89 D.A.R. 7111 (June 1, 1989).

Car Damage Waivers Misrepresented As Insurance Are Unlawful

The First District Court of Appeal affirmed a superior court ruling that car rental agencies are subject to penalty for selling collision damage waivers (CDW) as "insurance", as unfair competition and false and misleading, in violation of Business and Professions Code sections 17200 and 17500. The suit was filed by Attorney General John Van de Kamp in San Francisco. Following trial, judgment was entered to enjoin the defendant car rental company, and to impose cost penalties. On appeal, the First District, per judges Low, King, and Haning, upheld the trial court's findings that defendants made untrue and confusing representations and caused customers to be misled into believing that a CDW is insurance; and defendants misrepresented the cost of repairs and loss of use of the damaged vehicle when pursuing claims against

their customers. The court affirmed a permanent injunction and civil judgment of $100,000.

SUPERIOR COURTS

Ingredient Communication Council, Inc. v. Van de Kamp,

No. 504601 (Sacramento Superior Court).

Superior Court Hears Oral Argument in Proposition 65 Compliance Trial

On June 6, the Sacramento Superior Court completed hearing oral arguments in the case that will test whether the use of toll-free telephone numbers constitutes compliance with the warning requirement of Proposition 65, the Safe Drinking Water and Toxics Enforcement Act of 1986.

In a related case, *People v. Safeway Stores, Inc.*, No. 89576 (San Francisco Superior Court), the pleadings are filed and discovery continues. The ruling in *Ingredient Communication Council* will probably be dispositive in this case, which involves the same question. (See CRLR Vol. 9, No. 2 (Spring 1989) p. 127 for background information on both cases.)