ec/ss 8/18/'76

Grant & possibly set for argument with Mt Healthy.

This case presents three issues: (1) whether the 1972 amend. to Title VII, extending it to gov't employees, is retroactive; (2) whether a school board is a "person" w/in 1983; and (3) whether gov't officials (e.g. school bd members) acting in official capacity are "persons" w/in 1983. CA2 decided all questions in negative.

There is a conflict on #2 & #3, both imp. questions.

#2 is presented in Mt Healthy (set for argument this fall) but the issue was not addressed by CA6 in that case.

#3 is not in Mt Healthy.

Grant - is better case on 1983 issue than Mt. Healthy

This case should be "straight lined" with Memphis Light & Gas v. Craft, 76-39, and Muzquiz, 75-1723;

with Muzquiz and Craft, S. List 5, Sheet 4, No. 75-1723; S. List 13, sheet 3, No. 76-39

Discuss

See notes on last page

PRELIMINARY MEMORANDUM

~~Summer List 13, Sheet 2~~

Jan. 7, 1977, L3, S1

No. 75-1914 — Cert to CA2 (Hays, Timbers, Gurfein) — Timely

MONELL

v.

DEPT. OF SOCIAL SERVICES

Federal/Civil

1. SUMMARY: The petn presents three issues: (1) whether the 1972 amendments extending Title VII coverage to state and local officials and educational institutions should be applied in an action brought prior to the effective date of the 1972 amendments; (2) whether a local independent school board is a "person" within the meaning of § 1983; and (3) whether government

officials are "persons" within the meaning of § 1983 when "equitable relief" in the nature of backpay is sought against them in their official capacities.

Petitioners are female employees of the New York City Dept. of Social Services and of the NYC Board of Education suing on behalf of themselves and other female employees in city agencies similarly situated.[1] The complaint alleged that rules and regulations of the city agencies compelled pregnant employees to take unpaid leaves of absence before medical reasons required them to do so, and that such rules and regulations were unconstitutional. The defendants are the Dept., the Board, the former Commission of the Dept., the former Chancellor of the City School District of NYC, and the former Mayor. [The individuals were sued in their official capacities.] Jurisdiction is alleged under 42 U.S.C. 1983, and its jurisdictional counterpart, 28 U.S.C. 1343(3), as well as under Title VII, 42 U.S.C. § 2000e et seq.

Petrs sought declaratory and injunctive relief and damages for "the deprivation of their right to be employed, including but not limited to wages lost." No amount of damages was alleged. The defendants moved to dismiss the action, or in the alternative, for an order granting summary judgment. The plaintiffs cross-moved for summary judgment.

SDNY (Metzner) dismissed the complaint. With respect to the requests for injunctive and declaratory relief, the DC

1. SDNY determined that the action could be maintained as a class action.

noted that in the fall of 1971, the Dept. had changed its maternity leave policy to provide that no woman need report her pregnancy or take maternity leave as long as she is able to continue to perform her job and desires to do so. The policy change became effective on January 29, 1972. The Board similarly changed its bylaws effective September 1, 1973. The DC therefore dismissed as moot the claims for equitable relief by way of injunction or declaratory judgment. CA2 affirmed dismissal of these claims as moot and no review is sought with respect to that action.

The DC also dismissed the claims for back pay covering the periods for which plaintiffs allege they could have worked after they were forced to take maternity leave on the ground that there was no subject matter jurisdiction for the award of back pay either under Title VII or under § 1983. The DC concluded that the 1972 amendment to Title VII which broadened the definition of "person" under the Act to include "governments, governmental agencies [and] political subdivisions," could not be applied retroactively. Since all the alleged acts of discrimination occurred before the 1972 amendment to Title VII, the DC dismissed the Title VII claim. The DC also concluded that any attempt to use 1983 as a basis of obtaining monetary relief against the named city officials in their official capacities would circumvent Monroe v. Pape, 365 U.S. 167.

CA2 affirmed. With respect to the Title VII claim, CA2 held that Title VII does not apply retroactively so as to permit

an award of back pay under the circumstances of this case. With respect to the 1983 claim, CA2 held that the Board (an independent agency) is not a "person". [Petrs had conceded that the Dept. of Social Services, as an agency of the city, was not a "person".] Finally, CA2 ruled that it was without jurisdiction to entertain the claim for monetary relief against the named individuals in their official capacities since such a suit was actually one against the Board, which is not a "person".

3. CONTENTIONS: Petrs first contend that the CA2 ruling with respect to the retroactivity of Title VII conflicts with a subsequent decision of this Court. They cite Brown v. GSA, 96 S.Ct. 1961, 1964 n. 4, for the proposition that § 717(c) of the 1972 amendments applies to claims of federal employment discrimination occurring prior to the effective date of the amendments if the employee's complaint was the subject of administrative proceedings on that date or if a judicial proceeding had been timely commenced after final administrative action and was pending on the Act's effective date. They also refer to Place v. Weinberger, 497 F.2d 412 (CA6), cert. granted, judgment vacated, and remanded "for further consideration in light of Brown v. GSA, 425 U.S. ___, slip op. 3 n. 4 (1976)." [CA6 had been the only CA to rule that § 717(c) was not retroactive with respect to claims of employment discrimination by federal employees.] Petrs suggest that the instant case, like Place v. Weinberger, should be remanded for further consideration in light of Brown.

Petrs next contend that CA2's ruling that the Board is not a "person" for purposes of 1983 conflicts with decisions of other CAs and with decisions of this Court. Petr notes that CA4 and CA5 have held that a school board is not a person, while CA8 has ruled that a school board is a person. CA7 has ruled that a school board established under one statute was a person, and subsequently found that a school board established under a different statute was not a person. Petr also refers to Mount Healthy City School District, in which cert has already been granted, No. 75-1278. Petr notes that in that case CA6 "apparently" ruled that a school board is a person. Finally, petr suggests that CA2's decision is inconsistent with this Court's decision in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632.

CA6 did not address issue

Petrs also contend that there is a circuit conflict over whether local officials are liable in 1983 suits for monetary relief in their official capacities. Petrs note that CA5, sitting en banc, recently reached the same conclusion as that reached by CA2 in the instant case. Muzquiz v. San Antonio School District, 528 F.2d 499, petn for cert filed, see summer list 5, sheet 4, No. 75-1723.

As noted above, petrs would prefer to have the case remanded to consider the retroactivity question in light of Brown. Alternatively, petrs ask that the petn for cert be granted for consideration of all the issues, or that consideration of the petn be deferred pending a decision in Mt. Healthy.

4. DISCUSSION: With respect to the retroactivity issue, the decision of CA2 does not conflict with this Court's footnote (number 4) in Brown or with its disposition of Place v. Weinberger. Both the Brown footnote and Place concern § 717(c) of the 1972 amendments, which grants federal employees the right to file employment discrimination claims against the Government in federal district court. At the time of this Court's decision in Brown a number of CA's had considered the question whether § 717(c) applied to proceedings already pending at the time of its effective data. With the exception of the decision of CA6 in Place, every CA faced with the issue held that § 717(c) applied to claims of federal employment discrimination if the employee's complaint was the subject of administrative proceedings on that date or if a judicial proceeding had been timely commenced after final administrative action and was pending on the Act's effective date. The retroactivity ruling was based on the view that § 717(c) was merely a procedural statute that effects the remedies available to federal employees suffering from employment discrimination; their right to be free of such discrimination had been assured for years under a number of Executive Orders. The legislative history of § 717(c) indicated that § 717(c) did not grant a new substantive right to federal employees, but merely created a new remedy for the enforcement of existing rights.

In the instant case CA2 concluded that the § 717(c) cases were not directly on point. With respect to state and local officials, CA2 concluded that the 1972 amendments were intended

I can't see jumping with the retroactivity issue, especially since the CA2 disposition makes it moot.

to create a new substantive right thus barring retroactive application. See Weise v. Syracuse University, 522 F.2d 397, 410-411 (CA2)(Title VII inapplicable to discrimination occurring before the lifting in 1972 of the exemption for educational institutions).

Could wait for a conflict.

Petr's assertion that the decision of CA2 is in conflict with a subsequent decision of this Court is thus inaccurate. Petr cites no other federal decision concerning the precise retroactivity question at issue. In any event, it would be silly to remand the case to CA2 for further consideration in light of Brown, since the prevailing law in that circuit at the time the instant case was decided was that § 717(c) was retroactive. Brown v. GSA, 507 F.2d 1300, 1304-06, aff'd, 96 S.Ct. 1961.

As to the issue of whether a school board is a "person" for purposes of 1983, it is not at all clear that this case is a hold for Mount Healthy insofar as the Court may not reach the "person" issue in that case. Muzquiz v. San Antonio School District, summer list 5, sheet 4, No. 75-1723 may present another opportunity to consider the parameters of the "person" requirement. CA5 held en banc in that case that the Board of Trustees of a city's Firemen's and Policemen's Pension Fund was not a "person" for purposes of 1983. 528 F.2d at 500, adopting as the opinion of the court en banc the panel dissent of Judge Godbold, 520 F.2d 1003-06. The pool memo in Muzquiz indicates, however, that the petr does not challenge CA5's ruling in that regard.

Thus a grant in Muzquiz would not assure consideration of the "person" issue.

The main issue in Muzquiz, and the remaining issue in the instant case as well, is whether monetary relief is appropriate against the individual members of the entity (Board of Educ. in this case, Board of Trustees in Muzquiz) when they are sued in their official capacities. Both courts concluded that under such section 1983 actions circumstances had to be considered as if they had been brought directly against the entity, and consequently there was a lack of jurisdiction to entertain the claim. CA6 has apparently ruled to the contrary. See Burt v. Board of Trustees of Edgefield City School District, 521 F.2d 1201 (CA4)(to the extent that plaintiff seeks equitable relief [including back pay] under 1983 against the members of the Board in their official capacities, the action may be prosecuted, for such municipal officers are "persons" within the meaning of 1983).

There is no response.

8/18/76 Comey Op in petn.

This is an important issue, and I expect the Court will be inclined to take either this case or Muzquiz. If not take this case the Court could reach both the "person issue", and the issue of suit against individuals in their official capacities. I would grant in Morell, and hold Muzquiz pending Morell. I would not hold Morell pending Mt. Healthy.

Gene.