No. 87-2084

Jett

v.

Dallas Ind. School District

Cert to CA5 (Gee, Randall, Garwood)

No. 88-214

Dallas Ind. School District

v.

Jett

Cert to CA5 [same judgment below]

To be Argued Tuesday, March 28

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March 25, 1989

Foley

INTRODUCTION:

Jett, who was removed from his job as coach of a public school football team, sued the school district in federal court (ND Tex.; Sanders, J) under 42 U.S.C. §§ 1981 and 1983. Jett claimed that the removal decision, recommended by the school's principal (Todd) and approved by the district's superintendent (Wright), was based on his race (white). Jett won a jury verdict, but CA5 reversed and remanded for a new trial. CA5 found sufficient evidence that Todd had based his recommendation on Jett's race but ruled that the school district could not be held liable under §1983 for Todd's action because Todd clearly was not a policymaker under Pembaur v. City of Cinncinati, 475 U.S. 469 (1986). See 798 F.2d 748, 761 (CA5 1986). CA5 assumed that Wright was a policymaker, but found insufficient evidence that Wright's decision to approve Todd's recommendation was based on race. Ibid.

CA5 then went on reject Jett's contention that under §1981 the school district could be held liable for Todd's discriminatory conduct on the basis of respondeat superior. Essentially, the court determined that the standard of liability for the school district must be the same under both §1981 and §1983. See 798 F.2d, at 761-763 (CA5 1986); see also 837 F.2d 1244, 1245, 1248 (CA5 1988) (on rehearing). In other words, the court held that the "official policy" requirement first articulated in Monell v. Department of Social Services, 436 U.S.

658 (1978), and applied in such cases as Pembaur, governs §1981 suits against government entities. Jett sought cert on this issue, and cert was granted.

The school district cross-petitioned, claiming that under City of St. Louis v. Praprotnik, 108 S. Ct. 915 (1988), Wright could not be considered a policymaker. In other words, the school district argued that it could not be held liable under §1983, even if Wright made his decision for racial reasons. Thus, according to the school district, CA5 should have ordered a dismissal of the complaint, rather than remanding for a new trial. The Court granted cert on this Prapotnik issue as well.

THE §1981 ISSUE

Perhaps I am missing something, but the §1981 issue presented by Jett seems very straightforward, especially in light of the vote in Patterson. In Patterson the Court is unanimously reaffirming that §1981 prohibits racial discrimination by private employers (Part I) and is also unanimously holding that the framework of analysis for proving purposeful employment discrimination under Title VII (McDonnell Douglas and Burdine) also applies to §1981 suits (Part III). Thus, if a corporation like IBM discharges an employee and the discharge decision was made by a corporate officer based on the employee's race, there would be no doubt about the corporation's liability under §1981, as under Title VII. The corporation would have no defense under

either §1981 or Title VII that the officer who made the discriminatory decision decision did not have final policymaking authority for the corporation. (In other words, it does not matter if the IBM Board of Directors has established a corporate policy of no racial discrimination; if a corporate officer with authority to fire an employee on behalf of IBM does so on the basis of the employee's race, IBM is liable under Title VII and §1981.)

Local school districts, like private corporations, are expressly liable for race discrimination under Title VII. Similarly, no one in this litigation has disputed that §1981 applies to employment discrimination by local government bodies. Thus, it would seem to follow naturally that if a local school district terminates a teacher's employment and the decision was made by the superintendent on the basis of the teacher's race, the school would be liable under Title VII or §1981 even if the superintendent did not have final policymaking authority for the school district.

The school district here offers two arguments for why a government employer should not be liable for race discrimination under §1981 unless the employee can meet the Monell "official policy" requirements. These arguments, however, are largely undercut by the vote in Patterson.

First, the school district argues that a §1981 violation by a government employer cannot be remedied except through a cause of action under §1983. The school district observes that §1981 does not provide an express right of action and contends that the

Court should not find an implied right of action under the analysis in Cort v. Ash, 422 U.S. 66 (1975) (four-factor approach for deciding whether an implied right of action exists). The school district acknowledges that its argument based on Cort v. Ash would require overruling Runyon v. McCrary. See Br. for Resp. 25, n. 29. The school district, however, adds that even if Runyon is reaffirmed and an implied right of action under §1981 exists for private employees, the Court should reject an implied right of action under §1981 for government employees because §1983 provides an express remedy for §1981 violations. (Amici International City Management Assn., et al, make the same argument.)

In his reply brief, Jett urges that the Court not even consider the school district's first argument because it was not raised in any previous stage of this litigation. Alternatively, citing the langague and the legislative history of the original 1866 Act, Jett argues that Congress did intended to provide a right of action for §1981 violations. (This counterargument to the school district's application of Cort v. Ash goes to the merits of Runyon.) Finally, Jett argues that the existence of §1983 does not preclude a right of action directly under §1981 for government employees. Jett notes that the 1871 Act provided "[t]hat nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto." Thus, the existence of §1983 in no way eliminates an independent right of action available under §1981.

It seems to me that Jett has the better of this argument. Once it has been determined that private employees can sue directly under §1981, I see no reason why government employees, who are also covered by the statute, should be treated differently. Nothing in §1981 itself provides a basis for distinguishing between private and government employees in this respect. Nor should the mere existence of §1983 deprive government employees of a direct action under §1981, which would otherwise be available. Section 1983 is a very different statute from §1981. Section 1983 applies to all constitutional and civil rights violations by state agents. By contrast, §1981 applies only to race discrimination in the making and enforcement of contracts. The general right of action under §1983 should not be construed as depriving public employees of the independent, specific remedy for race discrimination available under §1981. In other words, because Patterson reaffirms the existence of a right of action under §981, I believe that holding applies in this case as well.

Thus, I think the school district's first argument should be rejected.

Second, the school district contends that even if government employees may bring race discrimination claims under §1981 directly, these §1981 actions must be understood as subject to the same Monell "official policy" requirements that govern §1983 claims. Br. for Resp. 38. Essentially, the school district's argument is that §1981 and §1983 were enacted during the same Reconstruction Era and must be construed similarly. According to

the school district, if the legislative history of §1983 reveals that respondeat superior is unavailable under that statute (as the Court held in Monell), then "it equally reveals the same about §1981." Br. for Resp. 43. CA5, in its opinion on rehearing, made the same argument. See 837 F.2d, at 1246-1247; see also 798 F.2d, at 762 (original panel opinion).

Jett counters by saying that the intent of Congress in enacting the 1866 Act (§1981) cannot be determined by the legislative history of the 1871 Act (§1983). Apart from saying what shouldn't control, however, Jett offers very little about what does govern the school district's liability under §1981. In his opening brief, Jett admits that the legislative history of the 1866 Act does not shed any light on the issue and asserts that, as a matter of policy, respondeat superior is the most suitable basis for liability under §1981.

Some amici offer some more substantial arguments in Jett's favor. First, LDF/ACLU point out that a private employee would not have to meet a Monell-type requirement in a §1981 race discrimination suit. Second, they observe that §1981, by its very terms, concerns racial discrimination in the enforcement of contracts. In this regard, they note that under the common law a principal is always liable for a breach of contract caused by an agent. Thus, in 1866, if a city employee was wrongfully dismissed by a city official, the city itself was liable for breach of the employment contract to which it was a party. Indeed, LDF/ACLU cites 1866 cases in which public school teachers successfully sued the employer school districts for wrongful

dismissal. See Br. for LDF/ACLU 45, nn. 32 & 33 (collecting cases).

This principle of contract liability is distinct from the doctrine of respondeat superior, which is applicable in tort cases. Because §1983 creates a general tort claim for constitutional violations by state actors, Monell had to consider the applicability of respondeat superior to §1983 claims. But §1981 violations sound in contract, not tort, and therefore Monell's discussion of respondeat superior is inapplicable in the §1981 context. In any event, LDF/ACLU point out that SOC's concurrence in General Building Contractors Assn. v. Pennsylvania, 458 U.S. 375, 404 (1982), which you joined, makes clear that respondeat superior is available in a §1981 case if the necessary facts are proven.

Amicus NEA makes a point that is related to LDF/ACLU's contract theory point. NEA observes that employment termination decisions necessarily are made by the employer. It is true that when a government agency dismisses an employee, some supervisory governmental official has made the dismissal decision. But it is only because the government agency treats the official's decision as its own does the employment relationship between the government agency and the employee become terminated.

This kind of official action is entirely distinct from another category of official action, which is not necessarily the action of the government agency itself. For example, an individual police officer might shoot a citizen in violation of the citizen's Fourth Amendment rights. Whether the city itself

should be held accountable for the shooting by the individual officer is an issue of vicarious liability. But no such issue of vicarious liability is present when a government agency terminates its employment contract with an employee. Because Monell's "'official policy' requirement was intended to distinguish between acts of the municipality from acts of employees," Pembaur, 475 U.S., at 479 (emphasis in original), it is unnecessary to apply that test in employment termination cases, which are inherently the acts of the government agency.

NEA recognizes that this argument is inconsistent with Praprotnik, in which both the plurality and concurrence applied the Monell "official policy" test in the context of an employment relationship. Nonetheless, NEA notes that neither the plurality nor concurrence considered the argument that the acts of a government agency as employer are necessarily the agency's own acts. Moreover, NEA notes that even if this argument is foreclosed by Praprotnik in a §1983 case, it nonetheless may be adopted for a claim that rests on §1981.

In my view, the arguments advanced by both amici briefs in support of Jett are compelling and require reversing CA5 on the §1981 issue. As noted above, private employers are liable under §1981 even if the racially motivated employment decision was made by a nonpolicymaking official of the corporation. The reason, as the amici explain, is that under contract theory an employer is necessarily liable for the wrongful termination of an employee. No other rule would make any sense. This principle of employer liability applies equally to government and private employers.

The existence of §1983 does not dictate a contrary conclusion. As mentioned above, §1983 creates tort liability for state actors for a broad category of constitutional and statutory violations. Section 1981, by contrast, focuses specifically on race discrimination in contract relations. Thus, it would be anomalous to apply a principle designed for limiting vicarious liability for constitutional torts to a specific claim of employment discrimination under §1981.

In sum, the Court should treat government employers as it does private employers under §1981 (just as government employers are treated the same as private employers under Title VII) and reject the school district's contention that §1981 claims against government employers are governed by the Monell "official policy" requirements developed for §1983 claims.

THE §1983 ISSUE

If you agree that §1981 does not contain a Monell test for public-sector employees, then there is no need to reach the second issue. In any event, there is not much for the Court to decide on the second issue. Whether Wright is or is not a policymaker simply involves an application of Praprotnik to this particular case. Of course, there were two different approaches in Praprotnik, the plurality's and the concurrence's (you joined WJB's concurrence). But regardless of which approach the Court were to adopt, this case simply involves an application of the

approach to the particular case. Moreover, CA5 did not have a chance to apply either Praprotnik approach to this case, since its opinion on rehearing was issued a month before Praprotnik was decided. Thus, all the Court should do here is choose definitively between the Praprotnik plurality and concurrence and then remand for an application of the correct standard. It seems obvious that you should stick with the Praprotnik concurrence and remand accordingly.

RECOMMENDATION

§1981 issue: REVERSE (Jett need not meet the Monell test in order for the school district to be liable; as long as his removal as coach was based on race, the school district is liable under §1981 for this employment decision.)

§1983 issue: REMAND for application of standard set forth in Praprotnik concurrence.

[P.S. I hope this memo suffices. Since Eddie's pool memo amply discusses the factual background of the case, I thought there was no need to describe the facts further in this memo. Additionally, the facts are largely irrelevant to the resolution of the §1981 issue. Moreover, since this issue is largely resolved by Patterson, I thought it could be treated with

brevity. In any event, it is time to redeploy my resources to other tasks!]