Jett v. Dallas Indep. School Dist.;
Dallas Indep. School Dist. v. Jett
Nos. 87-2084; 88-214

5(2)

Law Clerk: Lisa
Argument: Tues., Mar. 28

Cert to CA5
No. 87-2084: G: BRW; HAB; JPS; SOC; AS; AMK
D: CJ; WJB; TM
No. 88-214: G: CJ; WJB; TM; HAB; SOC
D: BRW; JPS; AS; AMK

Recommendation: Rev 2084; aff 214

Petitioner Norman Jett was a high school teacher and football coach for respondent school district. He is white, and the school in which he taught was predominantly black. After some hostility developed between Jett and the principal of his school (Frederick Todd) and after Jett made several derogatory public statements about the academic qualifications of his players, Todd told Jett that he would recommend that Jett be discharged from his athletic responsibilities. Jett met with various school district officials, including the superintendent of the district (Linus Wright), and eventually these officials decided to reassign Jett to another school. Jett later resigned from his new position. He sued the principal and the school district under §§1981 and 1983, alleging that his reassignment stemmed from discrimination on the basis of race and on the basis of his exercise of First Amendment rights.

The jury held in favor of Jett. On appeal, CA5 held that the DCt had erred in giving an instruction that predicated liability under §1981 on a theory of respondeat superior. CA5 concluded that, just as liability under §1983 can be imposed on municipalities only if they have a custom or policy that leads to the constitutional deprivation, so liability under §1981 cannot be imposed on municipalities on a general theory of vicarious liability. Case No. 87-2084 presents this question. In No. 88-214, the school district cross-petitions from CA5's decision to remand the case to the DCt for a determination whether Superintendent Wright was a policymaking official whose conduct could subject the school district to liability under §§1981 and 1983. The district contends that since under state law the school board possesses exclusive policymaking authority for the district, Wright cannot be deemed a policymaking official. I address each of these questions in turn.

I. No. 87-2084: Municipal Liability under §1981

Jett rightly takes issue with CA5's sole reliance on cases under §1983 for its conclusion that §1981 does not render munici-

palities vicariously liable for the actions of their employees. The predecessor to §1981, as we all know from Patterson, was §1 of the Civil Rights Act of 1866; the predecessor to §1983 was not enacted until five years later. (I will refer to the statutes by their modern titles.) It would be hazardous, to say the least, automatically to attribute the same intent to the Congresses who passed both statutes; as the ACLU as amicus points out, almost none of the representatives in Congress were present for the passage of both of these statutes.

A careful examination of the two statutes, moreover, reveals that the arguments against vicarious liability under §1983 do not apply with equal force to §1981. It is WJB's opinion in Monell, recognizing that a municipality may be liable under §1983 only if the constitutional deprivation at issue flowed from a custom or policy established by the municipality, that underlies the argument that §1981 does not impose vicarious liability on municipalities. The centerpiece of Monell is its discussion of Congress' rejection of the Sherman Amendment, which would have rendered municipalities liable for damages from riots occurring within their jurisdictions. Congress' rejection of this amendment, WJB explained, largely stemmed from its opposition to imposing an affirmative obligation of protection on local governments; indeed, at the time, Congress seems to have felt that it would have been unconstitutional to impose such a burden on them. The rejection of this amendment did not mean, however, that municipalities could not be liable at all under §1983, contrary to the conclusion in Monroe v. Pape; instead, in defeating the Sherman Amendment, Congress signaled that it did not seek sought to impose vicarious liability on them. Vicarious liability would have thrust upon them some of the same kinds of positive responsibilities that Congress had opposed in the Sherman Amendment. Vicarious liability would, for example, impose upon municipalities a positive duty to take care that municipal employees did not commit torts--much like the Sherman Amendment would have imposed on them a duty to ensure that riots did not happen within their environs. Thus, WJB concluded, in order to hold a municipality liable under §1983, a plaintiff must show that her injury occurred as a result of a policy or custom of the municipality. In coming to this conclusion, WJB also stressed the fact that §1983 imposes liability on a person who "subjects or causes to be subjected" a citizen to the deprivation of rights under the Constitution and laws of the United States. This language, he thought, indicated that liability ought not be imposed on the basis of respondeat superior.

Needless to say, the legislative history of §1981--occurring five years before the debate on and enactment of §1983--does not include the rejection of the Sherman Amendment, which Monell found so decisive. Although it still could be true that §1981 was not intended to impose vicarious liability on municipalities, the case for that position is, I think, greatly weakened by this difference in background. One would have to say that the rejection of the Sherman Amendment in 1871 is evidence that Congress

in 1866, in a different statute, would not have decided to impose liability on municipalities on a theory of respondeat superior.

It would be difficult to construct such an argument from the language of §1981, which is absolute: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." This statute does not contain the language ("subjects or causes to be subjected to") that WJB found so important in §1983 in Monell. Jett argues that we are therefore left to fall back on the common-law practice in 1866, which permitted the imposition of vicarious liability on municipalities. (Jett's additional argument--that the absence in §1981 of the "under color of law" language of §1983 shows that vicarious liability was intended for municipalities--is a nonstarter; Monell did not rely on this language in reaching its conclusion, and this Court long has recognized (contrary to Jett's impression) that the function of this language is to make plain that §1983 includes the same state action requirement that the Fourteenth Amendment does.)

The school district's response comes as a bit of a surprise. It argues that we must look to §1983, not to §1981, to decide whether vicarious liability may be imposed on municipalities for violations of §1981 because §1983 alone, not §1981, creates the cause of action for such violations. The district emphasizes that §1981 itself makes no mention of a civil remedy. Since §2 of the 1866 Act did create such a remedy, and since that remedy was criminal punishment, the district concludes that the only remedy under the 1866 Act for violations of §1 was the criminal one. When §1983 was passed, it created a cause of action in damages for violations of §1981, since it imposes liability for violations of the laws of the United States. (This argument depends on Maine v. Thiboutot's holding that one may sue state officials for damages for violations of federal statutes.) Thus, suits for violations of §1981 are subject to the limitations imposed on any §1983 suit--including the limitation of municipal liability to those violations that are the result of a custom or policy of the local government.

In making this argument, the school district must explain away two important obstacles. First, it must tell us why §3 of the 1866 Act does not create the cause of action that it can find only in the 1871 Act. Section 3 gave district courts jurisdiction "of all causes, civil and criminal, affecting persons who are denied or cannot enforce in [state courts] any of the rights secured to them by [§1] of this act." The district claims that this provision merely gave federal courts removal jurisdiction over actions originally brought in state courts in which it became clear that the defendant could not get a fair hearing; but then it is unable to explain the purpose served by the part of §3 explicitly conferring removal jurisdiction on the federal courts. The district's argument, moreover, flies in the face of the following statement in Moor v. County of Alameda, 411 U.S. 693,

704-705 (1973): "The initial portion of §3 of the Act established federal jurisdiction to hear, among other things, civil actions brought to enforce §1." This seems a pretty clear statement to me that §1981 does not piggyback on the cause of action created under §1983.

A second obstacle to the district's argument is just as formidable, and that is the continuing vitality of the line of cases represented by Runyan v. McCrary, authorizing §1981 suits against purely private actors. Certainly those cases are not brought under §1983, which permits suits only on the basis of state action. Runyan itself mentions only §1981, and Patterson does likewise. Whether this means that those cases conceive that the cause of action arises directly under that provision, or whether they think that it comes from §3 of the 1866 Act, makes no difference. The crucial point is that this line of cases demonstrates that one need not use §1983 in order to sue a state actor for violations of §1981. The district's response to cases like Runyan is unpersuasive. It argues that a cause of action directly under §1981 must be implied as to private actors if they are to be subject to that statute's substantive requirements, since §1983 creates no cause of action for private actors. But, the district goes on, since §1983 is available for suits against state actors, we needn't imply a cause of action against them under §1981. This argument not only creates a surprising and, I think, untenable distinction between private and state actors under §1981--one the Court refused to draw in Runyan, and refuses again to make in Patterson--but also gets things backwards. The only controversy under §1981, so far as I can tell, is whether private actors may be liable. Against this background, a conclusion that private actors may be subject to more penalties (penalties based on vicarious liability) than state actors would come as a shock.

The district's argument that §1983 is necessary to make violations of §1981 actionable thus should be rejected. This makes the district's case more difficult, since it no longer can rely directly on Monell for the argument that §1981 does not permit liability based upon respondeat superior. As I explained above, I think that one can persuasively distinguish the language and history of §1981 from the language and history of §1983. I also think that it is plausible to say that the different focuses of the statutes make liability based on respondeat superior more natural under §1981 than under §1983.

The portion of §1981 under consideration here is the same as involved in Patterson, and that is the guarantee that blacks will be able to "make and enforce contracts" to the same extent as whites. Since Jett's contract to teach and coach high school students ran to the school district, not to the person who reassigned him, and since the school district (acting through the superintendent or school board) had the authority to reinstate him, it seems reasonable to conclude that his reassignment may be laid at the doorstep of the district itself. Holding the dis-

trict responsible for allowing one of its own contracts to be terminated strikes me as very different from holding an employer liable for the everyday torts of its employees, and thus I can see a distinction between this case and the "affirmative obligations" rejected in Monell. In addition, there seems to be agreement among the lower courts that liability against private actors under §1981 may be based on a theory of respondeat superior; again, I see no reason to treat private and state actors differently for these purposes.

I therefore would recommend a reversal of CA5's holding that liability under §1981 may not be imposed against municipalities on a theory of respondeat superior--though I recognize that this view is probably unlikely to garner a majority.

II. No. 88-214: Superintendent Wright as Policymaking Official

The parties devote little space in their briefs to this second issue, which is whether CA5 should have held as a matter of law that Superintendent Wright was not a policymaking official whose decisions could subject the district to liability under Monell.

The district judge in this case gave an instruction basically telling the jury that the school district could be liable if Jett's reassignment had been discriminatorily motivated and if Wright had done nothing to ensure that it was not; the judge gave no hint that the district's liability depended on whether Wright possessed policymaking authority for the district. This instruction was, everyone admits, incorrect, at least as to the claims under §1983. CA5 held that this instruction was erroneous, and remanded for a retrial on this issue. CA5 correctly described the law on municipal liability (despite the school district's suggestions to the contrary in its cert petition), and its decision to remand seems to me to have been very sensible.

After having cross-petitioned for cert on this question, requesting that the case be remanded for consideration in light of City of St. Louis v. Praprotnik, 108 S.Ct. 915 (1988), the school district in its brief on the merits has relegated its discussion of this question to a footnote. The district no longer asks that the case be remanded, but instead asks that the §1983 claims against it be dismissed outright. It correctly notes that whether Wright possesses policymaking authority is a question of state law, and points to a state statute conferring on the school board the exclusive authority to set policy for the district. This statute alone cannot answer the question for all cases, however, since it does not tell us whether the district departed from this strict statutory mandate here. I should hope that, if the district had been in the habit of allowing lower-level officials to make all of its own policy decisions, those officials' actions could be "policy" within the meaning of Monell. I thus agree with Jett's suggestion that the case be remanded so that

the lower courts can take the first real crack at the state-law question of Wright's authority, unhampered by the district court's initially erroneous view of the law. Since this suggestion comports with the action CA5 took with respect to this claim, I recommend an affirmance on this second issue.