MONELL v. DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK

No. 75-1914 CFX

Cert to CA 2 (Hays, Timbers and Gurfein)

TABLE OF CONTENTS

9/20/77
Ellison

I. INTRODUCTION

The parties agree that this case presents two related issues. The first is whether the Board of Education (the Board) of New York City (NYC) is a "person" within the meaning of 42 U.S.C. §1983 when back pay is sought against it. The second is whether officials of the Board, when sued in their official capacities for back pay, are "persons" within the meaning of §1983. Cert was not granted on the question--raised in the petn for cert--whether Title VII's 1972 amendments are retroactive.

II. FACTS AND PROCEDURAL HISTORY

A brief statement of the facts relevant to the issues on which cert was granted may be useful. Petrs are female employees of NYC's Department of Social Services and of the NYC Board of Education. They are suing on behalf of themselves and other similarly situated female employees of the Board and City. Resps are the Board and its Chancellor, the Department of Social Services and its Chairman, and the Mayor. All of the individual resps were sued in their official capacities.[1] The essence of petr's complaint is that, prior to the 1971-72 academic year, resps compelled pregnant employees to take unpaid leaves of absence before medical reasons required them to do so. (Because the courts below did not reach the merits, this claim has not been adjudicated.)

This action was commenced on July 26, 1971, alleging that the disputed policies violated the Fourteenth Amendment. Jurisdiction was said to exist under 42 U.S.C. §1983 and its

---

[1] There is no allegation of malicious conduct, i.e., conduct not protected by the officials' qualified immunity (the "good faith defense"). See Wood v. Strickland, 420 U.S. 308 (1975).

jurisdictional counterpart, 28 U.S.C. §1343(3).[2] 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. Judge Constance Baker Motley (S.D.N.Y.) certified the suit as a class action.

On January 29, 1972, NYC put into effect a change in policy permitting a pregnant employee to remain on the job so long as she was in fact able to continue to perform her job. This new policy governed the Department of Social Services but not the Board of Education. In November 1973, the Board adopted new by-laws, retroactive to Sept.1 1973, permitting pregnant employees to remain on the job as long as they were able to perform their duties.[3] In April 1974, the DC concluded that petrs' declaratory and injunctive claims were moot, and dismissed petr's claim for back pay for lack of subject matter jurisdiction. In March 1976, CA 2 affirmed.

---

[2] The complaint was later amended to allege a cause of action under the then newly amended provisions of Title VII. 42 U.S.C. §2000e. The DC and CA 2 held that the 1972 amendments to Title VII were not retroactive. Cert was sought with regard to this aspect of the decision below but, as noted supra, cert was limited to the issues concerning §1983.

[3] In January 1974, this Court decided Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), holding invalid under the Fourteenth Amendment pregnancy regulations similar to those of resps in this suit.

Cert was sought, after an extension, in timely fashion. The case was apparently held for Mount Healthy School District v. Doyle, 97 S.Ct. 568 (Jan. 11, 1977), which, as that decision was written, did not resolve the questions presented by this case. Cert was granted on Jan. 25, 1977. The petns for cert in Musquiz v. City of Antonio, No. 75-1723, and Thurston v. Dekle, No. 76-5224 (both from CA 5) are evidently being held for this case. A memo to the Conference concerning those cases and the instant case has been included in the appendix to this memo.

III. STATUTE INVOLVED

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

IV. CA 2's OPINION

As stated supra, CA 2 first held that the 1972 amendments to Title VII are not retroactive. Concerning the §1983 issues, CA 2 began its discussion by noting that this Court has held that municipalities are not "persons" within the meaning of §1983. Monroe v. Pape, 365 U.S. 167, 187-192 (1961); City of Kenosha v. Bruno, 412 U.S. 507 (1973), and that a state or county is also not a"person" under §1983. Moor v. County of Alameda, 411 U.S. 693, 699-700 (1973). Similarly, a department of city, state or county government is not a "person." According to CA 2, petrs (appellants below) conceded that the Department of Social Services is not a person and is not suable under §1983 even though it was named as a respondent. See Petn for cert at A44.

CA 2 then addressed petrs' argument that the Board of Education is an independent body and not merely an arm of the city like the Department of Social Services. After reviewing various precedents concerning the independence vel non of different governmental entities, CA 2 held that the Board was not sufficiently independent from NYC to be considered a "person" under §1983. The court pdinted out that all funds for the Board must be appropriated by the City and, although the Board has the right to determine how funds appropriated to it shall be spent, it has no final say in deciding what its appropriation shall be. In short,"the funds of the Board of Education are public funds appropriated for its use as if it were a department of the city government." Id. A49.

The court then considered petrs' argument that several Supreme Court cases have held that a school board is a "person" for purposes of §1983. CA 2 stated that in every such case individual defendants were named in addition to the school board, and that the suability of school boards under §1983 was never expressly considered. Rather, the cases in question were decided on their merits without any jurisdictional issues being perceived. See, e.g., Bradley v. Richmond School Board, 416 U.S. 696 (1974); Goss v. Lopez, 419 U.S. 565, 568 (1975); East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976). CA 2 invoked this Court's observation in In re Nielsen, 131 U.S. 176, 184 (1889), "[i]f we have seemed to hold the contrary in any case, it has been from inadvertence." Id. A51.

The court then proceeded to consider the second issue that now faces this Court--whether individual officials "may be sued in their official capacities under §1983 for damages, even though the money would have to come out of the city treasury." Id. A53. CA 2 conceded that there is no doubt that municipal and state officials, sued in their official capacities, are "persons" within the meaning of §1983 when they are sued for injunctive or declaratory relief. However, CA 2 felt that the monetary relief requested in this instance presented a different question. Recognizing that the Eleventh Amendment has no direct applicability to cities, see Edelman v. Jordan, 415 U.S. 651, 657 n.12 (1974), the court nevertheless found "a compelling analogy from cases arising under the Eleventh Amendment." Id. A56. Relying on Edelman v. Jordan, supra, Ex parte Young, 209 U.S. 123 (1908), and other Eleventh Amendment cases, CA 2 held that a suit could be brought against an individual official in his official capacity for injunctive relief but not for monetary damages that would--as in this case--in fact be paid out of the public treasury.

V. CONTENTIONS

A. Petrs' Contentions

Petrs attack CA 2's conclusion that to allow monetary relief against the resps would undermine the holding in Monroe v. Pape, 365 U.S. 167 (1961),[4] that a city is not a person under §1983. Petrs argue that CA 2 unjustifiably

[4] In Monroe, J. Douglas wrote for the majority and J. Frankfurter dissented on other grounds than whether a city is a "person" under §1983.

extended Monroe and that the result is inconsistent with the weight of this Court's decisions concerning school boards and errant municipal officials.

1.) As regards school boards, petrs note that in a long line of cases--some of which had a far greater financial impact than is contemplated here--jurisdiction rested on §1983.[5] Also, petrs contend, Congress has subsequently expressed its approval of this line of cases by refusing to overrule it via legislation. Thus, even if the Reconstruction Congress had intended to exclude school boards from the ambit of §1983 (which petrs deny), the subsequent reliance by Congress on a contrary determination by this Court ought not to be disturbed. E.g., §718 of the Emergency School Aid Act of 1972, 20 U.S.C. §1617.

Though not citing any legislative history that bolsters the argument that the Reconstruction Congress intended to include school boards in the meaning of "person" under §1983, petrs plausibly suggest that there is no legislative history inconsistent with that proposition. Additionally, conceding that the NYC Board of Education has a significant relationship with the city, petrs contend that the Board is not simply an alter ego of the city or of any other governmental entity.

---

[5] Petrs assert that from Brown v. Board of Education, 347 U.S. 483 (1954), to East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976), this Court has entertained and decided on the merits nineteen actions commenced under §1983 in which the primary defendant was a school board. In other instances, this Court has dealt summarily with such cases. Of the Court's written opinions, eight involved actions in which §1983, together with 28 U.S.C. §1343, was the sole basis of jurisdiction alleged. In the other eleven cases, another federal cause of action was also alleged. All but one of these decisions were handed down after Monroe v. Pape.

2.) Concerning the respondent officials, petrs emphasize that they do not contend that NYC is liable for all constitutional violations of its employees, but only that officials who have used their powers to violate the Constitution can be compelled to use those same powers to remedy the violation. Petrs argue that this Court has approved decrees to this effect in several cases decided after Monroe and that CA 2 incorrectly rejected those authorities. Vlandis v. Kline, 412 U.S. 441 (1973); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Edelman v. Jordan, 415 U.S. 651 (1974) (referring to the §1983 issue therein).

Petrs point out that CA 2 sought to harmonize its result with the well-established doctrine allowing suits in equity against named officials by creating a distinction between types of equitable relief, viz., allowing only that which does not call for monetary restitution. CA 2 supported its approach, petrs note, by analogizing §1983 to the Eleventh Amendment as construed in Edelman v. Jordan, supra.

This analogy, petrs assert, is untenable for it ignores the different legislative purposes underlying the two laws. The central purpose of the Eleventh Amendment was to insure that the federal courts would not impose liability on the states in suits by citizens. The primary purpose for which §1983 was enacted, on the other hand, was to insure appropriate remedies for wrongful acts under color of laws--manifestly including wrongful acts by local officials. Monroe v. Pape, supra, 365 U.S. at 171, 173.

Petrs argue that the legislative history of §1983 that was held in Monroe, 365 U.S. at 187-192, to indicate an exclusion by Congress of municipalities from the word "persons", does not justify an extension of Monroe's exclusion to the situation presented here. The Sherman Amendment to §1983--the rejection of which by the Reconstruction Congress formed the basis of this Court's holding in Monroe--would have made cities and counties liable even for civil rights violations committed within their borders by private individuals.[5] Petrs point out that the Amendment was rejected for various reasons, but prime among them was the recognition that many cities did not have, under state law, the police powers necessary to control those violations. In petrs' view, therefore, Congress's rejection of the Sherman Amendment cannot support the interpretation given §1983 by CA 2.

Lastly, petrs suggest that since, from the time the complaint was filed, the DC unquestionably had the power to grant a preliminary injunction providing full prospective relief, Congress could not have intended to foreclose the less drastic remedy of appropriate monetary relief.

---

[5] The amici brief filed by the National Education Association and the Lawyers' Committee for Civil Rights Under Law argues that this Court's interpretation of the Sherman Act's rejection was simply incorrect. According to amici, Congress' rejection cannot be read as an attempt to forbid actions against municipalities. Rather, it was only a manifestation of Congress' dubiety that it had the constitutional power to impose on local government bodies the affirmative obligation to exercise its police powers or to face a kind of strict liability for constitutional violations committed within their jurisdictions.

B. Respondents' Contentions

1.) Resps argue that Monroe and this Court's decisions following it (e.g., Moor v. County of Alameda, supra, 411 U.S. at 706) were correctly decided and, in any event, should be adhered to under accepted principles of stare decisis. Accordingly, resps would have this Court hold that school boards and districts generally--to the extent they are not deemed arms of the State enjoying Eleventh Amendment immunity from suit--are governmental subdivisions of the States, exercising important governmental power, and thus should be treated the same as cities and counties under §1983. Particularly is such a result compelled on the facts of this case since NYC's Board of Education has such a close relationship to NYC that there is no basis for treating it any differently from the city itself.

2.) Resps also assert that imposing financial liability on individual officials in their official capacities under §1983 would be wholly inconsistant with Monroe. It would do indirectly what Monroe said could not be done directly. Moreover, according to resps, imposing liability on individual officials acting under color of law would also be inconsistent with the intent of Congress when it enacted §1983 and contrary to sound considerations of justice and public policy. Though recognizing that prospective injunctive relief can be obtained against such officials, resps urge the Court to accept CA 2's Eleventh Amendment analogy and hold that the monetary relief sought here is not obtainable.

VI DISCUSSION

Although it may seem regrettable, the logic of this Court's pertinent precedents virtually compels a holding that neither the Board nor the individual resps are suable under §1983.

A. The Board of Education

In all candor, I believe that this Court misinterpreted the legislative history of §1983 when it held, in Monroe, that cities were not suable thereunder. The legislative history that Justice Douglas relied on proves nothing more than that Congress did not wish to make cities or counties liable--under a kind of "respondeat superior" theory--for all unconstitutional acts of private individuals committed within the jurisdiction. Congress did not mean, when it rejected the Sherman Amendment, to insulate municipal treasuries from suits by plaintiffs seeking to recover damages for unconstitutional actions taken by a city, county or subdivision thereof.

I seriously doubt, however, that the Court wishes to overrule Monroe which has subsequently been relied on by this Court and lower courts. The Court could strictly limit Monroe by holding that school boards are sufficiently dissimilar from cities and counties that they are "persons" within §1983. However, though such a factual distinction may have some merit in future cases, it is hardly tenable here. As made clear in CA 2's decision, the Board is an integral part of NYC's government.

Another possible way around Monroe would be to hold that, because it has apparently been assumed by this Court in numerous cases that school boards may be sued under §1983, the Court declines to decide differently at this point. As the Court stated in Brown Shoe Co. v. United States, 370 U.S. 294, 306-307 (1962), "While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed sub silentio . . . neither should we disregard the implications of an exercise of judicial authority assumed to be proper for over 40 years." More recently, though, in an analogous context, this Court declined to follows three of its precedents which had assumed (with little or no discussion) that the Administrative Procedure Act is an independent grant of subject matter jurisdiction. Califano v. Sanders, 97 S.Ct. 980, 984 (1977). Furthermore, I come back to the point that deciding that this particular Board of Education is suable as a "person" under §1983 would--given the Board's interrelationship with NYC--be conspicuously at odds with Monroe.

B. The Individual Respondents

It appears to be established--and is not challenged in this case--that public officials, sued in their official capacities, are "persons" within the meaning of §1983 when the relief sought is injunctive or declaratory. Gresham v. Chambers, 501 F.2d 687, 690 (2d Cir. 1974); Erdmann v. Stevens, 458 F.2d 1205, 1207-08 (2d Cir.) cert denied, 409 U.S. 889 (1972).

However, neither Monroe nor other precedents of this Court have decided whether city or school officials sued for monetary damages in their official capacities are "persons" under §1983. The circuit courts that have considered the question have split. CA 5 in Musquiz v. City of San Antonio, supra, 528 F.2d 499 (1976) (en banc), and Thurston v. Dekle, supra,[6] held that public officials are not suable in this context. (The petn for cert in each case, as noted supra, is being held for the decision in this case.) But in Burt v. Board of Trustees, 521 F.2d 1201, 1205 (1975), CA 4 resolved the issue the other way.

Superficially, it appears that public officials such as the individual resps should be suable for monetary damages under §1983. They would seem to fit the plain meaning of "persons," and it is curious to consider them to be "persons" when they are sued for injunctive relief but not to be "persons" when they are sued for monetary relief. Moreover, Eleventh Amendment precedents and distinctions have no historical or precedent applicability to §1983 or other sections of the Civil Rights Acts.

Still, it is very difficult to see how this Court can avoid the conclusion that public officials cannot be sued in their official capacities for monetary damages under §1983. To hold that they can be thus sued would render null Monroe v. Pape and the subsequent decisions of this Court which have applied it. Accordingly, CA 2 was probably correct in importing into §1983 law the distinctions that have developed under Eleventh Amendment precedents.

---

[6] The relevant holding in Thurston rested entirely on the previous opinion in Musquiz.

VII CONCLUSION

The conclusion that neither the Board nor the individual resps are suable for monetary damages may well seem unfortunate. Not only does it leave theses petrs without redress but it makes it hard to think whom aggrieved parties can sue for §1983 violations committed by cities or their agents.

However, some solace may be gained from two facts. First, the 1972 amendments to Title VII now provide a cause of action for parties whose rights were violated as petrs claim that their rights were violated. Secondly, Congress is currently considering legislation that would, among other things, legislatively overrule Monroe v. Pape and make §1983 actions more broadly available against governmental bodies.

VIII BRIEF OF AMICI CURIAE

The only amici brief submitted wis by the National Education Association and the Lawyers' Committee for Civil Rights Under Law. On most points, the brief tracks the petrs' brief although amici's discussion is somewhat fuller.

IX QUESTIONS

A. For Petitioners:

1. How can this Court hold that New York City's Board of Education--an integral part of New York's municipal government--is suable for monetary relief under §1983 without overruling Monroe v. Pape?

2. If this Court were to hold that, although the Board is not suable for monetary relief under §1983, the individual respondents are, wouldn't this case effectively eviscerate the holding in Monroe v. Pape?

B. For Respondents:

1. How can an individual or a governmental entity be a "person" under §1983 for purposes of injunctive relief but not for purposes of monetary relief?

2. Would not an affirmance of CA 2's decision deprive §1983 of any utility for a wide range of constitutional violations?

Is it conceded that if the school + pub. trans. wd pay?