IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1914

JANE MONELL, et al., *Petitioners*

vs.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, et al., *Respondents*

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No.

JANE MONELL, SUSAN TERRALL, BEVERLY ZAPATA, and CAROL ABBEY, on their own behalf and in behalf of all others similarly situated, Petitioners

v.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, HENRY SMITH, as Commissioner of the Department of Social Services, BOARD OF EDUCATION OF THE CITY OF NEW YORK, IRVING ANKER, as Chancellor of the City School District of the City of New York, and ABE BEAME, as Mayor of the City of New York, Respondents,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Jane Monell, et al, pray that a writ of certiorari be issued to review the final judgment of the United States Court of

Appeals for the Second Circuit entered in the office of the clerk on March 8, 1976.

OPINIONS BELOW

The opinion of the District Court certifying this as a class action is reported at 357 F. Supp. 1051 (S.D.N.Y. 1972) and is reproduced as Appendix I, infra at A1-A14. The opinion of the District Court dismissing this action is reported at 394 F. Supp. 853 (S.D.N.Y. 1975) and is reproduced as Appendix II, infra at A15 - A27. The opinion of the United States Court of Appeals for the Second Circuit, reported at 532 F. 2d 259 (2d Cir. 1976) is reproduced as Appendix III, infra at A28 - A70.

JURISDICTION

The Second Circuit rendered its judgment affirming the order of the District Judge dismissing this action on March 8, 1976 and entered its order on the same date. An extension of time within which to file this petition to July 9, 1976 was granted by Mr. Justice Marshall on May 25, 1976. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Equal Employment Opportunity Act of 1972 extending the coverage of Title VII of the Civil Rights Act of 1964 to state and local officials and educational institutions should be applied in an action which had been brought prior to the effective date of the 1972 Act

and which was still pending on that date?

2. Whether local governmental officials and/or local independent school boards are "persons" within the meaning of 42 U.S.C. §1983 when equitable relief in the nature of back pay is sought against them in their official capacities?

STATUTORY PROVISIONS INVOLVED

Civil Rights Act of 1871 §1; 42 U.S.C. §1983 (1970).

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.

Equal Employment Opportunity Act of 1972, §2(1), §3; 42 U.S.C. §2000 e (a), §2000 e - 1.

Sec. 2. Section 701 of the Civil Rights Act of 1964 (78 Stat. 253; 42 U.S.C. 2000e) is amended as follows:

(1) In subsection (a) insert "governments, governmental agencies, political subdivisions," after the word "individuals".

Sec. 3. Section 702 of the Civil Rights Act of 1964 (78 Stat. 255; 42 U.S.C. 2000e-1) is amended to read as follows:

EXEMPTION

"Sec. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

STATEMENT OF THE CASE

The plaintiffs in this action are women who were compelled by the defendants to take leaves of absence from their employment during their pregnancies. Defendants are the Mayor of the City of New York and its Commissioner of Social Services as well as the Board of Education of the City of New York and its Chancellor. The mandatory suspensions were invoked against all of the plaintiffs at varying times during 1971, A7-8, A41,* pursuant to separate but similar policies then pursued by the City of New York and the Board of Education. None of the plaintiffs have ever been

* References are to the Appendix in the Second Circuit unless otherwise indicated.

compensated for pay lost during their involuntary suspensions. In their original complaint, filed July 26, 1971, plaintiffs challenged, on constitutional grounds, the relevant regulations of each of the defendants. Jurisdiction was initially based on 42 U.S.C. §1983 and 28 U.S.C. §1343(3), A1.

An amended complaint was filed on September 14, 1972, following the amendment to Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et. seq.)by the Equal Employment Opportunity Act of 1972 which extended the Civil Rights Act's coverage to state and local governments and boards of education, 14A. The plaintiffs then added Title VII both as a ground

for relief and as a source of jurisdiction.

In an opinion filed April 12, 1972, the District Court denied both defendants' motion to dismiss and plaintiffs' motion for summary judgment, but granted plaintiffs' motion to declare this a class action. The defendants subsequently abandoned their mandatory pregnancy rules. Plaintiffs' claims for equitable restitution, however, remained outstanding.

In the opinion and order dated April 30, 1974, Judge Metzner dismissed the complaint for lack of subject matter jurisdiction, Appendix II, infra. The Second Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I

In Holding That The Equal Employment Opportunity Act of 1972 Had No Application to A Case Pending At the Time of Its Enactment The Decision Below Conflicts With A Subsequent Decision of This Court.

Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000 e et seq was amended as of March 24, 1972 to include within its coverage "governments, governmental agencies [and] political subdivisions" as well as educational institutions, Pub. L. No. 92-261 § § 2(1), 3, "The Equal Employment Opportunity Act" (amending 42 U.S.C. § 2000 e (a)). In the instant case the Second Circuit held

that although the 1972 amendments brought local officials within the ambit of Title VII these amendments could not be applied to authorize relief on behalf of the plaintiffs, whose injuries occurred during 1971 but whose case was pending at the time of the amendments. This holding contravenes that of this Court in Brown v. General Services Administration, 425 U.S.____, 44 U.S.L.W. 4704 (1976), affirming 507 F. 2d 1300 (2d Cir. 1974).[1] There too the plaintiff was aggrieved in 1971 - prior to the effective date of the

1. The Second Circuit had also applied the 1972 amendments, retroactively in Brown v. G.S.A., supra. As will be shown, however, the purported distinction which allowed the Second Circuit to reach a different result in this case was erroneous under the Supreme Court's approach in Brown.

1972 amendments - but this Court found the amendments to be applicable, Brown v. General Services Administration, supra, 44 U.S.L.W. at 4705 n.4. The failure of the defendants in Brown to raise the question before this Court is not significant since the issue went to subject matter jurisdiction and this Court would, if such were lacking, have raised the point sua sponte and dismissed the action, compare Liberty Mutual Insurance Company v. Wetzel _____U.S._____, 44. U.S.L.W. 4350 (1976) (judgment of the Court of Appeals for the Third Circuit in a Title VII case dismissed sua sponte for want of appellate jurisdiction in the Court of Appeals).

Also indicative of the significance of the ruling in Brown, supra,

is this Court's disposition of Place v. Weinberger, 497 F. 2d 412 (6th Cir. 1974), cert. granted, judgment vacated and remanded ____U.S._____, 44 U.S.L.W. 3718 (1976), in which the Supreme Court remanded "for further consideration in light of Brown v. Government Services Administration, (sic) 425 U.S. ____, slip op. 3 n.4 (1976)." The sole question before the Court in Place v. Weinberger, supra, was the same question here at issue, i.e., whether the Equal Employment Opportunity Act of 1972 should be applied to a case pending as of its enactment, see summary of petition for certiorari, Place v. Weinberger, 74 - 116, 43 U.S.L.W. 3152 (1974).

Thus the vacatur and remand in Place not only demonstrates the sig-

nificance of footnote four in Brown, it also points the way to appropriate disposition of this petition: to grant the petition outright or to grant it, vacate the holding of the Second Circuit, and remand for reconsideration.

The Second Circuit was of the view that this case was distinguishable from Brown v. General Services Administration, supra, because the defendant there was an agency of the federal government whereas these defendants are municipal agents and an educational institution (App. III, A40). The Court thought that difference was important because it found - in a key error - that victims of federal discrimination enjoyed a right to back pay prior to 1972,

while victims of local discrimination did not, App. III, A40 - 42.

This Court's opinion in Brown v. General Services Administration, supra, shows that the Second Circuit was wrong. In Brown this Court held flatly:

> Until it was amended in 1972 by the Equal Employment Opportunity Act, however, Title VII did not protect federal employees. - Id at 425 U.S. ____, 44 U.S.L.W. 4705.

Were this not clear enough the Second Circuit's error could also be demonstrated by reference to Congress' understanding of the status of federal employees prior to the 1972 amendments.[2] Since, then, the Equal

2. "Despite the series of executive and administrative directives on equal employment opportunity, Federal employees ... face legal obstacles in obtaining meaningful remedies ... Monetary restitution or

Employment Opportunity Act created new rights for state, local, and federal workers, the distinction the Second Circuit made below was improper. That decision is therefore as much in conflict with Brown v. General Services Administration, supra, as was the Third Circuit's decision in Place v. Weinberger, supra. It should be remanded for reconsideration in the light of Brown, supra and of the law governing back pay for federal officials prior to 1972.

Additional reason for granting the writ concerns the importance of the legal questions at stake: Are

2. back pay is not attainable." H.R. Rep. No. 92-238, 92nd Cong., 2nd Sess. (1971), 1972 U.S. Code Cong. & Admin. News 2137, 2160.

state and local employees entitled to less protection under Title VII, as amended, than federal employees, even when the statute in terms makes no distinction between them? More basically still, in what circumstances may a statute furthering basic civil rights be denied application to a pending case? This Court recognized the importance of such questions when it granted the writs in Intern'l Union Etc. Local 790 v. Robbins and Myers, Inc., No. 75-1264, cert. granted _____ U.S. ____, 44 U.S.L.W. 3608 (April 23, 1976) and Guy v. Robbins and Myers, Inc., No. 75-1276, cert. granted _____ U.S. _____, 44 U.S.L.W. 3608 (April 23, 1976), both of which concerned the retroactive effect of another aspect of the 1972 amendments,

i.e., the increase of the time for filing charges from 90 to 180 days. For similar reasons the writ here sought should also be granted. Alternatively, the decision below should be vacated and remanded for reconsideration.

II

In Holding That The Defendants Were Not "Persons" for the Purposes of a Back Pay Award Under 42 U.S.C. §1983 the Decision Below Conflicted With Decisions of Other Courts of Appeals.

On its face, 42 U.S.C. §1983 authorizes a decree in equity ordering defendants Abe Beame and Henry Smith to provide, in their official capacities, back pay to the plaintiffs here, for those defendants are clearly "persons", whether sued individually or in their official capacities.[3] In reading the statute against its plain language the Second Circuit relied, in essence, on Monroe

3. Defendants are not alleged to be liable in their individual capacities.

v. Pape, 365 U.S. 167 (1961) and City of Kenosha v. Bruno, 412 U.S. 507 (1973), which together establish that municipalities are not "persons" for the purpose of §1983. Neither of these cases proscribed suits against municipal officials, or against a local independent school board, however.

Moreover, in subsequent cases the Supreme Court has continued to treat §1983 as authorizing monetary relief against governmental officials sued in their official capacities.

Precisely on point is Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974), in which the Court referred to the back pay award as "appropriate," 414 U.S. at 638.

The Court was there referring to the order in Cohen v. Chesterfield County School Board, 326 F. Supp. 1159, 1161 (E.D. Va., 1971). This was a companion to Cleveland Board of Education v. La Fleur, supra, in which defendants were the Chesterfield County School Board and its Superintendent. The result can be interpreted to mean that §1983 relief ordering back pay is authorized against local officials or against autonomous bodies of local government other than municipalities, or both. In the view of the Second Circuit, however, it meant neither, AIII, A42 - A70 .

This decision conflicts with that made in other circuits both as to the

amenability to suit of officials sued in that capacity and as to the amenability of school boards to §1983 suits.

This Court has already consented to review one of the cases presenting the latter issue, Mt. Healthy City School District Bd. of Ed. v. Doyle, 529 F. 2d 524 (6th Cir. 1975) cert. granted,_____U.S._____, 44 U.S.L.W. 3585 (1976) (No. 75-1278). There the Sixth Circuit apparently[4] held the defendant school board subject to liability under 42 U.S.C. §1983. The same result was reached in the Seventh and Eighth Circuits, see Aurora Education Assoc. East v. Bd. of Ed. of Aurora Pub. Schl. Distr.

4. The Sixth Circuit did not issue an opinion and the decision of the District Court is unreported.

No. 131, 490 F. 2d 431, 435 (7th Cir. 1973), cert. denied 416 U.S. 985 (1974), compare Hostrop v. Bd. of Jr. College Distr. No. 515 523 F. 2d 569, 576-577 (7th Cir. 1975), cert. denied ____U.S.____, 44 U.S.L.W. 3624 (1976) (defendant not a "person"). See also Keckeisen v. Independent School District 612, 509 F. 2d 1062, 1065 (8th Cir. 1975), cert. denied ____ U.S.____, 44 U.S.L.W. 3202 (1975).

Contrary results have been reached not only in the Second Circuit but in the Fourth and Fifth Circuits as well, Adkins v. Duval County School Board, 511 F. 2d 690, 693-696 (5th Cir. 1975); Singleton v. Vance County Board of Education, 501 F. 2d 429 (4th Cir. 1974).

A conflict also exists in the issue of whether local officials are liable to §1983 suits for monetary relief in their official capacities. In Burt v. Board of Trustees of Edgefield County School District, 521 F. 2d 1201, 1205 (4th Cir. 1975), the Fourth Circuit held that while the defendant school board was not a person for the purposes of §1983, the board members were such even for the purposes of a back pay award against them in their official capacities. This decision was adhered to in Thomas v. Ward, 529 F. 2d 916, 920-921 (4th Cir. 1975).

The Sixth Circuit has also taken a position in conflict with that adopted below, Incarcerated Men of

Allen County v. Fair, 507 F. 2d 281, 287-288 (6th Cir. 1974) (award of counsel fees against a sheriff sued in his official capacity.)

The Fifth Circuit, on the other hand, is in accord with the Second, see Muzquiz v. City of San Antonio, 528 F. 2d 499, 500 (5th Cir. 1976) (en banc), but see separate dissenting opinions of Judges Tuttle, Thornberry, and Godbold, Id. at 528 F. 2d 501-505.

The result in the present case illustrates the importance of the issues raised in this petition. Though petitioners were deprived of constitutional rights which this Court has included among "the basic civil rights of man," Cleveland Board of Education v. La Fleur,

414 U.S. 632, 640 (1974) the judiciary is, according to the Second Circuit, powerless to order those who violated their rights to recompense them. Though this is unfortunate for them as individuals, far more important is the impact of the holding on the status of constitutional rights in general, for, if plaintiffs right to compensation is eliminated so too will be defendants incentive to adhere to the Constitution and laws, see Albermarle Paper Co. v. Moody, ____ U.S. ____, 95 S. Ct. 2362, 2371 (1975).

As 42 U.S.C. §1983 offers protection against "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws ..." (emphasis added) it is the

source of federal judicial protection against official acts violating rights to due process of law, Goss v. Lopez, ___ U.S. ___, 95 S. Ct. 729 (1975); to freedom of speech, James v. Board of Education, 461 F. 2d 566 (1972) cert. denied, 409 U.S. 1042 (1972); and to the equal protection of law, Sugarman v. Dougall, 413 U.S. 643 (1974). To forbid the federal judiciary to make whole the victims of illegal official conduct is therefore to attack a broad range of constitutional rights.

If this Court decides not to vacate and remand this case (or grant the writ) as suggested in Point I, supra, it is respectfully urged that the writ should be granted for the reasons urged in this point. Alter-

natively, the Court could defer consideration of the petition pending its decision in Mt.Healthy City School District Bd. v. Doyle, supra.

CONCLUSION

For all of the foregoing reasons this petition for writ of certiorari should be granted and the judgment in this case should be vacated and remanded for further proceedings.

Respectfully submitted,

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