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General Building Contractors Assn. v. Pennsylvania

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Decision - I could
at least join 3.

(Case is important,
& wrong. But no

The Contractors, Petros here, had conflict,
a bargaining agt. with Union, & no op.
including a provision that Union below
would operate a "heating hall".

The Hall was operated vs blacks
in a discriminatory manner, resulting
in this "class action" suit.

DC found (1) no discrimination
by Petros, & (2) no knowledge by them.

DC nevertheless imposed vicarious
liability (viewing Union as agt of Petros)

and granted injunctive relief.

October 9, 1981 Conference

List 3, Sheet 3

CA 3 affirmed by divided vote (no op)

No. 81-280

Cert to CA 3 (affirmed by an
equally divided court (no opinion)
sitting en banc)

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.

v.

I think decision is plainly wrong. No
Contractor ever "controls" a Union Heating Hall.
COMMONWEALTH OF PENNSYLVANIA, et al.

Federal/Civil

Timely

Monell's rejection of vicarious liability
applies here with greater force.

No. 81-330

But no conflict.

UNITED ENGINEERS & CONSTRUCTORS, INC.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

Despite the seeming importance, I would probably
DENY. He stated by the memo-writer, there is no conflict.
If this is an "important issue of federal law," it will arise in
another case, in which there is a CA opinion to review. RF

No. 81-331

THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA

v.

COMMONWEALTH OF PENNSYLVANIA, et al.
same

same

No. 81-332

✓ GLASGOW, INC.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.
same

same

No. 81-333

BECHTEL POWER CORP.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.
same

same

SUMMARY: The Petitioners, who are construction contractors and their agents in the Philadelphia area, negotiated and signed a collective bargaining agreement providing for a union hiring hall. Without the employers' knowledge, the union operated the hiring hall in a racially discriminatory manner. The Petitioners ask this Court to consider:

1. Whether 42 U.S.C. §1981 permits a court to hold the employers liable for injunctive relief for racial discrimination committed by the union, when the Respondents have not proved that the employers acted with discriminatory intent.

2. Whether the employers and their agents can be held vicariously liable for the union's racial discrimination in the operation of the hiring hall.

FACTS: The Respondents, a class of black job-seekers, brought this action alleging that Local 542 and JATC, a local apprenticeship training committee, had discriminated against blacks in the operation of the hiring hall, in violation of Title VII and 42 U.S.C. §1981. The complaint also named one employer (who was later certified as the representative of a sub-class of 1400 employers) and four trade associations as defendants.

After a trial,¹ the District Court found that the hiring hall system created in the collective bargaining agreement between the union and the employers was nondiscriminatory and created a bona fide seniority system. The court stated that the Petitioners' allegations of discrimination were "not directed against the hiring hall system per se but against the union's

¹The trial court divided the litigation into two stages. Stage I involved only claims against the employers and trade associations as a class. Stage II, which has not yet begun, will decide individual questions of damages.

alleged intentional refusal to follow their own hiring hall rules." After reviewing the evidence, the ^{DC} court held that the union had violated both Title VII and §1981, and that JATC had violated §1981. *local committee not in this case*

^{DC} The court also found that trade associations and contractors "viewed simply as a class" were not "actually aware of the union discrimination," and that the plaintiffs had failed to "show an intent to discriminate by the employers as a class." Nevertheless, "whether or not the [Petitioners] knew or should have known" of the union's discrimination, the court held that they were liable for injunctive relief under §1981 "as a result of their contractual relationship to and use of a hiring hall system which in practice effectuated intentional discrimination." The court mandated extensive equitable relief against the union and the employers. The trade associations were ordered to pay a percentage of the costs of the remedial program mandated by the decree.

HOLDING: The Court of Appeals unanimously affirmed the portion of the judgment holding that the union and the apprenticeship committee had intentionally discriminated against the Respondents. The court ^{CA3} affirmed, by an equally divided vote (and thus without opinion), that portion of the judgment holding the employers and trade associations liable for "injunctive relief". The Petitioners seek review of only the latter holding.

CONTENTIONS:

1. The Petitioners contend that the court below held that proof of intent to discriminate is not required for an action brought under §1981, and that consequently, the decision conflicts with the decisions of several other circuits.² The Petitioners also argue that it makes no sense to hold them responsible to the union's actions since they have no control over the operation of the union hiring hall.

2. The Petitioners also object that the District Court incorrectly held that they are vicariously liable under §1981 for the discriminatory actions of the union and JATC. In reaching this holding the court relied not on §1981 case authority, but on analogous cases decided under the National Labor Relations Act, Title VII, and the common law doctrine of respondeat superior. ?

The Petitioners claim that holding them vicariously liable in a §1981 action conflicts with the reasoning in Monell v. Department of Social Services, 436 U.S. 658 (1978), which held, in the

²The Petitioners have cited Guardians Ass'n v. Civil Service Comm'n, 633 F.2d 232 (CA 2 1980); Williams v. De Kalb County, 582 F.2d 2 (CA 5 1978); Mescall v. Burrus, 603 F.2d 1266 (CA 7 1979); Donnell v. General Motors Corp., 576 F.2d 1291 (CA 8 1978); Craig v. County of Los Angeles, 626 F.2d 659 (CA 9 1980), cert. denied, 101 S.Ct. 1364 (1981); Chicano Police Officer's Ass'n v. Stover, 552 F.2d 918 (CA 10 1977). But see Kinsey v. First Regional Securities, Inc., 557 F.2d 830, 838 n.22 (CA D.C. 1977).

The Petitioners also note that this Court granted a petition for certiorari in County of Los Angeles v. Davis, 440 U.S. 625 (1979), on precisely this question. The case, however, was decided on other grounds.

context of municipal liability, that vicarious liability was not applicable in actions brought under §1983. According to the Petitioners, since the Reconstruction Congress enacted §§1981 and 1983 within a year of each other, Congress' intent regarding vicarious liability is the same for each section.

3. The Petitioners also argue that their class of employers and trade associations was improperly certified as class under Rule 23 of the Federal Rules of Civil Procedure. Rule 23(a) permits class certification only if the claims and defenses of the class representatives are typical of the class, and if the factual issues litigated at trial are common to class members. The Petitioners argue that if intent discriminate is a required element of a §1981 action, then many factual and legal issues will not be common to the class members, and the class representative will not be able to represent properly the interests of class members. The Petitioners also argue that even if class certification was proper, the court incorrectly certified the defendant class under Rule 23(b)(2) instead of Rule 23(b)(3). Only the latter provision gives the class members the opportunity to "opt out" of the class and defend the suit individually. Without the opportunity to opt out, and because notice under Rule 23(b)(2) is discretionary, Petitioners will be liable for costly injunctive relief without notice of the suit or a chance to defend. Moreover, the decision to certify the class under Rule 23(b)(2) conflicts with Paxman v. Campbell, 612 F.2d 848, 854 (CA 4 1980) (en banc), cert. denied, 101 S. Ct. 951

(1981), which held that defendant classes could be certified only under Rules 23(b)(1) and (b)(3).

4. The Respondents insist that the issue before this Court is not whether liability can be imposed under §1981 without a finding of discriminatory intent, but whether the court properly imputed the undisputed discriminatory intent of the union to the employers and trade associations. The Respondents fear that unless the court holds the employers vicariously liable for injunctive relief, the Respondents will never be made whole.

*Not a
valid
reason.*

The Respondents also argue that class certification under Rule 23(b)(3) would foreclose defendant class actions. They find Paxman distinguishable from the present case since Paxman did not involve class wide policies, whereas the present case involves a class of defendants, each of whom have acted pursuant to the same illegal hiring hall policies.

DISCUSSION: Because the court below affirmed the decision of the District Court by an equally divided vote, it did not issue an opinion. Consequently, the judgment below neither is precedent in the Third Circuit nor conflicts with the decisions of other circuits.

The District Court found that the union was liable under §1981 for intentional discrimination in the operation of the hiring hall. The court also found that the Petitioners did not

discriminate against the Respondents, and in fact found that they had no knowledge of the union's discriminatory policies. However, the Respondents are correct that the court did not hold the Petitioners liable because a §1981 action does not require proof of intent. Rather the court held that the Petitioners were vicariously liable for injunctive relief as a class because of the contractual relationship between the Petitioners and the union.

This Court has not decided whether a party can be held vicariously liable in a §1981 action for the intentionally discriminatory actions of other parties. In Monell, this Court held that a municipality could not be held vicariously liable in a §1983 action for the acts of its employees. The Court's holding stemmed both from the language of §1983 and the Court's reluctance to create a federal law of respondeat superior.

Even though the Petitioners have good arguments for their conclusion that Congress' intent regarding vicarious liability is the same for §1983 and §1981, this case may not merit review: the absence of any circuit decisions on this issue deprives this Court of the opportunity to rule after circuits courts have debated the issue.

If the District court correctly decided that the employers may be held vicariously liable for the discriminatory acts of the union under §1981, then the District Court correctly certified

this case as a class action; under a theory of vicarious liability the individual claims and defenses of the Petitioners are irrelevant to the decision to award class wide injunctive relief. Nonetheless, the District Court decision to certify the Petitioners' class under Rule 23(b)(2) conflicts with the Fourth Circuit's decision in Paxman v. Campbell, 612 F.2d 848 (CA 4 1980), which held that defendant classes may be certified only under 23(b)(1) or (b)(3). The conflict with Paxman is illusory, however, since the District Court in the present case also held that the Petitioners were certifiable as a class under 23(b)(1)(A). This issue is not certworthy.

I recommend denial.

There is a response.

9/30/81

Dwyer

Opinion in the petition

④ In a more recent case, CA3, en banc,
has held that intent to discriminate is
necessary for a defendant to be liable under
§ 1981. The result in this case -- in which
~~the court~~ CA3 split 3-3 with 3 recusals --
is inconsistent with the more recent
decision, Crocker v. Boeing. If Crocker
is the law of CA3, there is no conflict.
I would therefore remand ~~this~~ ^{in light of Crocker's} for
reconsideration, hoping that stare decisis
would avert another 3-3 split. RF

PENNSYLVANIA

Refer to
with
81-280

[illegible]

UNITED ENGINEERS

vs.

PENNSYLVANIA

Relected
with
86-280

[illegible]

PRELIMINARY MEMORANDUM

October 9, 1981 Conference
List 3, Sheet 3

No. 81-332

Cert to CA 3 (affirmed by an
equally divided court
sitting en banc)

GLASGOW, INC.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

Federal/Civil

Timely

Please see Preliminary Memorandum in No. 81-280 in General
Building Contractors Association, Inc. v. Commonwealth of
Pennsylvania.

9/30/81

Dwyer

Opinion in the petition

DENY. RF

PRELIMINARY MEMORANDUM

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Federal/Civil

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9/30/81

Dwyer

Opinion in the petition

DENY. RF

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Federal/Civil

Timely

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Pennsylvania.

9/30/81

Dwyer

Opinion in the petition

DENY RF

PRELIMINARY MEMORANDUM

October 9, 1981 Conference
List 3, Sheet 3

No. 81-333

Cert to CA 3 (affirmed by an
equally divided court
sitting en banc)

BECHTEL POWER CORP.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.
Federal/Civil

Timely

Please see Preliminary Memorandum in No. 81-280 in General
Building Contractors Association, Inc. v. Commonwealth of
Pennsylvania.

9/30/81

Dwyer

Opinion in the petition

DENY RF

UNITED ENGINEERS

vs.

PENNSYLVANIA

Grant
&
Crescible
with
81-280

[illegible]

No. 81-333

[illegible]

*Reviewed 2/27 - Very helpful summary
of DC 200 page opinion. The analysis part
of David's memo. is to come.*

df1 02/27/82

BENCH MEMORANDUM

To: Mr. Justice Powell

February 27, 1982

From: David Levi

81-280: Gen. Building Contractors Assn v. Penn. et al

81-330: United Engineers & Constructors v. Pennsylvania et al

81-331: Contractors Assn of Eastern Penn et al v. Penn. et al

81-332: Glasgow, Inc. v. Pennsylvania et al

81-333: Bechtel Power Corp. v. Pennsylvania et al

Questions Presented

I. Were the contractors and contractor's
associations properly held liable under 42 U.S.C. §1981 for

the discriminatory acts of the union despite a finding that they had no intent to discriminate, had no knowledge of the discrimination and did not cause the discrimination?

II. Did the district court properly certify a class of defendants?

III. Did the Commonwealth of Pennsylvania have standing to sue on its own behalf or as parens patriae?

I. Facts and Decision Below

*Bound to
wrong!*

The CA3 affirmed by an equally divided vote and without opinions. The opinion by District Judge Higginbotham is well over 200 pages in length--as you must have divined from the incredible mountain of paper in this matter. !

A. The Parties

This employment discrimination suit was begun in 1971 by 12 black plaintiffs on behalf of a class of minority workers in the operating engineer trade in Eastern Pennsylvania and Delaware. The Commonwealth of Pennsylvania also sued on behalf of the class and its citizens generally. Operating engineers are people that drive bulldozers, operate cranes, etc.

The defendants are as follows: (1) Local 542 of the International Union of Operating Engineers--the union and the main culprit in the litigation; (2) a "class" of defendants "headed" by Glasgow, Inc, and consisting of over 1400 construction contractors receiving referrals through the union's hiring hall; (3) a class of employer trade associations headed by four construction trade associations; and (4) the Joint Apprenticeship Training Committee ("JATC"), an organization created by the union and the trade associations for the training of new engineers.

1400
contractors

The four trade associations do not engage in construction or employ operating engineers. They are service organizations that act as collective bargaining agents for certain of the local employers when requested to do so. They do not control any building contractors or union. Each of the four were signatories to the 1961 collective bargaining agreement with Local 542 by which the hiring hall was established. The four associations represent approximately 20% of the local contractors who make up the class of defendant employers.

Trade
are in
employ
no
engineers.
are
service
orgs.

The certified class of defendant contractors includes local contractors who have entered into collective bargaining agreements directly with Local 542. It also includes large national contractors such as Bechtel who negotiate national labor agreements with the national construction trades unions. These national agreement

typically incorporate local labor standards, including hiring halls, if any.

The JATC was established in 1965 by the contractor associations and local 542. It is administered by 6 trustees--three picked by the associations and three picked by the Local. The apprenticeship program administered by JATC lasts 4 years and involves classroom and field training. Once admitted to the program the apprentice becomes a member of Local 542, and upon completion of training becomes eligible for referral to heavy equipment jobs by the hiring hall.

B. The Hiring Hall Agreement

At the center of this litigation is the Local's discriminatory operation of the exclusive hiring hall. *Union's "hiring hall" is culprit*

Following a strike in 1961, the local contractor associations agreed to a hiring hall provision in the collective bargaining agreement. Under this provision all contractors who perform work with union labor, within the jurisdiction of Local 542, are contractually obligated to use Local 542's hiring hall when employing operating engineers. By the terms of the agreement the Local maintains lists of operating engineers, or would-be engineers, in 4 categories defined by hours of experience. When an employer needs an operating engineer, he notifies the Local and within 24 hours will receive a referral. List I engineers get priority, then List II and so on. One's position on a particular list depends on the date of registration certifying availability for work.

The referral system is the only way an employer may hire an engineer--except on a permanent, full-time basis. However, the employer may refuse to employ the employee who is referred. Another referral will then be made which the employer can again accept or refuse. The local is divided into five districts, each with its own referral lists and hiring hall.

Article II, §2 of the collective bargaining agreement provides that referrals from the hiring hall are to be made on a non-discriminatory basis. The district judge found that "[t]he hiring hall system is on its face neutral and purports to create a bona fide seniority sytem." Plaintiffs' allegations were "not directed against the hiring hall system per se but against the union's alleged intentional refusal to follow their own hiring hall rules, thus causing intentional discrimination against and a discriminatory adverse impact on minorities."

*Neutral
on its
face*

C. Findings of Discrimination

There is no dispute that the union in its operation of the hiring hall and the JATC in its recruitment programs intentionally discriminated against blacks. These two defendants have not appealed the district court's finding of liability; they are not now before the Court as petitioners. The district court based its finding of discrimination on plaintiffs' proof of gross statistical disparity in union membership, entry into the union, hours and wages, and

Union

referrals between blacks and whites. In addition to statistical evidence of discrimination, the plaintiffs demonstrated that there were in practice white entry channels into the union and black entry channels, and that only the black entry channels required testing and apprenticeship. A barrage of anecdotal evidence pertaining to individual workers, black and white, was found to reveal a pattern of discrimination against blacks in the number and quality of referrals and entry to the union. Blacks tended to get referrals for lower paying and shorter term employment.

The district court also found that the union had consistently and intentionally supplied inaccurate information to the federal government as to the percentage of minority members in the union. In 1968 the federal government threatened to cut off funds to contractors in the Philadelphia area unless greater numbers of minority workers were hired. The government proposed an affirmative action plan known as the "Philadelphia Plan." In a June, 1968 meeting between members of the Office of Federal Contract Compliance and officials of Local 542, however, an Affirmative Action Program was agreed to in lieu of the Philadelphia Plan. This Plan was less stringent than the proposed Philadelphia Plan and preserved the union's control of hiring. The four contractor's associations also joined the agreement. The district judge found that the federal government had been induced to agree to this less stringent plan on the basis of

false and exaggerated data as to minority membership in the union. He found a deliberate scheme by the Local to mislead the federal government. He found further that the associations had been reckless in signing their names to a document that misrepresented minority membership in the union.

As to the Joint Apprenticeship Training Committee, the district judge found that particularly statistics pertaining to entry into the program revealed intentional discrimination against minority applicants.

D. Liability

Note that the trial and judgment below concerned only liability and injunctive relief. Damages (e.g. backpay) were to be determined in a later proceeding.

*Only
injunctive
relief -*

1. The Union and JATC

*damages
to be awarded*

The Local was the main culprit in the litigation. As the district judge stated, "[a]t the core of this class action is plaintiffs' Title VII ... claim against Local 542 for employment discrimination." The court found that plaintiffs had shown intentional discrimination as well as disparate impact discrimination.

later

In addition to Title VII, the union was also found to have violated §1981 (same right to contract as white citizens). The court found that its finding of intentional discrimination on the part of the Local was decisive as to liability under §1981 as well. Moreover, on the basis of the

*Union
violation*

Ninth Circuit's opinion in Davis v. County of Los Angeles (the Court had not yet decided the case), the district court found that a §1981 violation by the union could rest on proof of discriminatory impact alone. See page 140 ("I therefore adopt the view that a §1981 employment discrimination claim may be proven on roughly the same basis as a Title VII claim, including proof of disparate impact alone.").

As I have noted above, the union has not challenged these findings and is not now before the Court.

2. The Association and the Contractors

The district judge also found liability on the part of the associations and contractors. (pages 141-168) It is this finding that is now before the Court. The employers were not sued under Title VII. They faced liability under §§1981 and 1985 of the Civil Rights Acts.

*NO
Title VII
suit vs
present
Petrus*

a. Section 1981

Despite some evidence to the contrary, the court found "that ~~the~~ plaintiffs have failed to prove on a preponderance of the evidence that the associations or contractors viewed simply as a class were actually aware of the union discrimination affecting the employment of minority persons." p. 142. He found further "that not all contractors and associations may be said as a class to have had reasonable notice of the union's discrimination in view of the great number of contractors and the varying size and intensity of

their work." Even so he found that the contractors and association were "injunctively liable to the plaintiff class under §1981 as a result of their contractual relationship to and use of a hiring hall system which in practice effectuated intentional discrimination, whether or not the employers and associations knew or should have known."

In concluding that the employers could be held vicariously liable under §1981--at least for injunctive relief--the district court relied upon National Labor Relations Act cases in which employers without knowledge or intent have been found liable for the discriminatory practices of the union in its operation of the hiring hall. In these cases the union has discriminated against nonunion members, a practice forbidden by 29 U.S.C. §158(a)(1). Certain of the circuits have held that in these situations the union is acting as the employer's hiring agent. As such, the employer is liable as the agent's principal. It appears that the CA2 subscribes to this theory of liability although it is not clear that any of the other court of appeal share this theory of liability.

Relied
on
NLRA
cases
holding
that
Union
acted as
agent in
its
hiring
hall.
CA 2
but
probably
no other
Circuit

In addition, the court relied upon Title VII and §1981 decisions holding an employer liable for participating in a collective bargaining agreement with a seniority system that perpetuates past discrimination. Although these cases were decided before the Court's decision in International Brotherhood of Teamsters v. United States, 421 U.S. 324

(1977), in which the Court upheld bona fide seniority systems, the cases were still authority for the proposition that "all parties to a collective bargaining agreement which by its terms has a discriminatory impact can bear civil rights responsibility." p. 155. These cases indicate that the employer has an affirmative duty to prevent discrimination arising from the collective bargaining agreement.

Finally, the court found that respondeat superior was appropriately applied to civil rights cases brought under §1981. ✓ Monell was a §1983 suit and rested heavily on statutory language and legislative history inapplicable to §1981. ✓ Rizzo v. Goode, 423 U.S. 362 (1976) is distinguishable since it involved considerations of comity and since it did not involve a true employer/employee relationship. In short "[b]ecause of the complete inapplicability here of considerations of federal-state comity, absolute municipal immunity, and immunity of governmental supervisory personnel" Monell and Rizzo had no bearing in the present case. The court concluded the respondeat superior was properly applied to a §1981 suit.

And if properly applied, the theory of respondeat superior would lead to liability of the employers in this case: "under every test of agency the union hiring hall was the agent for two principals--the union and the contractors, with their respective associations.... The union hiring hall was, after all, designed to supply the employers with workers

DC found
"hiring hall"
was agent
of two
principals

and replace the traditional system of direct applications." p. 162. The court argued that "the duty to see that discrimination does not take place in the selection of one's workforce must ... remain with the employer if it is to have full meaning." p. 165. Moreover, the fact that this was a class action made no difference: "It is the mass of employers collectively who by originally agreeing to or subsequently adopting the exclusive hiring hall provision effectuated a collective delegation of the employment application process." p. 165.

*Employers
had
duty
to see
no.
discrim.*

absurd!

In short:

"Although plaintiffs have failed to show intent to discriminate by the employers as a class, and indeed have been unable to show knowledge or notice of discrimination by that class as a whole, plaintiffs have shown that the requisite relationship exists among employers, associations, and union to render applicable the theory of respondeat superior, thus making employers and associations liable injunctively for the discriminatory acts of the union." p. 166.

2. §1985

Turning to the conspiracy claim under §1985, the district court found no liability. No vicarious liability theory can be used to hold a class of employers liable to commit a conspiracy. Although the associations might have been thought to have conspired with the union in tricking the

federal government into dropping the Philadelphia Plan, mere recklessness would not suffice to establish conspiracy.

E. Appropriateness of the Defendant Class

Having established liability of the class of all employers, the court turned to consider several procedural questions concerning application of Rule 23 and personal jurisdiction over defendant class members.

1. Rule 23 (a)

The court found that a defendant class of employers was properly constituted under rule 23(a) and that Glasgow, Inc. was an adequate representative. The court found that there was no difference of interests among the members of the defendant class.

2. Rule 23(b)

The court rejected the argument that the class of defendants could only be certified under Rule 23(b)(3) which would permit any individual member to opt out after notice. The court found that 23(b)(2) was the appropriate section. The importance of a b(2) certification was clear in a case such as this because make-whole injunctive relief from employment discrimination could not be ordered against any particular defendant.

3. Standing

Related to the question of certification, is the question of whether the named plaintiffs (12 black workers) have standing to sue a class of defendants when some of the defendant are employers by whom no named plaintiff was employed as well as employers operating outside of the area of residence of all named plaintiffs. The court considered that there was standing in a case such as this involving civil rights violations and a joint hiring hall. Moreover, all plaintiffs have standing to sue the Local.

4. Personal Jurisdiction

The court found that it had personal jurisdiction based on Hansberry v. Lee, 311 U.S. 32 (1940), and the adequate representation provided by the named defendants. Particularly since the basis for liability was vicarious and because only injunctive relief was granted there was no basis for arguing that Glasgow, Inc. was not an adequate representative. Because notice was provided to the unnamed members of the defendant class by certified mail two years prior to trial, personal jurisdiction was properly asserted.

F. Injunctive Relief

The district judge ordered racial quotas and a five year minority job training program. Judge Bechtel, who

succeeded to the case after Judge Higginbotham was appointed to the CA3, ordered that the Union and JATC pay 40% and 25% respectively of the expenses of this program, that the employer class pay 5%, and that the three associations pay 10% each--(one of the associations was disbanded prior to suit).

To: Justice Powell

From: David

Re: Genral Building Contractors Assn. v. Pennsylvania--No. 81-280 etc

I thought you might find it useful to have the first part of this bench memo. I will give you an analysis section early next week, but Judge Higginbotham's opinion was so long that you may find this redaction useful.

From my quick reading of the briefs I gather that this is not so much a case in which to decide if intent is a requirement in section 1981 suits. Rather, it is a vicarious liability or respondeat superior case. I believe we have granted another case in which to decide if discriminatory intent must always be shown in section 1981 suits. Here, however, the district judge found intent ^{to discriminate} on the part of the union. The question is whether the employer can be tarred by the same brush. This case, Hydrolevel, and Claiborne Hardware show a striking resurgence of the law of agency in modern contexts. Maybe they will have to start teaching it again.

David - Your opportunity!

Vicarious liability on employers
& association for discrimination by
union in its "meeting hall".

~~McAlene~~ McAlene (for Re Glasgow)

Glasgow bargained, as required by law, with Union - & after impasse ~~was at~~ on the Union's demand for exclusion "use of Herring Hall & Union" - referral system of its members. Union struck to enforce this demand. (see P 5 of Glasgow's Br)

Bargaining Act, from 1971 on, had a non-discrimination clause

x x x

Can look at case in two ways:

1. On facts (as JPS's op. in Green v Memphis & find that 1981 doesn't apply at all, or
2. As matter of law, under the collective bargaining act. it was Union's resp. - not employers.

x x x

1500 contractors were using this referral system. Thus no reason ~~for~~ for a contractor to be suspicious if only whites were referred to it.

BRW noted that employer had right under act to demand that Union comply with its act. not to discriminate. But DC found no knowledge of breach

Kester (for Arin)

Sharp legal issue: How far 1981 liability reaches? Moreover, whether ~~it~~ it reaches inaction by private party.

Arin did nothing more than negotiate agt. It employs no engineers.

As to "non-delegable duty": a duty not to discriminate in

Arin signed ~~agmt.~~ ^{eth.} simply as agent for employers. Arin had no obligation under eth.

Arin relies heavily on argument that 1981 requires intent. Doubtful that 1981 applies to private contractors - despite Jones v Mayer & Rumson (^{supra} ~~relevant~~ ^{case}).

Title VII in the statute - not 1981 - that applies to this situation. ~~That~~

Most pertinent case is TVIA v Hel - & its quote - p 29. Brief

"Strict liability" has never been applied under 1981

Goodman (Rehr)

Hiring Hall is separate entity from Union. — the Union runs it. But it couldn't exist w/o approval of employers. Employers "gave" Union right to operate HH, § 1481 creates non-delegable duties —

Kester

Byron wonders whether the injunctive remedy vs Rehr should not be applied. Kester

p13,14 AFH/K10 Brief in Clairborne Hardware

1. Respondent Supervisor - "no possible basis for applying this to union / ~~no~~ management relations". They are "antagonistic".

2. Joint Enterprise - equally inapplicable

3. Apprentice School issue. (JATC

Raised for 1st time here

DC made no holding vs Arins on this.

Complaint alleged no discrimination by Association. It alleged JATC was agent of Union.

4. All Writs Act (auth. for Remedy)

Not argued in DC / no finding

5. Injunction vs Retrs - not found guilty of any violation by DC, except ~~that~~ on theories of respondent supervisor & joint enterprise - both erroneous.

See p 17
in
Arins's
Reply
Brief
(Buckley)

The Chief Justice

Rev

Union having full or not aqt. of employer.
In initial complaint to NLRB, ~~no~~ no claim was made
of employer or Asim responsibility.

Employers & Asim not even away of discriminate.
DL placed liab. on respondent superior. This was
error. ~~no~~ DL also erred as to Asim.

No allegation of conspiracy.

Injunctive remedy & back pay liability
are lawful only as to Union

Justice Brennan Affirm - possibly Rev as to #4 below

1. Apprentice School. It was aqt. for Asim & Union,
& ~~employees also~~ also was sub-aqt. for employers?
Affirm as to School.

2. Class certification was correct - 23(d)(2)

3. Injunctive decree. Regardless of liability
for discrimination, the success of remedy requires
compliance by employers; Aff. as to this

4. Vicarious liability - In view of labor law, then
in close Q. Not at rest - Pass

Justice White

Rev.

Vicarious liability is in effect saying there
was "intent" to discrimination. This would be
an "effects" result - i.e. no blacks employed.
This is error.

JATC not liable either.

Employers also not liable

Employers not liable for injunctive remedy
or back-pay.

Justice Marshall

App in ~~entirely~~ - possibly "in toto"

Employers are among worst in controlling
Hiring Hall not outside of employer's
control. Will look at record.

(no detailed discussion)

Justice Blackmun

Rev in part & App in part

Agree class properly certified.

As to Hiring Hall, Associations are not
implicated. Doubtful as to employers but
on basis of DC findings - may be free

Remand on IATL - it probably was
a joint enterprise.

Agree with WGB on injunction &
back-pay

Justice Powell

Rev.

See my notes.

Justice Rehnquist Rev.

Agree with LEP that resp. represent,
non-delegable duties & joint enterprise issues
Class action OK
Can't penalize Petros for sins of Union.
JATC probably not here - but not sure

Justice Stevens Rev.

Under 1981, intent may not always be test.
But here in view of findings, 1981 does not
apply

Also in view of findings, can't impose
liability on Petros w/out fault.

JATC ~~could~~ may not be here - not sure.

Probably DC could have found discrimination
by some of 1500 employers. But this was
massive undertaking.

Can't impose costs or back pay or obligations
in view of DC's findings

Justice O'Connor Rev basically

Class OK

No liability under 1981 ~~for~~ as
to employers or Union

Not advised as to JATC

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 13, 1982

✓
Quick!

Re: No. 81-280, 81-330, 81-331, 81-332, 81-333 -
General Bldg. Contractors Assn.; United
Engineers & Constructors; Contractors Assn.
of E. PA; Glasgow Inc.; Bechtel Power Corp.
v. Pennsylvania

Dear Bill:

I join.

Regards,

WJB

Justice Rehnquist

Copies to the Conference

April 16, 1982

81-280 General Building Contractors v. Pennsylvania

Dear Bill:

Please join me.

Sincerely,

Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 22, 1982

Re: 81-280, 81-330, 81-331, 81-332, 81-333
General Building Contractors Ass'n, Inc.
v. Pennsylvania, et al

Dear Bill,

Please join me.

Sincerely yours,

Byron

Justice Rehnquist

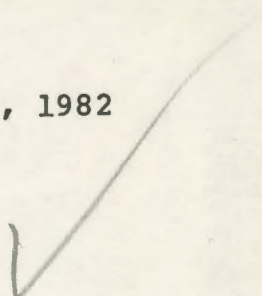
Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 22, 1982



Re: 81-280, 81-330, 81-331, 81-332, 81-333
General Building Contractors Ass'n, Inc.
v. Pennsylvania, et al

Dear Bill,

Please join me.

Sincerely yours,

Byron

Justice Rehnquist

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

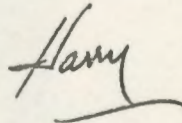
✓ May 10, 1982

Re: No. 81-280 - General Building Contractors Assn v. Penn.
No. 81-330 - United Engineers & Contractors, Inc. v. Penn.
No. 81-331 - Contractors Assn of E. Penn. v. Pennsylvania
No. 81-332 - Glasgow, Inc. v. Pennsylvania
No. 81-333 - Bechtel Power Corp. v. Pennsylvania

Dear Sandra:

I would be pleased if you would add my name to your concurring opinion with the little change you and Bill Brennan have worked out.

Sincerely,



Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 10, 1982

✓

RE: Nos. 81-280, etc. General Building Contractors v.
Pennsylvania, et al.

Dear Sandra:

The substitution of "incidental or ancillary" for
"minor" is satisfactory to me. Please, therefore, join
me.

Sincerely,

Bill

Justice O'Connor

cc: The Conference

[illegible]