

SUPREME COURT OF THE UNITED STATES

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In the Matter of:)

BRENDA PATTERSON,)

Petitioner,)

v.)

McLean Credit Union.)

No. 87-107

Pages: 1 through 43

Place: Washington, D.C.

Date: February 29, 1988

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X
3 BRENDA PATTERSON, :
4 Petitioner, :
5 v. : No. 87-107
6 MCLEAN CREDIT UNION. :
7 -----X

8 Washington, D.C.
9 Monday, February 29, 1988

10 The above-entitled matter came on for oral argument before
11 the Supreme Court of the United States at 10:57 a.m.

12 APPEARANCES:

13 PENDA D. HAIR, ESQ., Washington, D.C.;;
14 on behalf of the Petitioner.

15 H. LEE DAVIS, JR., ESQ., Winston Salem, North Carolina;
16 on behalf of the Respondent.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

PENDA D. HAIR, ESQ.

on behalf of Petitioner

3

H. LEE DAVIS, JR., ESQ.

on behalf of Respondent

21

PENDA D. HAIR, ESQ.

on behalf of Petitioner - Rebuttal

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1 P R O C E E D I N G S

2 (10:57 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument next in
4 number 86-107, Brenda Patterson versus McLean Credit Union.

5 Ms. Hair, you may proceed whenever you're ready.

6 ORAL ARGUMENT OF PENDA D. HAIR, ESQ.

7 ON BEHALF OF PETITIONER

8 MS. HAIR: Mr. Chief Justice, and may it please the
9 Court.

10 We seek reversal of two rulings concerning the scope
11 and application of Title 42 United States Code Section 1981.
12 Section 1981 guarantees to all persons within the jurisdiction
13 of the United States the same right to make and enforce
14 contracts as is enjoyed by white citizens.

15 The first issue presented is whether an employer that
16 intentionally subjects a black worker on account of her race to
17 onerous and discriminatory terms and conditions of employment
18 violates Section 1981.

19 The second issue is whether a black employee who
20 establishes that she was denied a promotion because of her race
21 must additionally affirmatively prove that she was more
22 qualified than the white worker who received the promotion in
23 order to hold her employer liable for promotion discrimination
24 under Section 1981.

25 In this case, unlike many cases of employment

1 discrimination, the plaintiff presented extensive direct
2 evidence that her employer engaged in blatant intentional
3 discrimination on the basis of race. According to the
4 evidence, the President and General Manager of McLean Credit
5 Union stated that black workers are slower by nature than white
6 workers. And he stated that he did not want to hire a black
7 worker because they cause problems.

8 And there were numerous instances of racial remarks
9 and race-based conduct that were introduced into the record
10 including an admission by one of the Company witnesses that
11 policy of the President was not to hire black workers.

12 Brenda Patterson was at first the only black worker
13 at McLean Credit Union and later one of only two black workers
14 and she was the victim of racial discrimination during her ten
15 years of employment under the management of the president and
16 general manager, Robert Stevenson. Patterson filed suit
17 charging the credit union with intentional discrimination in
18 the terms and conditions of her employment and with promotion
19 discrimination.

20 The District Court dismissed the claim of
21 discrimination in the terms and conditions of employment, and
22 the Court of Appeals affirmed. The Fourth Circuit concluded
23 that Section 1981 prohibits discrimination only with respect to
24 hiring, firing and promotion. On the promotion claim, the
25 District Court instructed the jury that the plaintiff had the

1 burden of proving both that she was denied the promotion
2 because of her race, and that she was more qualified than the
3 white employee who received the promotion.

4 And the Court of Appeals affirmed this jury
5 instruction.

6 With regard to the scope of Section 1981, under the
7 rule of law adopted by the Fourth Circuit, protection under
8 Section 1981 is afforded only against refusals to enter into a
9 contract or continue in a contractual relationship. Under that
10 rule of law, a black worker can get a job but the black worker
11 can be forced to pay a very high price for that job in loss of
12 dignity.

13 The employer can say to that worker, we'll hire you
14 but only if you submit to conditions of employment in which you
15 are humiliated and demeaned because of your race.

16 It is our position that that type of condition of
17 employment is exactly the badge of inferiority that the
18 Thirteenth Amendment and Section 1981 were designed to
19 prohibit. It seems obvious that a black worker who is forced
20 to pay the price of stigma and humiliation in order to be able
21 to perform the contract that she has a right to enter into has
22 not been afforded the same right to make and enforce a
23 contract.

24 The black worker's exercise of her right to make and
25 enforce a contract has been burdened because of her race.

1 QUESTION: Well, I don't think that's crystal clear,
2 Ms. Hair, that the consequences like you're talking about, bad
3 as they may be, necessarily implicate the right to make or
4 enforce a contract. That certainly isn't an inclusive term.

5 MS. HAIR: Mr. Justice Rehnquist, I would submit that
6 the right to make and enforce a contract has to include the
7 right to perform that contract free from racial discrimination.
8 If the right to make and enforce a contract is going to have
9 any meaning, it must include the right not to be burdened in
10 the exercise of your right to make and enforce a contract --

11 QUESTION: And so you suggest then that there could
12 have been a suit by the employee in a State court to enforce
13 the employment contract and get an injunction against this sort
14 of harassment based on the contract?

15 MS. HAIR: No, Justice White. That is not my
16 position.

17 My position is that it doesn't matter whether the
18 employee, the worker who is racially harassed --

19 QUESTION: Well, do you think that suit would fail?

20 MS. HAIR: In North Carolina, I believe that Mrs.
21 Patterson would not have been able to stop the harassment in
22 State Court under State contract law.

23 QUESTION: Because it was not a provision of the
24 contract, I take it?

25 MS. HAIR: That's right. Because she was an at-will

1 employee. She could be terminated under North Carolina law for
2 any reason whatsoever including the bad faith reason.

3 QUESTION: Well, now that would be a problem with
4 both whites and blacks, I suppose. And so if she couldn't be
5 protected against racial harassment based on the contract, why
6 is 1981 violated?

7 MS. HAIR: Because 1981 is not concerned with what is
8 a contract. 1981 is concerned by what is meant by the phrase,
9 the same right to make and enforce a contract. And that's a
10 Federal statute that prohibits discrimination. And it
11 prohibits more than discrimination in the words that are
12 written into the contract. It prohibits discrimination in the
13 process of making the contract.

14 For example, if the employer had imposed conditions
15 on a black worker that were not imposed upon a white worker as
16 a condition of making the contract, that would violate Section
17 1981. And in this case, Mrs. Patterson, because she was an at-
18 will employee was essentially making a new contract every day
19 that she went to work.

20 QUESTION: Well, supposing, Ms. Hair, that an
21 employer hires a black person for \$50,000 and the black person
22 later comes in and says, well, if I'd been white, they would
23 have paid me \$55,000, so they violated 1981. Do you think if
24 the black employee can prove that, that's a cause of action
25 under 1981?

1 MS. HAIR: Yes, I do, Mr. Justice Rehnquist. It's
2 intentional racial discrimination in pay.

3 QUESTION: So 1981 really covers everything that
4 Title VII does?

5 MS. HAIR: Practically I think that's probably
6 correct because Section 1981 guarantees the same right to make
7 and enforce a contract. And my position is that when the
8 exercise of that right is burdened by racial discrimination,
9 the same right has not been afforded.

10 QUESTION: In this case is it discrimination in the
11 making of the contract that you're complaining about?

12 MS. HAIR: I believe that it's discrimination in the
13 making of the contract and in the enforcing of the contract.

14 QUESTION: In what respect?

15 MS. HAIR: In the making of the contract because Mrs.
16 Patterson is an at-will employee under North Carolina law and
17 everyday that she goes to work, she makes a new contract. And
18 in order to make that contract, she has to endure conditions of
19 employment that are not required of a white worker. It's the
20 same as if the employer told her at the time that she showed up
21 to apply for a job, we won't give you a job unless you stand in
22 front of our factory for an hour holding a sign saying, I am
23 inferior. And that was not required of white workers.

24 That's not the same right to make a contract. And by
25 demeaning Mrs. Patterson, by making her dust and sweep the

1 office, --

2 QUESTION: Well, I suppose you'd make the same
3 argument if that was a contract for six months, an employment
4 contract for six months?

5 MS. HAIR: I think ultimately it doesn't make any
6 difference. In that case, if there were a fixed term of
7 contract so that she was not making a new contract everyday,
8 and I would still suggest that because her right to perform the
9 contract is burdened, that she does not have the same right to
10 make and enforce the contract as the white worker, because she
11 is being encouraged not to enforce her contract and receive the
12 benefits of her contract, but to cancel the contract. That's
13 what the racial discrimination in terms and conditions does.

14 It encourages cancelling the contract and not
15 obtaining the benefits of the contract.

16 QUESTION: Well, I mean, that's a question of proof,
17 I would suppose, isn't it? I mean, you're not asserting that
18 you had to prove that the racial discrimination was of such
19 force and effect as to make it impossible for her to perform
20 her job, thereby causing her to break the contract.

21 MS. HAIR: No. It is not our position that she must
22 prove constructive discharge. It's our position that any
23 conduct that's intentional and that's on the basis of race will
24 affect that employee as to whether they want to continue on the
25 job. It may not be so bad that they actually quit, but it

1 certainly is burdening the exercise of their right.

2 QUESTION: What right? It has to burden the right to
3 either make or enforce a contract, right? Either make or
4 enforce. Now, your example of the person with the sign is not
5 really accurate. That isn't what happened here.

6 If you said, before I will give you a job, you must
7 stand outside in front for an hour with a sign that says, I'm
8 inferior, there you are burdening the making of a contract.
9 But what happens here is, you give the person the job and after
10 the job, you are making the person hold a sign that says, I am
11 inferior.

12 Now, if that is so burdensome as to cause the worker
13 to be unable to perform and therefore cause the worker to break
14 the contract, then you're interfering with the right to enforce
15 it, I suppose. But I don't see how, if it doesn't rise to that
16 level, I don't see how it burdens her right to either make or
17 to enforce the contract.

18 MS. HAIR: Well, with Mrs. Patterson, because she is
19 an at-will employee and she makes the contract every day, I
20 would contend that she is in exactly the same position as the
21 person who is told to hold the sign for an hour before they
22 will be hired.

23 But even assuming that we're dealing with a person
24 that had a fixed contract, because it has the impact on that
25 person of treating them differently and discouraging them,

1 making them think about whether they want to continue, it
2 doesn't actually have to cause them to quit the job. It
3 discourages them in enforcing the contract and therefore they
4 have not been afforded the same right to enforce their
5 contract.

6 There doesn't have to be an absolute barrier against
7 enforcement of the contract which is what constructive
8 discharge would be. It's just a violation of the same right to
9 enforce the contract. She has not been afforded the same right
10 to carry out that contract, enforce the contract, and enjoy the
11 benefits of that contract as the white worker.

12 QUESTION: Ms. Hair, I take it the Solicitor General
13 supports reversal here, but makes an effort to link the theory
14 to the language of Section 1981 in referring, as has been
15 suggested by other Justices this morning, the the making and
16 enforcement.

17 And as I understand it, the SG would say if there's
18 an implied covenant under State law of good faith and fair
19 dealing, that can be relied upon to show that somehow she was
20 prevented or hindered in her performance under the contract,
21 that that would support reversal.

22 MS. HAIR: The Solicitor General, as I understand his
23 position, comes to the conclusion, as does the Fourth Circuit,
24 that Section 1981 directly protects only the right to enter
25 into a contract, regardless of the conditions of employment

1 after the contract.

2 QUESTION: Well, I didn't understand it that way,
3 since they refer and rely on the implied obligation of good
4 faith and fair dealing in the enforcement of it.

5 MS. HAIR: Yes, Justice O'Connor. When I said,
6 directly, I meant without looking at State law. The Solicitor
7 General then says, we can look at State law and if State law
8 gives a breach of contract remedy to a person like Mrs.
9 Patterson, that would be read into and enforceable --

10 QUESTION: And express or implied.

11 MS. HAIR: Express or implied, that would be read
12 into and enforceable under Section 1981. Again, I believe that
13 the Solicitor General focuses on the wrong issue. I would
14 agree that it's appropriate to look to common law to decide
15 what is a contract. But we have a Federal statute that
16 protects the same right to make and enforce a contract. And
17 the Solicitor General, by limiting that right only to terms
18 that are read into the contract under State law, does not give
19 effect to the Federal principle of equality that's set out in
20 that language, same right to make enforce.

21 QUESTION: Well, it does see, though, to at least
22 address itself more to the context and language of the Statute.

23 MS. HAIR: Well, when you say the context of the
24 Statute, what the Solicitor General's approach would do if it
25 had been accepted in 1866 is that it would have incorporated

1 the black codes into the contracts of black workers. And there
2 is no indication that Congress when it was acting in 1866
3 wanted to limit the coverage of Section 1981 to what State law
4 provided. In fact, the indication is to the contrary that
5 Congress was expressly concerned with overruling the black
6 codes which limited and put onerous conditions on the black
7 worker's ability to enter into contracts.

8 And if there's any doubt about --

9 QUESTION: I don't understand why that follows from
10 the Solicitor's position.

11 You were saying that if a State has a law that
12 impacts explicitly on racial minorities that this law can be
13 incorporated into the contract without violating 1981?

14 MS. HAIR: What the Solicitor General said, as I
15 understand it, is that you look to State law to determine what
16 rights are protected under Section 1981. And my position is
17 that you look to Federal law. That this is a Federal statute,
18 an equality statute, and that Congress explicitly did not want
19 to look to State law when it enacted Section 1981; it wanted to
20 overturn the black codes.

21 QUESTION: Well, there's a difference, isn't there,
22 between State laws that differentially impact on racial
23 minorities and those that are neutral. The covenant of good
24 faith is a neutral term.

25 MS. HAIR: That's true but there is absolutely no

1 indication that Congress wanted State law to govern the scope
2 of Section 1981.

3 And let me say with respect to the covenant of fair
4 dealing, that concept really doesn't provide any additional
5 protection beyond what the Fourth Circuit would have provided
6 in covering absolute refusals to enter into contracts. Because
7 in North Carolina, and in all but four States in the United
8 States, where there is at-will employment, the covenant of good
9 faith and fair dealing simply does not apply to the worker.

10 The employer has the right to fire the worker, except
11 in four States, for any reason whatsoever, including bad faith,
12 and therefore that employer has the right to harass that worker
13 until she quits. And the only possible situation under which
14 the Solicitor General's theory would apply is a situation where
15 the worker could quit and claim constructive discharge, but
16 does not quit, stays on the job and instead sues under Section
17 1981.

18 QUESTION: That would be protected by Title VII,
19 wouldn't she?

20 MS. HAIR: The worker would be protected by Title
21 VII, if Title VII covers her employer. But the Court in
22 Johnson v. Railway Express made very clear that the fact that
23 Title VII provides a remedy does not mean that Congress wanted
24 to undo any of the remedies that were provided by earlier Civil
25 Rights Acts.

1 QUESTION: That's perfectly true but the fact that
2 Title VII covers a lot of this perhaps would suggest to us that
3 we not strain to develop an independent body of Federal
4 contract law governing the terms of contracts.

5 MS. HAIR: I would suggest that it's not an
6 independent body of Federal contract law. It's a Federal
7 equality law, a Federal antidiscrimination law, and in this
8 case, the type of conduct that Mrs. Patterson complains of,
9 while actionable under Title VII, Title VII would not provide
10 an adequate remedy because Title VII does not provide
11 compensatory damages or punitive damages. And unless the
12 employee quits her job, unless the conduct is so severe that
13 she quits her job, she's not going to have a significant back
14 pay claim because she's still on the job.

15 So the only way that employees are going to have an
16 incentive to sue to stop this kind of conduct is if Section
17 1981 covers it. And the remedies that Congress wanted to make
18 available to supplement Title VII are made available under
19 Section 1981.

20 QUESTION: Ms. Hair, I don't see how you can run away
21 from State law and say it's just a matter of Federal law. I
22 mean, you have a statute that says a black person shall have
23 equal right to make and enforce contracts. Now, you're either
24 saying that we're going to develop a Federal law of contracts,
25 or what you have to look to in each case is what rights do

1 these State citizens have under State law to make contracts and
2 enforce contracts and are those rights being given equally.

3 Now, doesn't that put us right in the middle of
4 deciding what the State law is concerning contracts?

5 MS. HAIR: I do not believe it does, Justice Scalia.
6 I believe that what the court is asked to do under Section 1981
7 in this situation, as in all other situations where it enforces
8 Section 1981, is to develop a Federal law of what constitutes
9 discrimination. And Section 1981 was intended to address
10 discrimination.

11 QUESTION: It may be, but only discrimination in the
12 making and enforcing of contracts. It's not discrimination in
13 the open air. It's discrimination in one field.

14 Now, don't you think that this has -- it either
15 refers to a Federal contract law or to State law of contracts.
16 And you think it's a Federal contract law that we have to
17 develop?

18 MS. HAIR: No, I don't think that you have to develop
19 a Federal law that tells you what is in a contract. My
20 position is that regardless of what is written in the contract,
21 what are the terms of the contract, if the plaintiff is
22 burdened in performing that contract because of her race, that
23 she has not been afforded the same right to make and enforce a
24 contract.

25 And I think the Court's cases make clear that Section

1 1981 and the parallel provision, Section 1982, go beyond merely
2 guaranteeing an absolute right to enter into a contract.

3 In the case of Tillman v. Wheaton-Haven, under
4 Section 1982, the Court ruled in that case, and again, it did
5 not rest its decision on State property law. That case
6 involved the right to purchase and hold property under Section
7 1982, and the right to join a swimming pool association was not
8 a right that was protected under State law. In fact, under
9 State law it was clear that the swimming pool association had
10 the right to exclude blacks. And furthermore, the right to
11 join the swimming pool association was not a right that was in
12 the purchaser deed of the house at issue.

13 The owner of the house had no control over the
14 swimming pool association and the membership in the swimming
15 pool association could not be conveyed along with the ownership
16 of the house. And nonetheless, the Court held that the
17 membership in the swimming pool association was a benefit that
18 became associated with home ownership because a third party
19 voluntarily made it available to persons in the area, and that
20 the persons who were making it available could not make it
21 available on a racial basis.

22 QUESTION: I take it that you're saying that the
23 employer here conditioned the contract on being willing to put
24 up with harassment?

25 MS. HAIR: Certainly conditioned performance of the

1 contract.

2 QUESTION: Is that it?

3 MS. HAIR: Yes, on willingness to put up with
4 harassment. Otherwise, Mrs. Patterson, it was an absolute
5 requirement that she put up with this harassment in order to
6 continue to work there and perform the contract that she was
7 making on a day by day basis.

8 QUESTION: It's sort of like saying, well, I'll hire
9 you even though you're black as long as you're willing to
10 accept lower wages.

11 MS. HAIR: That's exactly the same situation in my
12 view.

13 QUESTION: Suppose this case. An employer hires a
14 person from a racial minority on absolutely equal conditions.
15 Then a supervisor comes in here for 30 days and causes great
16 humiliation and degradation. The employer then fires the
17 supervisor. Cause of action under 1981?

18 MS. HAIR: It might depend on the level of the
19 supervisor. I think in the Vincent case which dealt with the
20 issue of sexual harassment under Title VII, the Court
21 explicitly left open --

22 QUESTION: Assume a high level supervisor who had
23 general authority to act this way, although without the
24 employer's actual knowledge.

25 MS. HAIR: Again, I think it would depend on the

1 facts of the case. I assume that you're asking me two
2 questions. One, is thirty days' worth of harassment
3 actionable.

4 And two, can the employer be held responsible for
5 that supervisor when it was a temporary assignment and they
6 fired him. And on the second issue on whether the employer can
7 be held liable. I think the Court left that open in Vincent
8 under what circumstances if the employer took very prompt
9 action.

10 And I would see no reason that the same agency
11 principles that apply under Title VII according to Vincent
12 would not also apply under Section 1981.

13 On whether thirty days of harassment is sufficient to
14 state a cause of action, again, I think you would have to look
15 at the facts of what happened during that thirty days. I
16 certainly think there could be conduct that's so egregious that
17 even if it only occurred on one or two days that --

18 QUESTION: So what's the standard, egregious conduct?

19 MS. HAIR: No. I think the standard is whether the
20 same right to perform the contract has been afforded.

21 QUESTION: Well, we know. We know that white persons
22 were not subjected to this indignity and black persons were.
23 We know. That's stipulated in the hypothetical.

24 MS. HAIR: Well, again, if the conduct is intentional
25 and it's on the basis of race and the black person is treated

1 differently than the white person because of race, then that is
2 not the same right to make and enforce a contract in my view.

3 QUESTION: So your answer is, there is a cause of
4 action in the hypothetical?

5 MS. HAIR: Well, given the stipulations that you have
6 given me, I think that that is my answer. Yes, Justice
7 Kennedy.

8 QUESTION: You have another part to your case, I
9 think.

10 MS. HAIR: Yes, Justice White.

11 I will briefly address the second issue which is the
12 jury instruction.

13 In this case, Mrs. Patterson was required to prove
14 both that she was denied a promotion on account of race and
15 that she was more qualified. And that simply is not the law.
16 The question is whether she was denied the promotion on the
17 basis of race.

18 There are a number of circumstances in which a person
19 can be denied a promotion on the basis of race, without
20 necessarily being more qualified than the person who received
21 the job. The most obvious example is where the two candidates
22 were equally qualified.

23 And even if this employer had promoted fifty whites
24 who were equally qualified with the fifty blacks that it
25 rejected, none of those fifty blacks would be able to bring a

1 case under Section 1981 for promotion discrimination because
2 none of them could prove that they were more qualified. They
3 were equally qualified.

4 But an employer is not allowed to choose among
5 equally qualified candidates on the basis of race, and in this
6 case there was more than sufficient evidence to lead to the
7 conclusion that the promotion decision was being made on the
8 basis of race.

9 QUESTION: Now, did the employer claim that it was on
10 the basis of qualifications?

11 MS. HAIR: The employer articulated the alleged
12 superior qualifications.

13 QUESTION: And you think you proved that was a phony?

14 MS. HAIR: I think that there was certainly
15 sufficient evidence in the record to allow the jury to
16 conclude, if properly instructed, that the decision was made on
17 the basis of race.

18 If there are no further questions, I would reserve
19 the rest of my time for rebuttal.

20 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Hair.

21 Mr. Davis, we'll hear from you now.

22 ORAL ARGUMENT OF H. LEE DAVIS, JR., ESQ.

23 ON BEHALF OF RESPONDENT

24 MR. DAVIS: Mr. Chief Justice, and may it please the
25 Court.

1 This case presents the first opportunity that I'm
2 aware of for the Court to differentiate between the rights
3 available under Title VII as opposed to the rights available
4 under Section 1981.

5 The petitioner's case in the first instance is a case
6 of adverse working conditions and she bases that case of
7 adverse working conditions on several pieces of evidence of
8 discrete acts. That is that the President of the credit union
9 stared at her, that he criticized her work, that he made two
10 discrete racial remarks, one in 1972 and one in 1976. Her
11 allegations of excessive work load.

12 The question presented to this Court is whether these
13 acts of alleged racial harassment standing alone present a
14 cognizable claim under Section 1981. I believe that it's
15 obvious that the terms conditions and privileges of employment
16 language which is in Title VII would cover alleged racial
17 harassment, adverse working conditions.

18 The language in Section 1981, however, is a different
19 kind of language. The language there is to make and enforce
20 contracts. And I believe that they're two different things, so
21 I hope that this Court will take the opportunity to define and
22 differentiate the various rights available under each of the
23 two statutes.

24 Part of the problem in understanding what rights are
25 available in the statutes is the fact that many of the lower

1 courts have used the term, discrimination, synonymous with
2 various things. As you read the cases, you'll find that
3 discrimination sometimes means racial harassment. Sometimes
4 discrimination means adverse working conditions. Sometimes
5 discrimination means disparate treatment in hiring, firing,
6 promotion, wage discrimination.

7 In this case, we're dealing with discrimination as it
8 means abusive working environment, hostile working environment.

9 QUESTION: Mr. Davis, why would a plaintiff select
10 1981 as the basis of the suit instead of Title VII, possibly?

11 MR. DAVIS: Why would any plaintiff or why would this
12 plaintiff?

13 QUESTION: Yes, why would any plaintiff?

14 MR. DAVIS: I suppose, Justice O'Connor, the reason
15 --

16 QUESTION: The statute of limitations may have been
17 the question here.

18 MR. DAVIS: Well, she received her right to sue
19 letter in this case and had the opportunity to bring her Title
20 VII in this action. I presume the reason to try to pursue a
21 Section 1981 claim would be the opportunity for greater
22 monetary reward with compensatory damages and punitive damages
23 available.

24 That would be my assumption as to why a plaintiff
25 would attempt to pursue a claim under Section 1981.

1 QUESTION: Well, is it your position that once the
2 contract is made, there is no conduct of the employer that's so
3 onerous that it's not actionable under 1981 if it's racially
4 motivated?

5 MR. DAVIS: I think any conduct of the employer which
6 is racially motivated which impacts on the right to make and
7 enforce contracts is actionable.

8 QUESTION: Well, assume that a contract is made in
9 good faith and in non-discriminatory terms, but once its
10 performance begins, highly onerous conditions are imposed. Are
11 there no conditions that are so onerous that 1981 would not be
12 implicated?

13 MR. DAVIS: I don't think there are a separate and
14 independent issue. Now, if those onerous oppressive
15 opprobrious conditions, excessive hostile working environment
16 conditions impact on a promotion decision, impact on a
17 termination decision.

18 QUESTION: It has to be promotion or termination?

19 MR. DAVIS: Well, the Fourth Circuit limited that
20 somewhat. I'm not sure, Justice Kennedy, that it wouldn't also
21 impact, if it impacted on a wage discrimination case, I think
22 that the economic impact there may be sufficient to come under
23 Section 1981.

24 QUESTION: There are standard doctrines in contracts
25 of frustration of purpose, are there not?

1 MR. DAVIS: Yes, there are.

2 QUESTION: If the employment contract becomes
3 frustrated of its purpose by reason of racial discrimination,
4 is 1981 applicable?

5 MR. DAVIS: I don't think a constructive discharge
6 case is actionable, if that's what you're getting to.

7 QUESTION: Why?

8 MR. DAVIS: Excuse me. A constructive discharge case
9 would be actionable if the employee terminated.

10 QUESTION: Because that is the denial of the right to
11 make a contract or to enforce it?

12 MR. DAVIS: Enforce the contract, because the level
13 of opprobrious conduct became so great, if the evidence
14 supports that, that the employee could no longer continue the
15 employment.

16 QUESTION: Well, Mr. Davis, what about the SG's
17 argument that if under State law, there's an implied obligation
18 or duty of good faith and fair dealing that 1981 can be
19 implemented?

20 MR. DAVIS: If that is correct and if that is true,
21 then I believe that an employee would have a cause of action in
22 State court.

23 QUESTION: Well, this case wasn't analyzed on that
24 theory so presumably it would be appropriate then to send it
25 back and let the Court make that kind of analysis if we agreed

1 with the SG?

2 MR. DAVIS: There was no claim for relief. There was
3 a claim for relief for intentional infliction of emotional
4 distress, a pendant State claim.

5 QUESTION: I think that your colleague on the other
6 side indicated there would be no cause of action under North
7 Carolina law.

8 MR. DAVIS: Well, I think there is a cause of action
9 for a breach of the contract of fair dealing. Now, whether
10 such a case has been found cognizable for racial conduct, for
11 hostile working environment of racial conduct, I don't know of
12 any North Carolina case that would uphold that. But I know of
13 no reason why they shouldn't if it in fact meets the elements
14 of that cause of action under North Carolina law.

15 QUESTION: But I want to make it clear that you
16 interpret enforce as covering the situation where a contract is
17 frustrated of its purpose.

18 MR. DAVIS: I'm sorry, I didn't understand the
19 question.

20 QUESTION: Do you interpret, enforce, in the statute
21 to cover a situation where there is a frustration of the
22 contract's purpose by reason of racial animus?

23 MR. DAVIS: I think it if causes a termination, yes,
24 sir, that would then be a constructive discharge case which
25 would be cognizable under Section 1981, the right to enforce

1 the contract.

2 QUESTION: You don't think enforce means just the
3 right to go to a State court for relief?

4 MR. DAVIS: I believe the lower courts have held, I
5 believe there are decisions which allow you to bring a
6 constructive discharge case under Section 1981 which I think is
7 the question that you've asked me.

8 QUESTION: But you would not limit it to that?

9 MR. DAVIS: I don't think so, Your Honor.

10 QUESTION: You think enforcing a contract means not
11 taking it to Court but how else do you enforce a contract?

12 MR. DAVIS: I believe that what Section 1981 grants
13 is the competence and the capacity to take your case to Court.

14 QUESTION: It doesn't say, make and perform. It says
15 make and enforce, doesn't it?

16 MR. DAVIS: That's correct. I believe you have the
17 right to enforce your contract.

18 QUESTION: Well, we've been talking as though it
19 reads, make and perform, haven't we?

20 MR. DAVIS: No, sir, I don't think so.

21 QUESTION: How does constructive discharge come into
22 the question?

23 MR. DAVIS: Because --

24 QUESTION: Unless you're talking make and perform?

25 MR. DAVIS: I think the cases have held that a

1 constructive discharge where the employee has been forced to
2 resign then therefore they no longer have the opportunity to
3 enforce their contract.

4 QUESTION: Enforce it or perform it? I mean,
5 constructive discharge means you stop somebody from performing
6 his contract.

7 MR. DAVIS: Well, maybe I'm having difficulty --

8 QUESTION: You see no difference between performing a
9 contract and enforcing a contract?

10 MR. DAVIS: I suppose so in that definition.

11 QUESTION: You agree with the SG in this case, then?

12 MR. DAVIS: No, I don't.

13 QUESTION: Well, what's the difference between you on
14 this point?

15 MR. DAVIS: Well, I don't agree with SG as to the
16 facts of this case. I don't agree that there was a cause of
17 action which existed for frustration of the contract under
18 these facts. I have no problem with the petitioner in this
19 case bringing a state action for breach of the implied warranty
20 of good faith and fair dealing.

21 QUESTION: But it's just a disagreement among you as
22 to how his standard applies to the facts of this case?

23 MR. DAVIS: Yes, sir.

24 QUESTION: And you would say, I really don't see what
25 you've accomplished by the line you're seeking to draw. You

1 say constructive discharge would do it. I'm not aware that to
2 establish constructive discharge, you have to quit. You could
3 continue working and just say that the oppression was such that
4 effectively --

5 MR. DAVIS: I believe, Justice Scalia, the line of
6 lower court decisions hold that termination or quitting is an
7 element of constructive discharge.

8 QUESTION: You have to prove that in every case. All
9 right.

10 QUESTION: May I ask you, you suggested that under
11 North Carolina law, there is a cause of action for breach of an
12 implied covenant of fair dealings such as the Solicitor General
13 refers to.

14 Does that cause of action exist when the employment
15 is at will? Your opponent says, no.

16 MR. DAVIS: I don't know of any cases, Justice
17 Stevens, holding that.

18 Part of the problem in understanding the lower court
19 cases is the language. Discrimination has been intermingled so
20 much in Title VII and Section 1981 cases. Often times, the
21 plaintiff --

22 QUESTION: We're really here to decide this case for
23 ourselves. Perhaps understanding the lower court cases may be
24 helpful in that regard, but you know, the reason we granted
25 certiorari in this case was presumably to render a decision of

1 this Court, rather than to adopt lower court cases.

2 MR. DAVIS: Yes, sir.

3 I believe that Section 1981 primarily grants
4 competence and capacity to make and enforce the contracts.
5 Title VII grants a cause of action for racial harassment, for
6 hostile working environment, and it is under that Section that
7 this plaintiff, this petitioner could have brought her claim.

8 QUESTION: Well, I suppose you would agree that if an
9 employer puts a condition on contracting with a black that he
10 doesn't insist on with a white, that there's a 1981 cause of
11 action?

12 MR. DAVIS: If he puts a condition --

13 QUESTION: I will, sure, I'll hire you if so and so.
14 And it's a condition that he just doesn't insist on with
15 whites.

16 MR. DAVIS: I think that's in the making of the
17 contract.

18 QUESTION: Yes.

19 MR. DAVIS: Yes, sir.

20 QUESTION: So that if an employer expressly said to a
21 black, I'll hire you but remember there's a lot of harassment
22 going on in this work place and you have to agree to that.

23 MR. DAVIS: I think that's a condition attached, a
24 racial harassment which impacts the making of the contract.

25 QUESTION: But you don't think that analysis applies

1 here?

2 MR. DAVIS: No, sir.

3 QUESTION: Why not?

4 MR. DAVIS: Because in this case, the allegations
5 were not part of the contract. They were conduct, hostile
6 working environment.

7 QUESTION: It went on, say it went on everyday and
8 this was an employment at will?

9 MR. DAVIS: It's a Title VII claim, it's not a
10 Section 1981 claim.

11 If there are no other questions with regard to the
12 harassment claim, I'd like to go into the promotion claim
13 briefly.

14 The petitioner has written a magnificent brief
15 concerning all of the ways that you can support your claim for
16 punishing discrimination, none of which are applicable to this
17 case. In this case, the petitioner came into Court and said
18 three years ago, this Company gave a promotion to somebody else
19 who was working in an entirely different job responsibility,
20 had entirely different functions and you promoted her from
21 account junior to account intermediate. And I should have had
22 that job.

23 Faced with that evidence, the articulated reason for
24 giving that promotion was well, this lady's been performing her
25 job satisfactorily and we gave her a pay increase. And we gave

1 her an upgrade in job description and job scale pay scale and
2 gave her a pay increase.

3 Under the McDonnell-Douglas proof scheme, after the
4 Court had indicated that the prima facie case had been met,
5 that was our responsibility, that was our burden of persuasion.
6 The petitioner --

7 QUESTION: You're arguing now about the instruction,
8 right?

9 MR. DAVIS: Yes, sir. And the correct law with regard
10 to the burden or the burden of proof of the petitioner after we
11 have articulated a nondiscriminatory reason for our decision,
12 our nondiscriminatory reason being, number one, the petitioner
13 was not qualified for this job. She was a clerk, a file clerk.
14 This was an accountant bookkeeper position.

15 QUESTION: Well, what if your client, the Credit
16 Union, promoted exclusively by seniority and wasn't
17 particularly interested in qualifications, just whoever had
18 been in line longest would be enabled to have the promotion.
19 Now, an instruction like this wouldn't be warranted in that
20 case, would it?

21 MR. DAVIS: No, sir, I don't think it would. But
22 there's absolutely no evidence that seniority, education or any
23 other thing was a criteria in this particular promotion.

24 QUESTION: Well, was it conceded by the petitioner in
25 this case that qualification or performance was the only

1 standard for a promotion?

2 MR. DAVIS: I don't think the petitioner conceded
3 anything in this case. This lady was in the job, sitting at a
4 desk doing the job. One day she was an account junior, next
5 day she was an account intermediate and had a raise.

6 QUESTION: Well, was there any evidence introduced by
7 the petitioner indicating that performance and qualification
8 was not the only criterion for promotion?

9 MR. DAVIS: No, sir. No, sir, no evidence
10 whatsoever.

11 After the respondent, the credit union, had
12 articulated this nondiscriminatory reason for their decision,
13 that is, the qualifications of the lady doing the job, the
14 petitioner offered no further evidence, but simply relied on
15 these various allegations of this ten year course of conduct of
16 hostile working conditions to say that the decision by the
17 credit union was racially motivated.

18 QUESTION: And the reason given was a sham I suppose?

19 MR. DAVIS: I suppose. Although there's no evidence
20 of that. The various ways which the petitioner says that you
21 can prove pretext --

22 QUESTION: How does this all lead to approving the
23 instruction that was given?

24 MR. DAVIS: Because I believe, Justice White, that
25 under these facts, there was no evidence of anything other than

1 qualifications upon which --

2 QUESTION: I know, but what was the instruction on?

3 MR. DAVIS: The instruction was that in order for the
4 petitioner to prevail, she must show that she was more
5 qualified than the lady who received the promotion.

6 QUESTION: But the reason the employer gave was that
7 she wasn't qualified for the job.

8 MR. DAVIS: In the first instance, she wasn't
9 qualified and in the second instance, her qualifications did
10 not meet the qualifications of the lady who had the job.

11 QUESTION: Well, and so you think that the
12 instruction was nevertheless proper that she had to prove she
13 was more qualified?

14 MR. DAVIS: After we had met our burden of persuasion
15 of showing that relative qualifications were the reason for our
16 decision, I believe under Burdine, if we have the right to
17 choose between equally qualified candidates, then it then is
18 her burden to show that she is more qualified.

19 QUESTION: Yes, but may I ask, do you think you have
20 the right to choose between equally qualified candidates on the
21 basis of race?

22 MR. DAVIS: The right to choose between equally
23 qualified candidates absent any evidence of any other illegal
24 motive.

25 QUESTION: But supposing she offered evidence that

1 the plaintiff was denied the promotion because of her race?
2 That they were equally qualified. The only difference between
3 the two was that one was black and one was white and that
4 because one was white, that one was promoted?

5 MR. DAVIS: I suppose under that then she would have
6 a jury issue as to --

7 QUESTION: But then if you concede that, the
8 instruction's wrong.

9 MR. DAVIS: No, sir, I don't believe it is, because
10 there's no evidence that race was a factor.

11 QUESTION: Well, forget the evidence. Forget the
12 evidence. I'm just asking you about the instruction. So
13 supposing the evidence shows that they're absolutely equally
14 qualified. And the plaintiff says, yes, they were equal and
15 they had to figure out some way to break the tie. They could
16 have flipped a coin, they could have done it by alphabetical,
17 they could have done it by age, they could have done it by dark
18 hair versus light hair, but they did it because of race to
19 break a tie.

20 Is that permissible?

21 MR. DAVIS: I don't think that's permissible.

22 QUESTION: Well, the instruction says it is.

23 MR. DAVIS: No, sir, I don't believe the instruction
24 says that. I think what the instruction says is, to the jury,
25 if you find the decision was based on race --

1 QUESTION: That's one of four factors. The third
2 factor was also that she was more qualified.

3 MR. DAVIS: And the reason for that is because the
4 evidence which we presented in rebuttal of the prima facie case
5 was that qualifications were the reason, and the petitioner
6 offered no evidence to rebut that to show that, no, the
7 decision was based on race.

8 QUESTION: But the lack of evidence, it seems to me
9 is a reason for never sending the case to the jury, not a
10 reason for sending it to the jury with the wrong instruction.
11 It may well be that there was no evidence that the two of them
12 had equal qualifications and race was the reason for choosing
13 between two people with equal qualifications.

14 But in that case, the remedy was that it should never
15 have been sent to the jury, and you should have appealed on
16 that ground if the jury verdict wasn't set aside. But you're
17 not asking that. You're asking for the giving of erroneous
18 instruction, instead.

19 MR. DAVIS: I agree this case should never have gone
20 to the jury on that issue. It went to the jury, I think, under
21 the facts of this case where the only evidence for the decision
22 was promotion.

23 QUESTION: But that's what your brief boils down to.
24 You say, there wasn't evidence. That may well be, but that
25 means that no instruction should have been given, not a wrong

1 one.

2 MR. DAVIS: Unfortunately, the trial judge opted to
3 present the case to the jury.

4 QUESTION: Mr. Davis, you talk about no evidence.
5 What about this flat statement that negroes are just slower
6 than everybody else? What do you do with that?

7 MR. DAVIS: Justice Marshall, I dare say that there
8 are a few of us in the world who have not had a prejudice
9 thought or made a prejudice comment whether the prejudice may
10 be racial, sexual or religious or some other basis.

11 QUESTION: What do you do? Just ignore it?

12 MR. DAVIS: No, sir, I don't think you ignore it.

13 QUESTION: Well, how did you accommodate it?

14 MR. DAVIS: I believe, Judge, that just because --
15 and that statement by the way was contradicted. That wasn't
16 given.

17 QUESTION: Everybody's heard it before.

18 MR. DAVIS: I don't think that taking one piece of
19 evidence made in 1976 made in 1976.

20 QUESTION: Well, you've taken 87 other pieces. I'm
21 going to take one piece. And I still haven't gotten an answer
22 to it.

23 MR. DAVIS: Yes, sir. I don't think that was
24 sufficient, Your Honor, to allow a submission of this issue. I
25 don't think that piece of evidence is sufficient to say that

1 this decision, this promotion decision was based on a racially
2 discriminatory, made in a racially discriminatory context.

3 QUESTION: Was race a part of the decision?

4 MR. DAVIS: In this case?

5 QUESTION: Yes.

6 MR. DAVIS: No, sir.

7 QUESTION: No?

8 MR. DAVIS: No, sir.

9 QUESTION: Well, what showing do you have that he
10 didn't use race twice, I mean three times. He used it twice,
11 didn't he? Well, how do you know he didn't use it the third
12 time? What evidence do you have that he didn't? What
13 statement do you have that he didn't?

14 MR. DAVIS: That this girl was sitting in this desk
15 doing this job. There was no job opening. There was no
16 position available. The lady was a bookkeeper accountant. She
17 received an increase in pay grade.

18 QUESTION: You say it was a position that wasn't
19 there before?

20 MR. DAVIS: They changed her title is what they did.
21 She was doing the same job. She didn't change her job
22 responsibilities. They changed her title from account junior
23 to account intermediate.

24 QUESTION: They created a job with a higher grade.

25 MR. DAVIS: Well, they had two or three people in the

1 bookkeeping accounting department doing bookkeeping accounting
2 functions, much like having three lawyers in a law office who
3 are associates, and one day you promote one to partner and you
4 still have two associates.

5 They didn't create a new position. They didn't
6 create a new job or a new job title -- they did create a new
7 job title but no new position, no new job opening.

8 QUESTION: Is there any evidence in this record that
9 your client did anything concerning those two statements made
10 by the supervisor?

11 MR. DAVIS: Is there any evidence in the record that
12 he did anything with regard to those statements?

13 QUESTION: Yes, sir.

14 MR. DAVIS: No, sir, I'm not aware of any.

15 QUESTION: Thank you.

16 QUESTION: Did she complain about those statements
17 before this lawsuit?

18 MR. DAVIS: Not to my knowledge.

19 QUESTION: You really don't know that you brought it
20 to anybody's attention?

21 MR. DAVIS: No, sir, there's no evidence that she
22 brought it to anybody's attention.

23 QUESTION: It's in the record that he did say it and
24 it's uncontradicted.

25 MR. DAVIS: No, sir, I don't think it's

1 uncontradicted. I think he denied it.

2 QUESTION: Well, is it contradicted? If so, on what
3 page?

4 MR. DAVIS: I'm sorry, sir, I don't know that.

5 QUESTION: Do you think it was contradicted?

6 MR. DAVIS: To my knowledge, he contradicted those
7 statements.

8 QUESTION: In the statement? Well, I'll look in the
9 record and find it for you. I'll do you that service. And
10 guess what if I don't find it?

11 MR. DAVIS: If there are no other questions, thank
12 you.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Davis.
14 Ms. Hair, you have three minutes remaining.

15 ORAL ARGUMENT OF PENDA D. HAIR, ESQ.

16 ON BEHALF OF PETITIONER - REBUTTAL

17 MS. HAIR: May it please the Court.

18 In my initial argument, I did not reach the
19 legislative history of Section 1981. If there's any doubt
20 about the language of the Statute, the legislative history
21 makes it overwhelmingly clear that what Congress was concerned
22 about was onerous treatment, onerous conditions of employment
23 that former slave owners were putting on former slaves and
24 other black workers including whipping them, stopping talking
25 on the job, all the way from things that might be considered

1 miner such as talking on the job to whipping, were the types of
2 treatment that Congress was concerned about.

3 With regard to your question, Justice Scalia, about
4 whether Section 1981 guarantees an equal right to perform a
5 contract, I believed that the Court reached that conclusion in
6 footnote 78 of the Jones v. Mayer, although Jones was a Section
7 1982 case, footnote 78 discussed Section 1981, and it held
8 where a group of whites terrorized blacks in order to stop them
9 from performing their contract, that those whites had violated
10 the rights of blacks under Section 1981 to dispose of their
11 labor by contract.

12 With regard to the jury instruction, this is not a
13 case where there were no facts to support the conclusion that
14 the reason given was a sham and that the real reason was racial
15 discrimination.

16 Justice Marshall referred to two racial statements. I
17 counted nine different racial statements made by the President
18 of the company.

19 And Justice Scalia, you asked whether Mrs. Patterson
20 complained about those statements. The record shows that
21 another employee did complain about the statements and not only
22 statements, he complained about discrimination and refusal to
23 hire a black computer operator. And that employee was fired.

24 The District Court found that there was sufficient
25 evidence to submit the promotion claim to the jury and

1 particularly the District Court relied on the fact that Mrs.
2 Patterson introduced evidence to suggest that Susan Williamson
3 was trained for the job for a period of time before she was
4 actually promoted, and she was put into training for that job
5 at a time when she had failed in her training for a computer
6 operator job, and was brought back over, put into a new job.
7 There was a vacancy that somebody else was filling, and then
8 after she received the training, she was actually promoted into
9 that job.

10 And given the direct evidence in this case, given the
11 evidence of training, it's simply not true that the jury
12 instruction was harmless, which is essentially what Mr. Davis'
13 argument boils down to.

14 If there are no further questions, I have nothing
15 further.

16 Thank you very much.

17 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Hair.

18 The case is submitted.

19 (Whereupon, at 11:51 a.m., the case in the above-
20 entitled matter was submitted.)
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REPORTERS' CERTIFICATE

DOCKET NUMBER: 87-107
CASE TITLE: PATTERSON V McLEAW
HEARING DATE: 2/29/88
LOCATION: WASHINGTON, DC.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States

Date: 2/29/88

Margaret Daly
Official Reporter

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