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George A. Zunker

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CIVIL RIGHTS—Limitations of the Immunity Defense for Public Officials in Damage Actions Brought Under 42 U.S.C. § 1983 (1971). *Smith v. Losee*, ____ F.2d ____, No. 72-1244 (10th Cir., Aug. 22, 1973).

In February 1969, Plaintiff Smith was dismissed from his teaching position at Dixie Junior College, St. George, Utah. Smith had been politically active and had been critical of administrative acts at Dixie. As a result of his dismissal, Smith brought suit under 42 U.S.C. § 1983 (1971) against the Defendants Losee, President of Dixie College, and Barnum and Peterson, Deans at Dixie College. The United States District Court of Utah, Central Division, found the defendants liable for money damages on the grounds that they had acted to deprive Smith of his civil rights. From this judgment the defendants appealed. They contended, *inter alia*, that they were immune from judgment by virtue of their offices. The United States Court of Appeals, Tenth Circuit, held that the immunity privilege which they claimed was a qualified and not an absolute one. Absent a valid defense, they would be liable. The court then reversed the judgment against the Board of Education because it had established a qualified privilege. The court held that the board had affirmatively shown that their decision to discharge Smith represented an exercise of discretion vested in them by state law, made in good faith, and without malice, when the official facts before them showed a good and valid reason for the decision, even though other reasons advanced may have been constitutionally impermissible. However, the court held that Defendant Peterson had not established a qualified privilege because he had acted for the purpose of punishing Smith for his political activities and for other reasons relating to First Amendment rights. Consequently, he was liable for special damages. Finally, the court held that since the evidence showed that the Defendants Losee and Barnum had acted with malice in effecting Smith's dismissal, they were liable for both special and punitive damages without reference to a qualified immunity defense.¹

This action was brought under 42 U.S.C. § 1983 (1971), which provides as follows:

1. *Smith v. Losee*, ____ F.2d ____, No. 72-1244 (10th Cir., Aug. 22, 1973) (Hereinafter cited as *Smith*).
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Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

One of the problems which the courts have had with this section has been that of reconciling its provisions with the doctrine of governmental immunity and qualified privilege as they have traditionally been applied to officials sued under the section's provisions.²

Government immunity as an absolute defense is limited. It has been recognized for federal legislators³ under the provisions of the Speech and Debate Clause of the Constitution.⁴ It has also been extended by judicial decision to state legislators,⁵ judges,⁶ certain executives of high rank,⁷ and municipalities,⁸ at least when money damages are involved.⁹

Aside from these limited applications, the doctrine of immunity has been considered a qualified privilege. The problem has been to determine at what point the qualified privilege should be applied. The Supreme Court has said that the privilege has not been abolished by section 1983;¹⁰ however, before it is invoked, a careful inquiry into the facts of the particular case is to be made.¹¹ This inquiry must include a

2. Commentators have traced much of this confusion to the holding in *Monroe v. Pape*, 365 U.S. 167 (1961). For a discussion of the causes, see Thornberry, *Suing Public Entities Under the Federal Civil Rights Acts: Monroe v. Pape Reconsidered*, 43 U. COL. L. REV. 105 (1971); Kates and Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131 (1972).

3. *Wheelin v. Wheeler*, 373 U.S. 647 (1963); *Dombrowski v. Eastland*, 387 U.S. 82 (1967).

4. U.S. CONST. art. I, § 6.

5. *Tenney v. Brandhove*, 341 U.S. 367 (1951).

6. *Pierson v. Ray*, 386 U.S. 547 (1967).

7. *Barr v. Matteo*, 360 U.S. 564 (1959).

8. *Monroe v. Pape*, *supra* note 2.

9. *Harkless v. Sweeny Independent School Dist.*, 427 F.2d 319 (5th Cir. 1970). The court said the holding in *Monroe*, *supra* note 2, at 323, was not applicable to equitable actions against municipalities. This view has been criticized as a misreading of note 50 in *Monroe*, *supra* note 2, at 191. See Thornberry, *supra* note 2.

10. *Pierson v. Ray*, *supra* note 6.

11. *Doe v. McMillan*, _____ U.S. _____, 93 S. Ct. 2018 (1973).

careful balancing of the rights of the plaintiff to recover under section 1983, and the public interest in protecting its officials from suit by invoking the immunity privilege.

Because the Court has not set out specific conditions under which the defense is to operate, the circuit courts have attempted to decide the issue for themselves. The Second Circuit has apparently taken the position that once the plaintiff has established that an official, acting under color of state law, has violated his civil rights, the official is no longer entitled to the privilege defense.¹² The District of Columbia has used the traditional "discretionary v. ministerial" test to determine whether or not it will grant the privilege.¹³ However, the most common test seems to be the "good faith" test. This test is applied in the Fifth,¹⁴ Sixth,¹⁵ and Seventh¹⁶ Circuits. It requires that after the plaintiff has shown that the defendant has violated the provisions of section 1983, the defendant must go forward with evidence which shows he has acted in good faith and without malice. When an issue of racial discrimination has been raised, a district court in the Fifth Circuit,¹⁷ and the Eighth Circuit Court of Appeals¹⁸ have required this good faith be established by "clear and convincing" evidence.

Because *Smith* involved an action for money damages against public officials in their individual capacities, the Tenth Circuit was presented with an opportunity to reassess its position on the immunity question. In reassessing its position, the court has turned away from its reliance on state rules governing immunity¹⁹ and has opted for the creation of a "federal" immunity rule.²⁰ In taking this position, the Tenth Circuit said that federal actions could not be limited by state laws or rules relating to sovereign immunity or official

12. *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971).

13. *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971). The court held that all discretionary acts by government officials were protected by the doctrine of immunity, while ministerial acts which violated provisions of section 1983 were not protected by the doctrine.

14. *Fluker v. Ala. Bd. of Educ.*, 441 F.2d 201 (5th Cir. 1971).

15. *Nelson v. Knox*, 256 F.2d 312 (6th Cir. 1958).

16. *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968).

17. *Williams v. Kimbrough*, 295 F. Supp. 578, 585 (W.D. La. 1969).

18. *Franklin v. Meredith*, 386 F.2d 958 (10th Cir. 1967); *Jones v. Hopper*, 410 F.2d 1323 (10th Cir. 1969); *Williams v. Eaton*, 443 F.2d 422 (10th Cir. 1971).

20. *Smith v. Losee*, *supra* note 1, at 19.

privilege.²¹ In so doing, the court has adopted the position advocated by Justice Douglas in *Monroe v. Pape*²² and by commentators who contend that without such a federal rule, state immunity doctrines will operate to emasculate section 1983.²³

Furthermore, the court adopted the view that in all federal actions brought under section 1983, public officials, such as boards of education and administrators, would be entitled only to a qualified privilege. Taking its cue from the United States Supreme Court in *Doe v. McMillan*, the Tenth Circuit said that the extent to which the defense would operate would be determined, in part, by the duties of the official.²⁴ In other words, the greater the official's responsibilities and duties, and the wider his scope of discretion, the greater his privilege.²⁵

Noting that a board of education and similar boards are frequently comprised of citizens who volunteer their time and who are often required to act in quasi-legislative role, the Tenth Circuit said that the privilege available to them would lie somewhere between the absolute privilege of legislators and the "in good faith and without malice" privilege of police officers.²⁶ The court placed boards of education and administrators between these two positions, not because these were the two extreme positions, but because the Supreme Court had identified these two levels of immunity in its decisions.²⁷ On this basis, the court held that the Utah State Board of Education was entitled to the immunity defense and reversed the judgment against them. However, the Tenth Circuit said the three administrators were entitled to a lesser privilege than that available to the Board.²⁸

Exactly what that privilege was never clearly emerged because the defendants Losee and Barnum were found to have

21. *Id.*

22. *Supra* note 2, at 183.

23. *Kates and Kouba, supra* note 2, at 145.

24. *Supra* note 11.

25. *Barr v. Matteo, supra* note 7.

26. *Smith v. Losee, supra* note 1, at 26.

27. *Wheelidin v. Wheeler, supra* note 3 (fed'l legislators); *Tenney v. Brandhove, supra* note 5 (state legislators); *Pierson v. Ray, supra* note 6 (police officers).

28. *Smith v. Losee, supra* note 1, at 27.

acted with malice in seeking Smith's dismissal.²⁹ Because malice was present, the court said it was unnecessary to consider a qualified privilege for them. The defendants, the court held, would have been liable under any test, save that of absolute privilege.

Unlike the defendants Losee and Barnum, Peterson was not found to have acted with malice. Potentially, he was entitled to a qualified privilege. However, the privilege was denied, and the evidence which would have been necessary to invoke the privilege was not explained. The court simply held that, since his actions were taken to punish Smith for his political activities,³⁰ Peterson was liable for special, though not punitive, damages.

The primary significance of *Smith* is the court's attempt to create a "federal" rule on immunity. Prior to this decision, the Tenth Circuit had applied an extremely rigid and subjective test to suits brought under section 1983.³¹ In fact, unless the plaintiff could show that an official had acted fraudulently or had committed some other equivalent wrongdoing, he could not even state a federal cause of action.³²

The reason for this was that the court had relied heavily in the past upon the theory that public officials sued under section 1983 were "alter egos" of the state. As such, they were cloaked in the immunity of the state, making them virtually immune from judgment.³³ However, by moving away from this position, the court has given meaning to a concept which was latent in earlier decisions,³⁴ namely, officials acting

29. *Id.* Although never giving explicit examples of malice, the court noted that the plaintiff had been "harassed" by Losee and Barnum, and that the trial court had found malice in their actions. The malice apparently derived from the reasons which the defendants advanced for Smith's dismissal, that is, his political activity, his opposition to the administration while serving on the executive committee of the Faculty Association, and his criticisms of the administration.

30. As faculty sponsor of the Young Democrats, Smith had been active in a successful campaign to defeat an incumbent state senator.

31. Note, *The Defense of "Good Faith" Under Section 1983: London v. Florida Dept. of Health and Rehabilitative Services*, 313 F. Supp. 591 (N.D. Fla. 1970), 1971 WASH. U.L.Q. 666 (1971).

32. *Jones v. Hopper*, *supra* note 19, which holding the court specifically modifies in *Smith*.

33. *Id.*; *Williams v. Eaton*, *supra* note 19.

34. *Williams v. Eaton*, *supra* note 19; *Harris v. Tooele County School Dist.*, 471 F.2d 218 (10th Cir. 1973).

under color of law in an unlawful manner may be held personally liable.³⁵

While these changes reflect the Tenth Circuit's attempt to keep pace with the positions being taken by the Supreme Court, several of the circuit courts, and with the changing conditions in a complex society, the court has left several matters unresolved by its decision.

First, it is not altogether clear what kind of evidence the plaintiff must establish to shift the burden of proof to the defense. It appears from the decision that the burden shifts after the plaintiff has established two things: (1) that the official has acted under color of state law, and (2) that the official's acts have deprived the plaintiff of rights, privileges, or immunities secured by the Constitution and laws.³⁶ However, other language suggests that the plaintiff must also show that such acts were taken absent good faith or without malice.³⁷ It appears Smith established not only that he had a cause of action under section 1983, but that the acts of the defendants were unjustifiable.

The court has said that proof is required to support the defense of qualified privilege³⁸ and that such proof is often a showing of the absence of malice, or the presence of good faith, or some other showing of good and proper cause.³⁹ It would be the better approach, however, for the court to require that the plaintiff need only show that he has a cause of action under section 1983 before the burden of proof would shift to the defendant, who must then go forward with evidence to show that he has acted in such a manner as to justify the extension of the privilege.

This approach is preferable for two reasons. First, it requires the plaintiff to do no more than the statute requires. Secondly, since the qualified privilege may operate to deprive a plaintiff, whose civil rights have been violated, of a money judgment, the defendant should have the primary burden of

35. The court relied upon the reasoning in *Ex Parte Young*, 209 U.S. 123 (1908).

36. *Smith v. Losee*, *supra* note 1, at 9.

37. *Id.* at 12.

38. *Id.* at 21.

39. *Id.*

showing he has acted in good faith, without malice, or for some other good or probable cause.

Secondly, the court has left unanswered the extent to which the qualified privilege will be granted to public officials such as boards of education and administrators. To say that the privilege lies somewhere between the absolute privilege of legislators and the "in good faith and without malice" privilege of police officers is of little help. On the one hand, the decision seems to imply that the privilege available to boards which are not unlike legislative bodies lies very near the absolute privilege of those bodies. On the other hand, the decision also seems to imply that the privilege available officials such as administrators is very much like that which is available to police officers.

For example, the court has said that several factors are to be considered in determining the privilege available to boards. First, the court must determine the scope of the board's authority by looking to state statutes.⁴⁰ Secondly, it must determine if the act in question was within the board's discretionary powers under the statute. Thirdly, the court must determine if the actions were taken in good faith and without malice. Finally, it must determine whether the facts before the board showed a "good and valid" reason for the decision, even though other, constitutionally impermissible reasons were present and advanced.⁴¹

Unfortunately, the only thing certain in all of this is that a board such as the Utah State Board of Education will have virtually absolute immunity, absent a showing of malice. Otherwise, the new test leaves unanswered several important questions. For example, the court has not said whether this broad privilege will apply to local school boards, or if it will be limited only to boards whose duty it is to oversee statewide activities. Additionally, the court does not indicate whether the absence of any of these other factors, such as the absence of discretionary authority, or of good faith, or of other good or probable cause, will be sufficient by themselves to preclude

40. *Id.* at 25.

41. *Id.* at 26.

the privilege, or if they will have to exist in some sort of combination before the privilege will be barred.

Neither has the court indicated whether a college president or a school superintendent will have a greater privilege than a lesser administrator, such as a dean or a principal. In fact, it may well be that the test will be different not only for executive officers and supervisory personnel but for executive officers of different authority as well. At best, the only inference that can be drawn is that the test which is applied to lesser administrators will be the "in good faith and without malice" test.⁴²

A third problem which has arisen as a result of the Tenth Circuit's attempt to create a "federal" immunity law is that of the "in good faith and without malice" portion of the test. Apparently, the court considers absence of good faith and presence of malice to be two separate tests, for it found that the defendant Peterson was liable, not because he had acted with malice, but because he had acted to punish Smith for his political activities and for other reasons which violated Smith's First Amendment rights. The latter is an example of the absence of good faith, but it apparently is not an example of a malicious act.

This is confusing because the courts which have used this test have tended to use the terms interchangeably. It is also confusing because it is difficult to conceive how an official could act without good faith and still not be acting without malice. The court will have to make clear what constitutes good faith and what constitutes malice, for the chief case upon which it relies is not factually similar, and provides no help in defining the terms or their differences.⁴³

Clearly, the best approach would be to consider an absence of good faith and malice to be the same. Furthermore,

42. *Id.* at 27-28.

43. *Pierson v. Ray*, *supra* note 6. The defendant police officers had arrested the plaintiffs, who, in an effort to promote racial equality, had refused to leave a segregated waiting room in a bus depot. While the ordinance the officers sought to enforce was unconstitutional, the Court said the officers were not required to determine in advance if the ordinance they sought to enforce was constitutional. If they could show that they had acted with good faith and probable cause, they would be entitled to a qualified privilege defense.

what constitutes good faith should be determined, not by applying the strictly subjective test of what the official actually intended, but by applying an objective test which evaluates the official's actions in light of all the surrounding circumstances.⁴⁴ This approach will mean that good faith will not be limited to preconceived notions, but will vary according to the facts presented by the individual case.

One last ambiguity in the court's decision remains to be discussed. This is the level of proof which the court will require of the defendant before the privilege will be granted. While the usual level of proof required in civil actions is proof by a preponderance, the court favorably cited *Williams v. Kimbrough*,⁴⁵ which required that the defendant show by "clear and convincing" proof that he had acted in good faith and without malice. If this be the level of proof which the Tenth Circuit will require in section 1983 suits, then it has taken a significant step. If it be not the test, and other language in the decision indicates that the usual preponderance standard is all that is necessary, the court must act to clarify this. Clearly, the "clear and convincing" standard is preferable, since if the privilege be invoked, it will bar a person from a recovery he would otherwise have been entitled to.

CONCLUSION

In *Smith*, the Tenth Circuit has moved to align itself with the positions taken by its sister courts. In doing so, it has shifted from its former position which made recovery against public officials in section 1983 actions difficult. However, the court has moved neither far nor fast. It has permitted public officials to be held personally liable in such actions, but it has also taken pains to provide a protective shield of immunity for such officials. In subsequent cases, the court will have to further define all those areas which are still vague.

It is suggested that rather than using the complicated and confusing test which incorporates several imprecise factors, at least with reference to public boards, the court apply a uni-

44. *The Defense of "Good Faith" Under Section 1983*, *supra* note 31, at 669-670.

45. *Supra* note 17.

form test to all defendants, regardless of their relative positions. That standard should be that, absent a showing by "clear and convincing" evidence by the defendant that he has acted in good faith, he should be liable for money damages when he has acted under color of law to deprive a person of his constitutional and civil rights. Rather than making persons hesitant to assume public offices or to make decisions a test of this nature will insure that more thoughtful decisions will be made and that tendencies to rely on constitutionally impermissible reasons in making decisions will be diminished.

GEORGE A. ZUNKER