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Luddington v. Indiana Bell Telephone: The 1991 Civil Rights Act is No Help in Pending Cases

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Luddington v. Indiana Bell Telephone: The 1991 Civil Rights Act is No Help in Pending Cases

I. INTRODUCTION

In *Luddington v. Indiana Bell Telephone*,[1] the Seventh Circuit held that the Civil Rights Act of 1991 ("the Act")[2] does not apply to suits pending on the effective date of the Act.[3] In so holding, the court faced conflicts between Supreme Court precedent on the issue of when statutes become effective.[4]

The Supreme Court cases deciding whether statutes are to be applied retroactively have been said to be " 'in irreconcilable contradiction.' "[5] In *Bradley v. School Board of City of Richmond*,[6] the Supreme Court stated that statutes are presumed to apply to cases pending when the statute becomes effective.[7] In *Bowen v. Georgetown University Hospital*,[8] the Court stated that a statute will not apply retroactively unless the statute's language requires it.[9] Yet in another Supreme Court case, the Court held that statutes making procedural changes which will not likely favor one litigant over another can be applied to pending cases.[10]

While the Seventh Circuit acknowledged that the Act does not outlaw any conduct that was not previously illegal, it found that the changes were not purely procedural and should not be applied to cases pending when the Act became effective.[11]

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1. 966 F.2d 225 (7th Cir. 1992).
2. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.
3. 966 F.2d at 229.
4. *Id.* at 227.
5. *Id.* (quoting Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 841 (1990) (Scalia, J., concurring)).
6. 416 U.S. 696 (1974).
7. 966 F.2d at 227 (citing Bradley v. School Bd. of City of Richmond, 416 U.S. at 715-16).
8. 488 U.S. 204 (1988).
9. *Id.* at 208.
10. Dobbert v. Florida, 432 U.S. 282, 293 (1977).
11. 966 F.2d at 229.

II. FACTUAL STATEMENT

George Luddington began working for Indiana Bell Telephone in 1966. In 1979, he moved from laborer up to a low-level management position. Between 1982 and 1984, Luddington applied for thirty-five other positions with Indiana Bell. Some of these were higher positions and some were not. Luddington did not receive any of these positions. In 1986 he filed suit against Indiana Bell Telephone alleging that each of the thirty-five rejections constituted four statutory violations. The suit alleged that each rejection was both an act of racial discrimination and an act of retaliation for Luddington's complaints about racism. Each act allegedly violated Title VII of the Civil Rights Act of 1964,[12] 42 U.S.C. §§ 2000e et seq.,[13] which prohibits racial discrimination in employment, and 42 U.S.C. § 1981,[14] which entitles all persons to the same contractual rights.[15] The district court granted summary judgment for Indiana Bell.[16] While Luddington's appeal was pending, Congress passed the Act. At the court's request, both parties briefed the significance of this enactment to this case.[17]

III. THE SEVENTH CIRCUIT'S OPINION

Judge Posner writing for the court first noted that the other circuits and another panel of the Seventh Circuit that had addressed the question found that the Act did not apply retroactively.[18] However, the court's opinion discussed the question of retroactivity as if it had not been previously decided.[19]

In addressing the history of the Act, the court stated that *Patterson v. McLean Credit Union*[20] held that 42 U.S.C. § 1981 did not apply to claims based on an employer's refusal to transfer or promote an employee unless the transfer or promotion would have created a new employment relation.[21] Because court decisions normally apply to pending cases, the decision in *Patterson* eliminated many of Luddington's claims.[22] However, the Act makes 42 U.S.C. § 1981 applicable to all racial discrimina-

12. Civil Rights Act of 1964, Pub. L. No. 88-353, 78 Stat. 257.
13. 42 U.S.C.A. § 2000e (1981).
14. *Id.* § 1981.
15. 966 F.2d at 226.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. 491 U.S. 164 (1989).
21. 966 F.2d at 226-27 (citing Patterson v. McLean Credit Union, 491 U.S. at 177).
22. *Id.* at 227.

tion occurring in a contractual relationship.[23] Therefore, if the Act applies retroactively, some of Luddington's claims will be revived.[24]

The Act provides that it "shall take effect upon enactment."[25] The court found this language to be of no help due to its various possible interpretations.[26] This language could indicate that employers have to comply immediately or it could mean that the Act applies to undecided cases and possibly even decided cases.[27]

The court did not find any guidance in the legislative history of the Act.[28] The floor debates contain varying views of the Act's application.[29] After discussing the likelihood of President Bush vetoing an expressly retroactive act, and the likelihood that Congress would not have passed an act that was expressly prospective, the court concluded that this political disagreement had been "dumped . . . into the judiciary's lap without guidance."[30] In the court's opinion, the legislative and executive branches left the question of retroactivity to the courts because each side would have a chance at a favorable outcome due to the conflicting case law on the issue of when a statute retroactively applies.[31]

In *Bradley v. School Board of City of Richmond*,[32] the Supreme Court held that statutes are to be applied retroactively to cases pending on the statute's effective date.[33] In other cases, the Court held that statutes should not ordinarily apply retroactively.[34] After acknowledging this conflict in Supreme Court precedent, this court emphasized that part of the traditional conception of the "rule of law" is that law regulates only future conduct so that persons are able to conform their conduct to avoid

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23. *Id.*; Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071. This section amends 42 U.S.C. § 1981 by providing that "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enforcement of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C.A. § 1981(b) (Supp. 1992).

24. 966 F.2d at 227.

25. 42 U.S.C.A. § 1981 Historical Notes (Supp. 1992).

26. 966 F.2d at 227.

27. *Id.*

28. *Id.*

29. *Id.* In the floor debates on the Act, Senator Kennedy stated that the courts ordinarily apply statutes to pending cases. 137 CONG. REC. S15472-01, S15485 (daily ed. Oct. 30, 1991). However, Senator Danforth indicated that Supreme Court precedent would require that the statute apply prospectively. 137 CONG. REC. S15472-01, S15483 (daily ed. Oct. 30, 1991).

30. 966 F.2d at 227.

31. *Id.*

32. 416 U.S. 696 (1974).

33. 966 F.2d at 227 (citing Bradley v. School Bd. of City of Richmond, 416 U.S. at 715-16).

34. *Id.* The court does not provide citation for this proposition; however, the author presumes the court is referring to Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988).

punishment.[35] The court would follow this rule of prospective application in the absence of other guidance.[36] The court stated that this presumption in favor of prospective application brought it part of the way to its decision.[37] However, it still had to decide if the presumption applied in this case.[38]

The court then discussed Supreme Court and Seventh Circuit cases holding that procedural changes can be applied to pending cases if the changes will not bias the court's reasoning in favor of one party or the other.[39] The court indicated that this exception should be applied sparingly due to the lack of constraints on legislative power.[40] The presumption that legislative acts apply only prospectively helps to avoid the legislature's "awesome power."[41] The legislature is not held in check by a tradition of modesty or by limits on its ability to tax and spend like the judiciary.[42]

The court rejected the possibility that the Act should be applied retroactively since Congress enacted it in response to the *Patterson* interpretation of 42 U.S.C. § 1981.[43] When Congress passes legislation to "overrule" a Supreme Court decision, rather than disagreeing with the Court's decision, it is establishing a rule for the future.[44] This court viewed the Act as a reflection of "contemporary policy and politics," not a Congressional dispute with the Supreme Court.[45]

While acknowledging that other than prohibiting the practice of "race norming," the Act does not prohibit any conduct that was not already prohibited, the court pointed out that the Act makes changes in "remedies, procedures, and evidence."[46] These changes can impact behavior as much as purely substantive changes.[47] Individuals and firms take greater care to avoid liability when Congress imposes more severe penalties.[48] When penalties become more extreme, parties are entitled to an opportu-

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35. *Id.* at 227-28.
36. *Id.* at 228.
37. *Id.*
38. *Id.*
39. *Id.* (citing Dobbert v. Florida, 432 U.S. 282, 293 (1977); Prater v. United States Parole Comm'n, 802 F.2d 948, 953 (7th Cir. 1986) (en banc)).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 229.
47. *Id.*
48. *Id.*

nity to comply with new requirements in order to avoid those extreme penalties.[49]

In conclusion, the Seventh Circuit stated that retroactive application would result in too much uncertainty.[50] Retroactivity in every case would cause "massive dislocations in ongoing litigation and defeat substantial reliance interests of employers."[51] Retroactivity on a case by case basis would result in "enormous satellite litigation and associated uncertainty to fix an indistinct boundary."[52] Accordingly, the Act applies only to conduct occurring after the effective dates in the Act when the suit was filed before the effective date.[53]

IV. ANALYSIS

While the Seventh Circuit's decision in *Luddington* provides a clear rule for the application of the Act, its reasoning in reaching its conclusion is less than clear. The court acknowledged the conflict in Supreme Court precedent,[54] but did not try to reconcile it or decide to follow one line of cases or the other.[55] Instead, the court stated that it is part of the traditional concept of the rule of law that laws only apply to future conduct so that persons are able to conform their conduct to comply.[56] The opinion provides no citation of authority for this rule.[57]

The validity of the decision in *Luddington* is now uncertain. At the time of the decision in *Luddington*, all of the circuit courts that had decided the issue of retroactivity had found the Act to be prospective.[58] This is no longer the case.[59]

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49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 229-30.

54. *Id.* at 227.

55. In Baynes v. AT&T, 976 F.2d 1370 (11th Cir. 1992), without addressing the Act's application to pending cases, the Eleventh Circuit concluded that the Act did not apply retroactively to cases decided before the Act became effective under the *Bowen* or the *Bradley* analysis. *Id.* at 1375.

56. 966 F.2d at 227-28.

57. *Id.*

58. Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992); Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir. 1992); Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 207 (1992); Valdez v. Mercy Hosp., 961 F.2d 1401 (8th Cir. 1992); Vogel v. Cincinnati, 959 F.2d 594 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 86 (1992).

59. Davis v. San Francisco, 976 F.2d 1536 (9th Cir. 1992).

In *Davis v. San Francisco*,[60] the Ninth Circuit held that based on the language of the Act, it should have retroactive application to pending cases.[61] The court in *Luddington* did not discuss the language in the Act relied on by the Ninth Circuit.[62] Section 109(c) of the Act provides that the extension of Title VII's protections to United States citizens working for American companies in foreign countries shall not apply to conduct occurring before the Act becomes effective.[63] Section 402(b) precludes the Act's application to " 'any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.' "[64] The Ninth Circuit stated that since Congress provided that the Act does not apply to these two specific instances, that was a strong indication that Congress intended the Act to otherwise apply to pre-Act conduct.[65] These two sections and the canon of construction that "a statute should be interpreted so as not to render one part inoperative"[66] led the court to conclude that the Act applied to pre-Act conduct.[67] The court stated that there would be no reason for Sections 109(c) and 402(b) to specifically provide for prospective application if the rest of the Act did not apply retroactively.[68]

The approach of the Ninth Circuit differs from that of the court in *Luddington*. In *Luddington* the Seventh Circuit seems to say that retroactive application would simply not be fair.[69] The only language that the court discusses is that the Act "shall take effect upon enactment."[70] The Seventh Circuit never addressed the language in the Act that the Ninth Circuit relied on in *Davis*.[71] The two circuits take different paths of reasoning and naturally obtain conflicting results.

The Supreme Court has created further questions about the validity of the decision in *Luddington*. A case that relied on *Patterson* has been vacated and remanded to the District of Columbia Circuit for further consideration in light of the Act.[72] This action by the Court led one district

60. 976 F.2d 1536 (9th Cir. 1992).
61. *Id.* at 1556.
62. *Id.* at 1552.
63. *Id.* at 1551.
64. *Id.* (quoting 42 U.S.C.A. § 1981 Historical Notes (Supp. 1992)). This provision is referred to as the Wards Cove Amendment. *Id.* at 1551 n.7. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).
65. 976 F.2d at 1551.
66. *Id.* (quoting South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 510 n.22 (1986)).
67. *Id.*
68. *Id.*
69. 966 F.2d at 229.
70. *Id.* at 227.
71. 976 F.2d at 1552.
72. Gersman v. Group Health Assoc., 112 S. Ct. 960 (1992).

court to conclude that the Supreme Court interprets the Act to eliminate the effects of *Patterson* in cases prior to the Act as well as those filed after the Act.[73] This district court found no reason for the Supreme Court's action except that it must agree that the Act applied to cases which preceded the Act.[74]

Additional confusion resulted from the Supreme Court's recent denial of a petition for a writ of certiorari in two other circuit court cases that held the Act to be non-retroactive.[75] The reason for this denial may have been that at the time, there was no conflict among the circuits.[76] However, on the day after this denial, the Ninth Circuit ruled in *Davis* that the Act applied retroactively.[77]

While the reasoning of the Ninth Circuit has some attraction, the decision in *Luddington* presents a clear, practical result. The two main concerns of the court in *Luddington* override the statutory language argument advanced by the Ninth Circuit. As the court in *Luddington* emphasized, parties should have an opportunity to conform their conduct in order to avoid more severe penalties.[78] Further, retroactive application would create tremendous confusion in ongoing litigation and would destroy the reliance interests of employers who would expect an opportunity to conform their conduct.[79]

V. CONCLUSION

The above analysis shows that the Seventh Circuit reached a fair and equitable decision. It seems only fair that employers shoud have an opportunity to comform their conduct in order to avoid stricter penalties. It remains to be seen if the Seventh Circuit correctly interpreted the Act. Whether the Supreme Court favors the Seventh Circuit's interpretation of the Act is hard to decipher. Its recent denials of certiorari[80] have only added to the confusion. This confusion will not be resolved until the Court reaches the question. This, the Court appears in no hurry to do.

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73. Watkins v. Bessemer State Technical College, 782 F. Supp. 581, 586 (N.D. Ala. 1992).

74. *Id.*

75. Mozee v. American Commercial Marine Co., 113 S. Ct. 207 (1992); Vogel v. Cincinnati, 113 S. Ct. 86 (1992).

76. 976 F.2d at 1552.

77. *Id.* at 1536.

78. 966 F.2d at 229.

79. *Id.*

80. Mozee v. American Commercial Marine Co., 113 S. Ct. 207 (1992); Vogel v. Cincinnati, 113 S. Ct. 86 (1992).