

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FREDERICK R. KLAUS, )  
Plaintiff, )  
 )  
v. ) Civil Action No. 90-1149  
 )  
DUQUESNE LIGHT COMPANY, )  
Defendant. )

**R E P O R T**

GARY L. LANCASTER,  
United States Magistrate Judge

Plaintiff filed this civil action alleging violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and 42 U.S.C. § 1981. Before the court is plaintiff's motion to file a second amended complaint, seeking to avail himself of the expanded rights and remedies provided by the Civil Rights Act of 1991. P.L. 102-166 ("1991 Act" or "Act"). Additionally, defendant has filed a motion for partial summary judgment on plaintiff's section 1981 claim. For the reasons set forth herein, plaintiff's motion should be granted,<sup>1</sup> defendant's motion denied

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1. Ordinarily, the determination of whether to grant or deny leave to amend a complaint is a nondispositive pretrial matter over which a magistrate judge has final authority. 28 U.S.C. § 636(b)(1)(A). However, because of the nature of this amendment denial would be dispositive of plaintiff's claim for compensator damages. For that reason, we proceed by Report rather than Opinion and Order. See Fed.R.Civ.P. 72.

(continued...)

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1. (...continued)

I.

Plaintiff filed his action on July 10, 1990 alleging defendant had unlawfully discriminated against him on the basis of his race when it failed to promote him to a managerial position in March, 1988. Thereafter, plaintiff filed an amended complaint contending defendant did not select him for a second position, as retaliation for his having filed the earlier claim. Discovery in the suit has closed. The parties have filed their pretrial statements, but the court has recently granted them leave to postpone the filing of their pretrial stipulation pending the disposition of pending motions.

On February 3, 1992, plaintiff sought leave of court to amend his complaint so as to incorporate the restorative and remedial provisions of the 1991 Act which became law on November 21, 1991. Defendant opposes the motion. The issue to be resolved here is whether the provisions of the 1991 Act should be applied retroactively to the facts of this case.

II.

A.

The Civil Rights Act of 1991 is a comprehensive bill intended to expand certain remedies available to victims of discrimination and to undo the effects of recent Supreme Court

decisions, which had the effect of limiting remedies for civil rights violations.<sup>2</sup> The provisions of the 1991 Act from which plaintiff seeks to benefit are found in section 101, see n. 2 infra, and in section 102 which authorizes compensatory and punitive damages in Title VII intentional discrimination cases, as well as the right to a jury trial where such damages are sought and are not available to the claimant under the Civil Rights Act of 1872, 42 U.S.C. § 1981.

Whether the provisions of the 1991 Act are to be applied retroactively to those cases pending as of its effective date is a matter of considerable controversy. The district courts that have addressed the issue are divided as to its retroactive effect. In fact, there exists a split of opinion within the District Court for the Western District of Pennsylvania on the issue. See Sinnovich v.

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2. Section 101 reverses the limitations imposed on the scope of 42 U.S.C. § 1981 by the Supreme Court in Patterson v. McClean Credit Union, 491 U.S. 164 (1989). Section 105 codifies the pre Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), "business necessity" and "job related" standards. Section 107 reverses the liability limitations imposed on mixed motive cases by the decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The collateral challenge holdings of Martin v. Wilks, 490 U.S. 755 (1989), and Lorance v. AT&T, 490 U.S. 900 (1989), are reversed by sections 108 and 112 respectively. Section 109 reversed EEOC v. Arabian American Oil Co. & Aramco Services Co., 111 S. Ct. 1227 (1991), by mandating that Title VII applies to U.S. companies operating outside of the territorial jurisdiction of the United States. The \$30.00 expert witness fee limitation imposed by the Supreme Court in West Virginia University Hospitals, Inc. v. Casey, 111 S.Ct. 1138 (1991), is reversed by section 113.

Port Authority, (Civil Action No. 88-1524, filed 12/31/91) (provisions are not retroactive to pending case) (Standish, D.J.); compare, Wittman v. New England Mut. Life Ins. Co., (Civil Action No. 90-1688, filed 2/10/92) (1991 Act to be applied to pending action) (Diamond, D.J.). For the reasons set forth herein, we conclude that the provisions of the 1991 Act should be applied retroactively to the instant case.

B.

In Bradley v. Richmond School Board, 416 U.S. 696 (1974), the Supreme Court addressed the issue of whether an attorney's fee statute that went into effect during the pendency of an appeal was to be applied by the appellate court. Relying on Thorpe v. Durham Housing Authority, 393 U.S. 268 (1969), the Court held that there exists a presumption in law that "a court is to apply the law in effect at the time it renders its decision." 416 U.S. at 711. The Bradley Court recognized two exceptions to the presumption. The presumption does not govern where retrospective application would result in a manifest injustice to one of the parties. Similarly, the presumption does not apply where there is clearly expressed congressional intent to the contrary. Id.

Subsequent to Bradley, the Supreme Court decided Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988). There it

stated, "[r]etroactivity is not favored in the law . . . . [C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Id. at 208. However, Bowen did not explicitly overrule Bradley. Recently, in Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 836-38 (1990), the Supreme Court acknowledged, without resolving, the ongoing tension between the two cases.<sup>3</sup>

The Bradley/Bowen conflict is a matter of confusion among the circuits. Yet, a review of case law reveals that the Court of Appeals for the Third Circuit has consistently applied the Bradley rule when faced with this conflict. See, i.e., Kaiser Aluminum v. Bonjorno, 865 F.2d 566 (3d Cir. 1989); United States v. Jacobs, 919 F.2d 10 (3d Cir. 1990), cert. denied, 111 S. Ct. 1333 (1991); Air-Shields, Inc. v. Fullam, 891 F.2d 63, 65 (3d Cir. 1989); U.S. Healthcare, Inc. v. Blue Cross of Philadelphia, 898 F.2d 914 (3d Cir.), cert. denied, 111 S. Ct. 58 (1990).

The district courts of this circuit have also consistently followed the Bradley rule. See United States v. Youngstown Steel

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3. Kaiser Aluminum v. Bonjorno emanated out of this circuit. The Court of Appeals relied on a Bradley analysis in its decision. In reversing that decision, the Supreme Court did not rule that the Court of Appeals for the Third Circuit had erred in relying on a Bradley, rather than a Bowman analysis, but found that the congressional intent clearly prohibited retroactive application under either analysis in that case.

Corp., 1989 U.S. Dist. LEXIS 4564 (W.D. Pa. March 3, 1989) ( applied the Bradley analysis in determining that amendments changing damages recoverable under the False Claims Act, 31 U.S.C. §§ 3729-3731, may be applied to conduct occurring prior to enactment of the amendments). See also United States v. Board of Education, 697 F. Supp. 167 (D. N.J. 1988) (same). In American Trade Partners v. A-1 International Importing Enterprises, Ltd., 757 F. Supp. 545, 557 (E.D. Pa. 1991), the court relied on the Bradley rule to apply amended venue provision to a pending action.

Relying principally on Davis v. Omitowoju, 883 F.2d 1155 (3d Cir. 1989), defendant argues that Third Circuit precedent no longer favors the Bradley presumption. In Davis, the court did not refer to either Bradley or Bowen but merely stated that it agreed with the canon that newly enacted statutes operate prospectively. But, the court also noted that that rule is generally applied "only when application of the new law would affect rights or obligations existing prior to the change in law." Id. at 1170.

Defendant contends that such language is an indication that Bradley is no longer the rule of the Third Circuit. However, we do not read Davis so broadly. The question of whether or in what manner a newly enacted statute affects prior existing rights is, as seen below, one of the considerations in determining whether a retroactive application would constitute a "manifest injustice" under

a Bradley analysis. Thus, we do not consider Davis as a clear departure from the line of Third Circuit cases favoring a Bradley analysis.

We have considered all of defendant's arguments regarding the Bradley/Bowen conflict and conclude that although defendant's arguments in this regard are not frivolous, the weight of authority is that Bradley is the law of this circuit. Accordingly, we address plaintiff's motion in light of the principles set forth therein.

C.

We first address the question of whether there is a clearly expressed Congressional intent not to retroactively apply the 1991 Act to pending cases. Two methods are recognized for determining congressional intent with respect to legislation. The

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4. The circuits remain divided in choosing among the Bradley and Bowen presumptions regarding retroactivity as it relates to the 1991 Act. In circuits where the Bowen presumption against retroactivity has been adopted, district courts generally have rejected retroactive application of the 1991 Act to cases pending on the date of enactment. Van Meter v. Barr, 778 F. Supp. 83 (D.D.C. 1991); Hansel v. Public Service Co. of Colo., 778 F. Supp. 1126 (N.D. Ga. 1991); see also Sorlucco v. New York City Police Dep't, 780 F. Supp. 202 (S.D. N.Y. 1992) (precluding retroactive application to a case that had been tried prior to enactment and a narrow reading of Bradley). In circuits where the Bradley presumption of retroactivity is controlling, district courts have applied the 1991 Act retroactively. Stender v. Lucky Stores, Inc., 1992 U.S. Dist. LEXIS 274 (N.D. Cal. January 7, 1992); Kin v. Shelby Medical Center, 779 F. Supp. 157 (N.D. Ala. 1991); Mojica v. Gannett Co., 779 F. Supp. 94 (N.D. Ill. 1991) (relying upon the Seventh Circuit's precedent).

first is to examine the language of the legislation itself and thereby ascertain its plain meaning. The second, and less favored method, is to review the legislative history to see what various legislators had in mind at the time of casting their votes.

Both parties here have referred us to certain provisions of the 1991 Act which they contend are dispositive of the issue. However, our review shows that the provisions, read as a whole, are-- at minimum--susceptible to conflicting interpretation. We do not want to appear to have glossed over this aspect of the analysis, but we need not dwell on it either. We concur with the several district courts that have done an in-depth analysis of the 1991 Act that legislative intent on the issue of retroactivity is simply ambiguous.<sup>5</sup>

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5. Typical of this ambiguity is that in 1990, Congress passed a revised Civil Rights Act which did not survive a presidential veto. Section 15 of that version provided for retroactive application of many of its provisions to a specific date in 1989. Advocates of non-retroactivity argue that the absence of these provisions from the 1991 Act indicates that Congress did not intend retroactive application. While this factual background could possibly support such an inference, there are many more just as likely inferences which could be drawn from these facts. For example, Congress could have intended no cut-off date on retroactivity. Further, section 15 also contained language which would have vacated final orders entered prior to its enactment. It is not difficult to imagine a general outcry against such a provision. The court finds no guidance in viewing the language of the 1990 Act. We are better advised to pay attention to the Act before us.

Therefore, although persuasive arguments can be and have been raised by both parties in an attempt to demonstrate in the Act a clear manifestation of legislative intent, we find such arguments nondispositive of the issue. This is not surprising. If Congress itself had a clearly defined notion of whether the Act was or was not to be applied to pending cases, language could have been used to express such an intent, and this controversy would not exist regardless of whether a Bradley or Bowen analysis were employed.

Similarly, we have reviewed in this, and in other cases before this court, as well as in the opinions of several district courts, the text from the Congressional Record containing contradictory verbatim excerpts from the various senators involved in the legislative process. Again, our review establishes that the court cannot determine legislative intent from these contradictory and politically polarized statements without engaging in sheer speculation.

Thus, because Congressional intent is unclear, under Bradley, we must afford retroactive application of the 1991 Act unless we determine that its application would constitute a "manifest injustice."

III.

In Bradley, the court articulated three factors to examine in determining whether application of a new statute to a pending case would result in "manifest injustice."

The first relevant consideration is "the nature and identity of the parties." The greatest danger of "manifest injustice" arising from the retroactive application of an intervening statute occurs in "mere private cases between individuals." A court is less inclined to apply the statute retroactively in such instances. See Bradley, 416 U.S. at 717. By contrast, a court is more likely to apply a statute retroactively when it has to do with a "great national concern." Id. at 719.

Although the present case is an action between private parties, it cannot be seriously questioned that an act involving clarification of the nation's civil rights laws and the procedures and remedies available for enforcing those laws, implicates "great national concerns." See, i.e., Mojica v. Gannett, 779 F. Supp. at 98.

The second consideration has to do with the nature of the rights, if any, affected by the intervening statute. A statute affecting the substantive rights and liabilities of the parties is presumed to have only prospective application. See Bennett v. New Jersey, 470 U.S. 632, 639 (1985). It will not be applied retroactively when to do so would infringe upon or deprive either party of a right that had matured or become unconditional prior to enactment. See Bradley, 416 U.S. at 720.

The rights at issue here are not new. The Civil Rights Act of 1964 guaranteed a person's right to be free from racial discrimination in his or her place of employment. Here, we are concerned with new remedies for violations of these existing rights.

Finally, the third consideration has to do with the nature or impact of the change in the statute upon the existing rights of the parties. Id. at 717. The focus here is on whether new and

unanticipated obligations and duties may be imposed upon a party without prior notice or opportunity to be heard. See id. at 720

Instantly, plaintiff's Title VII claim is coupled with a section 1981 claim arising out of the same conduct. Plaintiff is entitled to a jury trial on the section 1981 claim. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). Moreover, once a jury makes its factual determinations under section 1981, the court, sitting in equity on the Title VII claim, will most likely not make a contrary finding. See Gunby v. Pennsylvania Electric Co., 840 F.2d 1108, 1122 n. 14 (3d Cir. 1988), cert. denied, 492 U.S. 905 (1989); see also Gutzwiller v. Fenik, 860 F.2d 1317 (6th Cir. 1988). Therefore, as a practical matter, even absent the 1991 Act, the factual determinations in this case will be made by a jury. Therefore, to award plaintiff the right to a jury trial on the Title VII claim will have little, if any, change upon the existing rights of the defendant in this regard.

Additionally, if plaintiff prevails on the underlying cause of action, i.e. that he was unlawfully passed over for a promotion due to his race, plaintiff is entitled to recover compensatory and punitive damages under section 1981. Johnson v. Railway Express Agency, 421 U.S. 454. Section 102(a)(1) of the 1991 Act states explicitly that the complaining party who has been a victim of intentional discrimination, may recover compensatory and punitive

damages "provided that the complaining party cannot recover under section 1977 of the revised statutes [42 U.S.C. § 1981]." Thus, should plaintiff prevail, defendant is liable for compensatory damages either under Title VII or section 1981.

Therefore, since defendant was already subject to a jury trial and compensatory damages under section 1981, no new and unanticipated obligations and duties will be imposed upon defendant. We conclude that retroactive application of the Act under the facts of this case will not constitute a manifest injustice against defendant.

#### IV.

On December 27, 1991 the Equal Employment Opportunity Commission ("EEOC") issued a policy statement on this issue. The EEOC took the position that the 1991 Act does not apply to pending cases or to conduct that occurred prior to November 21, 1991. As a general rule, the opinion of the administrative agency chargeable with implementing Congressional acts is entitled to deference. Chevron, USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). However, EEOC's policy statement is expressly based on a Bowen analysis. For the reasons stated infra, we have concluded that the Third Circuit follows the Bradley line. Therefore, we are not bound by EEOC's policy statement.

Based on all of the preceding, the 1991 Act should be applied to this case. Accordingly, plaintiff's motion for leave to file an amended complaint should be granted.<sup>6</sup>

V. SUMMARY JUDGMENT

Defendant has moved for summary judgment on plaintiff's section 1981 claim on the grounds that under the principles set forth in Patterson v. McClean Credit Corp., 491 U.S. 164 (1989), it is entitled to judgment as a matter of law under the facts of this case. Specifically, defendant argues that plaintiff's promotion would not constitute a new and distinct contractual relationship between plaintiff and defendant and thus, not actionable under section 1981.

Prior to the Supreme Court's decision in Patterson, an employer's failure to promote an employee due to that employee's race was deemed actionable under section 1981. See Gunby v. Pennsylvania Electric Co., 840 F.2d 1108 (3d Cir. 1988). It was only as a result

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6. We recognize that the referring district judge in this case addressed the issue of the 1991 Act's retroactivity in Sinnovich v. Port Authority, Civil Action No. 88-1524, and concluded in that case the Act would not be applied retroactively. However, that decision has not been published. Therefore, it has no precedential value outside of that case. See generally Heller Foundation v. Lee, 847 F.2d 83, 87 n. 3 (3d Cir. 1988); Aetna Li & Casualty Corp. v. Maravich, 824 F.2d 266, 269 (3d Cir. 1987). Thus, we present the reasoning contained herein for an independent consideration.

of Patterson that an ambivalence as to whether a failure to promote claim standing alone without the creation of a "new contract", stated a section 1981 claim. Nevertheless, the 1991 Act was clearly worded to reverse the Patterson decision which Congress expressly held was wrongly decided. 1991 Act, § 101. Legislative enactments passed for the purpose of modifying a court's interpretation of its legislation are, unless otherwise specifically designated, deemed to be applied retroactively. See Ayers v. Allain, 893 F.2d 732, 754 (5th Cir. 1990) (citing cases), rev'd on other grounds, 111 S. Ct. 1579 (1991); Mrs. W. v. Tirozzi, 832 F.2d 748, 755 (2d Cir. 1987); Pierce v. Hobart Corp., 939 F.2d 1305 (5th Cir. 1991).<sup>7</sup> Therefore, defendant's reliance on Patterson is in error and the motion should be denied.

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United States Magistrate Judge

Dated: March 11, 1992

cc: All Counsel of Record

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7. Defendant also argues that even if the 1991 Act applies to plaintiff's section 1981 claim, it does not provide a cause of action for retaliation. However, the language of section 1981 clearly provides for a cause of action for retaliation and case law prior to Patterson so held. See generally Malhotra v. Cotte & Co., 885 F.2d 1305, 1313 (7th Cir. 1989) (citing cases); Greenwood v. Ross, 778 F.2d 448 (8th Cir. 1985).

Finally, we address defendant's additional argument that should the court determine that the 1991 Act is to be applied retroactively to pending cases generally, the doctrine of sovereign immunity precludes its application in cases where the defendant is the United States Government.

Title VII of the Civil Rights Act of 1964, as enacted, did not cover employees of the federal government. Congress remedied that omission in 1972 by adding section 717 to Title VII which waived its sovereign immunity and made clear that federal government employees may bring suit under Title VII as can those in the private sector. Defendant contends, and its authorities support, that a waiver of sovereign immunity must be express. It can not be implied. Accordingly, defendant argues that the 1972 amendment expressly waived its immunity only with respect to the equitable relief and remedial scheme then available under Title VII. Since Congress has failed to expressly make the provision of the 1991 Act retroactive including the jury trial and compensatory damages we may not imply such waiver.

We need not dwell on this argument. In the aftermath of the 1972 amendment, the federal government raised analogous sovereign immunity arguments in an attempt to forestall a retroactive application of section 717. Such arguments were rejected by the Second, Third, Fourth and District of Columbia circuits. See

Sperling v. United States, 515 F.2d 465, 473 (3d Cir. 1975) and the authorities cited therein. Only the Sixth Circuit found the sovereign immunity argument valid. \_\_\_\_\_ v. \_\_\_\_\_,

On appeal to the United States Supreme Court, the government abandoned its sovereign immunity argument position. CITE  
We believe that defendant's claim that sovereign immunity prohibits a retroactive application of the 1991 Act is without merit. Contra. CITE

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Robert Ashby, *Engineering Cybernetics*, 2nd Edition, Prentice-Hall, 1984