McPeters v. Edwards et al Doc. 101

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KAREN McPETERS, individually, and on behalf of those individuals, persons and entities who are similarly situated Plaintiff	§	
vs.	§	CIVIL ACTION NO. 4:10-CV-01103
	§	**JURY**
THE HONORABLE FREDERICK E. EDWARDS; **BARBARA GLADDEN ADAMICK**, **DISTRICT CLERK; MONTGOMERY COUNTY, TEXAS, and REED ELSEVIER, INC. d/b/a LexisNexis** Defendants	§	

PLAINTIFF'S MOTION FOR RECONSIDERATION

TO THE HONORABLE KEITH ELLISON, UNITED STATES DISTRICT JUDGE:

Karen McPeters files her Motion for Reconsideration, pursuant to Rule 59(e) of the Fed. R. Civ. P., and would show:

1. The January 27, 2011 *Memorandum and Order* relied upon two questions of law in dismissing Plaintiff Karen McPeters' claims pursuant to 42 U.S.C. §1983:

(a) access to courts is not a fundamental right under the Constitution, and

(b) Plaintiff did not seek access to a court to vindicate a fundamental right.

The *Memorandum* states that "Plaintiff cannot point to a single federal case that is even arguably analogous to her constitutional claims." *Memorandum, p. 8.* Both of these questions should be resolved in favor of the Plaintiff for the reasons that follow:

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Supreme Court Authority: Access to Courts is a Fundamental Right

2. **First**, the *Memorandum* correctly cites *Bounds v. Smith*, 430 U.S. 817, 822, 97 S.Ct. 1491, 1498 (1977) to establish that the Supreme Court has described "access to the courts" as a "fundamental right." *Memorandum, p. 7.* Under *Bounds*, even inadequate prison law libraries or inadequate access to those libraries is an unconstitutional barrier to access. *Id*. at 827-28. "[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries." *Id. at 828.* The *Memorandum* cites *Bounds* but disregards its reasoning and its holding.

3. *Bounds* was unequivocal. "It is now established beyond doubt that prisoners have a constitutional right of access to the courts." *Id*. at 821. Plaintiff Karen McPeters has at least the same fundamental rights as a convicted felon.

4. *Bounds* is not the only Supreme Court case declaring that the access to the courts is a fundamental right.

> [T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983). Accordingly, the Constitution guarantees that prisoners, like all citizens, have a reasonably adequate opportunity to raise constitutional claims before impartial judges, see, *e.g.*, *Lewis v. Casey*, 518 U.S. 343, 351, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996).
>
> *Woodford v. Ngo*, 548 U.S. 81, 122, 126 S.Ct. 2378 (2006)

> Moreover, **because access to courts is a fundamental right**, see *id.*[Lewis], at 346, 116 S.Ct. 2174, government-drawn classifications that impose substantial burdens on the capacity of a group of citizens to exercise that right require searching judicial examination under the Equal Protection Clause, see, *e.g.*, *Lyng v. Automobile Workers*, 485 U.S. 360, 370, 108 S.Ct. 1184 (1988).
>
> *Id*. at 122-23, emphasis added.

Fifth Circuit Authority Confirms that Access to Courts is a Fundamental Right

5. "Meaningful access to courts is a fundamental constitutional right, grounded in the First Amendment right to petition and the Fifth and Fourteenth Amendment due process clauses. *Johnson v. Atkins*, 999 F.2d 99, 100 (5th Cir.1993) (internal quotations and citation omitted)." *Dallas v. Stevens*, 62 F.3d 394, 1995 WL 450095 * 1 (5th Cir. 1995)(not selected for publication).

6. "We have recognized that meaningful access to courts is a fundamental federal constitutional right. *Chrissy F. v. Miss. Dep't of Pub. Welfare*, 925 F.2d 844, 851 (5th Cir.1991)." *Hamilton v. Foti*, 372 Fed. Appx. 480, 485, 2010 WL 1286935 * 4 (5th Cir. 2010)(not selected for publication).

7. The foregoing authority follows the Constitution. The First Amendment protects the right to petition the Government for a redress of grievances; the Seventh Amendment provides that even in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and the Fourteenth Amendment provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States and that no state may nor deny to any person within its jurisdiction the equal protection of the laws.

8. The *Memorandum* disregards *Bounds* and relies instead upon cases (*Ortwein, Kras*) that did **not** involve fundamental rights. Those cases involved obtaining a discharge in bankruptcy or welfare benefits, neither of which is protected as a fundamental right.

Texas Authority is Persuasive

9. *LeCroy v. Hanlon*, 713 S.W.2d 335 (Tex. 1986) stands for the proposition that Texas considers access to courts to be a fundamental right for Texas citizens. This authority is not binding precedent, but is persuasive, such that Plaintiff must respectfully disagree that the Texas Supreme Court opinion is "irrelevant." *Memorandum, p. 7.* Access to the courts is a fundamental right under both the state and federal law.

Vindication of Fundamental Rights in Underlying Lawsuit

10. **Second**, the *Memorandum* relies, in part, upon an argument not advanced by any Defendant -- Plaintiff must seek to vindicate a fundamental right in her underlying lawsuit to obtain federal jurisdiction. Plaintiff respectfully disagrees that this is the law.

11. However, Plaintiff did seek access to the courts to vindicate a fundamental right. Plaintiff sought access to the courts to assert claims under 29 U.S.C. §2601, *et. seq*., and Title VII, 42 U.S.C. §2000e, *et. seq.* (Please see Plaintiff's Third Amended Petition – Exhibit 1.)

12. These claims assert fundamental rights, as explained by the Supreme Court in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S. Ct. 1437 (1981).

> The congressionally created right under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, was aimed at guaranteeing a workplace free from ***discrimination***, racial and otherwise. That **fundamental right** is not and should not be subject to waiver by a collective-bargaining agreement negotiated by a union." *Id*. at 749, italics in original, emphasis added.

> Leaving resolution of discrimination claims to persons unfamiliar with the congressional policies behind that statute could have undermined enforcement of **fundamental rights** Congress intended to protect. *Id*. at 750, emphasis added.

13. The Plaintiff has stated a claim of unconstitutional barriers to a fundamental right of access to the courts, and sought to vindicate a fundamental right under Title VII in the underlying lawsuit. The foregoing authority and documents allow no other conclusion.

Rational Basis is Not the Standard and Cannot Be Met in Any Event

14. The *Memorandum* cites controlling authority for the propositions that a "rational relationship" test is employed **only** if a practice does **not** burden a fundamental right and that if a classification does impact a fundamental right, it will be strictly scrutinized and upheld only if it is precisely tailored to further a compelling government interest. *Memorandum, p. 6.*

15. Because the *Memorandum* rests entirely upon the proposition that access to courts is not a fundamental right, or is not fundamental as to the Plaintiff in this case, the Court proceeds to a "rational basis" test and infers that efficiency is a sufficient purpose for the fees. This inference is not available, especially in the procedural context of Rule 12(b)(6).

16. First, efficiency is a purpose of e-filing and not a justification for unconscionable fees. They are simply not addressed in the *Memorandum*.

17. Second, efficiency is an end that cannot be used to justify an unconstitutional means of obtaining that end. For example, it would be highly efficient for each judge to summarily dismiss 50% of pending cases, or to limit litigants to a single page for each

filing. The goal of efficiency should not immunize these policies from invalidation in federal court.

18. Third, LexisNexis' charges are incurred for services that were already paid for by Karen McPeters to the Montgomery County District Clerk at the time that she paid the initial filing fee (Please see Affidavit of Margaret Montemayor – Exhibit 2);

19. Fourth, the rational basis test applies to evaluations of legislative enactments. This Court provides no authority for Judge Edwards to unilaterally skip the step of legislative enactment.

> We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. (citations omitted).
>
> *Romer v. Evans*, 517 U.S. 620, 631 (1996)

20. Fifth, the Legislature has already enacted fees and charges for access to the courts. The presumption is that the enactment comprises the extent of court costs. There is no attempt to interpret LexisNexis' charges as being within the scope of the legislative enactment.

The 2003 Order Does Not Provide Reasonable Alternatives

21. The *Memorandum* also relies upon an incorrect reading of the 2003 Order. (Please see the Order – Exhibit 3). In support of the argument that Defendants did not actually require Plaintiff to E-file and pay LexisNexis, the *Memorandum* explains that the 2003 Order provides two alternatives: a party may obtain leave of court to file conventionally, or may use the public terminal in the office of the District Clerk. *Memorandum, p. 8-9.*

22. The 2003 Order actually sets forth two "alternatives" in the paragraph quoted at p. 2 of the *Memorandum*—that "In short, the parties will be presented with two options. They may either: 1) become a subscriber….or 2) …the public terminal…" The 2003 Order does *not* provide for an option to file conventionally, except in specific cases of transmission errors and technical problems.

23. Inspection of the orders threatening a show cause hearing, and documents returned unfiled, when mailed to the Montgomery County District Clerk, will also shed some light on the issue of whether E-filing was and is required. (Please see, e.g., "Order on Failure to E-File" – Exhibit 4.)

24. Of course, there is also no evidence in the record of the 2003 Order having been filed in any case, or having been made accessible through LexisNexis, such that notice of any alternatives to E-filing was provided to anyone. Without discovery in this case, it is impossible to conclude that concealment of the 2003 Order was not "a policy in which litigants were not informed of the alternatives to E-filing" as the *Memorandum* suggests at page 9.

25. The problem of notice is shown in *Wadley v. Southern Railway Company v. Georgia*, 235 U.S. 651, 662-63, 35 S.Ct. 214, 59 L.Ed. 405 (1915):

> These cases do not proceed upon the idea that there is any want of power to prescribe penalties heavy enough to compel obedience to administrative orders, but they are all based upon the fundamental proposition that, under the Constitution, penalties cannot be collected if they operate to deter an interested party from testing the validity of legislative rates or orders legislative in their nature. Their legality is not apparent on the face of such orders, but depends upon a showing of extrinsic facts. A statute, therefore, which imposes heavy penalties for violation of commands of an unascertained quality is, in its nature, somewhat akin to an *ex post facto* law, since it punishes for an act done when the legality of the command has not been

> authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the part affected in a position where he himself must at his own risk, pass upon the question. He must either obey what may finally be held to be a void order or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality, the result inevitably would be that the [person] would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid.

The Local Terminal is Not a Reasonable Alternative

26. It is inconceivable that a terminal in the District Clerk's office is a reasonable substitute for filing by mail under the *Texas Rules of Civil Procedure*, especially for those individuals who do not reside in Conroe, Texas. It was certainly not a reasonable alternative for the Plaintiff who, along with her attorney, resides in San Antonio, Texas.

27. To require use of such a terminal as an alternative to unreasonable E-filing charges merely substitutes one barrier to access for another – driving to the Montgomery County Courthouse to file every pleading. Both barriers are far more significant than the inadequate law libraries, and inadequate access to those libraries, which were at issue in *Bounds.* (Please see attached document (Exhibit 5) showing 8,268 cases in Judge Edwards' court as of Feb. 7, 2011, since E-filing was initiated in 2000. A single terminal for use by up to 16,536 litigants, even over ten years, is not reasonable. Each litigant is or was affected by this barrier.)

The 2003 Straw Man

28. At page 2 of the *Memorandum*, the Court notes that Karen McPeters represented in her complaint that she did not see a copy of the 2003 Order until May 5, 2010. That statement is made at para. 31 of Plaintiff's Second Amended Complaint.

29. Mr. Mays' statement was mistaken. Upon review of his 2009 correspondence, he did indeed find a copy of the 2003 Order date- stamped as having been received on January 30, 2009. Counsel's statement was not an effort to mislead the Court, but the product of a faulty memory, for which counsel apologizes.

30. However, the issue of notice concerning the 2003 Order is interesting.

(a) The 2003 Order shows that it was entered as a minute entry in December 13, 2006, five months **before** Karen McPeters' employment discrimination lawsuit was filed (on May 18, 2007). Therefore, the 2003 Order is void because it was entered in the case without jurisdiction. (Please see McPeters' Hearing Brief No. 5 [Doc. 94]).

(b) The 2003 Order is not filed on-line. No litigant should be held to the terms of an unfiled order. Karen McPeters complained of Judge Edwards' attempt to hold her to the terms of an unfiled order. Karen McPeters complains of the Orders on Failure to E-File, based on the 2003 Order (Exhibit 4). An unfiled or void order violates Karen McPeters' due process rights under the Fourteenth Amendment to the Constitution.

How High Are the Charges?

31. The *Memorandum* also highlights a key question of fact. "While there may be circumstances in which charges could reach a level in which charges could reach a level that would violate the U.S. Constitution, Plaintiff has not alleged such circumstances here." *Memorandum, p. 10.*

32. Plaintiff respectfully notes that an insufficient allegation is better cured by amendment than by dismissal. This is especially true when a case is dismissed on grounds that do not appear in the motions filed by any defendant.

How High Must the Charges Be in Order to Cause Concern?

33. Karen McPeters also refers the Court to *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668, 86 S. Ct. 1079 (1966) in which the court held that a state poll tax of $1.50 violated the Equal Protection Clause of the Fourteenth Amendment. Because LexisNexis' filing charges are continuing, Karen McPeters has now paid $786.26 to-date to LexisNexis.

34. In this case, no defendant alleged that the level of charges is constitutional and, for that matter, no defendant alleged that the Plaintiff did not seek access to the courts to assert a fundamental right.

35. It is instructive to note, as does the *Memorandum* at page 2, that the 2003 Order promised "a minimal fee." In his 2001 article and again in 2010, Judge Edwards stated the cost as "a few cents per page." (Please see article attached – Exhibit 6.)(Please see Judge Edwards' Motion to Dismiss, p. 26 [Docket No. 56] – Exhibit 7.)

36. Judge Edwards **did not** set the charges in question. The actual charges by LexisNexis are hardly minimal and are an unreasonable barrier to access. It is one thing for a court to insist upon E-filing; it is quite another for a Texas county to give a non-U.S. foreign corporation the right to charge exorbitant fees, clearly not contemplated in any court order, as a condition of access to a state district court. And, we still do not know about the right of Montgomery County to review the charges.

Opportunity to Cure Omissions

37. In the *Memorandum*, the Court denied leave to file Plaintiff's Third Amended Complaint. Karen McPeters renews her request to file an amended complaint to address the issues raised in the *Memorandum*.

Access to Courts and §1983

38. "It is beyond dispute that the right of access to the courts is a fundamental right protected by the Constitution. … [I]nterference with or deprivation of the right of access to the courts is actionable under Sec.1983." *Graham v. National Collegiate Athletic Ass'n,* 804 F.2d 953, 959 (6th Cir. 1986).

39. "… [D]eprivation of materials necessary to afford reasonable access to the courts violates the Due Process Clause of the Fourteenth Amendment and … a federal court has jurisdiction of a claim for damages based on such deprivation." *Sigafus v. Brown,* 416 F.2d 105, 107 (7th Cir. 1969).

40. "Section 1983 protects all rights guaranteed by the Fourteenth Amendment. *Home Telephone & Telegraph Co. v. Los Angeles,* 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed. 510 (1913); *Findeisen v. North East Independent School District,* 749 F.2d 234 (5th Cir.1984)." *Matthias v. Bingley*, 906 F.2d 1047, 1051 (5th Cir. 1990).

41. It seems nigh unto superfluous to remind that Sec. 1983, in conjunction with its jurisdictional counterpart, 28 U.S.C. §1343(3), provides a federal civil remedy in federal court for violations, under color of state law, of the rights, privileges and immunities secured by the Constitution and laws of the United States. The statute extends protection to all rights guaranteed by the fourteenth amendment. *Home Tel. & Tel. Co. v. Los Angeles,* 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed. 510 (1913). Section 1983 provides an independent federal remedy "regardless of the availability of an adequate remedy under state law," *Brantley v. Surles,* 718 F.2d 1354, 1958 (5th Cir.1983), *citing Monroe v. Pape,* 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492 (1961), in which the Supreme Court stated:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not first be sought and refused before the federal one is involved.

> Accordingly, the fact that a state actor's acts may be remedied by recourse to state law does not negate the availability of the §1983 remedy, provided the victim alleges and proves a violation, under color of state law, of a federally protected right.
>
> *Findeisen v. North East Independent School Dist.*, 749 F.2d 234, 236-37, (5th Cir. 1984)

42. Each exhibit is incorporated herein by reference.

Relief Requested

43. Plaintiff Karen McPeters respectfully requests that the January 27, 2011 *Memorandum and Order* be withdrawn, that her §1983 claims, her motion to certify a class, motion for extension of time to join other class members and her claims for injunctive relief be reinstated, that her RICO claims be severed, and that she be permitted to pursue her state court claims, or, in the alternative, that the other grounds be addressed, with leave to amend granted for any matter that might be cured by pleading additional facts.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that the foregoing requested relief be granted.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that I conferred with opposing counsel on February 14, 2011 by sending each an email copy and requesting their input concerning opposition. All counsel for Defendants were (~~were not~~) opposed to this Motion for Reconsideration. The Motion is presented to the court for its consideration.

CERTIFICATE OF SERVICE

I certify that on February 15, 2011, after filing this motion and proposed Order, each counsel for Defendants will be served via the court's ECF system.

R. L. Mays, Jr.

Robert L. Mays, Jr.