Volume 54 | Number 5 Article 19

6-1-1976

Employment Discrimination -- New Limitations on Appellate Review of Teacher Employment Discrimination Suits

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Employment Discrimination — New Limitations on Appellate Review of Teacher Employment Discrimination Suits

Discrimination in the hiring and dismissal of teachers has been a perplexing aspect of school desegregation. The Fourth Circuit Court of Appeals has taken an active role in confronting this problem; however, in *Jones v. Pitt County Board of Education*[1] the court departed from this pattern of intervention. Because of the restrictions it imposed upon itself in reviewing the district court's findings, it appears that the court intends to place the teacher employment discrimination issue primarily within the discretion of the district courts.

The plaintiff in *Jones*, a black school teacher, alleged that the county board of education was racially motivated in its refusal to renew her contract. Mrs. Jones had been a seventh and eighth grade teacher in an all-black school for ten years. In the implementation of a judicially mandated school desegregation plan she was shifted to a fifth grade classroom in a previously all-white school. Pursuant to the recommendation of her principal, and requests of both the local advisory council and the county superintendent that she not be reemployed, the county board decided not to renew her contract. Mrs. Jones sued for damages and equitable relief under 42 U.S.C. section 1983[2] alleging a denial of equal protection.[3]

The district court concluded that the board of education had proved by clear and convincing evidence[4] that Mrs. Jones's professional incompetence and not racial discrimination was the reason for her nonretention. Plaintiff appealed claiming that the evidence did not support this finding of fact.[5] She argued that the principal's written

1. 528 F.2d 414 (4th Cir. 1975).

2. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . 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." 42 U.S.C. § 1983 (1970).

3. The plaintiff also raised a due process issue in the trial but did not raise it on appeal. Though not in issue, the court indicated that hearings before the advisory council and before the board of education with counsel present at both were sufficient under the due process clause. 528 F.2d at 415-16.

4. *See* text accompanying notes 12-14 *infra*.

5. If the court had been so inclined it could have focused upon the conclusion of no racial discrimination and treated it as a finding of mixed fact and law. The finding of no racial discrimination is a conclusory finding much like a finding of no negli-

evaluations did not support his recommendation that her contract not be renewed.

In affirming, the court of appeals displayed great deference to the lower court's finding. First, the court refused to consider plaintiff's crucial evidence. Terming the principal's written evaluations and the county's hiring practices[6] "minutia of the evidence," the court reasoned that they could not be reviewed under the "clearly erroneous" standard of appellate review[7] since this test prohibits the appellate court from conducting a trial *de novo*. Next, the court stated that the "clearly erroneous" standard must be applied without considering defendant's burden of proving its case by "clear and convincing" evidence.[8] In a vigorous dissent Judge Craven contended that the whole record must be examined in applying the "clearly erroneous" rule and that the rule must always be applied in light of the standard of proof. He concluded that, in view of the whole record, the board of education had failed to sustain its burden of proving the plaintiff's incompetence by "clear and convincing" evidence.[9]

Jones resulted from the confluence of two streams of judicial decisions. One of these was the litigation over school desegregation that followed *Brown v. Board of Education*.[10] As judicially mandated school desegregation was implemented, it became apparent that black teachers might become casualties of the process.[11] Because of the frequent recurrence of this problem, the Fourth Circuit in *Chambers v.*

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gence. If the finding of no discrimination is determined to be a finding of mixed fact and law, First Nat'l Bank v. Hartford, 273 U.S. 548, 552 (1927), seems to make the finding freely reviewable without regard to the clearly erroneous rule. *See also* 5A J. MOORE, FEDERAL PRACTICE ¶ 52.05[1] (2d ed. 1975); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2589 (1971) [hereinafter cited as WRIGHT AND MILLER]. *But cf.* St. Louis v. Rutz, 138 U.S. 226, 241-42 (1891); Famous Knitwear Corp. v. Drug Fair, Inc., 493 F.2d 251, 253 (4th Cir. 1974) (where the court said some questions of fact and law were freely reviewable while others were not).

6. The county's new hire ratio was 6 to 1 in favor of whites. Thus, the ultimate result of the 50-50 non-renewal rate was discriminatory. 528 F.2d 416, 420 (dissenting opinion).

7. FED. R. CIV. P. 52(a) provides in part that: "In all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon . . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." For the history of Rule 52(a), see Clark & Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190 (1937).

8. 528 F.2d at 418.

9. *Id.* at 420.

10. 347 U.S. 483 (1954).

11. *See, e.g.*, Wheeler v. Durham City Bd. of Educ., 346 F.2d 768, 773 (4th Cir. 1965).

Board of Education[12] fashioned a remedial mechanism for exposing this form of racial discrimination. Relying on Supreme Court cases[13] dealing with jury discrimination in criminal trials, *Chambers* held that when a history of segregation in the school system was ended only by judicial decree and there was a sudden disproportionate reduction in the number of black teachers, the school board had the burden of proving the absence of racial discrimination by clear and convincing evidence.[14]

This "clear and convincing" standard of proof has remained nebulous in teacher employment discrimination cases. The Fourth Circuit has defined the standard as an intermediate position between "a preponderance of the evidence" and "beyond a reasonable doubt."[15] *Chambers* indicates that the county school superintendent's assertions of personal preference are insufficient to sustain the burden.[16] On the other hand, *Williams v. Board of Education*[17] held that being late for the start of the school year, being late with reports, and having a dispute over corporal punishment was sufficient to sustain the board's burden of persuasion. Other cases indicate that the court is inclined to accept the general observations of the teacher's superiors.[18] Although school systems are supposed to prove their cases by clear and convincing evidence, the court of appeals has generally accepted much weaker proof in teacher employment discrimination cases than it has in other employment discrimination cases.[19]

The second stream of judicial decisions influencing *Jones* involves the interpretation of rule 52(a) of the Federal Rules of Civil Proce-

12. 364 F.2d 189 (4th Cir. 1966).

13. *See, e.g.*, Eubanks v. Louisiana, 356 U.S. 584 (1958); Reece v. Georgia, 350 U.S. 85 (1955); Norris v. Alabama, 294 U.S. 587 (1935).

14. 364 F.2d at 192. In Keyes v. School District No. 1, 413 U.S. 189, 209 (1973), the Supreme Court cited *Chambers* approvingly and held that racial discrimination must not play any part in the board's actions. To determine when to apply *Chambers*, see, *e.g.*, North Carolina Teachers Ass'n v. Asheboro City Bd. of Educ., 393 F.2d 736 (4th Cir. 1968); Wall v. Stanley County Bd. of Educ., 378 F.2d 275 (4th Cir. 1967). One line of teacher employment discrimination cases deals with the National Teachers Examination. *See, e.g.*, Walston v. County School Bd., 492 F.2d 919 (4th Cir. 1974); United States v. Chesterfield County School Dist., 484 F.2d 70 (4th Cir. 1973).

15. Hobson v. Eaton, 399 F.2d 781, 784 n.2 (6th Cir. 1968), *quoting* Cross v. Ledford, 161 Ohio St. 469, 120 N.E.2d 118. *Hobson* also distinguished between the "clear and convincing" standard and the "clear, unequivocal, and convincing" standard.

16. 364 F.2d at 191.

17. 490 F.2d 1231 (4th Cir. 1974).

18. *See, e.g.*, Vance v. Chester County Bd. of School Trustees, 504 F.2d 820 (4th Cir. 1974).

19. *Compare* cases cited in notes 16-18 *supra with* Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See also* Moody v. Albemarle Paper Co., 422 U.S. 405 (1975); Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

dure. The classic statement[20] of the "clearly erroneous" test of rule 52(a) is in *United States v. United States Gypsum Co.*:[21] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[22] A simple disagreement with the result or a preference for a different interpretation of the facts does not justify reversing the lower court.[23]

When reviewing cases that vary the standard of proof, such as cases that apply the *Chambers* rationale, the appellate court must determine how the standard of proof applied by the trial court will influence its review under the clearly erroneous test.[24] In *Baumgartner v. United States*[25] the Supreme Court held that in denaturalization cases, in which the government must prove its case by "clear, unequivocal, and convincing" evidence, it would review the findings in light of that standard of proof.[26] Also, in *Mortensen v. United States*[27] the Court held that in appeals of criminal convictions, in which the burden is "beyond a reasonable doubt," the appellate court must consider this standard in its review of the conviction. Since the appellate court must take into account the "beyond a reasonable doubt" standard and the "clear, unequivocal, and convincing" standard, it logically should also consider the "clear and convincing" standard in its review. Indeed, in the past the Fourth Circuit had claimed to do so.[28]

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20. Some courts have contended that if there is substantial evidence to support the judge's findings the findings cannot be "clearly erroneous," but that position has been generally abandoned. *See* WRIGHT AND MILLER, *supra* note 5, § 2585, at 735.

21. 333 U.S. 364 (1948).

22. *Id.* at 395.

23. *See* Guzman v. Pichirilo, 369 U.S. 698 (1962); United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950); Grace Girdler, 74 U.S. (7 Wall.) 196 (1868). *See also* Darter v. Greenville Community Hotel Corp., 301 F.2d 70 (4th Cir. 1962); Jersey Ins. Co. v. Heffron, 242 F.2d 136 (4th Cir. 1957).

24. For a general discussion of the topic see Note, *Appellate Review in the Federal Courts of Findings Requiring More Than a Preponderance of the Evidence*, 60 HARV. L. REV. 111 (1946).

25. 322 U.S. 665, 670 (1944). *Accord*, Nowak v. United States, 356 U.S. 660 (1958).

26. In *Jones* the majority used *Hobson* (*see* text accompanying note 15 *supra*) in an apparent attempt to distinguish the "clear and convincing" burden from the "clear, unequivocal, and convincing" burden.

27. 322 U.S. 369, 374 (1944). *But cf.* Woodby v. Immigration and Naturalization Serv., 385 U.S. 276, 282 (1966).

28. Darden v. Darden, 152 F.2d 208, 209 (4th Cir. 1945), and Holt v. Quaker State Oil Ref. Co., 67 F.2d 170, 171 (4th Cir. 1933), though not the only cases, provide the most straightforward statements that the "clearly erroneous" review must take into account the burden of proving by "clear and convincing" evidence.

Jones is unusual[29] in that the court of appeals expressly refused to consider the clear and convincing standard of proof when reviewing the case, even though it displayed no inclination to abandon the *Chambers* principle of increasing the standard of proof when there has been a history of segregation in the school district that persisted after *Brown*. Furthermore, the court applied *Chambers* without questioning whether there had been a rapid and disproportionate reduction in the number of black teachers.[30] It is therefore perplexing that the court in *Jones* would refuse to consider the standard of proof imposed at the trial stage when applying the clearly erroneous test while continuing to display such strong support for *Chambers*.

The majority[31] relied on *Oburn v. Shapp*,[32] which held that the court would not consider the "compelling state interest" test in reviewing a district court's denial of a preliminary injunction.[33] *Oburn*, however, provides only weak support for the majority's position. First, there is a difference between the "compelling state interest" criterion at issue in *Oburn* and the "clear and convincing" standard of proof in *Jones*. Secondly, *Oburn* was an appeal from the denial of a preliminary injunction, not an appeal from a final judgment; therefore, the question before the court was whether the trial court had abused its discretion, not whether the trial court was clearly erroneous in its findings of fact.[34]

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29. *See* notes 24, 26 & 28 *supra*.

30. One criterion for the application of *Chambers* had been a large and rapid reduction in the proportion of black teachers. *Williams* is another example, though not the only one, of the court's application of *Chambers* without any question as to the proportion of black teachers not retained. Perhaps the court has been influenced by *Keyes* which made no comparable requirement (however, *Keyes* did not deal directly with teacher employment discrimination). *Jones* clarifies the court's stance in applying *Chambers*. In Morton v. Charles County Bd. of Educ., 520 F.2d 871 (4th Cir. 1975), the court had refused to apply the *Chambers* approach where the school system, though segregated at the time of the *Brown* decision, had moved immediately to desegregate.

31. The dissent in *Jones* relied on two cases, Esso Standard Oil Co. v. Sun Oil Co., 229 F.2d 37 (D.C. Cir. 1956), *cert. denied*, 351 U.S. 973 (1956), and Soccodato v. Dulles, 226 F.2d 243 (D.C. Cir. 1955), that held that the clear, unequivocal, and convincing standard of proof must be considered in applying the clearly erroneous test. The dissent reasoned that since the court was obliged to consider the clear, unequivocal, and convincing standard in applying the clearly erroneous test, it should also consider the clear and convincing standard in applying the same test. 528 F.2d at 419. The majority distinguished both the dissent's cases and the denaturalization cases (*see* notes 24, 25, and 27 *supra*) by differentiating the clear and convincing standard used in *Jones* from the clear, unequivocal, and convincing standard used in the other cases. *See* note 15 *supra*.

32. 521 F.2d 142 (3d Cir. 1975).

33. *Id.* at 149 n.19.

34. *Id.* at 147.

In *Chambers* the court justified its original reallocation of the burden of proof[35] by the fact that the school board had the power to produce the facts.[36] This reasoning obviously supports the court's shifting to the school board the burden of coming forward with the evidence. The logical connection between determining who has access to the facts and imposing the "clear and convincing" standard of proof is less clear. Since only one party has access to most of the relevant facts, the adversary process by itself will not insure adequate fact production. Therefore, the court can assure itself of adequate fact production by imposing the burden of producing the evidence on the party having access to the facts *and* increasing the standard of proof. While the court has not abandoned the *Chambers* approach, *Jones* implies that, in the future, district courts will have exclusive authority in applying the "clear and convincing" standard. So far as appellate review is concerned, however, the court has settled for half a loaf. By tacitly retaining oversight of the shifting of the burden of coming forward with the evidence, it can be assured of *some* fact production, but by abandoning further examination of the use of the clear and convincing standard of proof, the court can no longer assure itself of *adequate* fact production.

The second significant aspect of *Jones* is the court's refusal to examine the evidence fully. The Supreme Court has cautioned that "[i]n applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*."[37] The Court, however, has also stated that in its review the appellate court must consider the whole of the evidence.[38] In *American Football League v. National Football League* the Fourth Circuit focused upon the latter requirement when it stated that it had been obliged to review all the evidence.[39]

The refusal of the *Jones* court to consider the "minutia of the evidence" in its review is the court's most radical departure from accepted authority. The majority based its refusal on the Supreme

35. See C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE §§ 336-41 (2d ed. 1972), for a discussion of burden of proof.

36. 364 F.2d at 192.

37. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969).

38. *See, e.g.*, United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Garsed v. Beall, 92 U.S. 684, 695 (1875). WRIGHT AND MILLER, *supra* note 5, § 2585, at 731, suggests that the prohibition against a trial *de novo* does not prevent examining all the evidence.

39. 323 F.2d 124, 134 (4th Cir. 1963).

Court's prohibition against conducting a *de novo* trial.[40] The dissent, on the other hand, emphasized that the Supreme Court required appellate courts to consider the record as a whole[41] even when reviewing decisions of administrative agencies, which had traditionally been shown more deference than those of trial courts. Judge Craven contended that the court must therefore consider the minutia of the evidence in order to review the record as a whole.[42] Such an examination in *Jones* reveals that the objective evaluation forms filled out by the principal tended to dispute his recommendation not to retain plaintiff. Thus, the majority's manipulation of the trial *de novo* concept not only forbids consideration of critical evidence but also violates the policy adopted by the court in *American Football League* of reviewing all the evidence.[43]

Although the court's approach has not been expressly prohibited[44] by the Supreme Court, it does seem to violate the policy for a review of the whole record. If the court can use the "minutia of the evidence" phrase to close off its consideration of proof that conflicts with the trial judge's findings of fact, then appellate review will be nothing more than a formal expression of the whims of the appellate court. The clearly erroneous rule, while it does limit appellate review of a trial court's findings of fact, should not be used to make the right to review meaningless. The Supreme Court once stated: "The right of appeal . . . is a substantial right, and not a shadow. . . . [W]e may not abdicate the performance of the duty which the law imposes upon us by declining to give our own judicial effect."[45] The *Jones* court's refusal to review the whole record is that kind of abdication of duty.

Perhaps *Jones* is merely the court's response to a questionable lower court decision that it desired to affirm. On the other hand, the case suggests a more basic decision by the court to restrict its review under the clearly erroneous test. If *Jones* is followed, appeals by

40. 528 F.2d at 418, *quoting* Zenith Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969).

41. 528 F.2d at 419-20. The dissent relied on Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

42. 528 F.2d at 419-20.

43. *See* authorities cited notes 38 & 39 *supra.*

44. If the court were inclined to review these cases more closely, it could use the "constitutional fact" doctrine to free its review from the "clearly erroneous" rule. *See* Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 121 (1954); Guzick v. Drebus, 431 F.2d 594, 599 (6th Cir. 1970); Strong, *Dilemmic Aspects of the Doctrine of "Constitutional Fact,"* 47 N.C.L. REV. 311 (1969); Strong, *The Persistent Doctrine of "Constitutional Fact,"* 46 N.C.L. REV. 223 (1968).

45. The Ariadne, 80 U.S. (13 Wall.) 475, 479 (1871).

teachers from adverse district court decisions will be virtually meaningless. The teacher's primary weapon has been the "clear and convincing" standard of proof imposed on the local school boards. On review, that standard will be ignored. Furthermore, the court can manipulate the "minutia of the evidence" phrase to avoid meaningful review of the lower court's findings. The potential effect of *Jones*, however, extends beyond the teacher employment discrimination issue. In the past, appellate courts have delved into intricate evidence in other kinds of employment discrimination cases to expose underlying discrimination. The "minutia of the evidence" phrase can be easily manipulated by a busy appellate court to avoid such time-consuming analysis. If *Jones* represents the beginning of a trend in the extent of appellate review by the Fourth Circuit, the right of appellate review may become no more than a shadow of what it once was.

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Evidence—A New Approach to Character Evidence in North Carolina

In 1904 Professor Wigmore stated that although the Anglo-American rules of evidence had "taken some curious twistings in the course of their development," none was more curious than the rule limiting the admissibility of character evidence only to that of the general community-reputation of the person in question.[1] This rule has generated continuous debate by legal theoreticians and scholars, but the case law has remained unchanged for almost seventy-five years. *State v. Stegmann*[2] is another curious twist in this area of the law; the North Carolina Supreme Court departed from precedent and the traditional rule and held admissible testimony about the character and reputation of the

1. III J. WIGMORE, EVIDENCE § 1986 (1st ed. 1904). An analysis of this issue must first differentiate between the terms "character" and "reputation." "Character" refers to the actual qualities and characteristics of an individual, while "reputation" is the esteem in which a person is held by others. 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 102 (Brandis rev. 1973). As the court stated in State v. Ussery, 118 N.C. 1177, 1180, 24 S.E. 414, 415 (1896), "Some critic has said that character lives in a man—reputation outside of him." Unfortunately, judicial decisions have tended to use the terms interchangeably and thus obscure the distinction. V J. WIGMORE, EVIDENCE § 1608 (3d ed. 1940).

2. 286 N.C. 638, 213 S.E.2d 262 (1975).