

FILED
United States Court of Appeals
Tenth Circuit

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

JAN 20 1988

ROBERT L. HOECKER
Clerk

THOMAS L. CANNIZZO and
REGINALD FRANZEN,

Plaintiffs-Appellees,

vs.

UNITED STATES POSTAL SERVICE,

Defendant,

WALLACE C. BOLEN and NATHAN
TOLAR, in their individual
capacities,

Defendants-Appellants.

Nos. 85-2878, 85-2879
(D.C. Nos. 84-2195, 84-2196)
(D. Kansas)

ORDER AND JUDGMENT

Before **LOGAN, MOORE, and ANDERSON**, Circuit Judges.

Plaintiffs/appellees filed this action asserting, among other contentions, a Bivens¹ claim against the named defendants for the alleged deprivation of the plaintiffs' due process rights in connection with their employment. The defendants claimed immunity and moved for summary judgment grounded on Harlow v. Fitzgerald, 457 U.S. 800 (1982). The motion was denied, and the subsequent appeal is properly before us as a final judgment. Mitchell v. Forsyth, 472 U.S. ___, 105 S. Ct. 2806 (1985). We conclude that

¹Bivens v. Six Unknown Federal Agents, 403 U.S. 388 (1971).

because the plaintiffs could not assert an unquestionable right of access to the mails, they had no protected property interest to claim; accordingly, the defendants were entitled to a defense of qualified immunity. We reverse.

Plaintiffs were employed by two individuals who had a contract with the Postal Service to deliver mail. As a part of their employment, plaintiffs were required to carry identification badges issued by the Service. These badges and access to the mail were necessary to the performance of plaintiffs' jobs.

Upon separate occasions, defendants contacted plaintiffs' employers claiming plaintiffs had performed poorly in violation of the contracts between the employers and the Service. Without discussing the alleged infractions with the plaintiffs, the defendants denied plaintiffs further access to the mails and ordered the employers to retrieve the identification badges. Plaintiffs alleged that they lost their jobs as a consequence of defendants' actions.

Plaintiffs originally filed this case against the Postal Service and the named defendants in their official and individual capacities. The trial court dismissed the claims against the Service and against the named defendants in their official capacities. Nevertheless, in reliance upon Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), and Perry v. Sindermann, 408 U.S. 593 (1972), the court concluded defendants were not entitled to assert a Harlow defense in their individual capacities because they should have known plaintiffs had a reasonable expectation of a continued interest in the badges.

Defendants appeal that ruling claiming the plaintiffs' right to expect continued access to the mails is not settled; therefore, Harlow provides the basis for their claim of immunity. Since the complaints filed here were clearly grounded upon the defendants' actions of revoking the badges and denial of access to the mails, the defendants' contention is critical to resolution of the issues before us.

The trial court's judgment can be affirmed only if it can be properly concluded plaintiffs' assertion of a right to expect continuation of their employment is correct. In Roth, the Supreme Court held that a person's right to assert a constitutionally protected property interest is dependent upon his ability to demonstrate the interest relied upon was more than a "unilateral expectation." Roth, 408 U.S. at 577. Plainly put, whatever plaintiffs' expectations were for continued employment, there had to be a factual justification for those expectations before plaintiffs can assert a constitutionally protected property interest in their jobs. Moreover, under Harlow, defendants are entitled to assert an immunity from liability unless their conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818.

Thus, in this instance, the nature of plaintiffs' right of access to the mails cuts two ways. First, the clarity of that right is a condition precedent to their ability to assert a protected property interest in their jobs. Second, unless plaintiffs can demonstrate they had an unquestionable right of

access to the mails, defendants are entitled to the Harlow defense.

The right of the Postal Service, acting through the named defendants, to deny persons access to the mails is uncontested. Thus, whatever right of access plaintiffs had was clearly defeasible. The question then becomes whether that right of access was more than a "unilateral expectation," or put precisely, whether plaintiffs' rights were such that they could not have been denied without a hearing.

The defendants argue that this is an unresolved issue, and plaintiffs cite no authority to the contrary. Defendants liken this case to Cafeteria and Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886 (1961), a case in which the Supreme Court held the Secretary of Defense could compel an employee of a contractor to surrender an identification badge even though the surrender led to the loss of employment. Moreover, the Court held, failure to grant the employee a predeprivation hearing did not violate the employee's due process rights. After establishing the validity of the power to revoke the employee's badge, the Court considered the effect of summary revocation and concluded where a private interest is subject to the "Executive's plenary power, it has traditionally been held that notice and a hearing are not constitutionally required." Cafeteria Workers, 367 U.S. at 895.

Whether the Fifth Amendment would mandate a different result when the rights of the plaintiffs are concerned is not the point for us to decide, however. Neither are we concerned about whether

the Postal Service properly terminated the plaintiffs' right of access. What we are concerned about is whether the defendants are personally liable for their acts. In that light, even if we give plaintiffs the benefit of the doubt that their conduct did not justify denial of access to the mails, we nevertheless must conclude their right to process other than what they received is problematic.

Translating this conclusion into the Roth and Harlow parameters, we hold that plaintiffs had no reasonable expectation for continued access to the mails that could be regarded a protected right in property. Moreover, although the issue is unresolved, it appears from Cafeteria Workers that the Postal Service can summarily deny employees of contractors access to the mails without a guaranteed right to predenial notice and a hearing.² Therefore, plaintiffs had no clearly established due process rights of which the defendants could be expected to have known. Accordingly, defendants are entitled to assert qualified immunity to defend against claims of their personal liability.

The trial court should have granted summary judgment to the defendants. The judgment of the trial court is **REVERSED**.

Entered for the Court

John P. Moore
Circuit Judge

²Our inability to read Cafeteria Workers in the same way underscores the problematic nature of plaintiffs' rights and justifies application of Harlow.

Nos. 85-2878, 85-2879, CANNIZZO and FRANZEN v. UNITED STATES POSTAL SERVICE, et al.

LOGAN, Circuit Judge, dissenting:

I do not read Cafeteria and Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886 (1961), as holding that the postal service can summarily deny these plaintiffs access to the mails without violating the Constitution. Even on this incomplete record,¹ Cafeteria Workers is distinguishable in at least two critical respects. First, in Cafeteria Workers, there was no law, rule or contract that the employee could be dismissed only for specified causes and after delineated procedures had been followed. Here, in contrast, plaintiffs point to § 19-125.7 of the Postal Contracting Manual, which provides that no employee of a mail contractor shall be denied access to the mail (or required to return an employee identification card) except for specified reasons, after a decision by the Regional General Manager and advance notice of the decision with an opportunity to submit a response. Plaintiffs assert that these procedures were not followed and that they lost their jobs as a result. Cf. Roman v. United States Postal Service, 821 F.2d 382, 386 (7th Cir. 1987) (postal service employees have property interest, and thus due process rights, by virtue of collective bargaining agreement between postal service and union).

Second, Cafeteria Workers involved the operation of a military base, a government function to which the courts often

¹ This appeal is taken from a denial of summary judgment, based on a claim of qualified immunity. See Mitchell v. Forsyth, 472 U.S. 511, 524-30 (1985).

have accorded particular deference. As the Court in Cafeteria Workers pointed out, "[i]n that proprietary military capacity, the federal government . . . has traditionally exercised unfettered control." 367 F.2d at 846. See also Serrano Medina v. United States, 709 F.2d 104, 107 (1st Cir. 1983) (citing Cafeteria Workers to support view that courts accord the military significant autonomy). The instant case involves operation of a mail truck, not the national security concerns attending permission to enter a military base as in Cafeteria Workers. Thus, Cafeteria Workers does not, in my view, control here.

While the postal service might not be required constitutionally to give mail contractor employees such rights, it appears to have done so in this case. Having adopted rules and regulations which in effect assure that access will not be denied or badges lifted without notice and an opportunity to be heard, it has created a "property" interest recognizable under Perry v. Sindermann, 408 U.S. 593 (1972), and Board of Regents v. Roth, 408 U.S. 564 (1972). These individual defendants presumably have knowledge of the postal regulations. I therefore agree with the analysis in the district court's opinion and would affirm its denial of summary judgment.