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Constitutional Law - Prohibition of Discrimination Through Regulation of Businesses - Massachusetts Commission Against Discrimination v. Colangelo, 182 N.E.2d 595 (Mass. 1962)

DePaul College of Law

CONSTITUTIONAL LAW–PROHIBITION OF DISCRIMINATION THROUGH REGULATION OF BUSINESSES

The defendant, owner of a 120 unit apartment building which was not publicly financed, refused to rent apartments to Negroes. Massachusetts has a statute which expressly prohibits discrimination in such multi-unit developments.[1] It was under this statute that the Negro plaintiff complained of the defendant's actions; and under which the Massachusetts Commission Against Discrimination brought petition to the Supreme Judicial Court of that state to have its order to desist from further discrimination enforced. The defendant's apartment building was within the language of the statute, even though it was not publicly assisted. The Supreme Judicial Court of Massachusetts enforced the order of the Massachusetts Commission and held that a statute prohibiting discrimination in housing is within the authorized police powers of the state and therefore constitutional. *Massachusetts Commission Against Discrimination v. Colangelo,* 182 N.E. 2d 595 (Mass. 1962).

In *Burks v. Poppy Construction Company*,[2] a prior case cited in the *Massachusetts Commission* case, a Negro brought suit under California's relatively new Unruh Civil Rights Act, which prohibits discrimination in "all business establishments of every kind whatsoever,"[3] and the Hawkins Act, which prohibits discrimination in publicly assisted housing.[4] The facts clearly established that the plaintiff was discriminated against because of his color. The defendants had advertised houses for a set price, and even though the plaintiff had shown that he was ready, willing and able to purchase such a house, the defendants refused to sell a house because of his race. The Supreme Court of California held that the statutes involved in the *Burks* case were constitutional and reversed in favor of the plaintiff. The defendants in this case contended that the statutes involved were unconstitutional in that the Unruh "business establishments" Act was violative of the due process clause of the federal constitution, and in that the Hawkins "publicly assisted housing" Act was violative of the equal protection clause of the fourteenth amendment. The Supreme Court held that there was no taking of property in any sense, and that a

[1] MASS. GEN. LAWS C. 151B, § 6, as amended through stat. 1957 C.426, §§ 4, 5; *also see* stat. 1961, C. 570.

[2] 57 Cal.2d 503, 370 P.2d 313, 20 Cal. Rept. 609 (1962).

[3] DEERING'S CALIFORNIA CODES (1961), CIVIL CODE § 52. The Unruh Act provides for actual damages plus $250 for each offense of the statute.

[4] DEERING'S CALIFORNIA CODES (1961), HEALTH AND SAFETY CODE §§ 35700–35741 added in 1959. At § 35730, the Act provides for damages caused by violations of not less than $500 among other equitable remedies.

statute cannot be striken merely because it now prohibits discrimination in fields of enterprise hitherto uneffected.[5]

In the *Massachusetts Commission* case, the defendants were sued under a statute not unlike California's Unruh Act. The defendants in Massachusetts raised similar defenses, namely: 1) due process, 2) right of acquiring, possessing and protecting property, 3) right to contract, 4) freedom of association, and 5) freedom from coercion. As to the due process argument, the Supreme Judicial Court stated that the defendants made no allegation that if the Negro plaintiff were allowed to rent one of their apartments, the value of their property would decrease. Concerning defendants' right of acquiring, possessing and protecting property, their right to contract and freedom from coercion, the Court held that even though the case involved private property and private dealings, the state, under its police powers, had the right to regulate such businesses. The Court also disallowed the defendants' argument that the tenants' rights of freedom of association had been violated. On this point, the Court mentioned that a 120 unit building is involved and no such valid objection could therefore be raised. The average person does not know 120 of his neighbors, let alone associate with them.

Only when we compare the *Burks* and *Massachusetts Commission* cases can we see the full scope of the *Burks* decision. In *Burks* the Court merely said that there can be no racial discrimination in publicly assisted business establishments. Now, in the *Massachusetts Commission* case, the Court has expanded the interpretation of the "business establishments" concept by saying: "The lack of public assistance to respondent's apartment house is not of crucial significance."[6] The Massachusetts Court then cited *Burks v. Poppy* as authority for this rule. Therefore, from the use of the *Burks* decision by the Massachusetts Court we have a very strong argument that the "business establishments" type statutes can be held constitutional and valid *even though no public assistance is involved.*

Previous to such type statutes, discrimination was accomplished without legal prohibition, and even publicly-assisted housing developers could discriminate.[7] In order to insure fulfillment of the legislative intent[8] in

[5] The California Supreme Court considered the 5 to 4 Washington Supreme Court decision of O'Meara v. Washington State Board, 58 W. 2d 793, 365 P. 2d 1 (1961), and decided that it was not binding. In that case, the Court struck a Washington statute concerning discrimination since it created a classification of citizens some of which could and others which could not discriminate and therefore no equal protection of the laws.

[6] 182 N.E. 2d 595, 602 (Mass. 1962).

[7] Dorsey v. Stuyvesant, 299 N.Y. 512, 87 N.E. 2d 541 (1949).

[8] For an excellent discussion and analysis of the legislative intent in regard to this point, see dissenting opinion in *Dorsey* case, *id.* at 31, 87 N.E. 2d at 551.

assisting housing developments, steps were taken to prevent further discrimination in any public accommodation. For example, the courts have extended the various statutes prohibiting discrimination in publicly assisted housing to the extent of even including projects with F.H.A. insured loans[9] as well as projects whose land was acquired under eminent domain, land grants and tax exemptions[10] as being publicly assisted. Therefore, we see the law has gone from no prohibition of discrimination, then to prohibition in publicly assisted developments, and now to the fullest interpretation of what is publicly assisted. Both California and Massachusetts statutes expressly or impliedly exempted privately-owned, single-family dwellings.[11] Such type statutes have been enacted in Colorado,[12] Oregon,[13] Connecticut,[14] Massachusetts[15] and California.[16] It is easy to see that this type of legislation is only to be found in the minority of states, but all indications are that it has a growing influence.

In Illinois, as exemplary of the majority, the only presently valid statute[17] prohibiting discrimination has been both vaguely and narrowly interpreted. The statute's language does not cover public or private living accommodations other than transient dwellings such as hotels, inns and other places of public accommodation and amusement.[18] Discrimination in Illinois, besides the aforementioned instances and the restrictve covenant cases now outlawed by *Shelly v. Kraemer*,[19] is legal. The state of Illinois, as well as the majority of other states, has no laws prohibiting housing discrimination similar to that found in the *Burks* and *Massachusetts Commission* cases. Especially in housing has discrimination been held legal under Illnois law.[20] In 1954, the Supreme Court of Illinois decided *Kankakee Housing Authority v. Spurlock*,[21] a case involving an eminent domain action for land to be used for a publicly assisted housing development. The Court held that when:

[9] Levitt v. Division against Discrimination, 56 N.J. Super. 542, 153 A.2d 700 (1959).

[10] Saks and Rabkin, *Racial and Religious Discrimination in Housing: A Report of Legal Progress*, 45 IOWA L. REV. 488 (1960).

[11] McGhee and Ginger, *The House I Live In*, 46 CORNELL L.Q. 194 (1960-61).

[12] 148 COLO. LAWS, § 5, (1959).

[13] 584 ORE. LAWS, (1959).

[14] CONN. GEN. STAT. § 53-35, (1958) amended Conn. Laws 1959, Substitute Bill No. 2484.

[15] MASS. GEN. LAWS. C. 151B, § 6, as amended through stat. 1957 C.426, §§ 4, 5; also see stat. 1961, C. 570.

[16] DEERING'S CALIFORNIA CODES (1961), Civil Code § 52.

[17] 38 ILL. REV. STAT. ch. 38, § 13-1 (1962).

[18] *Ibid.*

[19] 334 U.S. 1 (1948).

[20] Kankakee Housing Authority v. Spurlock, 3 Ill. 2d 277, 120 N.E. 2d 561 (1954).

[21] *Ibid.*

analyzed in its entirety . . . the whole question of occupancy by race was injected into . . . [the] housing program by the requirement of the Federal Housing Authority.[22]

The rationale of the majority of states not having the Unruh-type statute has been cognizantly expressed in Justice Kirks' dissent in the *Massachusetts Commission* case. Justice Kirks expressed his understanding that, although the prohibition of housing discrimination is a laudable undertaking, it cannot be rashly accomplished. Property rights are still the basis of our society. Speaking of the Massachusetts statute involved in the *Massachusetts Commission* case, Justice Kirks said:

I firmly believe that such a deep invasion of rights in purely privately owned property for residence purposes is repugnant to, and cannot stand in conflict with, the 'natural, essential, and inalienable rights . . . of acquiring, possessing, and protecting property.[23]

The inherent controversy is rooted in the fact that the chief aim of all civil rights statutes is to protect the equality under the law guaranteed by the federal constitution,[24] even though such protection can be accomplished only at the expense of private property rights.

In both the *Burks* case and the *Massachusetts Commission* case the issue was not the discrimination by the individual defendant against the Negro plaintiff, for the fourteenth amendment is not a guarantee against individual discrimination.[25] The fourteenth amendment applies only to the states which, in turn, cannot regulate or compel its citizens not to discriminate.[26] The states, however, have the constitutional right to regulate the businesses carried on within its borders, and hence, we see that the validity of the Unruh Act-type statutes flows from the fact that this type of statute only purports to regulate businesses, not individuals. Business establishments can and will be regulated by the state, and this was the true issue in the two cases. It is not enough that the Negro plaintiff's offer was rejected—it was rejected because the offeror was a Negro, and such rejection is now against the law in the minority of states. As this applies to housing, Illinois and the majority at present only prohibits discrimination in publicly assisted housing, and, unless legislative fiat comes to the fore, the practice of discrimination in the real estate business will remain an everyday legal occurrence.

[22] *Id.* at 281, 120 N.E. 2d at 563.

[23] 182 N.E. 2d 595, 606 (Mass. 1962).

[24] 42 U.S.C.A. § 1981 et. seq.; Hardyman v. Collins, 80 F. Supp. 501 (S.D. Cal., 1948).

[25] Civil Rights Cases, 109 U.S. 3 (1883).

[26] Dorsey v. Stuyvesant, 299 N.Y. 512, 87 N.E. 2d 541 (1949); Hackley v. Art Buildersm, 179 F. Supp. 851 (D.Md., 1960); Progress Development Co. v. Mitchell, 182 F. Supp. 681 (N.D. Ill., 1960).