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Can Public Housing Tenants, Alleging Civil Rights Violations, Enforce Federal Housing Law?

by Douglas Bowman and Neal Devins

Brenda E. Wright

v.

**City of Roanoke
Redevelopment and Housing Authority**
(Docket No. 85-5915)

Argued October 6, 1986

ISSUE

In *Wright v. City of Roanoke Redevelopment and Housing Authority*, the Supreme Court will again enter the thicket of determining whether private citizens are authorized to enforce congressional mandates. Specifically, *Wright* is concerned with the availability of relief under the Civil Rights Statute (42 U.S.C. Section 1983, establishing a private right of action for "the deprivation of any rights secured by law") in the face of a fairly comprehensive enforcement scheme entrusted to the Department of Housing and Urban Development.

FACTS

The United States Housing Act of 1937 (42 U.S.C. Section 1437) funds states to provide affordable housing for low-income families, either through constructing new units or rehabilitating existing but unsafe units. The Act is administered by the Department of Housing and Urban Development (HUD), which has regulatory and enforcement authority. HUD enters into Annual Contributions Contracts (ACC's) with Public Housing Authorities (PHA's), which operate and manage the assisted housing units in a given locality. Each PHA is bound under its ACC to the regulations established by HUD covering all aspects of housing management and funding.

The specific provision of the Act at issue in this case is the Brooke Amendment (42 U.S.C. Section 1437a). This subsection provides that the rent which can be charged to a tenant in housing assisted under the Act is limited to a specified percentage of the tenant's income. The rent charged by definition includes an amount for utilities. Each PHA is required by HUD to provide a reasonable allowance for utilities. Regulations establish

parameters by which to measure "reasonableness" and require revisions of the allowance under specific circumstances. A PHA has limited discretion in this area.

Where a tenant's utilities are furnished by the PHA, as in this case, the tenant receives an allowance of a certain number of consumption units (kilowatt hours of electricity). Consuming more than the allotted amount allows the PHA to impose a surcharge for the overconsumption. Where the tenant purchases utilities directly from the supplier, he or she receives an allowance in dollars which is deducted from the gross rent charged. The tenant is responsible for any consumption above that covered by the allowance.

Brenda E. Wright, Geraldine H. Broughman and Sylvia P. Carter, tenants in housing assisted under the Act, brought this lawsuit on behalf of the class of approximately 1,100 tenants of public low-cost housing in Roanoke. Wright, Broughman and Carter are all from families of "very low income" as defined by federal statute. All claim that the utility surcharges regularly added to their rents strains their limited budgets; the surcharges sometimes have totaled nearly as much as the monthly rent charged and have often taken several months to pay off.

Wright and the others sued their landlord-PHA, the City of Roanoke Redevelopment and Housing Authority (RRHA), alleging that the RRHA had violated the Brooke Amendment and its implementing regulations. Specifically, they claimed that the RRHA had established unreasonably low utility allowances, and had not revised them, allowing surcharges to be imposed on a majority of tenants. The tenants alleged that they were thus wrongfully overcharged. They based their claim on the Civil Rights Act of 1871 (42 U.S.C. Section 1983) and their leases with the RRHA.

The Fourth Circuit Court of Appeals affirmed the district court's grant of summary judgment for RRHA (771 F.2d 833 (1985)). That court, explicitly following the approach in *Middlesex County Sewerage Authority v. National Sea Clammers Association* (453 U.S. 1 (1981)) and *Pennhurst State School and Hospital v. Halderman* (451 U.S. 1 (1981)), made two inquiries. First, it asked whether a private right of action is foreclosed by the provisions of the Act. Second, the court questioned whether the Act creates the kind of rights for which Section 1983 is an appropriate remedy—inasmuch as Section 1983 does not itself confer any rights.

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As to whether the Act forecloses private actions, the court was unwilling to deviate from two of its recent cases considering similar questions, *Perry v. Housing Authority of City of Charleston* (664 F.2d 1210 (4th Cir. 1981)) and *Phelps v. Housing Authority of Woodruff* (742 F.2d 816 (4th Cir. 1984)), which answered in the negative. Working on the premise that for the tenants to have a right of action, the statute must either explicitly grant that right or provide for no other contrary enforcement mechanism, the court emphasized that nothing in the Act explicitly granted an independent right of action to tenants. The court further noted that the Act was clear in granting HUD full administrative and enforcement powers—including the most effective enforcement tool: the power to terminate funding. This combination was believed to be compelling evidence that Congress did not intend to vest a right of action in the tenants, but rather intended for HUD to enforce the regulations on the tenants' behalf.

The court also found it significant that, while the Act confers a benefit upon the tenants, the actual assistance provided goes to the state, making the tenants only indirect beneficiaries. For that reason, the court concluded that the Act did not create any legally cognizable rights in the tenants.

As to the question of whether Section 1983 is an appropriate remedy, the court again refused to deviate from *Phelps* in concluding that the Act does not grant the kind of right for which Section 1983 provides a remedy. The only stated reason for this conclusion is that the court considered it highly unlikely that Congress intended for "federal courts to make the necessary computations regarding utility allowances that would be required to adjudicate individual claims of right." This is apparently a corollary to the court's view that the proper forum for the tenants would be the state courts. There, the tenants might pursue a claim based on their lease with the RRHA—a remedy which was explicitly endorsed in the court's decision.

The tenants' claim now before the Supreme Court rests on two fundamental premises.

The first is that a private right of action under Section 1983 is presumed to exist whenever a federal right is conferred. Under this view, the presumption can be overcome only by showing congressional intent specifically to deny such a right of action.

The second is that the Brooke Amendment limiting the rent chargeable to tenants creates a right in the tenant to limited rent. This is the necessary foundation of the argument that the RRHA deprived the tenants of their rights for Section 1983 purposes when the RRHA allegedly disregarded regulations governing setting and revising utility allowances. The result of the RRHA's action (or inaction) was that the tenants had to pay wrongfully imposed utility surcharges which raised their gross rental charge above the Brooke Amendment ceil-

ings. Thus it is urged that the RRHA's alleged failure to comply with regulations concerning a component of rental charges amounts to a deprivation of substantive rights. Under the Act, tenants could, by virtue of "unreasonable" utility consumption, pay more than the rental ceiling even if the RRHA obeyed all regulations. Under the tenants' analysis, such payment would amount to a voluntary waiver of the right to the limited rent.

BACKGROUND AND SIGNIFICANCE

As in any case which concerns implied rights of action, *Wright* raises a fundamental separation of powers concern: whether implementing federal law is appropriately the sole province of the Executive, or whether vindicating legal rights is sufficiently important that private law enforcement efforts are proper. An important underlying issue is the means by which the choice is indicated: what evidence in the legislative history or specific statutory language is conclusive, and what if any presumptions exist? While the Fourth Circuit clearly opted for the plenary Executive authority model, the tenants here argue that the effect of such an approach is to "divest public housing tenants of any meaningful federal rights."

The Court might suggest that low utility rates are not a "right" under Section 1983, but are instead a nonenforceable "benefit." Under this approach, the issue of who has authority to enforce tenants' rights would become irrelevant. The question of what is a reasonable utility rate would simply be viewed as a policy decision left to the program's administrator, HUD. Such a ruling would have farreaching consequences, for it would suggest that federal aid programs are not subject to judicial challenge by private litigants.

ARGUMENTS

For Brenda E. Wright (Counsel of Record, Henry L. Woodward, 312 Church Avenue, SW, Roanoke, VA 24016; telephone (703) 344-2088)

1. The Brooke Amendment, as evidenced by congressional intent, vests public housing tenants with a substantive right to limited rents.
2. The disposition below erroneously reduces the availability of the Section 1983 remedy to cases where a private right of action can be implied from a federal statute. The proper approach to the preclusion inquiry is a presumption that the Section 1983 right of action may be used to vindicate federal rights.
3. The Authority has not met its burden of showing congressional intent to overcome the presumption that Section 1983 may be used for private enforcement of the Act: Congress did not expressly preclude private Section 1983 enforcement; Congress did not supplant Section 1983 with alternate private remedies, and Congress' grant of general regulatory au-

thority to HUD does not demonstrate intent to supplant the statute.

1. The federal courts must entertain a lease-based claim which unavoidably raises a substantial federal question under the Housing Act of 1937 and the implementing regulations.

For the City of Roanoke Redevelopment and Housing Authority (Counsel of Record, Bayard E. Harris, P.O. Box 720, Roanoke, VA 24004; telephone (703) 982-4200)

1. Public housing tenants have no federal cause of action under 42 U.S.C. Section 1983 to redress individual grievances arising out of their landlord's implementation of HUD regulations. The compre-

hensive enforcement scheme created by the Housing Act and HUD subsidy program evinces Congress' intent to foreclose a Section 1983 action to enforce HUD utility regulations.

2. The claim that RRHA breached its lease with its tenants is a claim for which federal jurisdiction cannot exist independent of this Section 1983 claim.
3. Damages should not be an available remedy under Section 1983 where the source of recovery will be federal grant monies.

AMICUS BRIEF

In Support of Brenda E. Wright

The National Housing Law Project