The Burger Court Opinion Writing Database

Adickes v. S.H. Kress & Co.

398 U.S. 144 (1970)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 22, 1970

Re: No. 79 - Adickes v. Kress & Co.

Dear John:

Please join me in your opinion.

Regards,

W.E.B.

Mr. Justice Harlan

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: Black, J.

Circulated: MAR 25 19

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SUPREME COURT OF THE UNITED STATES

No. 79.—October Term, 1969

Sandra Adickes, Petitioner, v. S. H. Kress and Company. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March —, 1970]

Mr. Justice Black, concurring in the judgment.

The petitioner, Sandra Adickes, brought suit against the respondent, S. H. Kress & Co., to recover damages for alleged violations of 42 U. S. C. § 1983. In one count of her complaint she alleged that a police officer of the City of Hattiesburg, Mississippi, had conspired with employees of Kress to deprive her of rights secured by the Constitution and that this joint action of a state official and private individuals was sufficient to constitute a violation of § 1983. She further alleged in another count that the Kress' refusal to serve her while she was in the company of Negroes was action "under color of" a custom of refusing to serve Negroes and whites together in Mississippi, and that this action was a violation of § 1983. The trial judge granted a summary judgment in favor of Kress on the conspiracy allegation and, after full presentation of evidence by the petitioner, granted a directed verdict in favor of the respondent on the custom allegation. Both decisions rested on conclusions that there were no issues of fact supported by sufficient evidence to require a jury trial. I think the trial court, and the Court of Appeals which affirmed, were wrong in granting summary judgment on the conspiracy allegation. And—assuming for present purposes that the trial court's statutory interpretation concerning "custom and usage" was correct—it was equally wrong

STYLISTIC CHANGES THROUGHOUT.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
✓Mr. Justice Brennan
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SUPREME COURT OF THE UNITED STATES

From: Black, J.

No. 79.—October Term, 1969

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Sandra Adickes, Petitioner,
v.
S. H. Kress and Company.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 1, 1970]

Mr. Justice Black, concurring in the judgment.

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SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 79.—October Term, 1969

Circulated: 3/17/70

Sandra Adickes, Petitioner, v. S. H. Kress and Company. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Recirculated: _____

[March —, 1970]

Mr. Justice Douglas, dissenting in part.

The statutory words "under color of any statute, ordinance, regulation, custom or usage of any State," 42 U. S. C. § 1983, is seriously emasculated by today's ruling. Custom, it is said, must have "the force of law"; and "law," as I read the opinion, is used in the Hamiltonian sense:[1]

> "It is essential to the idea of a law that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation. This penalty, whatever, it may be, can only be inflicted in two ways: by the agency of the courts and ministers of justice, or by military force; by the COERCION of the magistracy, or by the COERCION of arms."

The Court in effect makes "custom" as used in the statute a synonym for "statute, ordinance, regulation." But the draftsmen used the "custom" of a State, not as a synonym, but as a species of discrimination separate and distinct from "law" in the usual sense.

The Court seems to be bothered lest it "transform private predilections into compulsory rules of behavior that

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6-7-8

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SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

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[March —, 1970]

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7, 8, 9

SUPREME COURT OF THE UNITED STATES

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[March —, 1970]

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SUPREME COURT OF THE UNITED STATES

No. 79.—October Term, 1969

From: Douglas, J.

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Circulated: 4/9/70

[March —, 1970]

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From: Douglas, J.

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SUPREME COURT OF THE UNITED STATES

No. 79.—October Term, 1969

Sandra Adickes, Petitioner, v. S. H. Kress and Company. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1970]

Mr. Justice Douglas, dissenting in part.

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The Court seems to be bothered lest it "transform private predilections into compulsory rules of behavior that command obedience." It therefore requires "the State's participation" in the "development and maintenance" of the "custom" before "custom" can be actionable under

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To: The Chief Justice
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Mr. Justice Marshall

1, 4, 6 - 10

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SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 79.—October Term, 1969

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Sandra Adickes, Petitioner,
v.
S. H. Kress and Company.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1970]

Mr. Justice Douglas, dissenting in part.

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deletion

The Court requires "state involvement" in the "development and maintenance" of a "custom" before that "custom" can be actionable under 42 U. S. C. § 1983. This "state involvement"—aside from the use of statutes, ordinances, or regulations already covered in terms by § 1983—is said to be satisfied only by other forms of "systematic official conduct" that impose sanctions or withhold benefits. That construction of § 1983 is, to borrow a phrase from the first Mr. Justice Harlan, "too

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10

SUPREME COURT OF THE UNITED STATES

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To: The Chief Justice
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Mr. Justice Harlan
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From: Douglas, J.

Circulated:

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SUPREME COURT OF THE UNITED STATES

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[May —, 1970]

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Changes throughout

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Mr. Justice Black
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SUPREME COURT OF THE UNITED STATES

No. 79.—October Term, 1969

From: Douglas, J.

Circulated:

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Sandra Adickes, Petitioner, v. S. H. Kress and Company. On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 1, 1970]

Mr. Justice Douglas, dissenting in part.

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SUPREME COURT OF THE UNITED STATES

No. 79.—October Term, 1969

From: Harlan, J.

MAR 7 1970

Circulated:

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Sandra Adickes, Petitioner,
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S. H. Kress and Company.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March —, 1970]

Mr. Justice Harlan delivered the opinion of the Court.

Petitioner, Sandra Adickes, a white school teacher from New York, brought this suit in the United States District Court for the Southern District of New York against respondent S. H. Kress & Co. ("Kress") to recover damages under 42 U. S. C. § 1983 [1] for alleged violations of her constitutional rights. The suit arises out of Kress' refusal to serve lunch to Miss Adickes at its restaurant facilities in its Hattiesburg, Mississippi, store on August 14, 1964, and Miss Adickes' subsequent arrest upon her departure from the store by the Hattiesburg police on a charge of vagrancy. At the time of both the refusal to serve and her arrest Miss Adickes was with six young people, all Negroes, who were her students in a Mississippi "Freedom School" where she was teaching that summer.

[1] 42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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."

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SUPREME COURT OF THE UNITED STATES

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[March —, 1970]

From: Harlan, J.

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:
1, 8-10
19-23

SUPREME COURT OF THE UNITED STATES

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Mr. Justice Marshall

[March —, 1970]

From: Harlan, J.

Circulated:

Recirculated: MAR 26

Mr. Justice Harlan delivered the opinion of the Court.

Petitioner, Sandra Adickes, a white school teacher from New York, brought this suit in the United States District Court for the Southern District of New York against respondent S. H. Kress & Co. ("Kress") to recover damages under 42 U. S. C. § 1983 [1] for alleged violations of her constitutional rights. The suit arises out of Kress' refusal to serve lunch to Miss Adickes at its restaurant facilities in its Hattiesburg, Mississippi, store on August 14, 1964, and Miss Adickes' subsequent arrest upon her departure from the store by the Hattiesburg police on a charge of vagrancy. At the time of both the refusal to serve and her arrest Miss Adickes was with six young people, all Negroes, who were her students in a Mississippi "Freedom School" where she was teaching that summer. Unlike Miss Adickes, the students were offered service, and were not arrested.

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 2, 17-24, 26+29
In New Material

Reorganized Throughout

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From: Harlan, J.

[May —, 1970]

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Recirculated: MAY 5 1970

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2, 17-24, 26, 29 (new)

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[1] 42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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."

12, 14, 17, 18, 19, 20
21, 22, 23, 28

✓ Mr. Justice Brennan

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SUPREME COURT OF THE UNITED STATES

No. 79.—October Term, 1969

Sandra Adickes, Petitioner, v. S. H. Kress and Company. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 1, 1970]

Mr. Justice Harlan delivered the opinion of the Court.

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

No. 79.—OCTOBER TERM, 1969

Sandra Adickes, Petitioner, v. S. H. Kress and Company. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

From: Harlan, J.

Circulated: MAY 30 1970

Recirculated: MAY 1970

2nd Cir

[June 1, 1970]

MR. JUSTICE HARLAN delivered the opinion of the Court.

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Circulated
5-11-70

SUPREME COURT OF THE UNITED STATES

No. 79.—October Term, 1969

Sandra Adickes, Petitioner,
v.
S. H. Kress and Company.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1970]

Mr. Justice Brennan, concurring in part and dissenting in part.

Petitioner contends that in 1964 respondent, while acting "under color of . . . statute" or "under color of [a] custom or usage" of the State of Mississippi, subjected her to the deprivation of her right under the Equal Protection Clause of the Fourteenth Amendment not to be denied service in respondent's restaurant due to racial discrimination in which the State of Mississippi was involved, and that therefore respondent is liable to her in damages under 42 U. S. C. § 1983. I agree with the opinion of Mr. Justice Harlan that to recover under § 1983 petitioner must prove two separate and independent elements: first, that respondent subjected her to the deprivation of a right "secured by the Constitution and laws"; and, second, that while so doing respondent acted under color of a statute, ordinance, regulation, custom, or usage of the State of Mississippi.

Whether a person suing under § 1983 must show state action in the first element—the deprivation of a right "secured by the Constitution and laws"—depends on the nature of the particular right asserted. For example, a person may be deprived of a right secured by the Constitution and 42 U. S. C. § 1982 by a private person acting completely independently of state government. See *Jones* v. *Alfred H. Mayer Company*, 392 U. S. 409 (1968). On the other hand, the constitutional right to equal protection of the laws, unelaborated by any stat-

SUPREME COURT OF THE UNITED STATES

No. 79.—October Term, 1969

Sandra Adickes, Petitioner, v. S. H. Kress and Company. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 1, 1970]

Mr. Justice Brennan, concurring in part and dissenting in part.

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Whether a person suing under § 1983 must show state action in the first element—the deprivation of a right "secured by the Constitution and laws"—depends on the nature of the particular right asserted. For example, a person may be deprived of a right secured by the Constitution and 42 U. S. C. § 1982 by a private person acting completely independently of state government. See *Jones* v. *Alfred H. Mayer Company*, 392 U. S. 409 (1968). On the other hand, the constitutional right to

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 24, 1970

No. 79 - Adickes v. Kress & Co.

Dear John,

I am glad to join the opinion you have written for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Harlan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 12, 1970

No. 79 - Adickes v. Kress

Dear John,

I am glad to join your revised opinion as circulated May 5.

Sincerely yours,

P.S.

Mr. Justice Harlan

Copies to the Conference

March 19, 1970

Re: No. 79 - Adickes v. S.H.Kress and Co.

Dear John:

I join your opinion in this case, acquiescing in your treatment of the conspiracy matter on which I had tentative views the other way.

Sincerely,

B.R.W.

Mr. Justice Harlan

cc: The Conference