SUPREME COURT OF THE UNITED STATES

No. 98–238

TOGO D. WEST, JR., SECRETARY OF VETERANS AFFAIRS, PETITIONER *v.* MICHAEL GIBSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June 14, 1999]

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

The rules governing this case are clear and well established, or at least had been before the majority's unsettling opinion today. Relief may not be awarded against the United States unless it has waived its sovereign immunity. See *Department of Army* v. *Blue Fox, Inc.,* 525 U. S. ___ (1999). The waiver must be expressed in unequivocal statutory text and cannot be implied. *Id.,* at ___ (Slip op., at 4); *Lane* v. *Peña,* 518 U. S. 187, 192 (1996). Even when the United States has waived its immunity, the waiver must be "strictly construed, in terms of its scope, in favor of the sovereign," *Blue Fox, supra,* at ___ (Slip op., at 5); accord, *Lane, supra,* at 192, for "'this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied,'" *Lehman* v. *Nakshian,* 453 U. S. 156, 161 (1981), quoting *Soriano* v. *United States,* 352 U. S. 270, 276 (1957). Not only do these rules reserve authority over the public fisc to the branch of Government with which the Constitution has placed it, they also form an important part of the background of settled legal principles upon which Congress relied in enacting various statutes authorizing suits against the United States, such as the

Tucker Act, 28 U. S. C. §1491; §10(a) of the Administrative Procedure Act, 5 U. S. C. §702; and the Federal Tort Claims Act, 28 U. S. C. §2671 *et seq*. The rules governing waivers of sovereign immunity make clear that the Equal Employment Opportunity Commission (EEOC) may not award or authorize compensatory damages against the United States unless it is permitted to do so by a statutory provision which waives the United States' immunity to the awards in clear and unambiguous terms.

Section 717(b) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e–16(b), which authorizes the EEOC to enforce federal compliance with Title VII "through appropriate remedies, including reinstatement or hiring of employees with or without back pay," effects a waiver of the United States' sovereign immunity for some purposes. Unlike other similar statutes, however, the provision does not mention awards of compensatory damages. Compare §717(b) with 2 U. S. C. §§1311(b)(1)(B), 1405(g) (1994 ed., Supp. III). A waiver of immunity to other types of relief does not provide the unequivocal statement required to establish a waiver of immunity to damages awards. See *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 34 (1992) ("Though [11 U. S. C. §106(c)], too, waives sovereign immunity, it fails to establish unambiguously that the waiver extends to monetary claims"); *Lane, supra*, at 192.

Nor does the statutory grant of authority to the EEOC to enforce Title VII through appropriate remedies include, in unequivocal terms or even by necessary implication, the power to award or authorize compensatory damages. Even if the phrase "appropriate remedies" had been intended, as the majority maintains, to incorporate relief authorized for violations of Title VII under other statutory provisions, it is not obvious that the phrase's meaning would have been intended also to "expand" to include remedies that were not available at the time §717 was adopted. *Ante*, at 5.

It is far from clear, moreover, that the phrase was intended to incorporate other statutory provisions at all. Unlike other subsections of §717, see §717(d) (incorporating various provisions relating to judicial actions), §717(b) does not make an explicit reference to other statutory provisions. In addition, the specific examples given by the statute of appropriate remedies– reinstatement or hiring of employees with or without backpay– are equitable in nature. See *United States* v. *Burke*, 504 U. S. 229, 238 (1992). The interpretive canons of *noscitur a sociis* and *ejusdem generis* suggest the appropriate remedies authorized by §717(b) are remedies of the same nature as reinstatement, hiring, and backpay– *i.e.*, equitable remedies. The phrase "appropriate remedies," furthermore, connotes the remedial discretion which is the hallmark of equity. A plausible, and perhaps even the best, interpretation of §717(b), then, is that it grants administrative authority to determine which of the traditional forms of equitable relief are appropriate in any given case of discrimination. Whether or not this is the better reading, it should suffice to establish beyond dispute that the statute does not authorize awards of compensatory damages in express and unequivocal terms. As a consequence, §717(b) cannot provide the required waiver of the United States' sovereign immunity.

Unlike §717(b), 42 U. S. C. §1981a does authorize awards of compensatory damages against the United States. Although it is clear the statute authorizes courts to award damages, however, §1981a does not so much as mention the EEOC, much less empower it to award or authorize money damages. It is settled law that a waiver of sovereign immunity in one forum does not effect a waiver in other forums. See, *e.g.*, *McElrath* v. *United States*, 102 U. S. 426, 440 (1880) ("[The Government] can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in

such suits"); *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47, 54, n. 6 (1944) ("The Federal Government's consent to suit against itself, without more, in a field of federal power does not authorize a suit in a state court"); *Case* v. *Terrell*, 11 Wall. 199, 201 (1871) (The United States' consent to suit in the Court of Claims does not extend to other federal courts).

The majority's attempt to read 42 U. S. C. §1981a(a)(1) to authorize administrative awards of compensatory damages is not persuasive. Section 1981a(a)(1) provides:

> "In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 . . . the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 . . . ."

The provision authorizes an award of compensatory damages in an "action" brought under §717; the word "action" is often used to distinguish judicial cases from administrative "proceedings." See *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54, 60–62 (1980). Unlike §717(b), which authorizes administrative proceedings, §717(c) authorizes "civil action[s]" in court. It is most natural, therefore, to understand the phrase "an action brought by a complaining party under section . . . 717" as a reference to a judicial action under §717(c) but not to an administrative proceeding under §717(b). Compensatory awards are authorized under §1981a(a)(1), moreover, "in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964." Section 706(g) authorizes a "court" to grant equitable relief for violations of Title VII. This provision, as incorporated through §717(d), applies only in "civil actions" brought under §717(c); it does not apply in proceedings before the EEOC or any other agency. Section 1981a(a)(1)'s express reference to §706(g) confirms that compensatory damages are available only in judicial actions.

Other provisions of §1981a also make clear that the statute authorizes compensatory damages only in judicial actions. Section 1981a(c) provides that "[i]f a complaining party seeks compensatory . . . damages under this section– (1) any party may demand a trial by jury; and (2) the court shall not inform the jury of the limitations [on damages awards] described in subsection (b)(3) of this section." It cannot be disputed that this provision contemplates a jury trial overseen by a court. With due respect to the majority, the provision does not guarantee a jury trial to either party "*if* a complaining party proceeds to court under §717(c)," *ante,* at 8–9; it provides that either party may obtain a jury trial "[i]f a complaining party seeks compensatory . . . damages," §1981a(c).

While falling short of embracing the argument as its own, the majority flirts with the contention that allowing agencies rather than juries to award compensatory damages lowers the costs of resolving employment disputes and protects the public fisc. It is not clear to me that juries would be less protective of the fisc than would one group of Government employees who deem themselves empowered by agency interpretation to award Government funds to fellow employees. When a Government employee seeks damages from the Government itself, there may be advantages in insisting upon the expertise of a trial court with experience in awarding damages in all types of cases, with the additional safeguards of trial in a forum of high visibility, trial by jury if either party chooses to ask for it, and appellate review. These factors are disregarded by the majority, which seems instead to suggest that the nature and convenience of administrative proceedings will by necessity provide a financial advantage to the Government.

In all events, speculation does not suffice to overcome the rule that waivers of sovereign immunity must be clear

and express. An unequivocal waiver of the United States' sovereign immunity to administrative awards of compensatory damages cannot be found in the relevant statutory provisions. To the extent the majority relies on textual analysis, it establishes at most (if at all) that the statutes might be read to authorize such awards, not that that the statutes must be so read. To the extent the majority relies on legislative history and other extratextual sources, it contradicts our precedents and sets us on a new course, for before today it was well settled that "[a] statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text." *Lane*, 518 U. S., at 192; accord, *Nordic Village*, 503 U. S., at 37 ("[T]he 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report"). With respect, I dissent.