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Federal Employee Precluded from Obtaining Redress in Court for Tortious Injuries Caused by Co-Worker, Van Houten v. Ralls, 411 F.2d 940 (9th Cir. 1969)

FEDERAL EMPLOYEE PRECLUDED FROM OBTAINING REDRESS IN COURT FOR TORTIOUS INJURIES CAUSED BY CO-WORKER

Van Houten v. Ralls, 411 F.2d 940 (9th Cir. 1969)

Plaintiff, a government employee and a passenger in an automobile driven by a fellow employee, was injured when the auto collided with a vehicle driven by a third government employee. All three employees were acting within the scope of their employment. Plaintiff originally brought a tort action in federal district court, naming the United States and the two drivers as defendants. The court granted the United States summary judgment. It held that the only remedy a government employee injured in the course of his employment has against the United States is statutory compensation under the Federal Employee's Compensation Act (FECA).[1] The suit against the drivers was dismissed for want of diversity. The drivers had argued that the suit should be dismissed because, by the terms of the Federal Drivers Act (FDA),[2] suit against the government under the Federal Tort Claims Act is "exclusive of any other civil remedy." In dictum the court indicated that this argument would have failed. As the summary judgment ruling indicated, because statutory compensation is his sole remedy against the United States, the injured employee could not sue the government under the Federal Tort Claims Act; this, however, is the exclusive remedy to which he is referred by the Federal Drivers Act. To apply the referral provisions of section b of the FDA to government employees would leave them without a tort remedy. To preserve the plaintiff's tort remedy he could sue the individual drivers in state court.[3]

Van Houten then brought the instant suit against the driver-defendants in a Nevada state court. On certification of the Attorney General that the driver-defendants were acting within the scope of their employment,[4] and that under section b of the FDA[5] the United States

1. 5 U.S.C. §§ 8101 *et. seq.* (Supp. IV 1969).

2. 28 U.S.C. § 2679(b)-(e) (Supp. IV 1969).

3. Van Houten v. Ralls, 290 F. Supp. 67, 68 (D.C. Nev. 1967). The opinion in the first Federal Court determination in this case was not printed. Therefore the references are made to the second district court decision which describes the first.

4. (d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a state court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and

was the only proper defendant, the suit was removed to federal court. Plaintiff moved for a remand. Relying on the court's previous dictum, he argued that since a tort remedy was not available against the government, the case should be remanded for trial in state court against the individual defendants.[6] To support his argument the plaintiff relied on section d of the FDA, which provides that if ". . . a remedy by suit within the meaning of subsection (b) . . . is not available against the United States, the case shall be remanded . . ."[7] The district court, repudiating its previous dictum, denied the plaintiff's motion for remand. On motion by the United States, which was substituted as defendant under section b, it dismissed the suit,[8] holding that plaintiff's exclusive remedy against the government was statutory compensation under the FECA. Plaintiff appealed.

Held: FDA section d, which provides for a remand[9] if a remedy by suit is not available against the United States, is only applicable if the driver was acting outside the scope of his governmental employment;[10]

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the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

28 U.S.C. § 2679(d) (Supp. IV 1969).

5. (b) The remedy by suit against the United States as provided by section 1346(b) of this title [Federal Tort Claims Act] for damages to property or for personal injury, including death, resulting from the operation by an employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil remedy or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

28 U.S.C. § 2679(b) (1964). *See also,* 28 U.S.C. § 1346(b) (1964), which reads:

. . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

6. Van Houten v. Ralls, 290 F. Supp. 67, 68 (D.C. Nev. 1967).

7. *See* note 4, *supra.*

8. Van Houten v. Ralls, 290 F. Supp. 67, 69 (D.C. Nev. 1967). In reaching a conclusion which indicated an apparent about face the judge noted that an order granting the motion to remand would not be appealable and therefore the issue of the exclusivity of the remedy against the United States would not be resolved; in granting the motion to dismiss he invited appeal to the Ninth Circuit for a definitive ruling. *Id.* at 68-69.

9. *See* note 4, *supra.*

10. Van Houten v. Ralls, 411 F.2d 940, 942 (9th Cir. 1969).

if the driver was acting within the scope of his employment, the employee-plaintiff's only remedy is statutory compensation.[11] Affirmed.

The Ninth Circuit adopted the reasoning of the Sixth Circuit in *Vantrease v. United States*[12] in which the same result was reached on similar facts. The Sixth Circuit read the FDA, the FECA and the Federal Tort Claims Act together. It found that Congress intended the remand provision of the FDA to be applicable only when the government driver was acting outside the scope of his employment.[13] When the driver defendant was acting within the scope of his employment, Congress intended that no tort remedy lie against the negligent driver or the United States.[14] The injured employee is limited to statutory compensation under the FECA.[15]

In most cases, a significant monetary loss to the plaintiff will occur when his recovery is limited to statutory compensation.[16] For example, in a recent case on facts similar to *Van Houten,* the plaintiff received a jury award of $30,000 contrasted with compensation under the FECA of only $8,577.02.[17] To illustrate the curious statutory interaction which produces this result, it can be noted that with a slight variation of the facts, Van Houten's possible tort recovery would have been preserved.

(1) Had plaintiff been a private citizen injured by a federal employee acting within the scope of his employment, plaintiff either could have sued the employee in tort[18] or the government under the Federal Tort Claims Act.[19] If the accident had been an automobile accident, the

11. *Id.* at 943.

12. 400 F.2d 853 (1968).

13. *Id.* at 855.

14. *Id.* The Ninth Circuit in *Van Houten* stated that:

> The federal legislative objective . . . was apparently to protect federal drivers from personal liability by rendering the government liable in tort, in the case of non-federal employee plaintiffs, and by rendering the government liable only under the FECA in the case of federal employee-plaintiffs.

Van Houten v. Ralls, 411 F.2d 940, 943 (9th Cir. 1969).

15. The schedule of benefits conferred under the FECA is contained in 5 U.S.C. §§ 8105-07 (Supp. IV 1969).

16. *See* 1 A. LARSON, WORKMAN'S COMPENSATION § 2.50 (1967).

17. Gilliam v. United States, 407 F.2d 818, 820 (6th Cir. 1969) (concurring opinion).

18. *E.g.*, Western v. McGehee, 202 F. Supp. 287, 292 (D.C. Md. 1962); Irvin v. United States, 148 F. Supp. 25, 33 (D.C.S.D. 1957) (dictum); Henning v. Ebersole, 8 Misc. 2d 788, 789, 166 N.Y.S.2d 167, 169 (Sup. Ct. 1957).

19. 28 U.S.C. § 1346(b) (1964).

FDA would require that the government defend in an action brought against the employee.[20]

(2) Had plaintiff, as a government employee, been injured by another government employee in a non-auto accident, he could have recovered under both the FECA and in a private civil suit brought directly against the other employee.[21] The subrogation provisions of the FECA, however, would limit the plaintiff to the higher of the recoveries.[22]

(3) Had plaintiff, as a government employee, been injured by the negligence of a private party, he could have recovered both from the government under the FECA and from the negligent party in a private civil suit,[23] with the recovery limited to the higher amount.[24]

But Van Houten's case fit none of these fact patterns. Consequently, he was deprived of the opportunity to sue in tort.[25]

Three cases decided on the appellate level are in agreement with the holding of *Van Houten*.[26] One district court has twice reached a contrary result, but its most recent decision was reversed on appeal.[27] In a state court case, after a federal district court had remanded, holding no tort remedy was available against the United States, the

20. There of course is the usual requirement that the act complained of be within the scope of the employee's federal employment. 28 U.S.C. § 2679(b) (1964).

21. Marion v. United States, 214 F. Supp. 320, 323-24 (D.C. Md. 1963) (involving an automobile accident, but the cause of action arose prior to the passage of the FDA and therefore the act was not controlling). *See also* Allman v. Hanley, 302 F.2d 559, 563 (5th Cir. 1962).

22. *See* 5 U.S.C. §§ 8131-32 (Supp. IV 1969).

23. *E.g.*, Parr v. United States, 172 F.2d 462, 463 (10th Cir. 1949).

24. *See* note 22, *supra*. Had the defendant been in a contractual relationship with the United States it could have, in the proper case, joined the United States as third party defendant for indemnification; nothing in the FECA exclusivity provision prevents this. Newport Air Park, Inc. v. United States, 293 F. Supp. 809 (D.C.R.I. 1968); Hart v. Simons, 223 F. Supp. 109 (E.D. Pa. 1963). *But see* Murray v. United States, 405 F.2d 1361 (D.C. Cir. 1968). *See also* Annot., 17 L. Ed. 2d 929, 943 (1967).

25. Under the common law "fellow servant" rule a person in the position of plaintiff here would find that his exclusive right to remedy was against his co-worker and not against their mutual employer. The fellow servant liability rule is preserved in Nevada. NEV. REV. STAT. § 41.130 (1967).

26. Noga v. United States, 411 F.2d 943 (9th Cir.), *cert. denied*, 90 S.Ct. 104 (1969); Gilliam v. United States, 407 F.2d 818 (6th Cir. 1969); Vantrease v. United States, 400 F.2d 853 (6th Cir. 1968).

27. Gilliam v. United States, 264 F. Supp. 7 (E.D. Ken. 1967), *rev'd*, 407 F.2d 818 (6th Cir. 1969); Green v. Short, No. 1107 (E.D. Ken. 12 Feb. 1965) quoted in part in Gilliam v. United States, 264 F. Supp. 7, 8-9 (E.D. Ken. 1967). Another district court reached a result in accord with the *Van Houten* case, but the government's motion for summary judgment was not opposed and the case is therefore of dubious value as precedent. Beechwood v. United States, 264 F. Supp. 926 (D.C. Mont. 1967).

state Supreme Court, construing the FDA, held there was no remedy available against the drivers.[28]

Compensation in the form of tort recovery is a fundamental aspect of Anglo-American law.[29] Even when the fellow servant rule barred an action based on respondeat superior, an injured employee could sue the tortfeasor himself.[30] The existence of this common law remedy creates a presumption favoring tort recovery. The presumption should not be abrogated without the expression of a clear Congressional intent to do so.[31]

To overcome the presumption and find that a government employee is barred from suing either the government or his co-worker, a court must adopt two major premises: (1) that no government employee may recover tort damages against the United States for injuries sustained during the course of his employment, and (2) that when injured by the negligence of a government driver, a person's only redress is against the United States. Each of these premises can be supported separately. But in accepting the individual premises on which the FDA and FECA are based, the appellate courts have not explicitly considered the inequities that arise from their interaction.

The Ninth Circuit applies these two premises in the *Van Houten* case, and concludes: (1) the government employee is denied the right to bring suit against the government driver; and (2) because of the FECA, the employee is denied the alternative remedy under the FDA,

28 Polishuk v. Beavin, ____ Tenn. ____, 444 S.W.2d 140 (1969). There plaintiff first brought suit in state court, but the case was removed to United States District Court under the FDA and the United States was substituted as defendant. The district judge found that the plaintiff had no remedy against the United States under the FTCA because he was a serviceman; a motion by the United States for summary judgment was denied and instead plaintiff's motion to remand was granted. When the action was returned to state court, plaintiff won a judgment for $42,500 against his co-worker. The Supreme Court of Tennessee reversed, holding that the defendant was immune from personal suit by virtue of the FDA. The court said that the remand order of the federal court was conclusive only as to the right of the plaintiff to recover against the United States under the FTCA. The court relied on Vantrease v. United States, 400 F.2d 853 (6th Cir, 1968) as authority for its dismissal. Polishuk v. Beavin, ____ Tenn. ____, 444 S.W.2d 140, 144 (1969).

29 *E.g.* Ashby v. White, 92 Eng. Rep. 126, 136 (1703). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 1-7 (3d ed. 1964); Seavey, *Principles of Torts*, 56 HARV. L. REV. 73-74 (1942).

30 *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 551-54 (3d ed. 1964), and cases cited therein.

31 It is a popular maxim of statutory construction that "[s]tatutes in derogation of the common law will not be extended by construction." Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed*, 3 VAND. L. REV. 395, 401 (1950) [hereinafter cited as Llewellyn, *Remarks*].

suit against the United States. This conclusion creates a contradiction within the FDA: a common law right to sue the tortfeasor is destroyed and replaced by a statutory right to sue the tortfeasor's employer, the government. But in the case of the government employee-plaintiff, the substitute remedy is illusory. Under the FECA, he cannot sue the government. The inequity of the result,[32] combined with the agrogation of a traditional common law right, opens the courts to criticism for failing to make a careful examination of alternative statutory interpretations.

Though the *Van Houten* court relies on the intent of Congress, a careful study of the reports and debates surrounding the passage of the FDA demonstrates that Congress never considered whether the FECA and the FDA might be read together to eliminate the right of an injured government employee to sue in tort. Since Congress did not consider the specific situation, the debates and reports are ambiguous. They could be read as demonstrating that Congress did not intend to limit an employee-plaintiff to statutory compensation as well as supporting the *Van Houten* decision.[33]

The statute could have been interpreted in at least three ways to preserve the right of the injured employee to sue in tort. All of these interpretations are consistent with the normal rules of statutory construction, and, perhaps, the intent of Congress.

(1) The court could have read the remand provision literally.[34] Van Houten had no remedy *by suit* against the United States under the Federal Tort Claims Act, and therefore had a right to sue the employees in state court.

(2) It could also have been held that the "remedy by suit" provision of the FDA repeals the exclusivity provision of the FECA in so far as suits by employees injured by federal drivers are concerned.[35] The

32. The Sixth Circuit in *Vantrease* concluded: "[W]e cannot agree that a single remedy against the United States—here the receipt of compensation benefits—is manifestly inequitable as to plaintiff." Vantrease v. United States, 400 F.2d 853, 856 (6th Cir. 1968). *But see,* Combs, J., concurring in *Gilliam:* "I concur but I do so reluctantly because I think we can reach an inequitable result. Congress has very properly immunized from personal liability Government employee-drivers on claims arising from vehicular accidents. But someone needs to look at the other side of the coin." Gilliam v. United States, 497 F.2d 818, 819 (6th Cir. 1969).

33. The same conclusion is reached by Combs, J., concurring in Gilliam v. United States, 407 F.2d 818, 819 (6th Cir, 1969); Note, *Federal Employees Compensation Act as Barring Suit Under Section 2679 of the Federal Tort Claims Act,* 2 VAL. L. REV. 108, 113 (1968). *See* S. REP. NO. 736, 87th Cong., 1st Sess. (1961); 107 Cong. Rec. 18, 499-500 (1961).

34. "If language is plain and unambiguous, it must be given effect." Llewellyn, *Remarks* at 403.

35. "[I]f there is a conflict between two statutes relating to the same subject which cannot be

conflicting provisions in the two statutes would be resolved in favor of the statute later in point of time, i.e. the FDA. It can be argued that Congress was interested in protecting driver employees, not in depriving the driver and all other employees of their right to sue in tort.[36]

(3) Finally, it could have been held that the substitution of the United States was merely a technical one. Instead of being the actual defendant, the government could be found to "stand in the shoes" of the employee-defendant. Alternatively, the government may be characterized as an insurer. Under either interpretation the right of action arising from the employee's negligence would not be destroyed. A version of this approach was adopted by the only Federal Court to find for the plaintiff under similar facts.[37] Alternative versions of the FDA introduced before final passage lend support to a theory that the United States is to be treated as an insurer. These forms of the FDA would have the government either purchase insurance for its drivers or in the alternative reimburse the drivers for insurance obtained at their own expense.[38] By providing for a direct remedy against the United States under the Federal Tort Claims Act, and making it the exclusive remedy, these provisions seemed unnecessary.

The argument for a literal interpretation of the remand provision allowing the plaintiff to bring an action in state court by lifting the alleged protective veil of the FDA (first alternative) is the single argument to have been considered by the courts. Since this would destroy the government driver's immunity and frustrate the protective intent of Congress, it was rejected.[39]

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reconciled by any fair and reasonable method of construction, the last in point of time will control . . ." H. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 325 (1911).

36 See 107 Cong. Rec. 18, 499-501 (1961).

37 Delivering an oral opinion in *Green v. Short*, the district court judge said:

> Miss Green did have a right of action, a common law right of action, against Mr. Short for personal injuries. . . . If the United States came in and undertook to supplant itself as defendant for the original defendant and to discharge its obligation to him, then the United States could not claim that it was therefore being sued, because it had not been sued

Green v. Short, No. 1107 (E.D. Ken. 12 Feb. 1965), quoted in Gilliam v. United States, 264 F. Supp. 7, 9 (E.D. Ken. 1967).

38 S. REP. No. 736, 87th Cong. 1st Sess. (1961). *See also* Thornock, *Exclusive Remedy Provision of the Federal Employees Compensation Act—Fact or Fiction*, 42 MIL. L. REV. 1 (1968) which argues for the technical substitution viewpoint.

39 There is also an unanswered question of whether the FDA deprives a plaintiff of due process of law by destroying his right to sue a co-worker. The argument was rejected in Noga v. United States, 411 F.2d 943 (9th Cir.), *cert. denied*, 90 S.Ct. 104 (1969), because the plaintiff brought

Dissolution of the FECA immunity for the government (second alternative) or the technical substitution of the government as defendant (third alternative) have not been considered by the courts. However, these alternatives seem particularly viable, since they maintain Congressionally intended protection of the federal driver, while preserving the individual employee's right to sue in tort.

The interpretation the courts have given to the interaction of these federal protective and compensatory statutes leaves the injured government employee with only the FECA to compensate him for injuries suffered at the hands of another government employee. The FECA was never intended to be a complete remedy for an injury caused by the neglect of another.[40]

If the courts cannot be convinced to rethink this anomaly when it next comes up for review, Congress should be induced to review the inequities that have become apparent since the passage of the FDA. The government employee-plaintiff, by an unfortunate combination of circumstances, is deprived of a right to obtain redress in the courts when he has been injured by the negligence of a government driver.

his action directly against the United States and not against the individual employee; the court held that there was no common law right to sue the government and therefore plaintiff was not deprived of due process. But the court added, "Whether the Federal Drivers Act, in insulating federal drivers from pre-existing common law right of action for damages brought by a fellow employee, constitutes a deprivation of due process, is a question not presented here since Noga did not sue the driver." *Id.* at 945. Van Houten and Vantrease did sue the drivers, but the due process argument was not raised on either appeal.

40. *See* 1 A. LARSON, WORKMAN'S COMPENSATION § 2.50 (1967).