

ORIGINAL

In the
Supreme Court of the United States

CARLOS RIVERA GOMEZ,
PETITIONER

v.

ASTOL GALERO TOLEDO,
RESPONDENT

No. 79-5601

Washington, D. C.
April 16, 1980

Pages 1 thru 31

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X
3 CARLOS RIVERA GOMEZ, :
4 Petitioner :
5 v. : No. 79-5601
6 ASTOL CALERO TOLEDO, :
7 Respondent :
8 -----X

9 Washington, D. C.

10 Wednesday, April 16, 1980

11 The above-entitled matter came on for oral argument
12 at 1:16 o'clock a.m.

13 BEFORE:

14 WARREN E. BURGER, Chief Justice of the United States
15 WILLIAM J. BRENNAN, JR., Associate Justice
16 POTTER STEWART, Associate Justice
17 BYRON R. WHITE, Associate Justice
18 THURGOOD MARSHALL, Associate Justice
19 HARRY A. BLACKMUN, Associate Justice
20 LEWIS F. POWELL, JR., Associate Justice
21 WILLIAM H. REHNQUIST, Associate Justice
22 JOHN PAUL STEVENS, Associate Justice

23 APPEARANCES:

24 MICHAEL AVERY, ESQ., Two Park Sqzre, Boston,
25 Massachusetts 02116; on behalf of the Petitioner
26
27 FEDERICO CEDO ALZAMORA, ESQ., Assistant Solicitor
28 General, Department of Justice, P.O. Box 192,
29 San Juan, Puerto Rico 00902; on behalf of the
30 Respondent

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

MICHAEL AVERY, ESQ.,
on behalf of the Petitioner

2

FEDERICO CEDO ALZAMORA, ESQ.,
on behalf of the Respondent

21

REBUTTAL ARGUMENT OF

MICHAEL AVERY, ESQ.,
on behalf of the Petitioner

30

1 MR. CHIEF JUSTICE BURGER: We will hear arguments
2 next in Gomez v. Toledo.

3 Mr. Avery, I think you may proceed whenever you are
4 ready.

5 ORAL ARGUMENT OF MICHAEL AVERY, ESQ.,

6 ON BEHALF OF THE PETITIONER

7 MR. AVERY: Thank you, Mr. Chief Justice, and may it
8 please the Court:

9 This case comes to this Court following the dismissal
10 of Petitioner's 1983 action in which he alleged that he was
11 discharged from public employment in retaliation for a speech
12 on his part which we submit was clearly protected by the
13 First Amendment and without regard to his due process rights
14 to procedural due process under the Fourteenth Amendment.

15 QUESTION: Mr. Avery, I wonder if I could ask you
16 a question at the threshold. Has this Court ever decided that
17 Puerto Rico was a State for purposes of 1983?

18 MR. AVERY: I don't believe that has been decided
19 by this Court, Mr. Justice Brennan, but the First Circuit has
20 decided that on a number of occasions.

21 QUESTION: But has the issue ever been before this
22 Court?

23 MR. AVERY: Not to my knowledge.

24 QUESTION: I take it that it is the kind of issue
25 that we can take cognizance of, isn't it? If it is not, then

1 I gather --

2 MR. AVERY: It is a basic jurisdictional issue. It
3 is not disputed by any of the parties in the case.

4 QUESTION: I appreciate that.

5 MR. AVERY: And I know of no argument that has been
6 presented --

7 QUESTION: Well, what has been the rationale of the
8 First Circuit, to suggest that it is a State.

9 QUESTION: As you are aware, this Court has held
10 that the District of Columbia is not a State for purposes of
11 1983. And at least I take it constitutionally Puerto Rico is
12 a Territory, isn't it?

13 MR. AVERY: It is not a territory in a strict
14 constitutional sense but it has been treated as such by the
15 First Circuit. It has a sort of unique Commonwealth status
16 arising from the Organic Act earlier in this --

17 QUESTION: Well, that isn't a constitutional matter
18 though, is it? Congress has created something called a
19 Commonwealth but I suppose for the purposes of the Constitution
20 it is a territorial clause that applies, isn't it?

21 MR. AVERY: That would be our position with regard
22 to the application of 1983, yes, sir.

23 QUESTION: What has the First Circuit said is the
24 basis for a conclusion that actions against Puerto Rican
25 officials lie under 1983?

1 MR. AVERY: As I recall -- and you do catch me
2 somewhat off guard, Mr. Justice Brennan -- the argument that
3 has been made in this case is that the Constitution must have
4 meaning within the Commonwealth of Puerto Rico since it is
5 under our jurisdiction. And that 1983 is the method for
6 enforcing that.

7 QUESTION: We said that in the Fourth Amendment case,
8 didn't we?

9 MR. AVERY: That may very well be.

10 QUESTION: Not that it is a State, but that the
11 Constitution is applicable.

12 QUESTION: But didn't we also say in the opinion
13 written for the Court by Mr. Justice Brennan covering the
14 District of Columbia that Congress enacted 1983 because it
15 thought that State legislatures would be considerably less
16 receptive to Federal constitutional rights than Congress it-
17 self and that since Congress itself legislated for the District
18 of Columbia, the District of Columbia was not a State for
19 purposes of 1983.

20 MR. AVERY: Well, that rationale would support the
21 application of 1983 to Puerto Rico, because Congress does not
22 legislate for Puerto Rico within -- in the sense that it does
23 for the District of Columbia.

24 QUESTION: Well, it certainly passed the Organic
25 Act.

1 MR. AVERY: Yes, but the laws that govern the people
2 of Puerto Rico on a day to day basis are passed by the Puerto
3 Rifo legislature in Puerto Rico. And in that sense functionally
4 it is in the same position to the Federal Constitution as a
5 State or Territory.

6 QUESTION: Well, would you say then that the Home
7 Rule Act enacted by Congress for the District of Columbia
8 several years ago made our earlier decision saying 1983 was
9 not applicable to the District out of date because now the
10 City Council of the District of Columbia is the one that enacts
11 the laws which govern the citizens of the District of
12 Columbia?

13 MR. AVERY: Well, that might be a possible argument,
14 Mr. Justice Rehnquist. To be frank with you, I am a little
15 out of my depth with regard to the Home Rule Act in the
16 District of Columbia and I don't know that I can answer that
17 question adequately.

18 But I would say with regard to Puerto Rico that the
19 same concerns that prompted the 1871 Civil Rights Act are
20 in effect there, namely is the Federal Constitution going to
21 be given the same even-handed application by local officials
22 in that Territory as it is in all the other States and
23 Territories. And I think that that justifies the application
24 of 1983 to Puerto Rico.

25 QUESTION: Because there is a difference in the

1 status of the Virgin Islands and Puerto Rico, they aren't
2 going to stand for it, are they?

3 MR. AVERY: Well, I accept your statement that they
4 are not, Mr. Justice Marshall. I think that Puerto Rico does
5 have the unique relationship --

6 QUESTION: That is what I thought.

7 MR. AVERY: -- does have a unique relationship with
8 the United States. And the District Court in Puerto Rico and
9 the First Circuit have certainly entertained these suits with
10 regard to Puerto Rico for a number of years now.

11 QUESTION: Have there been any rulings with respect
12 to 1981 or 1982 about Puerto Rico?

13 MR. AVERY: I know of no 1981 and 1982 cases.
14 There may very well be such cases but I personally don't know
15 of such cases, Mr. Justice White.

16 The complaint in this case was dismissed by the
17 District Court purely for the reason that the plaintiff had
18 failed to allege bad faith in his complaint despite the fact
19 that he had pleaded constitutional violations and he had
20 pleaded that these violations had transpired under color of
21 law. And our position is that this question presents two
22 analytically different issues for resolution by this Court.
23 One, who has the burden of pleading matters relative to the
24 qualified immunity issue in a 1983 case; and two, what are
25 the elements of a cause of action under Section 1983?

1 In our view, the fatal flaw of the First Circuit
2 decision is that it merged these two questions and decided
3 both of them incorrectly by requiring the plaintiff to allege
4 bad faith as an element of his cause of action under 1983.

5 If I might turn to the qualified immunity issues
6 first, this Court has decided we would submit in *Scheur v.*
7 *Rhodes* that in a series of cases that have been decided by
8 the Court that the qualified immunity matters are matters of
9 defense. Although the Court has never referenced it specifically
10 to Rule 8(c), we would submit that the matters of affirmative
11 defense under Rule 8(c) have been continuously referred to in
12 that way by the Court.

13 QUESTION: Do you think all matters of immunity are?

14 MR. AVERY: I think --

15 QUESTION: What about absolute immunity for --
16 legislative immunity, for example?

17 MR. AVERY: This Court has treated absolute immunity
18 as a defense. In *Doe v. McMillan*, for example, I think the
19 Court clearly put a burden on the defendant in that case to
20 justify the conclusion that if --

21 QUESTION: Just to plead the immunity, to establish
22 that what was going on there was legislative.

23 MR. AVERY: Yes, that is correct. The subordinate
24 facts, if you will, that would have justified absolute immunity
25 in that case. And that is part of our argument, that if the

1 defendant has to do even for absolute immunity it would seem
2 to follow that for qualified immunity the defendant certainly
3 has to do it.

4 QUESTION: What about Eastland v. Servicemen's Fund
5 decided three or four years ago, wasn't there some statement
6 in there that a mere letter from the defendant stating that he
7 was a member of Congress was all that was required, no pleading
8 at all?

9 MR. AVERY: I don't know, Mr. Justice Rehnquist, but
10 in other absolute immunity cases rather more than that has
11 been required of the defendants. But even if there are cases,
12 for example a judicial immunity case where the mere status of
13 the person is a fairly complete answer to the immunity issue --

14 QUESTION: You still have to say, I object.

15 MR. AVERY: Yes. And in fact there are cases where
16 even the fact that the person is a judge won't insulate him
17 from liability under 1983 if he acts wholly beyond his judicial
18 authority.

19 QUESTION: What if the plaintiff alleges in his
20 complaint that the defendant is a judge and that it is clear
21 from the allegations in the complaint that the judge was acting
22 in his judicial capacity?

23 MR. AVERY: I think the judge would be entitled to
24 win on a motion to dismiss in that case.

25 QUESTION: For failure to take a cause of action?

1 MR. AVERY: No, because the immunity would be clear
2 on the fact of the pleadings and the complaint in that sense
3 would not state a claim for relief.

4 QUESTION: Well, Tenney v. Brandhove this Court
5 reinstated a District Court dismissal of an action where the
6 Court of Appeals had ruled that they had stated a cause of
7 action. And this Court reversed and reinstated the dismissal.
8 And you would think it was because of his failure to state
9 a cause of action.

10 MR. AVERY: Well, I think the plaintiff states a
11 cause of action when he alleges his constitutional rights have
12 been violated and that they have been violated under color of
13 law. And our submission is that the immunity matters, whether
14 absolute or qualified, are really matters in confession and
15 avoidance.

16 Now, the absolute immunity cases are easy because
17 so often it is obvious from the face of the complaint what the
18 issue is.

19 The qualified immunity matters, however, fall into
20 a completely different --

21 QUESTION: Well, you don't need to argue about
22 absolute immunity.

23 MR. AVERY: No, I do not. The qualified immunity
24 matters are rather different and I think this Court did decide
25 in Scheuer v. Rhodes that there is no automatic assumption

1 of qualified immunity even with regard to the Governor of a
2 State in that case. That case came here following the granting
3 of a motion to dismiss by the District Court and this Court
4 held in a unanimous opinion written by the Chief Justice that
5 that was erroneous for the District Court to assume that good
6 faith attached automatically and that there was no basis in
7 in the record, factual or otherwise, to support the automatic
8 assumption of good faith. And the Court specifically said
9 that the complaining parties in that case were entitled to
10 be heard more fully than was possible --

11 QUESTION: That doesn't necessarily follow because
12 you have to plead it that you have to prove it.

13 MR. AVERY: That doesn't necessarily follow under
14 the Federal --

15 QUESTION: So what cases do you have that the
16 defendant not only must plead but prove it?

17 MR. AVERY: This Court has not addressed the question
18 of who has the ultimate burden of proof with regard to the
19 qualified immunity matters. That issue has been widely
20 litigated in the lower Federal courts and nearly all of the
21 circuits outside the First Circuit, all ten circuits outside
22 the First Circuit have ruled either on the pleading or proof
23 matter and most of those circuits have decided that the
24 defendant has the burden not only of pleading it but of proving
25 it as well.

1 QUESTION: Some decided the other way?

2 MR. AVERY: There is only one case I know of outside
3 the First Circuit and that is Cruz v. Beto in the Fifth
4 Circuit where they held that the director of a State-wide
5 prison system did not have that burden and in that case the
6 plaintiff had the burden.

7 QUESTION: He had to plead it?

8 MR. AVERY: He had to raise it --

9 QUESTION: He had to pose a defense but it is
10 like an insanity defense in some jurisdictions. Then the
11 Government must prove insanity.

12 MR. AVERY: I don't know if that is an exact analogy,
13 because the Fifth Circuit decision isn't so clear, actually,
14 about the relationship between the pleading requirement and
15 the proof requirement.

16 Also there seems to be some disagreement among the
17 various panels within the Fifth Circuit about who has the
18 burden.

19 The other circuits have pretty uniformly held that
20 the defendant has the burden and the reason for that, I would
21 submit, is because of very sound promising consideration,
22 namely these matters, matters that go to the qualified immunity
23 issue in many cases are singularly within the knowledge of the
24 defendant. There were so many different types of sources
25 which the defendant might turn to to justify a qualified immunity

1 defense. The defense I think both as enunciated by this
2 Court and as interpreted by the lower Federal courts is very
3 broad. Defendants might look to administrative practice. They
4 might look to decided cases. They might look to the advice of
5 counsel. They might look to a manual that is produced by the
6 police department or the government that they work for.
7 Plaintiff simply has no way of knowing at the time he grants
8 the complaint what the defendant's explanation for
9 unconstitutional conduct might be and therefore we suggest that
10 is only the defendant who can consistent with the requirements
11 of Rule 11 come forward and plead the matter. That is true
12 not only because the defendant is the only one who would know
13 what the possible sources of his good faith might be but the
14 defendant is the only one who would know the circumstances
15 under which he claims to have developed some good faith
16 belief in the legality of his action. For example, suppose
17 the defendant relies upon advice of counsel and ultimately the
18 defendant's position at trial is going to be, my lawyer told
19 me that it was legal for me to engage in this act, which it has
20 turned out violates the plaintiff's constitutional right.

21 It is not only the question of what the lawyer told
22 him but what that defendant said to the lawyer. What was the
23 reason why he sought advice from that lawyer, what information
24 did he give to the lawyer before he asked the lawyer for an
25 opinion. What question did he finally put to the lawyer in

1 response to which the lawyer gave him some advice.

2 Those are matters totally within the control of the
3 defendant's knowledge and the plaintiff simply has no
4 information.

5 QUESTION: To you think the burden matter is even
6 here?

7 MR. AVERY: Do you think the --

8 QUESTION: Do you think the burden issue is here?

9 MR. AVERY: Yes, I do think it is here, because it
10 seems to me what the District Court and what the First Circuit
11 decided was that --

12 QUESTION: Well, wasn't the complaint dismissed?

13 MR. AVERY: The complaint was dismissed, yes.

14 QUESTION: On what -- motion?

15 MR. AVERY: It was dismissed on motion but the
16 District Court really sua sponte raised this issue.

17 QUESTION: Well, I know but it wasn't even pleaded.
18 There would have still been a dismissal just for failure to
19 plead.

20 MR. AVERY: The dismissal was for failure to plead.

21 QUESTION: It couldn't have been for failure to
22 prove.

23 MR. AVERY: That is correct.

24 QUESTION: So and neither could the First Circuit.
25 So why is the burden issue here?

1 MR. AVERY: As to burden of proof? Well, that issue
2 is not here.

3 I was talking about that, Mr. Justice White, because
4 you asked me a question about it.

5 QUESTION: Well, you certainly would seem to argue
6 and assert that is your position, anyway.

7 MR. AVERY: That would be my position.

8 QUESTION: It is your position in your brief, isn't
9 it?

10 MR. AVERY: Yes, it is our position in our brief but
11 we do state in the brief that we think it would be a mistake
12 for the Court in this case to announce a flat rule covering
13 all 1983 cases as to the allocation of that burden. Just like
14 Scheuer v. Rhodes, the Court announced it would be imprudent
15 to try to cover the whole waterfront with regard to the
16 qualified immunity --

17 QUESTION: Why get to the burden at all?

18 MR. AVERY: The burden of proof?

19 QUESTION: Yes.

20 MR. AVERY: I don't think the Court does need to get
21 to the burden of proof.

22 QUESTION: Well, then you are using the term "burden"
23 in two different senses, at least for my ear.

24 MR. AVERY: Let me apologize for my lack of clarity
25 but --

1 QUESTION: Pleading is the only thing that is here.

2 MR. AVERY: This is a case about the burden of plead-
3 ing. However --

4 QUESTION: Isn't it also true that if the Court should
5 ultimately decide that the burden of proof was on the
6 defendant, then necessarily the burden of pleading would fall
7 a fortiori.

8 MR. AVERY: That is correct.

9 QUESTION: So to the extent that you make an argument
10 favoring placing the burden of proof there you are supporting
11 an argument in favor of placing the burden of pleading there as
12 well.

13 MR. AVERY: That is correct. I only meant to say that
14 I don't need to go that far in order to win this case.

15 QUESTION: But the converse of that is not true,
16 necessarily?

17 MR. AVERY: That is correct also.

18 This is a case though which is somewhat confusing in
19 terms of what the First Circuit decided, because the First
20 Circuit appears to say not only in this case but in its other
21 decisions that the reason they put that burden on the plaintiff
22 is as though they consider pleading bad faith an element of
23 the plaintiff's cause of action. And that is the second half
24 of the analysis that the First Circuit gives us, namely that
25 in order to plead successfully a 1983 case the plaintiff has

1 to allege that the defendant acted in bad faith. That is a
2 ruling which may very well, although I just saw it a few
3 moments ago, be disposed of by the Court's decision today in
4 the Owen case because I take it that one of the things that
5 we could say on the basis of that is that bad faith in the
6 sense of negating qualified immunity can't be an element of
7 the very cause of action if that cause of action can be
8 asserted against the municipality without making the claim of
9 negating qualified immunity.

10 It would also, the First Circuit decision viewed
11 that way, it would seem to me require this Court really to over-
12 rule or at least to do substantial damage to Monroe v. Pape,
13 and Carey v. Piphus, cases in which this Court has in effect
14 said there were two requirements for making out a cause of
15 action under 1983 -- (1) deprivation of a constitutional right
16 and (2) a deprivation which takes place under color of law.

17 To add a third requirement, namely that the defendant
18 acted with some malice or recklessness or bad faith in the
19 sense in which the First Circuit uses those terms would be to
20 add a new requirement to --

21 QUESTION: Unless some element happens to be
22 independently an element of a constitutional violation?

23 MR. AVERY: That is correct. There are constitutional
24 violations that require some mental element.

25 QUESTION: In New York Times v. Sullivan, as I under-

1 stand it, the requirement of intent to defame or actual malice
2 is a burden on the plaintiff as a matter of constitutional
3 law.

4 MR. AVERY: In pleading a defamation case such as
5 The New York Times v. Sullivan, that is correct. I think an
6 example of that in this case is the First Amendment violation.
7 Under the Mt. Healthy case, as I understand it, the plaintiff
8 has to allege first that he was engaged in protected activity
9 and it was then in response to his being engaged in protected
10 activity and it was then in response to his being engaged in
11 protective activity that the defendant discharged him from
12 employment. In other words, the plaintiff does have to
13 allege that a substantial factor or a motivating factor in
14 the defendant's action in discharging the plaintiff was the
15 plaintiff's -- the content of the plaintiff's speech.

16 QUESTION: And in a racial discrimination case.

17 MR. AVERY: And in a Fourteenth Amendment racial
18 discrimination case invidious discrimination is required.

19 QUESTION: Intentionally.

20 MR. AVERY: And intent. And in an Eighth Amendment
21 case some deliberate indifference is required.

22 But those are very specific requirements which the
23 Court has developed as a result of the substantive juris-
24 prudence of each of those constitutional violations. I think
25 in the First Amendment case, for example, we know exactly what

1 it is that the plaintiff has to allege as a result of the Mt.
2 Healthy decision. Just to call that bad faith or malice is
3 to muddy the waters, we would submit, because those terms are
4 much more general, indeed not nearly so meaningful as the
5 specific content of those constitutional rights which are
6 developed with regard to the substantive law in those areas.

7 In this case, then, our submission is that the
8 plaintiff had only a responsibility to allege the substantive
9 elements of the constitutional violations he was pleading,
10 namely with regard to the First Amendment violation that he
11 had been engaged in speech activities which are arguably
12 protected by the First Amendment and (2) that he was fired as
13 a result of the fact that he engaged in that speech. And
14 with regard to the procedural due process question that the
15 plaintiff had employment in which he had a property right
16 and (2) that he was discharged without a hearing.

17 QUESTION: And you say that is pleading merely the
18 ultimate facts?

19 MR. AVERY: Well, I say that those are the elements
20 of those two constitutional violations, that the -- with
21 regard to the First Amendment issue I think that he has to
22 fairly put the defendant on notice that he is claiming that
23 he was fired because of the content of his speech and I
24 think with regard to the procedural due process issue he does
25 have to plead that he lost his job and that he lost it without

1 a hearing. I don't think he has to do any more than that
2 under the notice pleading rules. And I think the plaintiff
3 did that in this case.

4 QUESTION: Mr. Avery, I think before you sit down,
5 perhaps I should have looked at 1983 before I asked you the
6 question I did whether Puerto Rico is a State, the statute
7 reads:

8 "Every person under color of any statute,
9 ordinance, regulation, custom or usage of any State
10 or Territory" --

11 So I gather it is under 1983, because Puerto Rico is
12 a Territory.

13 MR. AVERY: Oh yes, if Puerto Rico is considered a
14 Territory, it --

15 QUESTION: Well, all right, then.

16 QUESTION: It is just a question of whether or not
17 Puerto Rico is a Territory.

18 MR. AVERY: I thought that was what Mr. Justice
19 Brennan's question was addressed to.

20 QUESTION: All right.

21 QUESTION: It is a Commonwealth, it is a Commonwealth
22 by congressional legislation.

23 MR. AVERY: Correct; as I say, and I am repeating
24 myself, it has been treated as a Territory for the purposes --

25 QUESTION: Incidentally, it has been a Commonwealth

1 for not that many years, has it?

2 MR. AVERY: The Commonwealth status, if I am not
3 wrong, is in the late 'Fifties or early 'Sixties.

4 QUESTION: 1983 would apply if it were a Territory
5 or if it were a State?

6 MR. AVERY: Yes.

7 QUESTION: And the Court of Appeals of the First
8 Circuit says, well, whatever it is, it is somewhere between
9 the two.

10 MR. AVERY: Yes, that is correct. And they treat it
11 as a Territory.

12 QUESTION: What was it before it was a Commonwealth?

13 MR. AVERY: It was, I believe, a Territory.

14 QUESTION: A Territory?

15 MR. AVERY: Yes.

16 I would like to reserve the rest of my time for
17 rebuttal if I may.

18 MR. CHIEF JUSTICE BURGER: Very well.

19 Mr. Cedo.

20 ORAL ARGUMENT OF FEDERICO CEDO ALZAMORA,

21 ON BEHALF OF THE RESPONDENT

22 MR. CEDO: Mr. Chief Justice, and may it please the
23 Court:

24 It has been brought before this most honorable Court
25 the fact that Petitioner was discharged from public office

1 because he chose to exercise his freedom of speech.

2 QUESTION: Are you familiar with any cases that have
3 addressed directly the question whether Puerto Rico comes
4 within 1983, and why?

5 MR. CEDO: No, sir.

6 Before delving any further into the issues of the
7 case I would like to state some of the facts.

8 Petitioner had been -- as it is reflected in Exhibit
9 1 of his complaint -- had been engaged for about two years in
10 a constant vortex of several problems concerning his fellow
11 officers. He accused some of them of fabricating cases, using
12 false witness. He suffered emotional problems himself which
13 affected him in his work professionally. He was not discharged
14 then because of that.

15 He pressed charge against his fellow officers, he
16 interfered with the Bureau of Inspection Services investigation.
17 He charged that some of his fellow officers had gained entry
18 into the police through illegal means.

19 Then some of his fellow officers in turn accused
20 him that he was maligning them -- many of them, about four of
21 them. They questioned his reputation, they accused him of
22 tampering with a witness and he was not discharged then.
23 He was accused of passing information to the defense of a
24 notorious criminal, he was accused of supplying information
25 to out-of-town killers in order that they could prepare their

1 defense. He was accused of creating problems, internal
2 problems in the police as to help underworld figures. He
3 was accused of having suspicious person in his own house.
4 He was not discharged then.

5 The fact is that an impartial investigation was
6 carried on by the police itself and he was cleared. He was
7 transferred because he could not properly work in this
8 unwholesome environment, surrounded by so many people who
9 he had accused and who had accused him in turn, he was trans-
10 ferred to the police headquarters and to the police academy.

11 QUESTION: How does this bear on the holding of the
12 First Circuit with reference to the pleading question here?

13 MR. CEDO: Well, it has been said here that his
14 right of freedom of speech had been violated. That was not
15 pleaded directly and so he did not state a violation to the
16 First Amendment at a District Court. This was not before
17 the District Court and was not decided by the Court of Appeals.
18 So it should not be before this Court. And that wasn't an
19 element of pleading. He was not discharged either when he
20 testified in the criminal case against his own supervisor,
21 undermining his authority or when criminal charges were brought
22 against him for wiretapping of his fellow officers in
23 conversations concerning official matters. He was discharged
24 two months afterwards, after three years of all this when it
25 became apparent to the Superintendent of Police that his

1 conduct was injurious and harming to the Police Department.

2 So I say that in justice it couldn't be said that
3 he was arbitrarily discharged as he actually pleaded in his
4 complaint.

5 The complaint was dismissed mainly because of a
6 failure to state a cause of action. He did not plead any
7 bad faith on the part of the respondent. And I deem that the
8 logic would justify on the plaintiff the absence of such bad
9 faith on the defendant is that otherwise defendant would not
1 have been liable for damages.

11 So we have the concurrence of that very bad faith,
12 linked it with valid cause of action. It seems to me that
13 discharge from employment does not entitle anyone to recover
14 from damages under civil rights action. Bad faith, malice or
15 recklessness, such circumstances actually constitute elements
16 of any valid claim for relief, simply because in their absence
17 the pleader would not be entitled at all to the relief
18 requested.

19 I would like to bring your attention to the opinion
20 delivered this very morning by Mr. Justice Brennan in the
21 case of Owen v. The City of Independence where on page 2 it
22 says:

23 "Where an immunity was well established at
24 common law and where its rationale was compatible
25 with the purpose of 1983 this has been construed

1 to incorporate that immunity."

2 The same page establishes that police officers
3 actually enjoy that immunity.

4 The purpose of pleading is to inform about the
5 essence of the claim and the ground on which it rests, to
6 indicate the basis upon which relief is sought.

7 And so no one should be required to put forward a
8 defense against minor imputations which have not even been
9 formulated or articulated or to state his position concerning
10 possible or probable issues which have not been raised yet
11 in a case against him.

12 QUESTION: Are you suggesting absolute immunity?

13 MR. CEDO: It is a qualified immunity.

14 QUESTION: Well, how is the party under 1983 to know
15 what immunity there is?

16 MR. CEDO: Because of the very position.

17 QUESTION: Well, how would you allege it; you are a
18 lawyer, how would you allege if you want others --

19 MR. CEDO: I would have claimed that regardless of
20 defendant being a police officer the immunity did not apply
21 to him because he had acted in bad faith.

22 QUESTION: Well, what other defense would have to
23 take care of in your original pleading? What other defense
24 would you have to negate in your original pleading?

25 MR. CEDO: I think this is main point on which the

1 defense rests. We don't negate all the other elements of the
2 violation.

3 QUESTION: Suppose you put in a provision that says
4 a defendant has no valid defense.

5 Is that enough?

6 MR. CEDO: I would say that this is a very valid
7 defense.

8 QUESTION: I said if the moving party says and the
9 defendant herein has no valid defense, would that be enough?

10 MR. CEDO: No, I would not say so. I would say that
11 that is --

12 QUESTION: He would have to be very particular,
13 wouldn't he?

14 MR. CEDO: Yes. I would say that he would have to
15 be very specific --

16 QUESTION: He would have to be very specific about
17 something he didn't know anything about.

18 MR. CEDO: Well --

19 QUESTION: Is he obliged to know the immunity or
20 lack of immunity that the police officer has?

21 MR. CEDO: I think he should know about it, since
22 he is actually pleading that it was implied in the allegations.

23 QUESTION: What was implied?

24 MR. CEDO: Before the Court of Appeals it was argued
25 that though they had not pleaded bad faith in those many words,

1 it was actually implied in the allegations.

2 QUESTION: Do you mean that the only way a police
3 officer can be held liable under 1983 is on proof of bad
4 faith, affirmative proof of bad faith?

5 MR. CEDO: That is correct.

6 QUESTION: That is your position?

7 MR. CEDO: That is my position.

8 Well, first I think that it should be pleaded.

9 QUESTION: Why plead it if you don't have to prove
10 it?

11 MR. CEDO: Well, why crossing the bridge before you
12 get to the river? We are at this stage of the pleading, the
13 case was dismissed because it had not been pleaded properly,
14 not because of any consideration --

15 QUESTION: But what you want to do is go to the
16 other side of the river. You want the moving party in 1983
17 to take care of all the defenses in his pleading.

18 MR. CEDO: I would --

19 QUESTION: There is just one defense.

20 MR. CEDO: I would ask from him to anticipate and
21 at least give notice of what he intends to say. That is the
22 purpose of pleading, to give notice, to inform as to the
23 essence --

24 QUESTION: Do you have discovery in Puerto Rico?

25 MR. CEDO: Yes, we do.

1 QUESTION: I assumed so.

2 Thank you.

3 QUESTION: Supposing you had a complaint in which
4 there were two defendants, one a municipality and the other
5 the chief of police. And say in two counts with the same
6 transaction basically in both. Would you say that there must
7 be pleading of bad faith in the count against the municipality?

8 MR. CEDO: Well, your very case of Owen v. The City
9 of Independence, Missouri covers that adequately. My personal
10 opinion is that in the face of an immunity you would have to
11 plead an indication of how that immunity would not apply.

12 QUESTION: But you would agree that under Owen there
13 would be no necessity of pleading bad faith against the
14 municipality?

15 MR. CEDO: Yes.

16 QUESTION: And you would say there is an additional
17 element in the cause of action against the individual?

18 MR. CEDO: Affirmative, yes.

19 Now, concerning the due process violation I would
20 say that considering the fact that petitioner was granted a
21 hearing and that he was rendered whole and he was reinstated,
22 his claims don't have any foundation. The fundamental
23 requirement of due process is an opportunity to be heard at
24 a meaningful time and in a meaningful way. And decisions of
25 this Court suggests rather strongly, I would say, that an

1 employee who has a hearing held after removal get his due
2 process, for example, Arnett v. Kennedy.

3 QUESTION: Counsel, is that so clear that it could
4 be decided on the complaint in this case?

5 MR. CEDO: It was definitely clear because Act 26
6 of 1974 on which the claim was based does not provide for the
7 celebration of an evidentiary trial-type, formal administrative
8 hearing. It just mentions an opportunity to be heard, which
9 in my opinion, could be accomplished by a chance to file an
10 answer. And petitioner has not alleged that he was denied
11 such opportunity. Besides, petitioner had a hearing and it
12 seems that the statute that created the Commission of
13 investigation, prosecutions and appeals of the police provides
14 that the Commission may confirm, revoke or modify the decisions
15 or acts appealed, it could be said that petitioner's discharge
16 was not in fact final until its time for an appeal had expired
17 or after 15 days after being affirmed upon appeal that a
18 Commission reconsideration was requested.

19 So he was granted his hearing before his discharge
20 was final and that comes from the very facts that were pleaded.
21 I think the case is very clear.

22 Thanks for your attention.

23 MR. CHIEF JUSTICE BURGER: Do you have anything
24 further, Mr. Avery?
25

1 REBUTTAL ARGUMENT OF MICHAEL AVERY, ESQ.,

2 ON BEHALF OF THE PETITIONER

3 MR. AVERY: Just two points, if Your Honor please.

4 First of all, this is a case where the plaintiff did
5 allege that he was entitled to a hearing, and that allegation
6 is supported by regulations which were drafted and promulgated
7 by the respondent in this very case. And so it is a case
8 where if he has any good faith defense that might even remotely
9 or conceivably be imagined, no one other than the respondent
10 could possibly know what his excuse or rationale for not
11 following his own regulations might be. And this is a case
12 that in that sense the burden definitely belongs on him to
13 come forward and escape from the logical import of his own
14 regulation.

15 Secondly ---

16 QUESTION: I don't have it in front of me right now,
17 but isn't there something in the complaint itself about the
18 conducting of a hearing?

19 MR. AVERY: The complaint alleges that the plaintiff
20 was entitled to a hearing under the Puerto Rico Police Act
21 of 1974.

22 QUESTION: But doesn't it also say he got one but it
23 was defective, or ---

24 MR. AVERY: No, he didn't get a hearing, Mr. Justice
25 Rehnquist. There was an investigation by the Legal Division

1 of the Police Department which exonerated the petitioner. But
2 that wasn't a hearing as such. In fact the answer admits
3 -- there was an answer filed in this case and it admits that
4 he was discharged without a hearing. He received no hearing.
5 There was an investigation by an attorney for the Legal
6 Department of the Police Department but not a hearing as such.

7 QUESTION: The affirmative allegation is that his
8 discharge was without prior hearing.

9 MR. AVERY: That is correct. That was admitted in
10 the answer.

11 And the second point was that although the petitioner
12 does not use the phrase "First Amendment" in the complaint,
13 which is what the respondent was referring to when he spoke
14 about the First Amendment issue, the petitioner clearly does
15 set forward the facts which support a First Amendment claim.
16 And we feel that really beyond doubt that the First Amendment
17 claim is very much a part of this case.

18 Thank you very much.

19 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The
20 case is submitted.

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