Private Club's Lease From City at Token Rental Does Not Constitute State Action

In *Golden v. Biscayne Bay Yacht Club*,[1] the U.S. Court of Appeals for the Fifth Circuit held that where the City of Miami's only connection with the defendant yacht club was its lease of certain bay bottom lands to the club for $1 per year, the action of the club in barring blacks and members of the Jewish religion from membership did not constitute state action under 42 U.S.C.A. §1983.

Biscayne Bay Yacht Club was organized in 1887, nine years before the City of Miami became a municipality. Except for the lease, the City of Miami never participated in the operation of the private club. The club's by-laws never expressly prohibited membership of individuals of any particular race or religion, but in practice the club's sponsorship requirements effectively blocked the admission of any blacks or Jews for almost 90 years.[2]

Plaintiffs, unable to obtain sponsorship from any members of the club, sought declaratory and injunctive relief pursuant to 42 U.S.C.A. §§1981, 1983 and 2000a,[3] asking the district court to enjoin the club from excluding prospective members on the basis of race or religion. The district court held that the existence of the lease alone amounted to sufficient state action to bring the alleged discrimination within the Fourteenth Amendment.[4] In a panel decision the Fifth Circuit affirmed.[5]

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1. 530 F.2d 16 (5th Cir. 1976).

2. David Fincher, a black, and Harry Golden, a Jew, expressed an interest in joining the Biscayne Bay Yacht Club, but when they requested membership applications the club responded that membership was by sponsorship only. Article VI, Election of Members, in the by-laws of the Biscayne Bay Yacht Club provides in Section 1.A: "A candidate for membership shall have three sponsors who shall file with the Secretary letters by each of them concerning his or her qualifications therefor, to go with a form to be furnished by the Secretary to the sponsors upon application for the same, whereon detailed data concerning the candidate will be set forth and signed by each of the sponsors." 530 F.2d at 24.

3. Section 1981, which was derived from the Civil Rights Act of 1866, provides, *inter alia*, that blacks shall have the same rights as white citizens to make and enforce contracts. Section 1983, the statutory provision of the Fourteenth Amendment, creates a cause of action for a deprivation of constitutional rights under color of law. Section 2000a, part of the Civil Rights Act of 1964, prohibits discrimination or segregation in places of public accommodation. Because the court of appeals followed the district court in deciding the case solely on Fourteenth Amendment grounds, it did not consider the §1981 and §2000a claims. 530 F.2d at 22.

4. Golden v. Biscayne Bay Yacht Club, City of Miami, 370 F. Supp. 1038, 1042 (S.D. Fla. 1973). The trial court dismissed the City of Miami as a defendant, *citing* City of Kenosha v. Bruno, 412 U.S. 507 (1973), which held that a city is not a "person" within the meaning of §1983 for purposes of equitable relief.

5. Golden v. Biscayne Bay Yacht Club, 521 F.2d 344, 353 (5th Cir. 1975).

On rehearing en banc the Fifth Circuit recognized that this was the "first time in the history of Fourteenth Amendment jurisprudence that a federal district court has undertaken the supervision of membership policies in a genuinely private club."[6] Reasoning that the bay bottom lease did not supply the requisite state involvement necessary to invoke the Fourteenth Amendment, the Fifth Circuit reversed.[7]

In the *Civil Rights Cases* of 1883,[8] the U.S. Supreme Court established a dichotomy between discriminatory action by the state, which is prohibited by the Fourteenth Amendment, and private conduct, against which the Fourteenth Amendment "erects no shield."[9] The kind of state action which is prohibited by the Fourteenth Amendment is codified in 42 U.S.C.A. §1983.[10] The chief problem which remains, though, is one of determining whether particular discriminatory conduct amounts to state action. *Burton v. Wilmington Parking Authority*[11] is perhaps the leading modern discrimination case that focuses on the degree of state action necessary to employ the Fourteenth Amendment.[12] *Burton* involved a publicly owned parking building operated by the Wilmington Parking Authority, an agency of the State of Delaware. To meet expenses for the operation and maintenance of the facility, the Authority leased part of the building to the Eagle Coffee Shoppe for $28,700 per year.[13] The result of the arrangement was that Eagle received business from persons using the garage and the Parking Authority received business from restaurant diners. When Eagle refused to serve Burton food or drink solely because he was black, litigation ensued. The Supreme Court, applying its own formula of "sifting facts and weighing circumstances"[14] on a case-by-case basis, found that "[t]he State [had] so far insinuated itself into a position of interdepend-

6. 530 F.2d at 17.

7. *Id.* at 23.

8. 109 U.S. 3 (1883).

9. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972), *quoting from* Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

10. 42 U.S.C.A. §1983 (1974) provides that: "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." (Emphasis added.)

11. 365 U.S. 715 (1961).

12. It is difficult to find a recent discrimination/state-action case that does not refer to *Burton*. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Gilmore v. City of Montgomery, 417 U.S. 556 (1974); and Greco v. Orange Memorial Hospital Corp., 513 F.2d 873 (5th Cir. 1975). *See also* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 658-62 (1974); Comment, *State Action and the Burger Court*, 60 VA. L. REV. 840, 841-46 (1974).

13. Other material connections with the state were Eagle's partial tax exempt status and its entitlement to state furnished heat and maintenance.

14. 365 U.S. at 722.

ence with Eagle that it must be recognized as a joint participant in the challenged activity."[15] This test is now known as the *Burton* standard.[16] The essence of the standard, however, is not contained so much in the "so far insinuated" language as it is in the particular set of facts in *Burton* that attach to and define the boundaries of the test. *Burton*'s facts abundantly supported the Court's conclusion that the symbiotic relationship between the restaurant and the state constituted a sufficient quantum of state action to warrant judicial intervention.

In Moose Lodge No. 107 v. Irvis,[17] also a discrimination case brought under §1983, the Court considered the discriminatory actions of a private club which refused to serve food and beverages to the plaintiff, a black guest of a white member of the lodge. The plaintiff alleged that the State of Pennsylvania fostered discrimination by way of its Liquor Control Board regulation which required each licensee to adhere to its own constitution and by-laws. Such a regulation, applied to Moose Lodge, in effect became a state directive to the lodge to discriminate.[18] The plaintiff argued that just as in *Burton*, there were mutual benefits flowing between the state and its liquor licensees.[19] But the Court rejected this argument, simply stating that "while Eagle was a public restaurant in a public building, Moose Lodge [was] a private social club in a private building."[20] The Court further noted that detailed state regulation did not automatically signal the required nexus between the state and the club's alleged unconstitutional acts necessary to trigger judicial sanction.[21]

Some courts have suggested that in cases not related to discrimination, a greater amount of state action should be shown to justify a holding of a Fourteenth Amendment violation.[22] The *Burton* standard should be applied in discrimination cases, and another standard, requiring a greater amount of state action than that required in *Burton*, should be applied in other cases. This double-standard theory was used in *Greco v. Orange*

15. *Id.* at 725.
16. 530 F.2d at 19.
17. 407 U.S. 163 (1972).
18. Each local Moose Lodge is bound by the Supreme Lodge's constitution and by-laws, which contain a provision restricting membership to white males only. Forcing the lodge to abide by its by-laws as a prerequisite for obtaining a state liquor license, therefore, necessarily forces the lodge to discriminate.
19. Licensees acquired economic benefit via the possession of a liquor license because the state was restricted in the number of licenses it could issue by a quota system. The state derived considerable revenue from its sale of liquor to its licensees.
20. 407 U.S. at 175.
21. *Id.* at 176, 177.
22. *See* Greco v. Orange Memorial Hospital Corp., 513 F.2d 873 (5th Cir. 1975); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974). *See also* Blouin v. Loyola, 506 F.2d 20 (5th Cir. 1975); Brantley v. Union Bk. and Trust Co., 498 F.2d 365 (5th Cir. 1974); Calderon v. United Furniture Co., 505 F.2d 950 (5th Cir. 1974); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956). *Compare*, Simkins v. Moses H. Cone Mem. Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

Memorial Hospital Corp.[23] to allow a significant amount of state action to go unchecked. *Greco* involved a doctor who sued an ostensibly private hospital, allegedly affiliated with the state, for preventing him from performing elective abortions in accord with his right to practice medicine free from the imposition of arbitrary restraints. In *Greco*, the county owned the building upon which the hospital was situated; the hospital was constructed in part with $1,762,000 in county funds; the hospital leased the land and the building from the county for $1 per year; and the hospital agreed, under the lease, to provide certain services and to operate in a prescribed manner. Holding that there was insufficient state action, the Fifth Circuit said that "[a]bsent a charge of racial discrimination we are disinclined to press the state action doctrine and all that it entails into the internal affairs of a hospital."[24]

Unfortunately, however, the Supreme Court has been reluctant to articulate any guidelines for, or even to acknowledge the existence of such a double standard for state action. In *Jackson v. Metropolitan Edison Co.*,[25] the plaintiff alleged that the defendant's termination of her electric service constituted state action depriving her of her property without due process of law. Though *Jackson* was a non-discrimination case, the Court applied the less stringent standard used in the discrimination cases of *Burton* and *Moose Lodge*.[26] Similarly, in *Moose Lodge*, although the plaintiff alleged racial discrimination, the Court applied no stricter standard than that used in other situations.

In *Golden*, the Fifth Circuit distinguished *Burton* on the facts and followed *Moose Lodge*. Using the *Burton* standard, the court said that the facts and circumstances "fall short of establishing that the City of Miami has so far insinuated itself into a position of interdependence with the club that it must be recognized as a joint participant in the internal membership policies of the club."[27] The court in *Golden* found that, as in *Moose Lodge*, "[t]he lease does not provide a sufficiently close nexus between the city and the club so that the action of the club may be fairly treated as that of the city."[28] The court unequivocally rejected the panel's application of the "but for" rule. The panel had said that "without the city's lease of the bed of the bay the club could not exist."[29] The court reasoned that since the application of the "but for" rule would have probably dictated a contrary holding in *Moose Lodge* and since no mention of the "but for" rule was made in *Burton*, the use of such a rule in *Golden* was improper. Although the court based its holding primarily on the *Moose Lodge* ration-

23. 513 F.2d 873 (5th Cir. 1975).
24. 513 F.2d at 882.
25. 419 U.S. 345 (1974).
26. 419 U.S. at 351.
27. 530 F.2d at 22.
28. *Id.*
29. *Id.*

ale, the majority also cited the Fifth Circuit case, *Greco*, to support its decision.[30] By illustrating a greater quantum of state involvement in *Greco* than in the instant case, the court further justified its holding of insufficient state action.

Chief Judge Brown, joined by four other judges in a vigorous dissent, took exception with the majority's refusal to consider the effect of certain ordinances passed by the City of Miami in 1968 for the purpose of prohibiting any form of racial or religious discrimination by lessees of city owned land.[31] The majority's treatment of the city ordinances as an incidental issue[32] contrasted sharply with the dissent's heavy reliance on the ordinances' dispositive capacity. The dissent also attacked the majority's reliance on *Greco* as indefensible based on the dissimilarity of facts between the two cases.[33] By reference to the majority opinion in the *Golden* panel decision,[34] Judge Brown showed the *Greco* holding to be in support of, rather than against the double standard theory.

Golden's interpretation and application of *Burton* and *Moose Lodge* appears to be sound, but the decision exposes some uncertainties awaiting any court faced with the double standard theory in a "state action" case. The presence of so many cases[35] and commentaries[36] which support either side of the double standard theory, in the absence of a definitive analysis by the Supreme Court,[37] makes it possible for a court to reject the double standard theory and then strengthen its rejection by citing a case which

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30. *Id.* at 19.

31. There is little doubt that, had the ordinances been applied to the letter in this case, the majority's decision would have been different. Golden himself helped draft the ordinances, and the provisions focus on the very type of discriminatory practices used by Biscayne Bay Yacht Club. Section 1 of one of the ordinances says: "That the lessee of any property of which the City of Miami is the owner shall not discriminate against or refuse or deny to any person or persons, guests or permittees, the use of the facilities leased from the City because of race, creed, religion, color or national origin." 530 F.2d at 27.

32. 530 F.2d at 22. The majority justified its light consideration of the ordinances by referring to the lower court's similar disregard for their effect. *Id.* at 23.

33. 530 F.2d at 33.

34. *Id.* at 23-24.

35. *See* note 22, *supra*.

36. *See, e.g.*, Note, *Constitutional Law—State Action—Private Club's Lease of Bay Bottom Land from City for Token Rental Constitutes State Action*, 54 TEXAS L. REV. 641, 646 (1976); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 658-62 (1974); Comment, *State Action and the Burger Court*, 60 VA. L. REV. 840, 859 (1974).

37. The Supreme Court's latest decision on the subject, *Jackson*, appears to contradict the holding in Norwood v. Harrison, 413 U.S. 455 (1973). In *Norwood* the only state action was the Government's furnishing of free textbooks to students in a private segregated school. *Norwood* was cited in the *Golden* panel decision, 521 F.2d at 351, as an example of a case in which an attenuated amount of state involvement was all that was required in racial discrimination cases. The fact that Justice Rehnquist sided with the majority and yet wrote the majority opinion in *Jackson*, a case which seemingly rejected the double standard, leaves the law somewhat muddled with respect to the double standard theory.

endorses the double standard. Likewise, a court can approve the double standard theory and yet support its approval by using the facts of a case which rejects the theory. For example, in *Golden* the majority apparently refused to go along with the double standard theory[38] but used *Greco*, a case which endorsed the double standard, to convincingly support its holding. In the non-discrimination case of *Greco*, the court, as a result of acknowledging the double standard theory, allowed a considerably greater amount of state involvement to go unchecked than it probably would have allowed had it been charged with the duty of deciding a racial discrimination case. Thus, by using the *Greco* facts in a supportive role in the racial discrimination case of *Golden*, the *Golden* court was able to generate a considerable amount of leverage for its decision.

Arguably, the court erred in employing that tactic with regard to *Greco*. A possible explanation for the court's inconsistent use of *Greco* is that Judge Coleman, who wrote the *Golden* majority opinion and the *Golden* panel decision's dissent, refused to recognize the double standard theory. Speaking of the majority's adoption of the theory in the *Golden* panel decision, Judge Coleman commented, "I simply cannot grasp the logic for this kind of judicial picking and choosing."[39] The court could have justified its decision to follow *Moose Lodge* without resorting to the use of the *Greco* facts.[40] But as long as the Supreme Court maintains its present noncommittal position with regard to the double standard theory, courts will inevitably practice the tactic employed by the *Golden* court. The shortcoming of this tactic is that it allows courts to make misguided decisions by citing cases for propositions for which they were never intended to be cited. A Supreme Court decision specifically addressing the double standard would provide certainty and predictability to the presently unstable condition of "state action" law.

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38. *Jackson* is cited with approval in *Golden* as accepting the discrimination cases of *Burton* and *Moose Lodge* as proper gauges for weighing the degree of state action in non-discrimination cases. 530 F.2d at 19.

39. 521 F.2d at 355.

40. If the ordinances are disregarded, the facts in *Golden* clearly depict a smaller amount of state action than was present in *Burton*, and it can be easily shown that *Golden's* facts are more analogous to the facts in *Moose Lodge* than to those in *Burton*.