DANIEL WEBSTER; PEGGY WEBSTER; WEBSTER GREENTHUMB CO.; KELLY GOFE, Plaintiffs/Appellants, v. FULTON COUNTY, GEORGIA, Defendant/Appellant

00-11644 CC

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

2000 U.S. 11th Cir. Briefs 11644; 2000 U.S. 11th Cir. Briefs LEXIS 115

May 30, 2000

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA. CASE NO. 1-96-CV-2399-TWT.

Initial Brief: Appellant-Petitioner

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TITLE: BRIEF OF APPELLANTS

TEXT: [EDITOR'S NOTE: THE ORIGINAL SOURCE CONTAINED ILLEGIBLE WORDS AND/OR MISSING TEXT.]

[*i] **STATEMENT REGARDING ORAL ARGUMENT**

The Appellees request oral argument in this case, as the issues are complex and they believe oral argument would be helpful to the Court.

[*vii] **STATEMENT OF JURISDICTION**

This is an appeal from a final judgment of the United States District Court for the Northern District of Georgia. Appellate jurisdiction lies with this Court pursuant to *28 U.S.C. § 1291.*

[*1] **STATEMENT OF THE ISSUES**

I. Does a cause of action for retaliation [**5] exist under *42 U.S.C. § 1981?*

II. a) Does a white stockholder of a small closely-held corporation have standing under the Equal Protection Clause to sue a county for race discrimination, if the county discriminates against the corporation solely on account of the white stockholders' race, where the corporation **does** bring suit in its own name?

b) Does a white stockholder of a small closely-held corporation with one white and one black stockholder have standing under the Equal Protection Clause to sue a county for race discrimination, if the county discriminates against the corporation solely on account of the white stockholder's race, and the corporation **refuses** to maintain such a suit?

[*2] **STATEMENT OF THE CASE**

I. Course of Proceedings and Dispositions in the Court Below

Plaintiffs Daniel Webster, Peggy Webster and Webster Greenthumb Co. filed this action on September 17, 1996, asserting that Fulton County had engaged in race discrimination against themselves and other white-owned businesses in awarding contracts and asking for damages and injunctive relief. (R1-1) On January 30, 1997, the complaint was amended to add [**6] Minority Distributing Co. and its three shareholders as plaintiffs, and to add counts of gender discrimination; all of these plaintiffs except Kelly Goff eventually dismissed their claims voluntarily. (R1-16; R19-134) On February 4, 1998, the Complaint was again amended to add a claim that the Fulton County MFBE Program was unconstitutional *per se* and alleging that the County had retaliated against the Webster plaintiffs for filing the original suit. (R2-35)

On February 12, 1999, the court generally denied motions for summary judgment by both parties; however, the court granted Defendants' motion to dismiss Goff's claims for lack of standing and dismissed the claims of the [*3] Webster plaintiffs for retaliation, holding that *42 U.S.C. § 1981* does not prohibit retaliation against persons who protest race discrimination. (R19-136)

A bench trial on the equitable issues was held beginning May 11, 1999, and an Order and Final Judgment under Rule 54(b) issued on June 11, enjoining Fulton County from using race or gender in awarding County contracts. (R19-143; R22-176; *Webster v. Fulton County, Ga., 51 F.Supp.2d 1354 (N.D.Ga. 1999))* The [**7] Defendants appealed that judgment, which is docketed in this Court as No. 99-12216C. As of this date, oral argument in No. 99-12216C is scheduled for the week of July 10, 2000.

On February 14, 2000, the damages issues came before the district court for jury trial. The district court dismissed the individual claims of Plaintiffs Daniel Webster and Peggy Webster on grounds of standing. (R22-183-9-10; R.E. 139-140.) The trial proceeded with Webster Greenthumb Co. as the sole plaintiff. The jury returned a verdict for plaintiff Greenthumb in the amount of $ 8,750 against defendant Fulton County and in the amount of $ 1 nominal damages against defendant Michael Cooper. (Doc. 306)

[*4] On February 25, 2000, the district court entered a final judgment against Fulton County. (Doc. 307) In the same judgment, the district court vacated the verdict against defendant Michael Cooper, on grounds of qualified immunity.

II. Statement of the Facts

(1) The Webster Plaintiffs

Daniel and Peggy Webster own a small landscaping business called "Webster Greenthumb Co.", which is incorporated under Georgia law. n1 In September, 1996, the Websters filed suit against Fulton County complaining [**8] of two instances of apparent race discrimination. They alleged that first, in 1995, Webster Greenthumb bid $ 2,500 to cut down a tree on Mt. Paran Road in Fulton County. Ben's Landscaping, which is owned by an African-American man, bid $ 3,800 to cut down the same tree. Webster Greenthumb had an excellent record of completing its jobs on time, in a safe manner, and cleaning up the job sites. The record of Ben's Landscaping was not as good in these respects. Despite this, [*5] the County awarded the contract to Ben's Landscaping, paying him $ 3,800 for a job that Greenthumb would have done for $ 2,500. (R1-1)

n1 This Brief will refer to Daniel Webster, Peggy Webster, and Webster Greenthumb, collectively, as "the Webster Plaintiffs".

The second instance of alleged race discrimination arose in 1996, when Fulton County adjusted Greenthumb's annual contract (known as a "purchase order") from $ 66,000 to $ 45,500, and increased Ben's by the same amount. As found by the jury, Fulton County would not have done this [**9] "but for" the fact that Ben is black and the Websters are white. During this entire time period, Fulton County had an illegal program, applicable to all County contracting, of giving preferences to African-American companies in making contract awards. (Rl-1)

After the initial suit was filed, Greenthumb continued to bid upon contracts. Even though it was the lowest qualified bidder for these contracts, the County refused to award the work to Greenthumb, in retaliation for Greenthumb's complaint of race discrimination under *42 U.S.C. § 1981*. (R2-35) The record does not show who did Fulton County's tree-cutting work in 1997, but it was not Greenthumb.

In 1998, Plaintiffs Greenthumb and the Websters amended their complaint to include a count of retaliation. (R2-35) The district court accepted the amendment. (R2-33) In a summary judgment order, however, the court later [*6] dismissed this claim on purely legal grounds, that is, on the grounds that no cause of action for retaliation exists under *42 U.S.C. § 1981*. (R19-136)

(2) Plaintiff Kelly Goff

Plaintiff Kelly Goff owned 49% n2 of the stock in a corporation called Minority Distributing [**10] Co. (hereinafter called "MDC"), which is in the business of wholesale hardware supply. There was one other shareholder, Willie Hill, who owned 51% of the stock and was its President. Goff is white and Hill is black. (R2-35-7) In 1997, Goff sold his interest in the company, and Hill and MDC dismissed their lawsuits. (R19-134) When it became apparent that Hill and MDC were going to drop their claims, Goff moved to be substituted for MDC as the real party in interest, to pursue the claim (R3-53), but the judge denied the motion. (R19-134) Hill and MDC were thus dismissed from the suit, but Goff- being the only white person involved and therefore the person most aggrieved by the County's conduct - continued to pursue his claim.

n2 Another shareholder, Marjorie Simpson (white female), was originally a plaintiff as well, but she sold her interest to Goff shortly after suit was filed, and then dismissed her claim.

[*7] It is important to note that MDC was not considered to be a "minority-owned" business by Fulton [**11] County, despite the fact that the majority stockholder was an African-American. Fulton County treated MDC as a non-minority company for all purposes. (R16-100, Exhibits P and R.)

MDC frequently bid on hardware supply contracts with Fulton County. It did significant business with Fulton County; however, in some cases, it did not receive contracts where it was the low bidder, or was forced to split contract awards with minority-owned businesses which had placed higher bids than MDC. Generally, MDC offered to sell hardware to Fulton County at 30% off list price, while the successful minority-owned bidders offered to see at prices ranging from 10% to 25% off list price. (R16-100, Exhibits P, R, and S.) The price differences were in some cases extraordinary, where the County would pay a minority company more than 200% of the price bid by MDC for the same merchandise. (Id.) In fact, in several instances, the winning bidder would buy the merchandise from MDC and then resell it to Fulton County at a profit. (Deposition of Kelly Goff at 89-91, 166-67.)

Goff alleged that, because of his race (non-Hispanic white) and gender (male), Fulton County discriminated against him and against MDC, causing [**12] him [*8] to suffer emotional distress, humiliation, and mental pain and suffering, as well as loss of income due to discrimination against MDC. n3 (R2-35)

n3 See R2- 35 - PP 14, 15, 16, 37; R16-110.

On Defendants' Motion for Summary Judgment, the court dismissed Goff's claims on grounds of standing, finding simply: "It is well-established that shareholders lack standing to bring a Section 1983 or 1981 action claiming injury to the corporation in which they own shares. *Bellows v. Amoco Oil Co., 118 F.3d 268, 276-77 (5th Cir. 1997)* . . . ." n4 (R19-136-22)

n4 R19-136 - 22.

Shortly before this matter came to trial, the district court dismissed the individual claims of Daniel and Peggy Webster on the same grounds as Goff; that is, they lacked standing as individuals to complain about race or gender discrimination, [**13] where their race had caused the county to treat their small corporation differently than a company owned by a member of a different race. (R22-183-9-10; R.E. 139-140.)

III. Statement of the Standard of Review

[*9] All issues raised in this brief are appeals from dismissals pursuant to Fed. R. Civ. Proc. 12(b)(6) or motion for summary judgment, as to which this Court reviews the district court's findings *de novo. E.g. Wesson v. Huntsman Corp., 206 F3d 1150 (11th Cir. 2000).*

SUMMARY OF THE ARGUMENT

In Part I, Plaintiffs argue that a cause of action exists under *42 U.S.C. § 1981* for retaliation as a matter of binding precedent.

In Part II, Plaintiff Kelly Goff argues that he has standing as an individual under the Equal Protection Clause to bring a suit to redress discrimination targeted at him because of his race, even though the discrimination is effectuated against a corporation in which he holds stock. First, a county has a duty not to discriminate against persons on the basis of race in allowing them to own and operate businesses, separate and distinct from any obligation to the corporation. A corporation does not [**14] have a "race", and any discrimination against a corporation on account of race is merely derivative of discrimination against the stockholders. Second, where a county discriminates against a corporation on the basis of a [*10] stockholder's race, the individuals suffer injuries peculiar to a natural person, that the corporation does not suffer and cannot protect.

ARGUMENT AND CITATIONS OF AUTHORITY

I. *42 U.S.C. § 1981* States a Cause of Action for Retaliation.

To prepare this appeal, counsel for the Plaintiffs began to do an exhaustive research project on the holdings of the various circuits, as well as drafting some policy arguments. On re-reading *Andrews v. Lakeshore Rehabilitation Hospital, 140 F.3d 1405 (11th Cir. 1998)*, however, the issue would appear to be so clearly established in this Circuit that extensive briefing would be fruitless.

The *Andrews* court held that *42 U.S.C. § 1981* creates a cause of action for retaliation against a person who protests race discrimination. The *Andrews* court clearly intended its decision to operate as *stare decisis* and the decision has all the [**15] earmarks of precedent: 1) The issue was squarely before the *Andrews* Court; 2) the Court discussed the prior authority and policy issues at length; and 3) deciding the issue was required in order to reach the judgment, that is, to reverse a district court's dismissal of a retaliation count under *42 U.S.C. § 1981*. If there were ever a case where the doctrine of *stare decisis* should apply, this is it.

[*11] The district court's dismissal of the Plaintiffs' retaliation complaint is simply incomprehensible, especially considering the care generally given by the district court to the correct application of law in this case. Plaintiffs Daniel Webster, Peggy Webster, and Webster Greenthumb complained of retaliation in the Second Amended Complaint; the district court specifically allowed the amendment; and the dismissal was entirely predicated upon the lack of a cause of action for retaliation under *42 U.S.C. § 1981*.

Unless and until this Court, sitting en banc, hears argument that the holding in *Andrews* should be reversed, Plaintiffs believe that further argument on the issue would be a waste of the Court's time. The district [**16] court's decision dismissing the retaliation claim is directly contrary to binding precedential authority of the Eleventh Circuit, and it should be reversed and remanded.

II. Kelly Goff Has Standing to Complain of Governmental Discrimination Aimed at Him Because of His Race, Even if the Discriminatory Action is a General Refusal to Contract with any Corporation in Which He Holds Stock.

A. Goff's Injury Sounds in Tort and Constitutes an Injury to His Person.

[*12] A government's denial of equal protection is a tort. *E.g. Jackson v. Sauls, 206 F.3d 1156 (11th Cir. 2000).* The appropriate statute of limitations adopted in § 1983 cases is the state statute of limitation for a personal injury tort, *Williams v. City of Atlanta, 794 F.2d 624 (11th Cir. 1986),* and persons injured in violation of the equal protection clause are afforded remedies appropriate to a personal injury tort, such as compensatory damages in excess of economic ("special") damages to compensate them for humiliation and emotional distress and punitive damages. *E.g. Carey v. Piphus, 435 U.S. 247, 263-64 (1978)*

> In essence, §§ 1983 creates a cause [**17] of action where there has been injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person. In the broad sense, every cause of action under §§ 1983 which is well-founded results from personal injuries.

Wilson v. Garcia, 471 U.S. 261, 278 (1985), quoting with approval Almond v. Kent, 459 F.2d 200, 204 (4th Cir. 1972).

The difficulties in analyzing Goff's standing stem from his overlapping cause of action under *42 U.S.C. § 1981*. Even under § 1981, however, Plaintiffs would argue that the cause of action is a tort statute rather than a breach of contract statute. The statutes of limitations, types of proof, and remedies allowed for violations of § 1981 clearly mark it as a tort statute. Thus, to the degree that [*13] Goff has suffered non-economic injuries stemming from a violation of §

1981, he must be given standing to recover them. Because the nature of the duty and injury are more clear under the Equal Protection Clause, however, Goff's argument will focus his argument on them.

1. Goff Meets the Prerequisites of [**18] **Standing Under *42 U.S.C. § 1983.***

To enforce a right guaranteed by the Equal Protection Clause, a plaintiff must meet three basic tests. First and foremost, there must be alleged (and ultimately proven) an "injury in fact" - a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983).* Second, there must be causation - a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. *Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41-42 (1976).* And third, there must be redressability - a likelihood that the requested relief will redress the alleged injury. *Id., at 45-46; see also Warth v.* [*14] *Seldin, 422 U.S. 490, 505 (1975).* "This triad of injury in fact, causation, and redressability comprises the core of Article III's case-or-controversy requirement." *Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 103 (1998).*

Kelly Goff meets these tests easily. First, he has an injury in fact. He has suffered [**19] actual loss of income and plausible emotional distress. The most pronounced effect of the Fulton County MFBE Program was to deny white persons the right to own a business on the same terms as persons of other races and to make any such business less valuable when held by a person of one race than when owned by a person of another race. Goff also lost a lot of money, in the form of business profits, from the discrimination. Finally, he pleaded emotional distress. n5

n5 Although Goff's claims were dismissed on summary judgment, the grounds of dismissal were entirely legal and jurisdictional, i.e. a categorical finding that he lacked standing to bring an action. There was no finding that he lacked evidence to support any of his claims.

Secondly, the injury exceeded the "fairly traceable" test, as Fulton County's conduct was the direct and immediate cause of the injury. It was unarguably the direct cause of Goff's emotional distress. As to the economic injury, in the form of his lost income, the district court effectively [**20] replaced the Supreme Court's [*15] "fairly traceable" requirement with a much more stringent requirement, that is, that the plaintiff be a nominal party to a contract. Moreover, in this case, the damage to the corporation is in practice as "direct" to Goff as if he owned the business as a partnership or sole proprietorship. MDC is a small, closely-held corporation. With two shareholders, any financial damage done to the corporation directly and immediately affects the income of the owners. n6 A lost contracting opportunity to MDC literally took money right out of Goff's bank account.

n6 In fact, a shareholder in a Subchapter S corporation must report revenues to the corporation as if they were revenues directly to the individual, exactly like a sole proprietorship. "Subchapter S of the Internal Revenue Code, *26 U.S.C. §§ 1361*-1379, [creates] a pass-through system under which corporate income, losses, deductions, and credits are attributed to individual shareholders . . . ." *Bufferd v. Comm'r, 506 U.S. 523, 524-25 (1993).*

[**21]

The Supreme Court's approach to standing to attack a constitutional deprivation, unlike an action to enforce a contract, is expansive. It includes any person who meets the three-pronged test of injury, causation, and redressability. And the Court has repeatedly refused to restrict an individual, whose race is the target of unlawful governmental race discrimination and who has suffered an injury from unlawful race discrimination, from bringing suit in his own name to redress his actual injury.

[MISSING PAGE 16]

[*17] **B. In an Equal Protection Case, the Supreme Court Has Emphasized That the "Target" of Race Discrimination Has Independent Standing to Enforce the Equal Protection Clause, Even if the Discrimination Was Effectuated Against Someone Else.**

This case presents a difficulty of analysis because the "target" of Fulton County's discrimination was not the immediate victim. Goff, not MDC, was the target of the discrimination, even though it was MDC who lost the contract and which would have signed it. The purpose of the MFBE Program was to increase the income of minority persons, and the only reason that Fulton County treated one corporation differently from another [**22] was the race of its **shareholders,** both legally and as a matter of fact.

Legally, "A corporation . . . has no racial identity and cannot be the direct target of [race] discrimination." *Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 263 (1977).* Factually, Fulton County's definition of a favored "minority business enterprise" depended, as it must, entirely on the race of the individuals who own it: "Minority Business Enterprise (MBE) shall mean a business . . . owned or controlled by one or more minority group members . . . ." (Plaintiffs' Trial Exh. 1 at 14.) "All securities [*18] which constitute ownership and/or control of a corporation shall be held directly by minorities or women." (Plaintiffs' Trial Exh. 1 at 48.)

The fundamental principal underlying the Supreme Court's extension of standing to the intended and ultimate victim (or "target") is that Equal Protection is primarily an individual right. Nowhere is this stated more strongly than in *Croson* itself:

> The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. [**23] To whatever racial group these citizens belong, **their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.**

488 U.S. at 493 (emphasis added). The rights of individuals to be free from governmental race discrimination is simply a more important goal that the right of corporations to be free from discrimination based upon the race of their owners. The individual right is primary. The corporation's right, although important, is secondary to, and derivative of, the individual right, at least when the discrimination is based upon the race of shareholders.

C. Goff Has Non-Economic Damages That MDC Does Not Have and Cannot Enforce.

[*19] In dismissing Goff's claim, the district court correctly characterized the basic law concerning breach of contract actions, which several Circuits have applied to cases arising under *42 U.S.C. § 1981* (but not under the Equal Protection Clause). The court failed, however, to take into account an exception applicable to the current case: "The rule does not apply in a case where the [**24] stockholder shows a violation of a duty owed directly to him." *Schaffer v. Universal Rundle Corp., 397 F.2d 893, 896 (5th Cir. 1968).*

The Seventh Circuit has announced a nearly identical exception, but which focuses on the injury done rather than the duty violated:

> As a general principle, a corporate shareholder does not have an individual right of action against third parties for damages to the shareholder resulting from injury to the corporation. . . . **This court has recognized the exception to the general rule for injuries suffered by the shareholder that are separate and distinct from those suffered by other shareholders.**

Flynn v. Merrick, 881 F.2d 446, 449 (7th Cir. 1989)(emphasis added).

Goff has unquestionably suffered a non-economic injury from the discriminatory scheme which a corporation is incapable of suffering and which a corporation cannot enforce. n7 Simply put, the corporation does not have a race and

[*20] cannot "feel" the insult of race discrimination. A citizen does not derive this injury from an injury done to the corporation; he derives this injury from the color of his skin. This is an injury that [**25] **only** a natural person can suffer; and Goff, being the only person to suffer such an injury, has a "separate and distinct" injury sufficient to confer standing upon him to seek compensation for it.

n7 Goff, being a member of the disfavored race, also suffered an injury "separate and distinct" from the other **stockholder,** who was black and therefore a member of a favored race. See Paragraph G., below.

In its interpretation of the "injury in fact" requirement, the Supreme Court has repeatedly emphasized that a showing of non-economic injury is sufficient to confer standing. *See, e.g., Valley Forge Christian College v. Americans United For Separation of Church and State, 454 U.S. 464 (1982); United States v. SCRAP, 412 U.S. 669 (1973); Duke Power Co. v. Carolina Environmental Group, Inc., 438 U.S. 59 (1978); Sierra Club v. Morton, 405 U.S. 727 (1972); Baker v. Carr, 369 U.S. 186, 204 (1962).*

MDC has neither a race to [**26] be targeted, nor emotions to be damaged. Not only does it not have an **exclusive** right to bring an action for non-economic damages; but even more strongly, it is questionable whether it is even a **proper** party to seek a remedy for Goff's non-economic injury. "As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioner's [*21] alleged discrimination. In the ordinary case, a party is denied standing to assert the rights of third persons." *Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 263 (1977).*

Nor does Goff's standing to recover for his non-economic damages hinge on his ability to recover economic damages. The separate injuries he pled - emotional distress and humiliation - will support an award of compensatory damages under *42 U.S.C. § 1983,* whether or not he has "out-of-pocket" or pecuniary damages. Humiliation and insult are recognized, recoverable harms. *See, e.g., Ferrill v. Parker Group, 168 F.3d 468 (11th Cir. 1999); Carey v. Piphus, 435 U.S. 247, 263-64 (1978).* Even if Goff cannot convince the jury he has suffered [**27] compensable injury, he could claim nominal and punitive damages, as proven. *E.g. Kelly v. Curtis, 21 F.3d 1544 (11th Cir. 1994).* Thus, whether or not this Court will allow Goff to pursue his share of the lost profits, he should be allowed to pursue his claim for compensatory and punitive damages for non-economic injury.

The Supreme Court has extended standing under the Equal Protection Clause even to a stranger to a transaction, if he is within the "zone of interest" protected. In *Village of Arlington Heights, supra,* a corporation sued a township, [*22] claiming that the town had denied it permission to build housing because it intended to rent units to racial minority members. An African-American with no direct connection to the prohibited transaction was held to have standing to challenge it. Like Goff, it was his race that determined the discriminatory act. Distinctions made between corporations on the basis of race will necessarily be based on the race of an individual. "As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination." *429 U.S. at 263.*

The Village of Arlington [**28] Heights refused a building permit to MHDC because it preferred that its residents be white. Although the direct economic damage was done to the builder, the underlying goal was racial and the intent to damage was an intent to damage natural persons. Arlington Heights had no reason to dislike MHDC except for the race of its prospective tenets. And as such, the black person who intended to live there - the "target" of the refusal to give MHDC a building permit - had standing to bring an action under § 1983.

By direct analogy, Fulton County refused to contract with MDC because it preferred that the people receiving its money be African-American. Although the direct economic damage was done to the corporation, the motivating intent was an [*23] intention to damage natural persons. The underlying goal was racial. Fulton County had no reason to dislike MDC except for the race of one of its stockholders. And as such, the white person who wants to own stock in a corporation doing business with Fulton County - the "target" of the refusal to give MDC a contract - has standing to

bring an action under § 1983.

D. The Fulton County MFBE Program Constitutes Illegal Discrimination Against [**29] **Individuals in Their Right to Own and Operate Businesses.**

The courts have long recognized a cause of action where a local government has different rules for business owners, depending on their race. *E.g. Yick Wo v. Hopkins, 118 U.S. 355 (1886)*(a San Francisco building ordinance constituted "unjust and illegal discriminations" against Chinese laundry owners). The situation in *Yick Wo* implicated individual rights much more derivative than those in the present case. *Yick Wo* was, in essence, an early disparate impact case, where a facially neutral building code was determined to be aimed at shutting down laundries owned by Chinese-Americans. Here, the Fulton County MFBE Program on its face created different rules for business **owners** depending on their race. It [*24] effectively prevented Goff from owning stock in a business on the same footing as a person of a different race, just as the Village of Arlington Heights effectively prevented the individual plaintiff from renting real estate on the same basis as a person of a different race.

Not only did the Fulton County MFBE Program target business owners rather than businesses, but it is easy to see [**30] how the burden of the MFBE Program might fall almost entirely on the shoulders of a business owner rather than a business. A white person cannot buy shares in a minority corporation if the very fact of his purchase will diminish the shares' value. The same stock in the hands of a white owner is less valuable than in the hands of a minority owner. To extend the anthropomorphism of corporate identity to the extreme, a corporation interested in public contracting would rather be owned by a minority person than a white person, because it will have a higher income and a higher net value. Similarly, a white person does not have an equal opportunity to start a new business aimed at obtaining public contracting.

Of course, the very purpose of an affirmative action program such as Fulton County's is to increase opportunities for minority business ownership. Unfortunately, the flip side of such a program is that it decreases opportunities for [*25] non-minority business owners, based solely on their race. Where such a program is illegal, the burden on white business owners is a real one, and the business owners who suffer concrete injury should be given standing to redress any injury they [**31] can prove.

E. It Is Questionable Whether MDC Even *Has* Standing to Redress the Non-Economic Injuries to Stockholders.

The "first and foremost" requirement of standing is an "injury in fact" - a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983).* Although the issue has not arisen in this case, this would seem to preclude a corporation from seeking damages suffered solely by its stockholders. While a stockholder might suffer emotional distress, this is very much a question of evidence about the individual. Some (or all) stockholders might suffer such damages, some (or all) might not. Emotional distress from a constitutional deprivation would seem to be entirely a personal question and, in fact, the issue was discussed (but not decided) by the Supreme Court in the *Village of Arlington Heights* case.

[*26] If, as it appears, the corporation has no standing to redress non-economic injuries, caused by a government's illegal race discrimination, then the shareholder **must** be accorded standing. Otherwise, the most basic aim of the Equal Protection [**32] Clause - the protection of individuals from unequal treatment - will be incapable of redress. As has actually happened in this case, there will be a "right without a remedy."

F. MDC and Hill Have Interests in Conflict with Goff and Are Not Persons Who Should Exercise Exclusive Standing To Enforce Goff's Constitutional Rights.

Goff is white and Hill is black. As 51% owner of MDC, Hill controls corporate decisions. But Hill is not the intended "target" of the discrimination. To the contrary, he is the intended **beneficiary.** Theoretically speaking, he has less interest in bringing suit than Goff. Practically speaking, Hill did in fact exercise his power as majority shareholder

to dismiss MDC's claims - and therefore, to dismiss **Goff's** claims. n8 Depriving Goff of individual standing to [*27] enforce his personal Constitutional rights has effectively made them incapable of protection. It placed Goff's Constitutional rights in the sole discretion of a person of the race benefitted by the discrimination.

> n8 There can be no doubt that Hill, and therefore MDC, did not want to pursue their claim own claim, much less Goff's. They dismissed their claims over Goff's ardent protest. Goff, on the other hand, is clearly dead-set on obtaining redress for the discrimination against him, as he has pursued this case for four year, including an appeal to this Court

[**33]

Goff therefore argues that *Bellows* (which is not binding on this Court) is an incorrect extension of earlier, binding Fifth Circuit decisions such as *Schaffer v. Universal Rundle Corp., 397 F.2d 893 (5th Cir. 1968).* It effectively makes an individual's remedy for race discrimination contingent on the cooperation of other persons, who may have a diametrically conflicting interest. Blind application of the *Bellows* rationale can create a "right without a remedy" and has done so in this case.

The Supreme Court has stated:

> Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional prerequisites are met.

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 80-81 (1978). Goff fully meets these criteria for standing and asks this Court to allow [*28] him to proceed against Fulton County for all damages he suffered, including his share of lost profits.

Goff therefore asks for this [**34] Court to hold that he may pursue not only his own personal non-economic damages, but his share of lost corporate profits as well. He does not ask that the Court generally extend standing to shareholders to seek lost corporate profits. Rather, he asks that the Court make a specific exception applicable only to the facts of this case: 1) The corporation has suffered a loss of revenue from a government entity due to a policy of race discrimination, 2) The plaintiff belongs to the race targeted for discrimination under the illegal program, 3) The majority interest in the corporation is controlled by persons who belong to race benefitted by the illegal program, and 4) The corporation refuses to prosecute the action. Such an exception would continue to place general authority to recover lost profits in the corporate entity, while solving the difficult problem faced by the court and Mr. Goff in this case.

G. Goff Should Have Been Allowed to Succeed to MDC's Cause of Action.

[*29] Although it seems a rather awkward way to handle the problem, Goff did move the district court to substitute himself for MDC as the real party in interest, at the time MDC was dismissed as a plaintiff. [**35] If this Court will not allow Goff standing outright to pursue his claims, he would, in the alternative, ask this Court to allow the substitution under Fed. R. Civ. Proc. 25(c).

III. Daniel and Peggy Webster Have Damages That Were Not Suffered by Webster Greenthumb, and for Which It Could Not Recover.

Daniel and Peggy Webster have a less compelling case than Kelly Goff, because they at least were able to recover their economic damages, a recovery limited to lost corporate profits. Daniel Webster owns and controls the corporation, so no question arises concerning a conflict of interest between his interest and that of Webster Greenthumb Co.

Nevertheless, Daniel and Peggy Webster have the same right to plead and receive compensatory (and possibly punitive) damages for their emotional distress and mental suffering as Kelly Goff. The district court's dismissal of their individual claims thereby deprived them of a remedy established by precedent.

[*30] Therefore, Plaintiffs Daniel and Peggy Webster ask this Court to reverse the district court's dismissal of their individual claims for emotional distress and mental suffering, and remand the cause to the district court for [**36] an additional trial on damages.

[*31] **CONCLUSION**

Plaintiffs Daniel and Peggy Webster, and Plaintiff Kelly Goff, ask this Court to reverse the district court's dismissal of their claims for humiliation and emotional distress, on grounds that they meet the basic tests for Title III standing, that they were the primary targets of the race discrimination, and that these injuries were entirely personal and therefore separate and distinct from any injury to the corporations.

Plaintiff Webster Greenthumb asks this Court to reverse the district court's dismissal of its complaint of retaliation for the exercise of rights under *42 U.S.C. § 1981,* on grounds that such a cause of action exists in this Circuit as a matter of binding precedent.

Plaintiff Kelly Goff further asks that this Court reverse the district court's dismissal of his claim for his share of economic damages to MDC, on grounds of public policy, that is, that it would disserve the enforcement of rights under the Equal Protection Clause to allow another stockholder, with a clear conflict of interest, to bar his recovery under the circumstances of this case.

Certificate of Interested [**37] **Persons and Corporate Disclosure Statement**

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 6,120 words in compliance with FRAP 32(a)(7)(b), as measured automatically by the WordPerfect 8.0 word processing system on which it was written.

/s/ [Signature]
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May 26, 2000

CERTIFICATE OF SERVICE

This is to certify that I have this day served opposing counsel in the foregoing matter with two copies of the within and foregoing Brief of Appellants by depositing two copies of the same in the United States mail, first-class postage prepaid, to the following address:

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