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Administrative Agencies; Subpoena Power; Relevancy; Right of Privacy; Atchison, Topeka & Sante Fe Ry. Co. v. Lopez

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CONSTITUTIONAL LAW

Administrative Agencies · Subpoena Power · Relevancy · Right of Privacy

Atchison, Topeka & Sante Fe Ry. Co. v. Lopez,
216 Kan. 108, 531 P.2d 455 (1975)

A DIVIDED KANSAS SUPREME COURT, in *Atchison, Topeka and Sante Fe Ry. Co. v. Lopez,*[1] upheld a subpoena by the Kansas Civil Rights Commission which required the railway company to supply the Commission with the complete personnel records, including arrest and conviction records, of all employees within the job classification of "trackman."[2]

On April 4, 1972, Arnold Lopez, a Mexican-American, applied for employment as a "trackman" with the Sante Fe. A subsequent check of Lopez' criminal record revealed 20 convictions for various offenses including drunkenness, driving while intoxicated, assault and battery, resisting arrest, and numerous traffic offenses.[3] On April 14, 1972, Sante Fe informed Lopez that his application had not been approved.[4]

Lopez then filed a complaint with the Kansas Commission on Civil Rights alleging that Sante Fe had terminated his employment on account of his national origin, and therefore in violation of the Kansas Act Against Discrimination.[5] The Commission, upon initial investigation, determined that Lopez had been terminated because of his police record.[6] It then centered its investigation on the question of whether Sante Fe had considered Lopez' police record in accordance with the same standards used in considering the records of employees from other national origins and whether they had considered factors which had a "disparate impact on persons of Lopez' ancestry and for which there was no valid business purpose."[7] The Commission further sought to determine whether any of Sante Fe's employees had made any discriminatory "errors" in compiling the records and in their subsequent recommendations affecting management decisions.[8]

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[1] 216 Kan. 108, 531 P.2d 455 (1975).

[2] 531 P.2d at 459.

[3] *Id.* at 463.

[4] *Id.* at 460.

[5] KAN. STAT. ANN. § 44-1001 (Supp. 1974) (in part): "It is hereby declared to be the policy of the state of Kansas to eliminate and prevent discrimination in all employment relations. . . ." The vast majority of states and a number of local governments have enacted similar legislation. *See* J. WITHERSPOON, ADMINISTRATIVE IMPLEMENTATION OF CIVIL RIGHTS (1968), for a comprehensive discussion of the scope of authority granted by the various statutes.

[6] 531 P.2d at 460.

[7] *Id. See generally* Griggs v. Duke Power Co., 401 U.S. 424 (1971), in which the Supreme Court dealt with similar considerations in an action brought under The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1971).

[8] 531 P.2d at 463.

Pursuant to this investigation the Commission issued a subpoena *duces tecum* seeking: "Complete and total personnel records, including, but not limited to the 'Arrest and Conviction Records,' of all employees hired into the 'Trackman' classification during the calendar year 1972...."[9] Sante Fe refused to supply the Commission with the subpoenaed information, contending:

1. That the information sought was irrelevant to any legitimate issue which the Commission was authorized to investigate;[10]
2. that their employees' constitutional right of privacy would be invaded by a release of the subpoenaed information;[11] and,
3. that the subpoena constituted an unreasonable burden and was oppressive because Sante Fe, by providing the information, would be exposing itself to civil liability in litigation potentially brought by its employees.[12]

The Sante Fe had sought and received a permanent injunction against the Commission, the trial court ruling in favor of Sante Fe on all three of the above issues.[13] The Commission thereafter appealed.

In dealing with the relevancy of the personnel records the Supreme Court of Kansas emphasized the broad scope of the Commission's investigative power,[14] relying heavily on *Yellow Freight Systems, Inc. v. Kansas Commission on Civil Rights.*[15] In *Yellow Freight* three employees, classified as over-the-road drivers, complained of racial discrimination in Yellow Freight Systems' employee layoff practices.[16] A subpoena was served on Yellow Freight ordering the production of employment histories of all over-the-road drivers hired since January 1, 1960.[17] One of the issues before the Kansas Supreme Court on appeal was whether the subpoenaed information was relevant, since the requested information encompassed a period of time some eight years

[9] *Id.* at 460. The court treats the subpoena as though it had requested arrest and conviction records only, even though the precise wording obviously contemplates a much broader scope.

[10] 531 P.2d at 463.

[11] *Id.* at 465. *See* Potash, *Maintenance and Dissemination of Criminal Records: A Legislative Proposal*, 19 U.C.L.A. L. REV. 654 (1972), for a comprehensive history of the right of privacy relating to arrest and conviction records.

[12] 531 P.2d at 468.

[13] *Id.* at 461.

[14] KAN. STAT. ANN. § 44-1004 (Supp. 1974) (in part):

> The commission shall have the following functions, powers and duties:
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> ....
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> (4) To receive, initiate, investigate, and pass upon complaints alleging discrimination in employment, public accommodations and housing because of race, religion, color, sex, national origin or ancestry.
>
> (5) To subpoena witnesses, compel their appearance, require the production for examination of records, documents and other evidence or possible sources of evidence and to examine, record and copy such materials....

[15] 214 Kan. 120, 519 P.2d 1092 (1974).

[16] *Id.* at 121, 519 P.2d at 1093.

[17] *Id.*

prior to the cause of action. The supreme court discussed the requisite relevancy of records sought via administrative subpoena and specifically approved the standards set forth in *Brovelli v. Superior Court,*[18] which required only that the inquiry be one that the agency demanding production is authorized to make, that the demand not be too indefinite, and that the information sought be reasonably relevant.[19] Reasonable relevance, according to the decision in *Yellow Freight,* is satisfied if there is a possibility of relevance in the documents subpoenaed and there is no showing that the subpoena is oppressive. The *Yellow Freight* court held that where the subpoena meets these requirements, it "should be liberally construed to permit inquiry."[20]

Sante Fe, however, contended that the subpoenaed information was irrelevant because the only question raised by Lopez' complaint was the extent to which his conviction records may lawfully be said to be job related and that, since its reasons for termination have merit *per se,* the Commission's inquiry should go no further. Sante Fe asserted that this question was not a comparative one and therefore the subpoenaed personnel records were irrelevant.[21] The Kansas court, in rejecting this argument, accepted the proposition of the Commission that the controlling issue was not whether the reasons set forth by Sante Fe had merit *per se,* but whether those reasons were pretextual and reflected bias based on national origin.[22] On this issue the Kansas Supreme Court, three justices dissenting, held that the subpoenaed employment records were reasonably relevant[23] since there was a possibility of relevancy and since investigative "fishing expeditions" by administrative agencies had become an accepted practice.[24]

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[18] 56 Cal. 2d 524, 364 P.2d 462, 15 Cal. Rptr. 630 (1961).

[19] 56 Cal. 2d at 529, 364 P.2d at 465, 15 Cal. Rptr. at 633. *See also* United States v. Morton Salt Co., 338 U.S. 632, 651-54 (1949); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 202 (1945); Federal Communication Comm'n v. Cohn, 154 F. Supp. 899 (S.D.N.Y. 1957); Cooper, *Federal Agency Investigations: Requirements for the Production of Documents,* 60 MICH. L. REV. 187 (1961) [hereinafter cited as Cooper].

[20] 214 Kan. at 124, 519 P.2d at 1096. The majority of courts "liberally construe" such subpoenas, reflecting the inherent difficulty of either establishing or refuting the relevance of documents the contents of which are unknown. *See* Cooper, *supra* note 19, at 191.

[21] 531 P.2d at 463.

[22] *Id.*

[23] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973), where the United States Supreme Court in dealing with a similar situation in an action under the Civil Rights Act, tit. VIII (1964), stated: "On remand respondent must . . . be afforded a fair opportunity to show that petitioner's stated reason for . . . rejection was in fact pretextual. Especially relevant to such a showing would be evidence that white employees . . . were nevertheless retained or rehired. . . ." *See also* Equal Employment Opportunity Comm'n v. University of New Mexico, 504 F.2d 1296 (10th Cir. 1974); Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination,* 71 MICH. L. REV. 59, 91-94 (1972).

[24] 531 P.2d at 462. *See also* Equal Employment Opportunity Comm'n v. University of New Mexico, 504 F.2d 1296, 1303 (10th Cir. 1974), where the court states that:

> [W]e thus conclude that . . . [the] subpoena duces tecum is enforceable even though no "probable cause" has been shown. . . . [That] which we have previously considered administrative "fishing expeditions" are often permitted; and that administrative

The dissenting opinion in essence dealt only with the issue of relevancy.[25] Appearing to base their dissent more on the weight of the evidence in favor of Sante Fe than on any viable concepts of logical relevance, the dissenting justices refused to accept the premise that the 20 criminal convictions could have been used as a mere pretext in order to cover up discrimination based on national origin.[26] The dissent would hold that the subpoenaed information was not reasonably relevant to the complaint being investigated and that the subpoena imposes an unreasonable burden and is oppressive.[27] The dissenting opinion did not discuss whether or not its view that the subpoena was burdensome and oppressive was predicated on a consideration of any potential civil liability on the part of Sante Fe.

The Kansas court, having decided that the records were reasonably relevant, then directed its attention to the issue of whether or not the acquisition of the subpoenaed records would violate Sante Fe's employee's constitutional right of privacy.[28] The court noted that constitutional rights, in and of themselves, do not create privileges and that the Constitution only "protects against improper invasion of such rights."[29] The Commission contended that the Constitution only protects against unreasonable invasions into privacy and that the subpoena of personnel records in this case was not unreasonable.

The court, ruling in favor of the Commission, found that the "basic requirement of the constitution and the courts is that an intrusion of a constitutional right is permissible if reasonable."[30] The court did not attempt to differentiate those standards applied to property rights from those applied to rights involving personal liberties, but simply entered into a discussion of the

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subpoenas may be enforced for investigative purposes unless they are plainly incompetent or irrelevant to any lawful purpose.

Although there is still authority contra, "fishing expeditions" are now generally upheld. *See* Annot., 27 A.L.R.2d 1208 (1953); F. COOPER, STATE ADMINISTRATIVE LAW (1st ed. 1965).

[25] 531 P.2d at 470 (Fromme, J., dissenting).

[26] *Id.*

[27] *Id.* This would of course involve a determination of fact. *See* Winn and Lovett Grocery Co. v. N.L.R.B., 213 F.2d 785 (5th Cir. 1954); Schlossberg v. Jersey City Sewerage Auth., 15 N.J. 360, 104 A.2d 662 (1954), where administrative agency subpoenas were held oppressive. *See also* Howard Savings Institution v. Francis, 133 N.J. Super. 54, 335 A.2d 80 (1975), which deals with administrative interrogatories.

[28] For a general overview of the right of privacy *see* Ringold, *History of the Enactment of the Ninth Amendment and Its Recent Development*, 8 TULSA L.J. 1 (1972); Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); Comment, *The Concept of Privacy and the Fourth Amendment*, 6 U. MICH. J.L. REFORM 154 (1972).

[29] 531 P.2d at 465, *citing* Terry v. Ohio, 392 U.S. 1 (1964), which permits a "pat down" on less than probable cause. *See also* Couch v. United States, 409 U.S. 322 (1973); United States v. Powell, 379 U.S. 48 (1964), where the Supreme Court held that a finding of probable cause need not be shown prior to an I.R.S. subpoena of tax records.

[30] 531 P.2d at 466.

general right of privacy and cited *Katz v. United States*[31] and *Griswold v. Connecticut*,[32] as supportive of a constitutionally guaranteed right to privacy.[33]

In the *Katz* case the United States Supreme Court, in holding that the F.B.I.'s bugging of a public telephone booth without a search warrant constituted an unreasonable search in violation of the fourth amendment, stated that what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[34] The Kansas court took note of this language, and further that: "[t]he protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual states."[35]

In *Griswold*, the Supreme Court struck down a Connecticut statute forbidding the use of contraceptives on the grounds that the statute invaded the constitutionally protected right of privacy of married couples. The Court held "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[36] The Kansas Supreme Court in *Sante Fe* quoted extensively from Justice White's concurring opinion in *Griswold*:[37]

> "Where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling." But such statutes, if reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application, are not invalid under the Due Process Clause.[38]

The Kansas court, apparently accepting Sante Fe's argument that the subpoena in question constituted a significant encroachment on personal liberty then quoted Justice Goldberg's concurring opinion in *Griswold* as containing the applicable test: "The law must be shown 'necessary,' and not merely rationally related to, the accomplishment of a permissible state policy.' "[39] The Kansas court, without discussion, simply stated that:

> When the foregoing reasoning is applied to the instant case, we have no hesitancy in holding . . . [that] enforcement of the Commission's subpoena requiring disclosure of the arrest and conviction records . . . is not constitutionally impermissible as violative of the employees' right of

[31] 389 U.S. 347 (1967).

[32] 381 U.S. 479 (1965). *See also* Pointer v. Texas, 380 U.S. 400 (1965), holding the "fundamental rights" guarantee applicable to the states through the fourteenth amendment.

[33] 531 P.2d at 466.

[34] 389 U.S. at 351.

[35] 531 P.2d at 466, *quoting* Katz v. United States, 389 U.S. 347, 350-51 (1967).

[36] 381 U.S. at 485. *See also* Poe v. Ullman, 367 U.S. 497, 516-22 (1961) (dissenting opinion).

[37] 381 U.S. at 502.

[38] *Id.* at 504, *citing* Zemel v. Rusk, 381 U.S. 1 (1965).

[39] 531 P.2d at 467.

privacy. The public policy of this state as declared in the Kansas Act Against Discrimination *compels* that the interests of the individuals affected by the disclosure be subordinated in order "to eliminate and prevent discrimination in all employment relations."[40] (emphasis added).

It is here, again worthy of note, that the subpoena in question demanded the production of complete and total personnel records, *including, but not limited, to arrest and conviction records.* It seems, therefore, that the court has declared that a compelling state interest must be established before arrest and conviction records may be released, and further that the state's interest in preventing discrimination in employment practices constitutes such a requisite compelling state interest. The serious implications of such a holding are essentially twofold. First, by including arrest and conviction records within the penumbra of a constitutionally protected right of privacy, the court, by implication, is in effect denying access to such records for legitimate interests which do not qualify as "compelling." Logically, under this standard, a prosecuting attorney might even be denied access to arrest and conviction records, though it is extremely doubtful that the court intended such broad ramifications.

Secondly, it would seem that by classifying the state's interest in preventing discrimination in employment as "compelling" the court is in essence issuing the Commission a *carte blanche.* This consequence is especially ominous when considered in the light of the extremely liberal standards governing the relevance of subpoenaed information.[41] It is unlikely that any prohibitions in regard to the reasonableness or oppressiveness imposed by a Commission subpoena could prevail when such a subpoena is justified by a "compelling state interest."

The court in its discussion of the scope of the right of privacy completely ignored the concurring opinion of Justice Harlan in *Katz,*[42] where the appropriate test in regard to the scope of the right of privacy was perhaps most clearly set forth: "[T]he rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[43]

Applying this standard to the instant case, it becomes evident that the court could have made arrest and conviction records available, while still preserving the confidentiality of other information in the personnel files, by simply declaring that there is no reasonable expectation of privacy in regard to arrest and conviction records.[44] The court could have thus avoided the broad

[40] *Id.*

[41] *See* notes 23 and 24 *supra.*

[42] 389 U.S. at 360 (Harlan, J., concurring opinion).

[43] *Id.* at 361. *See also,* United States v. James, 494 F.2d 1007 (D.C. Cir. 1974).

[44] *See* Loder v. Municipal Court, 43 Cal. App. 3d 157, 117 Cal. Rptr. 533 (1974); People v.

implication that arrest and conviction records fall within a constitutionally protected right of privacy and the broad declaration that the state's interest in preventing employment discrimination is "compelling."

The court, after a brief discussion of the duty of the Commission to honor the confidentiality of the subpoenaed records,[45] then took up the issue of whether Sante Fe's compliance with the Commission's subpoena would subject the company to irreparable damage in the form of civil liability in suits for damages potentially brought by employees who are members of the class of "Trackmen."[46] Although recognizing that the fact that Sante Fe had supplied the records pursuant to a court-enforced subpoena could not be raised as a defense in either a tort action for invasion of privacy[47] or an action under Section 1983 of the Civil Rights Act,[48] the court nevertheless held that the subpoena was not unreasonable or oppressive.[49] The court reasoned that a tort action for the public disclosure of private facts could not be maintained because the facts disclosed must be private facts, and not public ones.[50] It concluded that records of arrests and convictions are not private facts. Arrests and convictions are made in public, publicized in the news media, and are subject to pleas in open court. Considerable weight was also given to the fact that court records are subject to inspection, with certain exceptions, by any citizen.[51] In regard to a potential federal action under Section 1983 the court reasoned that: "Since we have determined that Sante Fe's disclosure of the subpoenaed information would not violate the constitutional rights of its employees, there is no basis for the employees to maintain a section 1983

Ryser, 40 Cal. App. 3d 1, 114 Cal. Rptr. 668 (1974), where the court declared that the relationship between an accused and society does not fall within the penumbra of freedoms guaranteed by the Bill of Rights.

[45] 531 P.2d at 467, *quoting* KAN. STAT. ANN. § 44-1005 (Supp. 1972) (in part): "The members of the commission and its staff shall not disclose what has transpired in the course of such endeavors [investigations]." *See also* The Freedom of Information Act, 5 U.S.C.A. 552(b)(6) (1967), which exempts personnel records from public inspection, "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

[46] *See* note 12 *supra.*

[47] 531 P.2d at 468, *citing* KAN. STAT. ANN. § 44-1004(5) (Supp. 1972), which provides for immunity for "natural persons" only.

[48] 531 P.2d at 469, *citing* Kletschka v. Driver, 411 F.2d 436, 448 (2d Cir. 1969), where the court declared that a grant of immunity by a state is not binding on the federal courts in an action brought under § 1983. *See also* Donaldson v. O'Conner, 493 F.2d 507 (5th Cir. 1974), *rev'd on other grounds,* 95 S. Ct. 2486 (1975); Dale v. Hahn, 440 F.2d 663 (2d Cir. 1971). *But see* Stevens v. Marks, 383 U.S. 234 (1966); Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52 (1964), as to subsequent federal criminal prosecution.

[49] 531 P.2d at 470.

[50] *Id.* at 469, *citing* W. PROSSER, LAW OF TORTS 836 (4th ed. 1971). *But see* Briscoe v. Reader's Digest, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971), which held that conviction records can be subject to a right of privacy.

[51] 531 P.2d at 469. One must wonder why the court did not develop this same argument in its discussion of the scope of the constitutional right to privacy.

action against Sante Fe in a federal court."[52] In its discussion in this area, the court again fails to consider the fact that the scope of the subpoena in question extends considerably beyond just arrest and conviction records.

CONCLUSION

The Kansas Supreme Court in *Sante Fe* has joined the majority of states in declaring that administrative "fishing expeditions" via the use of subpoena powers are now permissible. No probable cause need be shown and confidential information may be subject to subpoena if there is even a mere possibility of relevance to a matter within the scope of the agency's authority. The state's interest in preventing discrimination in employment practices has been declared a "compelling state interest" such as to override any claims to rights of privacy. Although primarily discussing only arrest and conviction records, the court in actuality upheld without modification a subpoena which was much broader in scope.[53] As a result of this decision personnel records of employees who are not themselves parties to any litigation may be obtained upon a showing of a mere possibility of relevance. It seems doubtful that a general legislative dictate that the agency maintain the confidentiality of the records can provide sufficient safeguards to potential administrative "witch hunts," especially when the legislature does not even establish penalties for the breach of such confidentiality.[54]

DAVID L. HOSTETLER

[52] *Id.* at 469.

[53] *See* note 11 *supra*. *See also* Kansas Comm'n on Civil Rights v. Carlton, 216 Kan. 735, 533 P.2d 1335 (1975) for a general follow-up of the Sante Fe case where the Kansas Supreme Court upheld a lower court modification of an administrative subpoena.

[54] *See* note 45 *supra*.