

1991 WL 350036

United States District Court, N.D. California.

Nancy J. STENDER et al., Plaintiffs,

v.

LUCKY STORES, INCORPORATED, Defendant.

No. C-88-1467 MHP.

|

June 18, 1991.

Opinion

PATEL, District Judge.

*1 Plaintiffs bring this class action against defendant Lucky Stores, Inc. ("Lucky") alleging discrimination on the basis of race and sex in initial job placement, allocation of work hours, reclassification of part-time employees to full-time positions, and promotions. Defendant moves to dismiss the claims of race discrimination brought pursuant to 42 U.S.C. § 1981, arguing that because none of plaintiffs' claims concern the making or enforcement of employment contracts, they are not actionable under section 1981. Having reviewed the submissions and arguments of the parties, for the reasons below, the court Denies defendant's motion to dismiss.

Background

Although plaintiffs assert claims for race-based and sex-based discrimination in various employment practices of defendant and with respect to various job categories, their claims pursuant to 42 U.S.C. § 1981 are restricted to claims of discrimination against Blacks with respect to (1) initial job placement, Pl.Opp. to Motion to Dismiss Section 1981 Claims at 4; (2) promotion from Courtesy Clerk to Apprentice Clerk in the grocery department, *id.* at 13; (3) promotion from Journey Clerk to entry-level management,¹ *id.* at 15-16; and (4) promotion from General Merchandise Clerk to General Merchandise Department Head. *Id.* at 17.²

Defendant argues that plaintiffs' claims are directed at allegedly discriminatory working conditions and that they do not go to either the formation or the enforcement of an employment contract; therefore they are beyond the scope of section 1981. First, Lucky argues that initial job placement does not implicate the right to make and enforce a nondiscriminatory contract, but rather involves "conditions of continuing employment" once an employee has entered into an employment contract. Def. MTD Section 1981 Claims at 8 (quoting *Patterson v. McLean Credit Union*, [50 EPD ¶ 39,066] 491 U.S. 164, 184, 176 (1989)).

Secondly, Lucky notes that the alleged discriminatory promotions refer to positions covered by the Collective Bargaining Agreement existing between Lucky and plaintiffs' union locals, and that the Agreement specifies criteria for these promotions. *Id.* at 10-11. Defendant impliedly argues that because any promotion to one of the challenged positions would not take an employee out of the Collective Bargaining Agreement and would be made according to procedures specified in the agreement, such promotions do not involve the "making or enforcement" of a new contract, and as such are beyond the scope of section 1981.³

Plaintiffs respond that initial job placement is in fact "part and parcel of the making of the employment contract," Pl.Opp. to MTD Section 1981 Claims at 4, since applicants may be offered one of several entry-level positions and since the Store Manager determines an employee's initial placement at the time of hire. Joint Statement of Undisputed Facts at ¶ 30; Defendant's Pre-Trial Statement of Undisputed Facts at ¶ 93, Ex. 3. Thus, where a less desirable or lower-paying entry-level job is offered to a Black job applicant on the basis of his or her race, this is an offer to make a contract on discriminatory terms and is cognizable under section 1981. Pl.Opp. to MTD Section 1981 Claims at 4.

*2 Plaintiffs further argue that the existence of a collective bargaining agreement covering the challenged promotions is not dispositive of the issue whether those promotions represent the opportunity to make a new contract or enter into a new and distinct relation between the employer and the employee within the meaning of section 1981. They contend that this "new and distinct relation" inquiry is multi-factored and fact-specific, and that the presence or absence of such a relation is an issue of fact that should be determined at trial. *Id.* at 12-13.

Discussion

Section 1981 provides that “[a]ll persons ... shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens.” 42 U.S.C. § 1981. The statute thus prohibits discrimination only in the making and enforcement of contracts and is not “a general proscription of racial discrimination in all aspects of contract relations.” *Patterson*, 491 U.S. at —, 109 S.Ct. at 2372. Specifically, in the employment context, section 1981 prohibits a refusal to enter an employment contract where that refusal is based upon race, or an offer to make a contract only on terms that are discriminatory; however

the right to make contracts does not extend ... to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII.

Id. at —, 109 S.Ct. at 2373.

The issue before the court is whether plaintiffs have asserted claims of race discrimination going to the making or enforcement of employment contracts and therefore cognizable under *Patterson*.

I. Initial Job Placement

Plaintiffs claim that Lucky discriminates on the basis of race in its initial placement of Blacks into less desirable and lower-paying entry-level positions.

The court finds unpersuasive defendant’s contention that such a claim concerns only “conditions of continuing employment” and not the “right to make ... a nondiscriminatory contract.” Def. MTD Section 1981 Claims at 8. As plaintiffs note, “[e]mployees are not ‘hired’ in the abstract and then, after being employed, told what job they have been hired for.” Pl.Opp. to MTD Section 1981 Claims at 5. To distinguish initial hiring from initial job placement and then to hold the latter noncognizable under section 1981 is sophistry at best. In the context of Lucky’s hiring practices, entering into an employment contract *is* being placed in a particular entry-level job; initial placement is not “conduct by the employer [occurring] after the contract relation has been established.” *Patterson*, 491 U.S. at —, 109 S.Ct. at 2373.

***3** The court therefore concludes that plaintiffs’ claim of race discrimination in initial job placement states a cause of action under section 1981, and defendant’s motion to dismiss this claim is Defined.

II. Promotion

Plaintiffs allege that Lucky discriminates on the basis of race with respect to (1) promotions from Courtesy Clerk to Apprentice Clerk in Grocery; (2) promotions from Journey Clerk to entry-level management positions; and (3) promotions from General Merchandise Clerk to General Merchandise Department Head. Pl.Opp. to MTD Section 1981 Claims at 13–17.

All plaintiff class members are parties to a Collective Bargaining Agreement between Lucky and locals of the United Food and Commercial Workers International Union (“UFCW”). The agreement specifies, *inter alia*, wage rates and other terms of employment for each of the positions in dispute. A Lucky employee remains subject to the terms of the Collective Bargaining Agreement until that employee is either discharged or promoted to a position above Third Person (*i.e.*, to Assistant Store Manager or Store Manager). Def. MTD Section 1981 Claims at 3–4.

Although Lucky asserts that with respect to all promotions to Third Person or below, “employees do not have the opportunity to enter a new employment contract” and are therefore not within the scope of section 1981, the court finds that the existence of a common collective

bargaining agreement covering the disputed positions is not sufficient by itself to preclude a claim under section 1981.

Nor, however, does the court accept plaintiffs' claim that the specific Collective Bargaining Agreement between Lucky and the UFCW locals "is not itself an employment contract." Pl.Opp. to MTD Section 1981 Claims at 7. There is no suggestion here that the Collective Bargaining Agreement does not set forth enforceable terms of the employment relationship between Lucky and its employees up to and including Third Person; an aggrieved employee has the right to bring a grievance and sue on her individual contract rights under the Agreement. There is no evidence that Lucky employees enter into "separate contracts [apart from the Collective Bargaining Agreement], frequently oral, between the employer and each employee." *International Union, UAW, AFL-CIO v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1986). Moreover, the Ninth Circuit has held that an employee's claim based upon an "independent employment contract" is preempted if the claim concerns a job governed by a collective bargaining agreement. *Chmiel v. Beverly Wilshire Hotel Co.*, [50 EPD ¶ 39,181] 873 F.2d 1283, 1285-86 (9th Cir.1989).

A collective bargaining agreement may function as a contract between an employer and individual employees for certain purposes. However, the court finds that the breadth of job categories covered, the nature of the terms of each job, and the extent to which the agreement and its specific provisions governing promotions is followed in practice by the employer, among other factors, will determine whether a collective bargaining agreement constitutes a contract for the purpose of section 1981 liability. Thus, even where a failure-to-promote claim only involves movement between positions covered by such an agreement, the promotion may nevertheless represent the kind of "new and distinct relation between the employee and the employer" contemplated by *Patterson*. 109 S.Ct. at 2377. Although a promoted employee may remain within the scope of an expansive collective bargaining agreement, she may nevertheless come to be bound by, and acquire new contractual rights under, *different of its terms* as a result of the promotion.

*4 Courts following *Patterson* have consistently held that the "new and distinct relation" inquiry is multi-factored and fact-specific. *Hudgens v. Harper-Grace Hospitals*, [53 EPD ¶ 39,741] 728 F.Supp. 1321, 1325 (E.D.Mich.1989) (reviewing caselaw citing broad range of factors); *Malhotra v. Cotter & Company*, [51 EPD ¶

39,329] 885 F.2d 1305, 1311-12 (7th Cir.1989) (question of fact exists where advancement is not "routine" and involves a change in terms of contractual relation).

The following factors have been held relevant to a determination of section 1981 liability: "changes in pay, in duties and responsibilities, in status from hourly to salaried employee, in required qualifications, in responsibility level, in daily duties, in potential liability, and in pension and other benefits," *Hudgens*, 728 F., Supp. at 1324; change in supervisory responsibility, duties performed and required qualifications, *Luna v. City and County of Denver*, [51 EPD ¶ 39,455] 718 F.Supp. 854 (D.Colo.1989); whether the promotion was non-routine and represented an advancement to a position for which outsiders could apply. *Malhotra*, 885 F.2d at 1311. Cf. *Sofferin v. American Airlines, Inc.*, 717 F.Supp. 597 (N.D.Ill.1989), *aff'd in part, rev'd in part on other grounds*, [55 EPD ¶ 40,538] 923 F.2d 552 (7th Cir.1991) (advancement from probationary to tenured status insufficient for section 1981 liability where no change in duties or functions involved); *Williams v. National Railroad Passenger Corp.*, [51 EPD ¶ 39,410] 716 F.Supp. 49 (D.D.C.1989) (change in pay standing alone insufficient for section 1981 liability).

The court in *Hudgens* characterized the court's *Patterson* analysis with respect to promotion to require

carefully examining what changes, if any, will result from the promotion and determining if the combined changes are significant enough to give rise to a new and distinct relationship.... [T]he trial court must consider evidence of all change ... which a promotion will work.... This judgment must consider not only the number of resulting changes, but the magnitude of individual changes, and of the changes as a whole."

728 F.Supp. at 1325-26.

A promoted employee under the Collective Bargaining Agreement with Lucky remains on an hourly-wage basis, a factor which weighs against a finding of "new and distinct relation." *Kyles v. Houston Lighting & Power*

Co., [55 EPD ¶ 40,476] 53 FEPC 1105, 1106 (1990). However, plaintiffs note the presence of other factors in each of the disputed promotions which suggest a significant change in the nature and terms of employment. The Collective Bargaining Agreement makes it clear that promotion to the disputed positions is not automatic, but is based upon merit, ability and seniority. Fisher Decl., Ex. C. (Agreement) at 6 (¶ 4.3.1); Ex. D. (Agreement) at 13 (¶ 4.3.2).

In addition, promotion from Courtesy Clerk to Apprentice Clerk in Grocery involves a raise in pay, new rights to subsequent automatic pay raises, and entitlement to subsequent automatic progression to journey clerk status.⁴ Promotion from Journey Clerk to entry-level management gives the employee a guaranteed full-time schedule and the right to step-up to higher level management position, Fisher Decl., Ex. C (Agreement) at ¶ 4.10, 9.3, Appendix A at 24–25, and entry-level management employees also take on significant supervisory responsibility. Def. Pre-Trial Statement of Undisputed Facts at ¶ 13. Promotion from General Merchandise Clerk to General Merchandise Department Head provides the employee with a raise in pay, full-time status and substantial additional supervisory responsibilities. Fisher Decl., Ex. C at Appendix A; Def. Pre-Trial Statement of Undisputed Facts at ¶ 13.

*5 It is a close question whether plaintiffs' failure-to-promote claims involve the kind of change in position and in employer-employee relationship sufficient for liability under section 1981, especially with respect to promotions to Apprentice Clerk and to General Merchandise Department Head. The court concludes that plaintiffs should be afforded the opportunity to develop a full factual record at trial as to the nature of the promotions involved.

Accordingly:

(1) Defendant's motion to dismiss plaintiffs' claim under 42 U.S.C. § 1981 with respect to initial job placement is DENIED.

(2) Defendant's motion to dismiss plaintiffs' claim under 42 U.S.C. § 1981 with respect to promotions to Apprentice Clerk in Grocery, entry-level management and General Merchandise Department head is Denied.

It Is So Ordered.

All Citations

Not Reported in F.Supp., 1991 WL 350036, 57 Empl. Prac. Dec. P 41,000

Conclusion

Footnotes

¹ The primary entry-level management position in Lucky's retail stores is Head Clerk (Fourth Person); other entry-level management positions include Head Clerk (Front-End Clerk); Head Clerk (Receiving Clerk); Head Clerk (Night Crew Manager); and Head Clerk (Fifth Person).

² The Court previously granted summary judgment for defendant on claims of race discrimination with respect to promotions to Third Person, Produce Manager, Deli/Bakery Head, Store Manager and Assistant Store Manager. Memorandum and Order dated April 4, 1991 at 10, 14, 15.

³ Defendant also argues that claims of racial discrimination with respect to allocation of work hours and reclassification from part-time to fulltime status are not actionable under section 1981. Because plaintiffs make clear in their opposition that they are not pursuing work-hour allocation and reclassification claims under section 1981, the court will not consider those arguments.

⁴ Because the promotion from Apprentice Clerk to Journey Clerk is automatic, plaintiffs do not allege section 1981

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liability with respect to the Journey Clerk position.
