1992 WL 295957
United States District Court, N.D. California.

Nancy J. STENDER et al., on behalf of themselves and all others similarly situated, Plaintiffs,
v.
LUCKY STORES, INC., Defendant.

No. C–88–1467 MHP.
|
April 28, 1992.

Opinion

PATEL, District Judge:

***1** Plaintiffs have brought this class action against Lucky Stores, Inc. on behalf of Black and female employees working in retail stores within Lucky's Northern California Food Division. Plaintiffs allege 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. Claims are brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; 42 U.S.C. § 1981; and the California Fair Employment and Housing Act ("FEHA"), Government Code §§ 12900–12996.

In light of the passage of the 1991 Civil Rights Act, and this court's determination that the Act applied to this case, the court requested that the parties submit briefs on the impact of the 1991 Act on the issues before the court. After considering the submissions of the parties, the court issues this order regarding the state of Title VII law following the passage of the 1991 Civil Rights Act. However, section D of this order is issued tentatively. The court requests that the parties agree on a date for a status conference and that they be prepared to discuss the issue of punitive damages at that time.

Background

Following plaintiffs' presentation of their case-in-chief in the liability phase of trial, defendant moved for involuntary dismissal pursuant to Federal Rules of Civil Procedure 41(b). On September 11, 1991, this court issued an order which held that (1) plaintiffs had established a *prima facie* case of disparate treatment of women with respect to initial placement, promotion, movement from part-time to full-time employment, and additional hours; (2) plaintiffs had established a *prima facie* case that defendant's discretionary decisionmaking and reliance upon subjective decisionmaking resulted in a disparate impact upon women with respect to initial placement and hiring; (3) plaintiffs had established a *prima facie* case that defendant's failure to follow its bid procedure with respect to movement from part-time to full-time employment resulted in a disparate impact upon women with respect to such movement. Nevertheless, the court held that (1) plaintiffs had failed to establish a *prima facie* case of disparate treatment of Black employees or disparate impact on Black employees with respect to initial placement, promotion, or additional hours; and (2) plaintiffs had failed to establish that Lucky is guilty of malice, oppression or fraud with respect to the treatment of women or Blacks. The order dismissed all of plaintiffs' claims of discrimination against Black employees and denied plaintiff's motion for punitive damages.

After the conclusion of the liability phase of the trial, but before the court had issued its final order, the Civil Rights Act of 1991, Pub.L. No. 102–166 (codified as amended at 42 U.S.C. § 2000e–2), was signed into law. The 1991 Act expands the scope of Title VII to provide more protection to victims of discrimination. On January 7, 1992 this court issued an order which held that the 1991 Civil Rights Act is applicable to plaintiffs' claims in this case. In that order, the court requested that the parties brief the following issues: (1) the effect of the 1991 Civil Rights Act on the use of statistical evidence in disparate impact and disparate treatment cases; (2) the appropriate post–*Wards Cove* analysis in disparate impact cases as a result of section 105 of the Act; and (3) the Act's effect on any other issues pending before the court in *Stender v. Lucky.* The parties submitted their briefs on these issues on February 6, 1992.

Discussion

A. Use of Statistical Evidence in Disparate Impact Cases[1]

***2** The parties agree that the 1991 Civil Rights Act has

little effect on the use of statistical evidence in disparate impact cases. Prior to the enactment of the Act a plaintiff could establish a *prima facie* case of disparate impact by: 1) identifying the specific employment practices being challenged; 2) establishing disparate impact on a protected group; and 3) demonstrating that the disparity was the causal result of one or more of the employment practices identified. *Wards Cove Packing Co., Inc. v. Antonio,* [50 EPD ¶ 39,021] 490 U.S. 642, 656–57 (1989); *Watson v. Forth Worth Bank & Trust,* [46 EPD ¶ 38,065] 487 U.S. 977, 994–95 (1988). Once a *prima facie* case was established, the burden of production shifted to the employer to articulate a business justification for the use of the challenged practices. *Wards Cove,* 490 U.S. at 658. If the defendant articulated such a justification, the plaintiff then had the burden of persuasion to show that " 'other tests or selection devices, without a similarly undesirable ... effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship.' " *Watson,* 487 U.S. at 998 (quoting *Albermarle Paper Co. v. Moody,* [9 EPD ¶ 10,230] 422 U.S. 405, 425 (1975)).

The 1991 Civil Rights Act does not alter plaintiffs' burden of proving that an employment practice has a disparate impact on a protected group. *See* Act § 105(a). Nor does the Act change the rule that a statistical analysis comparing segments of an employer's workforce is inadequate to carry a plaintiff's burden of proof. *See Wards Cove,* 490 U.S. 653–55. However, the 1991 Civil Rights Act bolsters this court's January 7, 1992 ruling with respect to defendant's discretionary and subjective decisionmaking and defendant's failure to follow its bid procedure. The Act provides that "if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice." Act § 105(a). As this court held:

> Where the system of promotion is pervaded by a lack of uniform criteria, criteria that are subjective as well as variable, discretionary placements and promotions, the failure to follow set procedures and the absence of written policies or justifications for promotional decisions, the court is not required to "pinpoint particular aspects of [the system]" that were unfavorable to women.

September 11, 1991 Order at 31 (quoting *Allen v. Seidman,* [51 EPD ¶ 39,260] 881 F.2d 375, 381 (7th Cir.1989)).

B. Post–Wards Cove Analysis in Disparate Impact Cases

The parties also agree that once the plaintiff has established a *prima facie* case of disparate impact, the 1991 Civil Rights Act shifts both the burden of production and the burden of proof to the employer to show that a challenged employment practice is job related and consistent with business necessity. *See* Act § 105. This allocation of the burden of proof is consistent with case law prior to the Supreme Court's decision in *Wards Cove.*[2] *See Albemarle Paper Co. v. Moody,* 422 U.S. 405, 431 (1975); *Griggs v. Duke Power Co.,* 401 U.S. 424, 432 (1971).

***3** In addition, section 105(b) of the Act defines "business necessity" by reference to an interpretive memorandum. That memorandum states:

> The terms "business necessity" and "job related" are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.,* [3 EPD ¶ 8137] 401 U.S. 424 (1971), and the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989).

137 Cong.Rec. S 15276 (daily ed. Oct. 25, 1991). Under *Griggs,* in order to prove business necessity, an employer must show that its selection criteria bear "a manifest relationship to the employment in question." *Griggs,* 401 U.S. at 432. The employer must also demonstrate that the employment practice significantly serves legitimate employment goals. *See New York Transit Authority v. Beazer,* [19 EPD ¶ 9027] 440 U.S. 568, 587 n. 31 (1979). The employer is not required to show that those employment goals "require" the employment practice. *See id.*

Under the 1991 Civil Rights Act, if a defendant successfully mounts a defense of business necessity a plaintiff may rebut that defense by demonstrating that 1) there exists an alternate employment practice which serves the employer's business necessity, but does so

without causing a disparate impact, and that 2) the employer refuses to adopt that alternative employment practice. Act § 105(a). "Alternative employment practice" is defined in the Act as that practice consistent with "the law as it existed on June 4, 1989," Act § 105(a), the day before the Supreme Court issued its opinion in *Wards Cove.* Before *Wards Cove* the Supreme Court had described the "alternate business practice" rebuttal:

> [T]he complaining party [may] show that other tests or selection devices, without a similarly undesirable [discriminatory] effect, would also serve the employment's legitimate interest in "efficient and trustworthy workmanship."

Albemarle, 422 U.S. at 425 (quoting *McDonnell–Douglas Corp. v. Green,* [5 EPD ¶ 8607] 411 U.S. 792, 801 (1973)).

C. Plaintiffs' Race Claims

Plaintiffs argue that as the 1991 Civil Rights Act has altered the legal standard governing their race claims, the court should reconsider its dismissal of those claims. The Civil Rights Act reverses *Patterson v. McLean Credit Union,* [50 EPD ¶ 39,066] 491 U.S. 164 (1989), by stating section 1981 covers discrimination in the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." Act § 101(2).

In its September 11, 1991 order, this court held that plaintiffs had failed to establish a *prima facie* case of disparate treatment with respect to Black employees. Specifically the court found that:

> the statistically significant disparities in promotions of Blacks to three positions at Lucky are too isolated to permit an inference that Lucky has engaged in a "pattern or practice" of racial discrimination. The disparities themselves are not sufficiently gross to permit an inference of discriminatory intent. Nor has the statistical evidence been bolstered by the kind of anecdotal or direct evidence that would establish a *prima facie* case that race discrimination was the "standard operating procedure" at Lucky Stores.

***4** September 11, 1991 order at 25 (citations omitted). The 1991 Civil Rights Act expanded the types of conduct that are actionable under section 1981. However, the change in section 1981 law worked by the Act does not alter the showing plaintiffs were required to make to establish a *prima facie* case of disparate treatment with respect to Lucky's Black employees. In fact, plaintiffs have failed to make that showing under either *Patterson* or pre-*Patterson* standards. Therefore, the court declines to reconsider its September 11, 1990 decision to dismiss plaintiffs' race claims.[3]

D. Punitive Damages

This court's September 11, 1991 order denied plaintiffs' request for punitive damages under FEHA and 42 U.S.C. § 1981 with respect to their class claims. Plaintiff requests that the court reconsider that order. Defendant counters that the court should not reconsider its denial of plaintiffs' request for punitive damages, September 11, 1991 Order at 34–5. The court agrees and declines to reconsider that decision.

However, plaintiffs also argue that they are entitled to sue for punitive damages under Title VII. The 1991 Civil Rights Act creates a new punitive damages remedy under Title VII. The Act allows an award of punitive damages "if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." Act § 102(b)(1). Defendant argues that as the punitive and deterrent purposes of punitive damages can only be served if the defendant has prior notice of the legal standard by which its conduct will be judged, the punitive damages provision of the 1991 Civil Rights Act should not be applied in this case. Moreover,

defendant contends that the application of a new legal standard for punitive damages could violate the Due Process Clause.

The court agrees that the question of whether the punitive damages provision of the 1991 Civil Rights Act should be applied retroactively is more difficult than the question of whether the restorative provisions of that Act should be retroactively applied.[4] Where "Congress enacts [a] statute to clarify the Supreme Court's interpretation of previous legislation thereby returning the law to its previous posture," the statute should be applied retroactively. *Ayers v. Allain,* 893 F.2d 732, 754–55 (5th Cir.), *vacated on other grounds,* 914 F.2d 676 (5th Cir.1990) (en banc), *cert. granted on other grounds,* —— U.S. ——, 111 S.Ct. 1579 (1991). However, the punitive damages provision of the 1991 Civil Rights Act is not restorative; unlike some other sections of the Act, it was not designed to undo the effects of Supreme Court cases which Congress believed were wrongly decided. The punitive damages provision creates a new remedy for plaintiffs who can show "unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact)." Act § 102(a)(1).

***5** The retroactive application of statutes which create new rights or remedies must be determined on a case by case basis. *Bradley v. School Board of the City of Richmond,* 416 U.S. 696, 717 (1974). In this case the only justification for rejecting the presumption that the punitive damages provision applies retroactively would be if retroactive application would result in "manifest injustice." *Stender v. Lucky Stores, Inc.,* [57 EPD ¶ 41,234] 780 F.Supp. 1302, 1307 (N.D.Cal.1992) (quoting *Bradley,* 416 U.S. at 711).[5] In the January 7, 1992 order, this court rejected defendant's argument that by expanding defendant's liability for intentional discrimination the Civil Rights Act has infringed upon defendant's rights. The court held that defendant has no unconditional right to limit plaintiffs to a particular type of remedy, and noted that defendant had always been subject to broader compensatory and punitive damages under FEHA and 42 U.S.C. § 1981 for the same conduct. *Stender,* 780 F.Supp. at 1308. In addition, defendant should have expected to be subject to much greater liability for punitive damages under FEHA and 42 U.S.C. § 1981.[6] While defendant was exposed to unlimited punitive damages liability under FEHA and 42 U.S.C. § 1981, plaintiffs can only recover $300,000 in punitive damages under the 1991 Civil Rights Act. Act § 102(b)(3)(D). Moreover, since a showing of unlawful *intentional* discrimination is a prerequisite to the award of punitive damages, defendant can hardly claim that although it was aware of the wrongfulness of its conduct it relied on the fact that its violations of plaintiffs' civil rights would be inexpensive. Title VII prohibits discrimination, it does not impose a licensing fee for the privilege of continued discrimination. As a result the equities weigh in favor of subjecting defendant to the new punitive damages provision under Title VII. Therefore, the court holds that it would not work manifest injustice to subject defendant to the punitive damages provision established by the 1991 Civil Rights Act.

The standards for proving punitive damages under the 1991 Civil Rights Act are easier to satisfy than those under FEHA or 42 U.S.C. § 1981. The new Title VII punitive damages provision allows the award of punitive damages for "reckless indifference." Act § 102(b)(1). This evidentiary standard is more lenient than that under either FEHA or 42 U.S.C. § 1981. Under FEHA and section 1981 only "oppression, fraud, or malice" are actionable. Cal.Civ.C. § 3294(a), (c). In addition, although the Act contains no explicit burden of proof for punitive damages claims, Act § 102, "[c]onventional rules of civil litigation generally apply in Title VII cases ... and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence." *Price–Waterhouse v. Hopkins,* [49 EPD ¶ 38,936] 490 U.S. 228, 253 (1989). In comparison, both FEHA and section 1981 require plaintiffs to make a showing of "clear and convincing evidence" in order to prevail on a punitive damages claim. *See* Cal.Civ.C. § 3294(a); *Mitchell v. Keith,* [36 EPD ¶ 34,952] 752 F.2d 385, 390 (9th Cir.), *cert. denied,* [37 EPD ¶ 35,330] 472 U.S. 1028 (1985) (borrowing California law for punitive damages standard).

***6** It is unclear to the court what distinction there is between the standard for establishing punitive damages and the standard for establishing liability for disparate treatment. The burden of proof, preponderance of the evidence, is the same for both claims. In addition, it would seem that if a plaintiff were able to establish the intentional discriminatory conduct required to prove disparate treatment, s/he would by definition have satisfied the requirement of showing the "reckless indifference" required for an award of punitive damages. Although the 1991 Civil Rights Act does not define "reckless indifference," punitive damages are available under both section 1981 and section 1983 upon a showing of intentional violation of federal law. *Smith v. Wade,* 461 U.S. 30, 51 (1983), *see also Yarbrough v. Tower Oldsmobile, Inc.,* [40 EPD ¶ 36,216] 789 F.2d 508, 514

(7th Cir.1986). In fact, the *Wade* court equated reckless or callous disregard with intentional discrimination and held that either was "sufficient to trigger a jury's consideration of the appropriateness of punitive damages." *Wade,* 461 U.S. at 51. In addition, the *Wade* court noted that "[t]here has never been any general common-law rule that the threshold for punitive damages must always be higher than that for compensatory liability." *Id.* at 53. The court requests that the parties be prepared to discuss the appropriate standards for awarding punitive damages under the 1991 Civil Rights Act at the status conference.

In the September 11, 1991 order, this court held that as long as there was no evidence that defendant's affirmative action plans were adopted as a ruse, the court would not subject defendant to punitive damages under FEHA or section 1983. However, under the more lenient punitive damages provision of Title VII, plaintiffs claim that they are entitled to punitive damages based on "Lucky's knowledge of significant problems with underrepresentation of women and Blacks in management; of its repeated failure to implement recommendations of the Human Resource Director to promulgate formal job descriptions and promotion criteria; and of its apparent abandonment of two affirmative action programs despite continued evidence of gender imbalance in Deli–Bakery and General Merchandise and of underrepresentation of women in managerial positions." September 7, 1991 Order at 30. Given the relaxed burden of proof and evidentiary requirement established by the 1991 Act, plaintiffs may be able to prove that they are entitled to punitive damages under Title VII.

E. Expert Witness Fees

Section 113 of the Act, which reverses *West Virginia University Hospital, Inc. v. Casey,* [55 EPD ¶ 40,606] 499 U.S. 83, 111 S.Ct. 1138 (1991), allows recovery of expert fees as part of an attorneys' fee award to a prevailing party under 42 U.S.C. § 1988. The court will defer consideration of the issue until it is ripe.

Conclusion

1. The court requests that the parties agree on a date for a status conference.

***7** 2. Once the plaintiff has established a *prima facie* case of disparate impact, the 1991 Civil Rights Act shifts both the burden of production and the burden of proof to the employer to show that a challenged employment practice is job-related and consistent with business necessity.

3. The court declines to reconsider its September 11, 1990 decision to dismiss plaintiffs' race claims.

4. The court tentatively holds that the punitive damages provision of the 1991 Civil Rights Act is applicable to plaintiffs' claims. However, at the status conference the court requests that the parties be prepared to discuss: 1) the applicability of the Title VII punitive damages provision to this case; 2) the distinction between the standard for establishing punitive damages and the standard for establishing liability for disparate treatment; and 3) the appropriate standards for awarding punitive damages under the 1991 Civil Rights Act.

5. Until the issue is ripe, the court will defer consideration of whether expert fees may be recovered as part of an attorneys' fee award to a prevailing party.

It Is So Ordered.

All Citations

Not Reported in F.Supp., 1992 WL 295957, 58 Fair Empl.Prac.Cas. (BNA) 1346, 59 Empl. Prac. Dec. P 41,703, 60 USLW 2739

Footnotes

[1] The parties agree that the 1991 Civil Rights Act has no effect on the use of statistical evidence in disparate treatment cases.

[2] Under *Wards Cove,* an employer could rebut a prima facie showing of disparate impact by producing evidence that

the "challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Wards Cove,* 490 U.S. at 659. The "business necessity" standard which was originally articulated in *Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971), and which is adopted by the 1991 Civil Rights Act, places much higher burdens of production and proof on the defendant than did the *Wards Cove* "business justification" standard.

[3] As the court stated at trial, R.T. at 26–437, plaintiffs are authorized to present anecdotal evidence of race discrimination in Stage IB of this case.

[4] To date two circuit courts have considered the question of the retroactive application of the 1991 Civil Rights Act; both held that the Act did not apply retroactively. *Vogel v. City of Cincinnati,* [58 EPD ¶ 41,320] 1992 WL 45451 (6th Cir.1992); *Fray v. Omaha World Herald Company,* [58 EPD ¶ 41,384] 1992 WL 65663 (8th Cir.1992). However, neither decision discussed the retroactive application of the punitive damages provision of the Act. In fact, the *Fray* court's discussion only related to the retroactive application of section 101 of the Act, which overruled *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989).

The district courts which have specifically addressed the retroactive application of the punitive damages provision of the 1991 Civil Rights Act have split on the question. *See Mojica v. Gannett Co., Inc.,* [58 EPD ¶ 41,267] 779 F.Supp. 94 (N.D.Ill.1991) (applying the punitive damages provision retroactively); *King v. Shelby Medical Center,* [58 EPD ¶ 41,317] 779 F.Supp. 157 (N.D.Ala.1991) (applying the punitive damages provision retroactively); *but see West v. Pelican Management Services Corp.* [58 EPD ¶ 41,426] 782 F.Supp. 1132 (M.D.La.1992) (refusing to apply the punitive damages provision retroactively).

[5] In *Bradley v. School Board,* 416 U.S. at 711, the Supreme Court held that the presumption of the retroactive application of a statute may only be rebutted if it will "result in manifest injustice or [if] there is statutory direction or legislative history to the contrary." This court determined in its January 7, 1992 order that "[i]n the case of the 1991 Civil Rights Act, the statutory direction indicates that the Act should be applied retroactively and the legislative history is unclear." *Stender v. Lucky Stores, Inc.,* 780 F.Supp. at 1307. In addition, the court held that the first prong of the *Bradley* manifest injustice test, in which the nature and identity of the parties is considered, militates in favor of the retroactive application of the Act. *Id.* These factors also weigh in favor of the retroactive application of the punitive damages provision of the Act. Therefore, the court need only consider the second and third prongs of the *Bradley* test, which weigh the nature of the parties' rights, and the nature of the impact of the change in law upon those rights, to determine whether the punitive damages section of the 1991 Civil Rights Act should be applied retroactively.

[6] The court is uncomfortable tying the application of the punitive damages provision of the 1991 Civil Rights Act to the existence of a right to punitive damages under the relevant state law. However, *Bradley* requires courts to evaluate the expectations of the parties in considering whether a statute should apply retroactively. *Bradley,* 416 U.S. at 720 ("the possibility that new and unanticipated obligations may be imposed upon a party without notice"). If the court is to consider the expectations of the parties, that necessarily implies that the court must look to all of the law under which the defendant may be held liable for its conduct.