

1974 WL 10550
United States District Court, S.D. Alabama.

Lee, et al., United States Of America,
Plaintiff-Intervenor and Amicus Curiae, and
National Education Association, Inc.,
Plaintiff-Intervenor
v.
Conecuh County Board Of Education, et al.

No. 5945-70.
|
Feb. 7, 1974.

Attorneys and Law Firms

Gray, Seay & Langford, Montgomery, Ala., for NEA.

Jerris Leonard, Assistant Attorney General, and Charles
S. White-Spunner, Jr., U.S. Attorney for the Southern
District of Alabama, for the United States.

Johnston, Johnston & Kendall, Mobile, Ala., and J. B.
Nix, Jr., Evergreen, Ala., for defendant Conecuh County
Board of Education.

Opinion

DANIEL H. THOMAS, Senior District Judge: -

*1 This matter is before the Court on remand from the Circuit Court of Appeals for the making by this Court of findings of fact and conclusions of law. Lee v. Macon County Board of Education, 482 F.2d 1253, 6 FEP Cases 290 (5th Cir. 1973). The claims to which the consideration of this Court is directed are those of four black former principals and four dismissed black teachers. The claims involve contentions that the Conecuh County School Board violated the rights of these persons in contravention of the requirements of Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1969), and the order of this Court entered pursuant thereto.

At no time was it made to appear to this Court that the NEA was attempting to advance, as a class action, the claims of the individual principals and teachers. In view of the fact that the NEA advanced these claims on appeal,

the Court of Appeals has directed that this Court determine (1) whether the NEA may advance the claims as a class action and, if so, (2) whether the rights of the principals and teachers have been violated. Inasmuch as the first question is answered in the negative, it is unnecessary for the Court to reach the second question.

The standing of the NEA to advance the claims depends upon whether the claims are properly the subject of a class action and upon whether the NEA has sufficient interest in the claims to be a member of the class.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Among the prerequisites of Rule 23, FRCP, to the maintenance of a class action is the requirement that the class be "so numerous that joinder of all members is impracticable". The class whose claims the NEA would assert consists of eight persons formerly employed by the same rural county school board. None of these persons is a party to this litigation.

A similar question was before the court in Bonner v. Texas City Independent School District, 305 F.Supp. 600 (S.D. Tex. 1969). The court found that the numerosness requirement was not met, saying:

"The only Negro teachers not rehired by defendants for the 1965-1966 school year other than plaintiff were Mrs. Hall, Mr. Niles, Miss Rice, and Mrs. Randall. The total class thus could number no more than 5 persons. Seventeen potential class members were held too few in DeMarco v. Edens, 390 F.2d 836 (2d Cir. 1968). Sixteen were held too few in Giordano v. RCA, 183 F.2d 558 (3d Cir. 1960). Ten were held too few in Association for Preservation of Freedom of Choice, Inc. v. Wadmond, 215 F.Supp. 648 (S.D.N.Y. 1963). Seven were held too few in Thaxton v. Vaughn, 321 F.2d 474 (4th Cir. 1963). See also Smith v.

Board of Educ., 365 F.2d 770, 778
(8th Cir. 1966).”

24(a)(2), FRCP, there would appear to be little distinction between the requirements of that rule and those of Rule 23(a) (3) and (4), FRCP.

*2 See Foster v. Mobile County Hospital Board, 398 F.2d 227 (5th Cir. 1968).

As recognized in Harper v. Vance, 342 F.Supp. 136 (N.D. Ala. 1972), the burden is on the party seeking to establish a class action to prove the prerequisites to such action. The court finds that the NEA has failed to prove that the class is so numerous that joinder of all members is impracticable, and the court further finds that it affirmatively appears that the class is not so numerous.

In view of the finding that at least one of the prerequisites for a class action does not exist, the question of whether the NEA would have standing to advance the claims of the class is moot. However, the court notes that denial of a petition by NEA to intervene was affirmed in both Horton v. Lawrence County Board of Education, 425 F.2d 735 (5th Cir. 1970), and Bennett v. Madison County Board of Education, 437 F.2d 554 (5th Cir. 1970). While those cases dealt with intervention of right under Rule

[ORDER]

Based on the foregoing, it is

ORDERED, ADJUDGED and DECREED that the petition of National Education Association, Inc., Plaintiff-intervenor, be, and the same hereby is, dismissed. Costs are taxed against said Plaintiff-Intervenor.

All Citations

Not Reported in F.Supp., 1974 WL 10550, 8 Fair Empl.Prac.Cas. (BNA) 935
