

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

FILED
MAR 27 2000
G. PATRICK MURPHY
DISTRICT JUDGE
SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, et al.,)

Plaintiffs,)

vs.)

CITY OF BELLEVILLE, ILLINOIS,)

Defendant.)

CIVIL NO. 93-799-GPM

MEMORANDUM AND ORDER

MURPHY, District Judge:

This matter is before the Court on Defendant's motion to dismiss Count II of Plaintiff Henry Lee Johnson's second amended complaint (Doc. 52) in the above-entitled action. For the following reasons, Defendant's motion is denied.

A motion to dismiss is properly granted only if it appears beyond doubt that a plaintiff is unable to prove any set of facts which would entitle him or her to relief. *Benson v. Cady*, 761 F.2d 335, 338 (7th Cir. 1985) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In ruling on a motion to dismiss, a court must take all allegations in a complaint to be true and view them, along with all reasonable inferences to be drawn therefrom, in the light most favorable to the plaintiff. *Powe v. City of Chicago*, 664 F.2d 639, 642 (7th Cir. 1981).

In Count II of his second amended complaint, Plaintiff Johnson, who was formerly employed by Defendant as Supervisor of Housing Inspection Program, alleges that Defendant failed to interview him for the position of Director of Sanitation, Health and Housing, Building and Zoning in violation of 42 U.S.C. § 1981. Defendant contends that Count II is subject to dismissal under Federal Rule

of Civil Procedure 12(b)(6) for two reasons: (1) the claim is barred by the Court's Order dated June 27, 1997 (Doc. 227); and (2) as an at-will employee, Plaintiff Johnson lacks a contractual relationship with Defendant sufficient to support a claim under 42 U.S.C. § 1981.

The Court finds no merit in Defendant's contention that Count II of Plaintiff Johnson's second amended complaint is barred by the Order dated June 27, 1997. In that Order, the Court concluded that the position of Director of Sanitation, Health and Housing, Building and Zoning is a "policy making" position within the meaning of § 701(f) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(f). Thus, the Court ruled that the position is exempt from the consent decree between Defendant and Plaintiff United States of America entered by the Court on August 8, 1995. The Order makes no reference to 42 U.S.C. § 1981. Accordingly, the Court fails to see how the Order necessitates dismissal of Count II.

Nor is the Court persuaded by the argument that Plaintiff Johnson's at-will employment by Defendant is not a contractual relationship sufficient to support a claim under 42 U.S.C. § 1981, which prohibits all racial discrimination with respect to making and enforcing contracts. The Seventh Circuit Court of Appeals has not addressed directly the issue of whether at-will employment provides a sufficient contractual relationship to state a claim under 42 U.S.C. § 1981. However, in *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990), Chief Judge Posner suggested that it does:

Employment at will is not a state of nature but a continuing contractual relation. Wages, benefits, duties, working conditions, and all (but one) of the other terms are specified and a breach of any of them will give the employee a cause of action for breach of contract. All that is missing is a provision that gives the contract a fixed term or that entitles one or both parties to a specified amount of notice before the other party can cancel the contract without liability. A contract for employment at will may end abruptly but it is a real and continuing contract nonetheless . . .

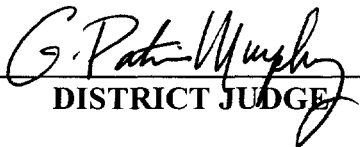
Id. at 109 (citations omitted). The conclusion that at-will employment is sufficient to ground a claim

under 42 U.S.C. § 1981 is supported also by the Supreme Court's holding in *Haddle v. Garrison*, 119 S.Ct. 489 (1998), that an at-will employee has a sufficient contractual relationship to maintain a cause of action for injury to person or property under 42 U.S.C. § 1985. *See id.* at 492. Finally, several Circuits have concluded that a plaintiff may assert a claim under 42 U.S.C. § 1981 as an at-will employee. *See Perry v. Woodward*, 199 F.3d 1126, 1133-34 (10th Cir. 1999); *Spriggs v. Diamond Auto Glass*, 165 F.3d 1015, 1018-19 (4th Cir. 1999); *Fadeyi v. Planned Parenthood Ass'n of Lubbock, Inc.*, 160 F.3d 1048, 1052 (5th Cir. 1998). Accordingly, the Court finds that Count II sufficiently alleges an enforceable contract for purposes of 42 U.S.C. § 1981 and is not subject to dismissal.

To conclude, Defendant's motion to dismiss Count II of Plaintiff Johnson's second amended complaint (Doc. 52) is hereby **DENIED**.

IT IS SO ORDERED.

DATED: 03/27/00


DISTRICT JUDGE