UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 94-1140-CIV-HIGHSMITH

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MAGISTRATE JUDGE JOHNSON

CITY OF HIALEAH; RAUL L. MARTINEZ, MAYOR (in his official capacity); HIALEAH PERSONNEL BOARD; and DAN GREENFIELD, PERSONNEL DIRECTOR (in his official capacity),

Defendants.

_____/

Movants, Rafael Suau, et al., file this Memorandum in Support of their Motion to Intervene, and Objections to the Stipulation and Settlement Agreement in this case and state:

Fed. R. Civ. P. 24(a)(2) provides that:

> Rule 24. Intervention.
>
> (a) Intervention of right. Upon timely application, anyone shall be permitted to intervene in an action:
>
> (1) when a statute of the United States confers an unconditional right to intervene; or
>
> (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical

> matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The focus of a Rule 24 inquiry is whether the intervenor has a legally protectable interest in the litigation. Chiles v. Thornburgh, 865 F.2d 1197 (11th Cir. 1989). The inquiry on this issue is "a flexible one" and focuses on the particular facts and circumstances surrounding the motion. Id. at 1214.

Participation by an employee organization in a fairness hearing held by a district court before approving a consent decree in an employment discrimination case does not mean that the members of the organization have an identity of interest with the organization. Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492 (11th Cir. 1987). Therefore, an agreement by a city to a consent decree to remedy employment discrimination against blacks in public service employment did not create an identity of interest with individual firefighters so as to preclude them from subsequently bringing reverse discrimination actions against the city and the personnel board. Id. at 1499. In Barfus v. City of Miami, 951 F.2d 1265 (11th Cir. 1991), the court held that even where the employees' union signs a consent decree settling employment discrimination litigation on the basis of race, it does not preclude individual actions by members who are victims of reverse discrimination.

It is, therefore, clear that the movants in this case have standing to challenge the proposed action of the United States and the City of Hialeah. A movant who shows standing is deemed to have a sufficiently substantial interest to intervene. Meek v.

Metropolitan Dade County, 985 F.2d 1471 (11th Cir. 1993). The movants in this case do not challenge alleged unlawful conduct in the abstract. Rather, the proposed Stipulation and Settlement Agreement will cause tangible, actual or prospective injury to the movants. This clearly constitutes an appropriate basis for standing and for intervention as a matter of right. Id. at 1480.

In Howard v. McLucas, 782 F.2d 956 (11th Cir. 1986), white and nonblack minority Air Force employees were entitled to intervene in a class action filed by black Air Force employees for the purpose of challenging the promotional remedy insofar as it restricted their promotional opportunities solely on the basis of race. The prospective intervenors in Howard, supra, like those in the present case, filed their motion to intervene shortly after a proposed consent decree was announced and before the fairness hearing and their intervention in this case will not prolong any known pattern of past discriminatory practices and the intervenors in this case, like those in Howard, raise important questions regarding the legality of race conscious promotional remedies.

The proposed settlement in the present case will provide remedial relief to an unidentified class of black applicants to the Hialeah Police Department solely on the basis of their race. Employment decisions made by a government employer solely on the basis of race, require a "strict scrutiny" review of the proposed decree. Bennett v. Click, 20 F.3d 1525 (11th Cir. 1994); City of Richmond v. J.A. Croson Co., 109 S.Ct. 706 (1989). An employer

implementing a race conscious affirmative action plan must assure that race will be considered consistent with the purposes of Title VII and that the interests of those employees not benefiting from the plan will not be unduly infringed. Johnson v. Transportation Agency, 107 S.Ct. 1442, 1452 (1987); Wygant v. Jackson Board of Education, 106 S.Ct. 1842 (1986).

In Click, supra, the Eleventh Circuit Court of Appeals held that as a necessity that there be some finding that the city engaged in past discrimination in order to allow for proper judicial review of the city's use of race in its affirmative action plan. In the present case, there has been no finding of past discrimination and, in fact, the City vehemently denies that any such discrimination has occurred.

In Click, supra, the City of Birmingham made race the sole factor to determine eligibility for certain promotions in the Fire Department. In the present case, the City proposes a remedy solely on the basis of race which will accord an as yet unidentified class of black employees the right to shift selection, vacation selection, advanced placement in the pay scale, protection from layoffs, eligibility for off-duty details and a "fast track" for promotional eligibility solely on the basis of their race to the exclusion of all other employees of the Department. The proposed decree, therefore, "embodies exactly the sort of danger that personnel decisions would be made by reflexive adherence to a numerical standard" that the Supreme Court cautioned against in Johnson. Click, supra. Johnson, at p. 1454.

The court in Click, as well as the Supreme Court in Johnson and Wygant, recognized the extremely intrusive nature of exposing employees to layoffs or denying them promotional opportunities solely on the basis of their race. Yet that is precisely what the City of Hialeah and the Government propose in the present case.

The movants have no particular objection to the issue of backpay or to the question of hiring, except to the extent that some tool must be used to make sure that qualified persons are hired as law enforcement officers. The focus of the intervenors' objection is on the portion of the remedial relief that provides for retroactive seniority and advanced promotional opportunities. It is these two factors which serve to disadvantage all 198 movants and objectors in this case. See also, Ensley Branch NAACP v. City of Birmingham, 20 F.3d 1489 (11th Cir. 1994); United States v. City of Miami, 2 F.3d 1497 (11th Cir. 1993).

The movants in this case do not accept at face value the relevant labor market alleged in the Complaint, nor do they accept at face value that the in-hiring exam attacked by the Government is invalid. Before a remedy can be imposed that will deprive the 198 movants of job benefits which they have earned through loyal service to the citizens of the City of Hialeah in the arduous and dangerous task of law enforcement, there must be more than a bald allegation that there is a numerical disparity in the work force based on race.

The proposed decree should not be approved in its present form nor should race conscious affirmative relief be adopted in the absence of proof that discrimination exists and that the

methodology chosen is the least intrusive means of resolving that discrimination.

WHEREFORE, for the foregoing grounds and reasons, movants respectfully pray the Court for the following relief:

A. Grant their motion to intervene pursuant to Fed. R. Civ. P. 24(a)(2);

B. Deny the proposed Stipulation and Settlement Agreement;

C. Schedule an evidentiary hearing to determine whether a finding of discrimination is appropriate and whether the remedy selected is the least intrusive;

D. Enter findings of fact and conclusions of law that the utilization of race conscious retroactive seniority and advance promotional opportunities unduly interferes with the rights of employees not benefiting from the decree;

E. Grant such other relief as the Court shall deem appropriate.

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this 11th day of July, 1994, to: Alejandro Vilarello, City Attorney, 501 Palm Avenue, Hialeah,

Florida 33011; Brenda Berlin, Esquire, and Marybeth Martin, Esquire, U.S. Department of Justice, Civil Rights Division, Employment Litigation Section, P.O. Box 65968, Washington, D.C. 20035-5968.

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