For Opinion See 2004 WL 835620, 2004 WL 726110, 2004 WL 434210, 2002 WL 31478261

United States District Court, N.D. Illinois.
John MCGEE and Thomas Malone, Plaintiffs,
v.
ILLINOIS DEPARTMENT OF TRANSPORTATION, Kenneth S. Chlebicki, Dennis A. Mahoney and John Kos, Defendants.
No. 02 C 0277.
June 20, 2002.

Defendants' Motion to Dismiss Plaintiffs' Complaint

Hon. Sidney Schenkier Judge Presiding.
Defendants, Illinois Department of Transportation (“IDOT”), Kenneth S. Chlebicki (“Chlebicki”), Dennis A. Mahoney (“Mahoney”), and John Kos (“Kos”), by and through their counsel, JAMES E. RYAN, Attorney General of Illinois, hereby move to dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, stating as follows:

1. Plaintiffs' § 1981 and § 1983 claims against IDOT are barred by the Eleventh Amendment.

2. Plaintiffs' fail to state a claim under 42 U.S.C. §1983 against any Defendants.

3. Plaintiffs' claims arise out of alleged violations of the retaliation provisions contained in the Consent Decree in *Massie v. IDOT.*

4. Plaintiffs' complaint in the instant action duplicates their claims brought under the Consent Decree, entered in *Massie v. IDOT,* 96 C 4830.

WHEREFORE, Defendants Illinois Department of Transportation, Kenneth S. Chlebicki, Dennis A. Mahoney, and John Kos respectfully request that this Honorable Court grant their motion to dismiss Plaintiffs' Complaint.

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendants, Illinois Department of Transportation (“IDOT”), Kenneth S. Chlebicki (“Chlebicki”), Dennis A. Mahoney (“Mahoney”), and John Kos (“Kos”), by and through their counsel, JAMES E. RYAN, Attorney General of Illinois, hereby submit this memorandum in support of their Motion to Dismiss Plaintiffs' Complaint, stating as follows:

I. *INTRODUCTION*

Plaintiffs John McGee and Thomas Malone are class members in the *Massie v. IDOT,* 96 C 4830, which alleged discriminatory practices in IDOT's promotional policies. The *Massie* suit was resolved by the parties entering into a detailed consent decree with this Court retaining jurisdiction for a three year period to enforce the terms of the decree. This period expires on June 12, 2003.

The *Massie* Consent Decree contains numerous policy and promotion terms, including an equal treatment provision as well as a non-retaliation provision. The terms of the decree are to be overseen by a Monitor who is the attorney for the Plaintiffs in the *Massie* case. All allegations of unequal treatment and/or retaliation arising under the decree are to be investigated by IDOT and overseen by the Monitor. If the investigation is not resolved to the satisfaction of the Monitor, the matter may be brought before this Court for further proceedings.

In March 2001, pursuant to the terms of the *Massie* Consent Decree, Plaintiffs complained that they were being subjected to discrimination, harassment, and retaliation as result of their participation in the *Massie* Consent Decree. They complained of unequal treatment and an inability to perform their jobs. IDOT initiated an investigation; however the Monitor did not appear to be satisfied with the investigation. In June 2001, Plaintiffs filed a motion for rule to show cause before this Court for violation of the Consent Decree. This Court denied Plaintiffs' motion as premature. Plaintiffs then pursued their complaints with IDOT's Civil Rights Committee. In January 2002, Plaintiffs expressed their dissatisfaction with the results of IDOT's investigation and expressed their intention to appeal IDOT's recommendations to this Court.

In the present case, Plaintiffs make the same allegations of unequal treatment and retaliation as they made under the *Massie* Consent Decree. They complain that since their promotions under the Decree, they have been subjected to discrimination, harassment and retaliation.

In Count I of their lawsuit, Plaintiffs have brought a claim under 42 U.S.C. § 1981 against all defendants, including IDOT. In Count II, Plaintiffs have sued all Defendants under 42 U.S.C. §1983. In Count III, Plaintiffs have brought a claim under Title VII for race discrimination against IDOT only and in Count IV, Plaintiffs have brought a claim under Title VII for retaliation against IDOT only. Plaintiffs lawsuit should be dismissed for the following reasons:

A. Plaintiffs' §1981 and §1983 claims against IDOT are barred by the Eleventh Amendment;

B. Plaintiffs' fail to state a claim under 42 U.S.C. §1983 against any Defendants;

C. Plaintiffs' claims arise out of alleged violations of the retaliation provisions contained in the Consent Decree in *Massie v. IDOT;* and,

D. Plaintiffs' complaint in the instant action duplicates their claims brought un-

der the *Massie* Consent Decree.

II. *STANDARD OF REVIEW*

The purpose of a motion to dismiss is to test the sufficiency of the complaint, not the merits of the lawsuit. *Triad Assocs., Inc. v. Chicago Housing Auth.,* 892 F.2d 583, 586 (7th Cir 1989). Notwithstanding the "simplified notice pleading" requirement of the Federal Rules of Civil Procedure, dismissal is proper if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99 (1957).

Defendants are also mindful that this Court must view the Plaintiffs allegations in the light most favorable to the Plaintiff. *Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683 (1974). All well pleaded facts and allegations in the plaintiffs complaint must be taken as true, *Ed Miniat. Inc. v. Globe Life Ins. Group. Inc.,* 805 F.2d 732, 733 (7th Cir. 1986), *cert. denied,* 482 U.S. 915, 107 S.Ct. 3188 (1987), and the plaintiff is entitled to all reasonable inferences that can be drawn therefrom. *Ellsworth v. Racine,* 774 F.2d 182, 184 (7th Cir. 1985), *cert. denied,* 475 U.S. 1047, 106 S.Ct. 1265 (1986).

III. *ARGUMENT*

A. *Plaintiffs' §1981 And §1983 Claims Against IDOT Are Barred By The Eleventh Amendment*

Plaintiffs allege that IDOT discriminated against them in violation of 42 U.S.C. §1981 and 42 U.S.C. §1983. (Ex. A, Plaintiffs' Complaint, pp.7-10). Plaintiffs' §1981 and §1983 claims against IDOT are barred by the Eleventh Amendment and should be dismissed with prejudice.

Under the Eleventh Amendment, the state and its agencies are immune from private damage actions or suits for injunctive relief in federal court unless the state by unequivocal language waives the protections of the Eleventh Amendment or Congress unequivocally abrogates the state's Eleventh Amendment immunity. *Kroll v. Board of Trustees Univ.of Ill.,* 934 F.2d 904, 907 (7th Cir. 1991).

Illinois has not waived its Eleventh Amendment immunity. 745 ILCS 5/1 (1996). A state may waive its constitutional immunity by state statute or constitutional provision. *Kroll,* 934 F.2d 904, citing *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 238 n.l (1985). Illinois, however, has determined by statute that the State may not be sued. The State Lawsuit Immunity Act provides that the State shall not be made a defendant or a party in any Court. 745 ILCS 5/1 (1996).[FN1] Nor has Congress expressed an unequivocal intent to abrogate the state's immunity under §1981 or §1983. *Winters v. Iowa State University,* 1992 U.S.App. LEXIS 1161 (April 2, 1992) (holding that the state university is immune from suit under both §1981 or §1983).

FN1. The Illinois legislature has crafted one exception to the State Lawsuit Immunity Act. Under the Court of Claims Act, the Court of Claims has exclusive jurisdiction over all claims against the State for damages sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit. 705 ILCS 505/8(d) (1998).

IDOT is an agency of the State and as such, is immune from Plaintiffs' claims under 42 U.S.C. §1981 and 42 U.S.C. §1983. Therefore, Plaintiffs' §1981 and §1983 claims against IDOT should be dismissed with prejudice.

B. *Plaintiffs' Fail To State A Claim Under 42 U.S.C. §1983 Against Any Defendants*

In Count II, Plaintiffs allege that all Defendants have violated their rights under §1983. (Ex. A, pp. 9-10). Plaintiffs' claims under 42 U.S.C. §1983 fail to state a claim as §1983 does not independently provide any substantive rights and as Plaintiff fails to identify the underlying constitutional right that has allegedly been violated. Plaintiffs' claims under §1983 should therefore be dismissed.

Section 1983 does not provide any substantive rights. Thus, "[s]tanding alone, §1983 clearly provides no protection for civil rights..." *Chapman v. Houstan Welfare Rights Org.,* 441 U.S. 600, 618, 99 S.Ct. 1905, 1916 (1979). Section 1983 merely authorizes a cause of action based upon the deprivation of civil rights guaranteed by other Acts of Congress. Id.

In this case, Plaintiffs' bring suit under § 1983 but fail to identify the underlying constitutional right(s) that Defendants have purportedly violated. While both Plaintiffs claim that they have experienced hostility, harassment, and retaliation which have deprived them of their rights under state and federal civil rights laws, Plaintiffs fail to point to the state and federal laws that have been violated. (Ex. A, ¶ 38, 41). Even under federal notice pleading standards, Defendants are entitled to fair notice of Plaintiffs' claims and the grounds upon which they rest. *Kyle v. Morton High School,* 144 F.3d 448, 444-445 (7th Cir. 1998). Because Plaintiffs fail to give Defendants fair notice of their claims, Plaintiffs fail to state a claim under 42 U.S.C. §1983. Plaintiffs claims under §1983 should therefore be dismissed.

C. *Plaintiffs' Claims Arise Out of Alleged Violations of The Retaliation Provisions Contained in the Consent Decree In Massie v. IDOT*

All of the claims in Plaintiffs' Complaint arise out of alleged violations of retaliation provisions contained in the Consent Decree entered in the case of *Massie v. IDOT,* 96 C 4830. Plaintiffs' Complaint should therefore be dismissed with prejudice.

The purpose of a consent decree is to avoid protracted litigation by entering into a court supervised agreement that resolves the dispute to the satisfaction of the

parties. If Defendants violate the terms of the consent decree, the plaintiff's recourse is to bring an action to enforce the decree. *USA v. City of Northlake,* 942 F.2d. 1164, 1167-8 (7th Cir. 1991). To allow Plaintiffs to bring a "fresh" lawsuit would undermine the purpose of the Decree.

A judicially approved consent decree is essentially a contract for the purposes of construction. *Id.* In determining whether Plaintiffs' claims fall within the scope of the consent decree, the court will apply the fundamental principles of contract interpretation. Id. The court will first focus on the language contained within the decree itself. Id. If the plain language of the contract unambiguously provides an answer to the question at hand, the inquiry is over. Id. If the plain language, however, is unclear, then parol or other extrinsic evidence must be considered in order to reconstruct the intent of the parties at the time they entered into the agreement. *Id.*

The *plain language* of the *Massie* Consent Decree essentially provides that IDOT and its supervisory personnel shall treat all persons promoted under this decree equally to the way it treats other employees in the HCEO and Lead Worker classifications, and are enjoined from retaliating against those class members who assert any of their right under the Decree. (Ex. D, Consent Decree, pp. 17-18)(See footnote 2). The Decree also provides a mechanism for redress if any of these provisions are violated. (Ex. D, pp. 23- 25).

Plaintiffs' claims unambiguously fall within the scope of the Consent Decree entered in *Massie v. DOT,* 96 C 4830. In their Complaint, both Plaintiffs claim that *immediately after* their activities in implementing aspects of the decree and their promotions pursuant to the decree, they began experiencing race discrimination, harassment, and retaliation in that they were treated differently than other Lead Workers. (Ex. A, ¶ 2, 14, 15, 17, 21, 22). Plaintiffs' further claim that they were subjected to discrimination, harassment, and retaliation *as a result of* their promotions (under the decree), their participation in the Consent Decree, and their opposition to discrimination, harassment, and retaliation. (Ex. A, ?2, 14, 15, 17, 21, 22).

Through their own actions, Plaintiffs implicitly acknowledged that their claims should be brought under the Decree. The claims that Plaintiffs have made in this lawsuit are the same claims they made previously under the *Massie* Consent Decree, as a violation of the equal treatment and non-retaliation provisions of that Decree.

As early as March 2001, Plaintiffs complained that they were being subjected to discrimination, harassment, and retaliation as result of their participation in the *Massie* Consent Decree. (Ex. B, Plaintiffs Motion for Rule to Show Cause, filed June 15, 2001, pp. 2-4 and attachments C, D, G, J, K, L, M, N, 0, Q) (See footnote 2). They complained of unequal treatment and an inability to perform their jobs. (Ex. B, pp. 2-4 and attachments C, D, G, J, K, L, M, N, O, Q.) In response to

their complaints and in accordance with the terms of the Consent Decree, IDOT initiated an investigation. (Ex. B, pp. 2-4 and attachments C, D, G, J, K, L, M, N, 0, Q.) The Monitor however did not appear to be satisfied with IDOT's efforts and in June, 2001, Plaintiffs filed a motion for rule to show cause before this Court for violation of the Consent Decree, again alleging unequal treatment, racial discrimination, harassment and retaliation. (Ex. B, pp. 2-4 and attachments C, D, G, J, K, L, M, N, O, Q). Plaintiffs complained that they were subjected to a pattern of severe harassment and retaliation based upon their race and their participation in the *Massie* Consent Decree. (Ex. A, ¶29, Ex. B, Plaintiffs Motion for Rule to Show Cause, filed June 15, 2001, pp. 2-4 and 6-8 and 11)[FN2]. This Court denied Plaintiffs' motion as premature. Plaintiffs then pursued their complaints with IDOT's Civil Rights Committee as required under the Decree. Then, when those efforts allegedly failed, they expressed their intention to appeal IDOT's recommendations to Judge Schenkier. (Ex. C, Letter to Maine from Franklin, dated January 28, 2002) (See Footnote 2).

> FN2. Normally, attaching materials to a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) converts the motion to a motion for summary judgment. However, the "district court may also take judicial notice of matters of public record without converting a 12(b)(6) motion into a motion for summary judgment." *Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7th Cir. 1994). Accordingly, this Court should take notice of all documents within the court record.

D. *Plaintiffs' Complaint in the Instant Action Duplicates Their Claims Brought Under The Consent Decree, Entered in Massie v. IDOT, 96 C 4830*

Plaintiffs' Complaint in this case is duplicative of the claims they recently raised under the Massie Consent Decree. Plaintiffs' Complaint should therefore be dismissed with prejudice.

Generally, a federal suit may be dismissed for reasons of wise judicial administration when it is duplicative of a pending parallel action, *Serlin v. Arthur Anderson & Co.*, 3 F.3d 221, 223 (7th Cir. 1993). "District courts are accorded a great deal of latitude and discretion in determining whether one action is duplicative of another." Id. (emphasis added) (holding "[t]he irrationality of tolerating duplicative litigation in the federal system is all the more pronounced where, as here, two federal judges sitting on the same district are ... devoting scarce judicial resources to the adjudication of the same charges, essentially by the same plaintiffs, against the same defendants.")

The claims in Plaintiffs' Complaint are duplicative of the claims they brought under the Massie Consent Decree. As previously stated, Plaintiffs have claimed, in both their Complaint and their Motion for Rule to Show Cause, that *immediately after* their activities in implementing aspects of the decree and their promotions pursuant to the decree, they began experiencing race discrimination, harassment, and retaliation in that they were treated differently than other Lead Workers.

(Ex. A, ¶ 2, 14, 15, 17, 21, 22; Ex. B, pp. pp. 2-4 and 6-8 and 11). Plaintiffs' have further claimed that they were subjected to discrimination, harassment, and retaliation *as a result of* their promotions, (under the decree), their participation in the Consent Decree, and their opposition to discrimination, harassment, and retaliation. (Ex. A, ?2, 14, 15, 17, 21, 22; Ex. B, pp. pp. 2-4 and 6-8 and 11). While, unlike *Serlin,* all of Plaintiffs claims are before the same Court, the rational in *Serlin* still applies as scarce judicial resources are being devoted to the adjudication of the same charges, essentially by the same plaintiffs, against the same defendants and or their employees.

IV. *CONCLUSION*

For the foregoing reasons, Defendants respectfully request that this Court grant their Motion to Dismiss Plaintiffs' Complaint.

Appendix not available.

John MCGEE and Thomas Malone, Plaintiffs, v. ILLINOIS DEPARTMENT OF TRANSPORTATION, Kenneth S. Chlebicki, Dennis A. Mahoney and John Kos, Defendants.
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