For Opinion See 2011 WL 2600665

United States Court of Appeals,
Sixth Circuit.
COALITION TO DEFEND AFFIRMATIVE ACTION, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (Bamn), et al., Plaintiffs - Appellants,
v.
REGENTS OF THE UNIVERSITY OF MICHIGAN, et al., Defendants-Cross-Appellants.
No. 08-1534.
June 12, 2009.

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit

Defendants/cross-Appellants' Second Cross-Appeal Brief

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to the Federal Rule of Appellate Procedure 34(a)(1) and Sixth Circuit Rule 34(a), the University Defendants-Appellants hereby respectfully request oral argument on their cross-appeal. The University Defendants-Appellants' cross-appeal raises the important and foundational question of whether the Universities are properly named as parties in the action brought by the Coalition Plaintiffs-Appellants. The University Defendants-Appellants further note that the Coalition Plaintiffs-Appellants have requested oral argument with respect to their appeal.

JURISIDICTIONAL STATEMENT

The Court of Appeals has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1291. On March 18, 2008, the District Court issued a final order granting summary judgment to the Attorney General and dismissing all claims. In that same order, however, the District Court denied in part the University Defendants-Appellants' Motion to Dismiss. On April 11, 2008, the University Defendants-Appellants filed a Notice of Appeal, thereby taking a timely appeal from that portion of the District Court's order.

STATEMENT OF ISSUE FOR REVIEW

Whether the District Court erred in denying in part the University Defendants-Appellants' Motion to Dismiss, where the University Defendants-Appellants argued that they are not proper parties to this case because they cannot afford the Coalition Plaintiffs-Appellants the relief they demand.

I. STATEMENT OF THE CASE

The Second Amended Complaint ("the Complaint") filed by Plaintiffs-Appellants the Coalition to Defendant Affirmative Action, Integration, and Immigrant Rights and Fight for Equality by Any Means Necessary, et al. ("the Coalition") challenged the constitutionality of Article I, § 26 of the Michigan Constitution ("Proposal 2"). The Complaint

properly named the Attorney General of the State of Michigan as a defendant. But the Complaint also named as defendants the Regents of the University of Michigan, the Board of Trustees of Michigan State University, the Board of Governors of Wayne State University, Mary Sue Coleman, in her official capacity as President of the University of Michigan, Lou Anna K. Simon, in her official capacity as President of Michigan State University, and Irvin D. Reid, in his official capacity as President of Wayne State University (collectively, the "Universities").[FN1] Simply put, the Universities do not belong in this case.

> FN1. The plaintiffs in the companion case of *Cantrell, et al. v. Cox,* et al. did not name the Universities as parties and did not oppose the dismissal of the Universities from the case brought by the Coalition.

The limited role of the Universities here is obvious but merits emphasis. The Universities did not draft Proposal 2. They did not pass Proposal 2. They cannot change Proposal 2. They are not executive branch entities charged with the responsibility of enforcing Proposal 2. Indeed, the only role of the Universities is that they-like every other public body affected by this constitutional amendment-must follow Proposal 2. The Universities were therefore powerless to afford the Coalition the relief sought in the Complaint-an injunction against the enforcement of Proposal 2. In contrast, the Coalition could have obtained such relief from another party to the litigation, namely, the Attorney General.

As a result, the Universities filed a Motion to Dismiss, in which they argued that, inter alia, they were unnecessary parties to this action. In its March 18, 2008 Opinion and Order the District Court granted the Attorney General's Motion for Summary Judgment and dismissed the Complaint on its merits. In that same Opinion and Order, however, the District Court also denied the Universities' Motion to Dismiss for misjoinder. The Universities have filed this limited cross appeal because they believe the District Court erred in so ruling and because they wish to preserve the argument that they were not properly named as defendants in this case.

II. STATEMENT OF FACTS

On November 7, 2006, the voters of the State of Michigan passed Proposal 2, which added a new Section 26 to Article I of the Michigan State Constitution. In pertinent part, Proposal 2 amended the Constitution as follows:

(1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting...

Shortly after the enactment of Proposal 2, the Coalition commenced an action challenging its validity and seeking to prevent its enforcement.[FN2]

> FN2. The Coalition filed its initial Complaint on November 8, 2006. District Court Record Entry ("RE") 1. The Coalition filed an Amended Complaint on December 17, 2006. RE 24. And the Coalition filed a Second Amended Complaint on March 28, 2007. RE 96. As noted above, in this brief "the Complaint" refers to the Coalition's Second Amended Complaint.

The Complaint alleged that Proposal 2 violates federal law, including the United States Constitution. See Complaint, RE 96, at ¶11. The first count of the Complaint claimed that Proposal 2 violates the Equal Protection Clause of the Fourteenth Amendment by "intentionally discriminating" against minorities. *Id.* at ¶¶105-111. The second and fourth counts of the Complaint claimed that Proposal 2 violates the Equal Protection Clause of the Fourteenth Amendment by

restructuring government in a manner than eliminates "equal political means" for minorities and women to petition for university admissions policies in their interest. *Id.* at ¶¶ 112-121, 130-136. The third count alleged that Proposal 2 is preempted by Title VI of the Civil Rights Act of 1964. *Id.* at ¶¶ 122-129. The fifth count alleged that Proposal 2 is preempted by Title IX of Education Amendments of 1972. *Id.* at ¶¶ 137-142. And the sixth count alleged that Proposal 2 violated "the First Amendment rights of the universities." *Id.* at ¶¶ 143-149. In other words, the Complaint challenged the lawfulness of Proposal 2 itself and maintained that the enforcement of Proposal 2 would violate federal law. The Complaint therefore requested preliminary and permanent injunctive and declaratory relief restraining the "enforcement of] Proposal 2 insofar as it applies to the admission, education and graduation of students at the defendant universities." *Id.* at 21.

On October 17, 2007, the Universities filed a Motion to Dismiss in which they requested that the court drop them from the case. RE 179. Among other things, the Universities argued that Fed. R. Civ. P. 21 provides a mechanism for courts to dismiss unnecessary parties from a lawsuit. And they maintained that they plainly qualified as unnecessary defendants because they could not provide the relief the Complaint demanded.

The District Court denied this aspect of the Universities' Motion to Dismiss.[FN3] RE 246. The court acknowledged that "dismissal for misjoinder is proper where the party is not responsible for the alleged harm and does not have the power to accord relief." RE 246 at 22. But the court nevertheless concluded that the Universities were "properly joined as parties to this case" because "the claims brought against the universities are intertwined with those challenging proposal 2 in general." *Id.* The Universities respectfully submit that in so ruling the District Court applied an incorrect legal standard to an incorrect characterization of the allegations of the Complaint and consequently reached an incorrect conclusion.[FN4]

> FN3. The District Court granted the Universities' motion insofar as it requested dismissal of the Coalition's claim that Proposal 2 violated the Universities' right to academic freedom. The District Court concluded that the Coalition lacked standing to advance this claim. *See* RE 246 at 23-27.
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> FN4. This Court reviews de novo a district court's ruling on summary judgment. *Cherry Hill Vineyards, LLC v. Lilly,* 403 F.3d 798, 802 (6th Cir. 2005).

III. ARGUMENT

A. The District Court Erred in Concluding the University Defendants Were Necessary Defendants

Fed. R. Civ. P. 21 provides, in pertinent part, as follows:
Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.

Rule 21 thus provides "a mechanism for correcting either the misjoinder or non- joinder of parties or claims." American Fid. *Fire Ins. Co. v. Construcciones Werl, Inc.*, 407 F. Supp. 164, 190 (D.C. V.I. 1975).

Rule 21 does not itself define "misjoinder." The cases interpreting the rule, however, clarify its meaning and application. That case law makes plain that where a defendant's presence is not necessary to afford a plaintiff complete relief, such as where the defendant lacks the authority to provide the requested relief, the defendant should be dropped as a party and dismissed without prejudice. *See, e.g., Brooks v. Glynn County,* 1989 U.S. Dist. LEXIS 4776, *11 (S.D. Ga. 1989) ("Where a particular defendant lacks authority to provide the requested relief, dismissal is proper.").

Brooks is instructive here. In that case, plaintiffs- African American voters in the various judicial circuits in Georgia-brought a class action challenging state laws that allowed for the use of "at large" elections. Plaintiffs claimed that such elections prevented African Americans from being the majority voting bloc in many districts. *Id.* at *2-*4.

Plaintiffs argued that this election system unfairly discriminated against African American voters and violated the Federal Voting Rights Act and the 13th, 14th, and 15th amendments. *Id.* at 2. Plaintiffs sued the State Election Board, the Secretary of the State of Georgia, and the Chairman of the State Election Board. *Id.* Plaintiffs also sued the "Superintendent of Elections" of several counties ("local defendants").

The local defendants moved to be dropped from the case pursuant to Rule 21 on the basis that the election practices at issue were statewide and that, therefore, the state defendants-not the local defendants-were responsible for the challenged practices. *Id.* at *4-*5. The local defendants argued that they had no power to grant plaintiffs any of the relief requested, and that dismissing them would not prejudice the plaintiffs or the state defendants. *Id.* Plaintiffs claimed that the local defendants were proper parties because they supervised the elections and would implement any changes to the law. *Id.* at *6. Thus, the argument raised by plaintiffs in Brooks is identical to that raised by the Coalition here, i.e., that a party who has no connection with a law beyond the obligation to *follow* it is a proper defendant in a lawsuit challenging that law.

The court in Brooks granted the local defendants' Rule 21 motion and held that they were not necessary parties:
The Court finds that the local defendants' presence is not necessary to afford plaintiffs complete relief. State officials are charged with the responsibility of complying with preclearance requirements. In addition, the other challenged election procedures were promulgated by the state legislature and not by the local defendants....
[Georgia law] specifies that a superintendent's rulemaking authority is circumscribed by laws and by regulations of the State Elections Board. Plaintiffs have not alleged that the local defendants failed to follow the dictates of the State Election Board or that the local defendants applied state law discriminatorily. Consequently, the Court can afford plaintiffs the relief requested without the presence of the local defendants; the Court can address the alleged grievances, if necessary, by directing the state defendants to amend state laws, by declaring certain statutes unenforceable until precleared, and by enjoining certain state-wide procedures.
The gravamen of plaintiffs' complaint is that the local defendants and other superintendents have acted in accordance with a superior court judge election system that discriminates against blacks. The local defendants do not have the authority to amend these laws. They function in a ministerial capacity and they cannot act in a manner inconsistent with the statute governing election of superior court judges.
Where a particular defendant lacks authority to provide the requested relief, dismissal is proper... [t]he power to alter the contested procedures rests with the state defendants. Joinder of the local defendants is superfluous and they will be dismissed.

Id. at *8-*11. *See also Hispanic Coalition on Reapportionment v. Legislative Reapportionment Commission,* 536 F. Supp. 578, 584 (E.D. Pa. 1982) ("[W]here certain defendants are clearly without authority or power to effect any of the relief sought by plaintiffs, a motion to drop those defendants may be properly granted.").

In addition, numerous courts have dismissed defendants in circumstances like these on standing grounds, reasoning that no case or controversy existed between those particular defendants and the plaintiffs in the case. *See, e.g., Okpalobi v. Foster,* 244 F.3d 405, 425 (5th Cir. 2001) (holding that because the governor and attorney general "have no powers to redress the injuries alleged, the plaintiffs have no case or controversy with these defendants that will permit them to maintain this action in federal court."); *Snyder v. Millersville Univ.,* No. 07-1660, 2008 U.S. Dist. LEXIS 97943, at *12 (E.D. Pa. Dec. 3, 2008) ("In proceeding against only individuals who do not have the authority to afford her the desired relief... plaintiff's request for a mandatory injunction necessarily fails"); *Williams v. Doyle,* 494 F. Supp. 2d 1019, 1024 (W.D. Wis. 2007) ("[A] claim for injunctive relief can only stand against someone who has the authority to grant it.")

The Universities should have been dismissed pursuant to Rule 21 because the Complaint demanded no relief they could provide. Rather, as discussed above, the Complaint claims only that Proposal 2 violates various federal laws and asks for an injunction against its enforcement. Because the requested remedy would have restrained the "enforc[ement] of Proposal 2," the Complaint, in its totality, raised a claim solely with respect to the State officer charged with defending and enforcing that constitutional provision - the Attorney General.

Indeed, a line of case law decided after the Motion to Dismiss was filed makes clear that the Complaint failed to meet basic pleading requirements with respect to the claim for relief against the Universities. *See Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) (holding that a "plaintiff's obligation to provide the 'grounds' of 'his entitle[ment] to relief' requires more than labels and conclusions"); *see also Ashcroft v. Iqbal,* 2009 U.S. LEXIS 3472 (U.S. May 18, 2009) (holding that the standard articulated in Twombly applies to all civil actions). A complaint that fails even to request relief that the Universities could provide obviously does not comply with this demanding standard.

The District Court therefore erred in concluding that "the claims brought against the universities are intertwined with those challenging Proposal 2 in general." RE 246 at 22. After all, the Complaint - for the reasons discussed - did not actually advance any claim against the Universities; rather, it simply alleged that Proposal 2 itself runs afoul of various federal laws. Accordingly, there were no "claims brought against the universities" in the Complaint, let alone claims that were "intertwined" with "those challenging Proposal 2 in general."

The District Court further erred in relying on Fed. R. Civ. P. 20(a) in concluding that the Universities were properly joined in this case. The District Court reasoned that "[b]ecause the claims against the university defendants and the attorney general share common questions of law and fact and arise out of the same occurrence, the preconditions of joinder under Rule 20(a) have been met and dismissal is unwarranted." RE 246 at 22. But that analysis obviously does not apply here, where the Complaint actually states no claim at all against the Universities, let alone a claim that "share[s] common questions of law and fact and arise[s] out of the same occurrence" as the other claims advanced.

Unfortunately, the District Court fell into this error because it accepted an argument that was advanced by the Coalition but that has no merit. In response to the Universities' Motion to Dismiss, the Coalition argued they had a claim against, and might need a remedy against, the Universities because those institutions "implemented" Proposal 2 by making such changes to their admissions and financial aid policies as the law required. RE 198 at 1. The Coalition contended that, if the District Court declared that Proposal 2 violated the Constitution or other federal law, and if that violation had "harmed the admission" of minorities, then "affirmative relief' against the Universities might be required to undo those injuries. *Id.* at 7. The District Court apparently accepted this argument, stating that "[i]f this Court were to find Proposal 2 unconstitutional, affirmative action would not automatically be reinstated into the admissions process. Rather, the universities would have to choose to do so on their own." RE 246 at 22.

This line of reasoning suffers from two fatal flaws. First, the Complaint nowhere states that the Universities violated the Fourteenth Amendment or the federal civil rights laws; rather, it alleges, over and over again, that *Proposal 2* runs afoul of those provisions. Nor does the Complaint include a request for relief that encompasses the "affirmative" remedies that the District Court speculated might prove necessary. Indeed, with respect to this failing the Coalition made no argument at all, save the weak observation that the "Second Amended Complaint repeatedly requests 'such further relief as may be necessary' to implement any judgment that they secure." RE 198 at 2, n. 1. Surely, the pleading requirements of the federal rules demand a more specific allegation than *that.* Again, see *Twombly* and its progeny, as discussed above.

Second, and for these purposes more importantly, such a claim against the Universities-even if made-would not bring them within the terms of Rule 20(a). After all, the "transaction" or "occurrence" allegedly giving rise to such a claim would not be the passage of Proposal 2; it would be the implementing policies and procedures adopted by the Universities. Of course, the Universities deny that the Coalition has a legally cognizable claim against them based on their decision to obey the law.[FN5] But the critical point here is that if such a claim did exist it would not belong in this lawsuit. Permissive joinder under Rule 20(a) therefore has no application here.

> FN5. In addition, if the Coalition were to prevail in this action, and if a court were to hold Proposal 2 unconstitutional or otherwise unlawful, and if the law required the Universities to take remedial steps as a result, then there is no reason to believe that the Universities would not follow the law and take such steps.

IV. CONCLUSION

The Universities are not necessary parties to this action. They are not charged with the responsibility of enforcing Proposal 2 against anyone or of defending Proposal 2 in court. They did not draft or enact Proposal 2 and they cannot repeal it, amend it, or ignore it. At present, all they can do is comply with their legal obligation to follow it. In contrast, should this Court grant the Coalition the relief it seeks, that relief can be obtained from the Defendant Attorney General. Because the Universities are not necessary parties to this action they should have been dismissed pursuant to Fed. R. Civ. P. 21. This aspect of the District Court's Opinion and Order should therefore be reversed.

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