1981 WL 27018 (N.D.Ala.)
United States District Court, N.D. Alabama.

UNITED STATES OF AMERICA
v.
JEFFERSON COUNTY, ET AL.

No. 75-P-0666-S,*. | Aug. 18, 1981.

Attorneys and Law Firms

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David P. Whiteside, Birmingham, Ala., for defendant Jefferson County Personnel Board.

James K. Baker, City Attorney for the City of Birmingham, and James P. Alexander, Birmingham, Ala., for defendant city.

Opinion

POINTER, District Judge: -

***1** This litigation involves various charges of racial and sexual discrimination in governmental employment in Jefferson County, Alabama. Charged with engaging in a pattern and practice of discrimination are the Jefferson County Personnel Board and some fourteen separate county and municipal employers which participate in the multi-unit civil service system administered by the Personnel Board.

In January 1977, the court found that tests used by the Personnel Board to screen and rank applicants for employment as police officers and firefighters discriminated against blacks and were not shown to be job related under criterion-related validity studies. Those rulings, sub nom. Ensley Branch of the N.A.A.C.P. v. Seibels, 13 EPD ¶ 11,504, 14 FEP Cases 670, were upheld by the Fifth Circuit. See 616 F.2d 812, 22 FEP Cases 1207 (1980). The basic features of the civil service system are described in those opinions and will not be repeated here.

A second trial was held in August and October, 1979. At issue under F.R.Civ.P. Rule 42(b) were a number of other claims directed against practices of the Personnel Board. Under attack by the plaintiffs were eighteen other tests; various rules affecting promotional opportunities; the imposition of height, weight or educational requirements for certain jobs; and the restriction of some job announcements and certifications to persons of a particular sex. The Personnel Board defended by asserting that the challenged practices either had no adverse impact upon blacks or women or were nevertheless permissible under the employment discrimination laws.

During the period that the court was preparing its decision following the second trial, it was advised that the parties had commenced serious negotiations in an effort to resolve by settlement not only those issues already submitted to the court but also additional issues relating to the practices of some of the governmental employers, which had been severed under Rule 42(b) for yet an additional trial. The court was kept generally advised over the course of the following months - for the negotiations proved far more time-consuming than the parties had originally anticipated - of the general progress of the discussions, although not the details of any proposed settlement. Completion of the court's decision, many pages of which had already been drafted, was deferred in view of the prospect of settlement.

In June 1981 the parties tendered to the court two proposed consent decrees which would, if approved, settle the plaintiffs' claims against both the Personnel Board and the City of Birmingham.[1] Tentative settlement classes for purposes of these decrees were formed, and notice of the proposed settlement and of the rights to be heard in opposition was given both by publication and by individual mailing to certain individuals. Objections to the proposed decrees were timely filed on behalf

of three groups. A fourth objection by an individual, although untimely, was by consent also considered by the court at a fairness hearing under F.R.Civ.P. Rule 23 held on August 3, 1981.

For decision at this time is the question whether the proposed settlements should be approved. At the outset it should be noted that there is no contention or suggestion that the settlements are fraudulent or collusive. Rather, the issue is whether - considering the terms of the proposed decrees, the nature of the objections, the status of judicial proceedings, and the evidence before the court - the settlements should under the current state of the law be held to be unreasonable, unfair, inadequate, inequitable, illegal, unconstitutional, or against public policy. See United States v. City of Alexandria, 614 F.2d 1358, 22 FEP Cases 872 (5th Cir. 1980).

Although the decrees, which with attachments exceed 100 typewritten pages, would affect many employment practices and jobs, the objections are focused upon provisions relating to the certification, hiring, and promotion of persons in the police and fire departments of the City of Birmingham. Billy Gray, a white male lieutenant in the fire department, joined by the Birmingham Firefighters Association, objects to various segments of the decrees designed to increase the number of blacks and women in that department. Johnny Morris and six other individuals, who presumably are white police officers,[2] object to provisions intended to increase the employment and promotion of minorities in the police department, while the Guardian Association - a group largely comprised of black officers - asserts that the decrees provide an inadequate remedy for past discrimination against blacks. James Miller, a white male, complains that his opportunities for employment as a police officer are unfairly curtailed by the present and proposed rules regarding that position. No other objections were made to the proposed decrees.

Gray, Morris, and those who joined in their objections assert that the settlements may accord preferential treatment to blacks and women with respect to future vacancies in the city's police and fire departments - a contention that can hardly be disputed. What is controverted is their argument that such favoritism would constitute an impermissible "reverse discrimination" in the absence of a finding or admission of prior discrimination by the city against those groups, particularly insofar as it might operate to benefit individuals who personally never were the victims of any discrimination by the city or to disadvantage those who personally never were the beneficiaries of such discrimination. Cf. University of California Regents v. Bakke, 438 U.S. 265, 17 FEP Cases 1000 (1978). Also in controversy is the position of Gray and the Firefighters that certain of the rules to be altered should be deemed as equivalent to the terms of a collectively bargained seniority system, which could not be modified without their consent. See Myers v. Gilman Paper Corp., 554 F.2d 837, 14 FEP Cases 218 (5th Cir. 1977); but cf. United States v. City of Miami, 614 F.2d 1322, 22 FEP Cases 846 (5th Cir. 1980), pet. for reh'g en banc granted and opinion vacated, 625 F.2d 1310, 23 FEP Cases 1510 (5th Cir. 1980).

The objectors are certainly correct in their underlying premise - that not all forms of "affirmative action" to aid minorities can be defended against an assertion of "reverse discrimination" and that the principal focus for remedial measures upon proof of discrimination is to provide appropriate relief for those who were the harmed by those acts or practices. The Supreme Court has, however, upheld as against an attack under Title VII of the Civil Rights Act of 1964 the voluntary adoption by a non-governmental employer of hiring goals and preferential treatment for minorities, even though these procedures would benefit persons never discriminated against by the employer and even though indeed there had been no showing of any discrimination by that employer. United Steelworkers of America v. Weber, 443 U.S. 193, 20 FEP Cases 1 (1979), rev'g 563 F.2d 216, 16 FEP Cases 1 (5th Cir. 1977). The Courts of Appeals have moreover upheld the use of goals and quotas for governmental and non-governmental employers, both in the context of judicial remedies after proof of discrimination and in the form of settlement of unproven claims of discrimination, not only when attacked under Title VII but also when challenged under the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983. See United States v. City of Alexandria, 614 F.2d 1358, 22 FEP Cases 872 (5th Cir. 1980); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 20 FEP Cases 1728 (6th Cir. 1979), cert. denied, 452 U.S. 938, 25 FEP Cases 1683 (June 15, 1981); Valentine v. Smith, 654 F.2d 503, 50 LW 2066, 26 FEP Cases 518 (8th Cir., July 21, 1981); Setser v. Novack Investment Co., 657 F.2d 962, 50 LW 2066, 26 FEP Cases 513 (8th Cir., July 21, 1981) (en banc); Local Union No. 35 v. City of Hartford, 625 F.2d 416, 22 FEP Cases 1786 (2nd Cir. 1980); cf. Talbert v. City of Richmond, 648 F.2d 925, 25 FEP Cases 953 (4th Cir. 1981). Also see pre-Bakke cases cited in the City of Miami opinion, 614 F.2d at 1335-36.

The goals and quotas here under attack are well within the limits upheld as permissible in these decisions. First, they do not preclude the hiring or promotion of whites and males even for a temporary period of time.[3] Rather, the relevant parts of the proposed decrees provide, in summary, as follows: (1) the Personnel Board will certify black applicants for entry-level positions as police officers and firefighters as earlier directed by this court after trial (and as affirmed by the Fifth Circuit), i.e., basically at a rate commensurate with the relative percentage of black applicants; (2) the Board will attempt to certify women for these entry-level positions at a rate commensurate with the relative percentage of women applicants or, if higher, at the rate of 1 woman to 3 men for police officer and of 1 woman to 9 men for firefighter; (3) the Board will attempt to

certify black and female candidates for higher-level positions in the departments in a manner as will permit the city to attain its own goals and, where necessary for this purpose, can certify more than the top three candidates found eligible by it; (4) subject to the availability of qualified candidates, the city agrees to hire into these entry-level positions blacks and women at a rate commensurate with the percentage of black and female applicants or, if higher, at the rate of 1 black to 1 white, at the rate of 1 woman to 3 men for police officer, and at the approximate rate of 1 woman to 6 men for firefighter; (5) subject to the availability of qualified candidates, the city agrees to promote blacks to police sergeant and fire lieutenant at the rate of 1 black to 1 white, to promote blacks to two of the next four police lieutenant vacancies, to promote a black to one of the next two police captain vacancies and to one of the next two fire captain vacancies, and to promote blacks to subsequent vacancies in the higher level positions in the departments at twice the percentage of blacks in the positions from which promotions are traditionally made; and, (6) subject to the availability of qualified candidates, the city agrees to promote women to police sergeant at the rate of 1 woman to 3 men and to promote women to higher level positions in the police department at the percentage of women in the positions from which such promotions are traditionally made. For purposes of these provisions, the certification, hiring, or promotion of a black woman is counted both towards the goal for blacks and towards that for women.

Study of these provisions indicates that, while comprehensive, they nevertheless preserve a substantial opportunity for whites and males to be hired or promoted in the two departments. Moreover, the goals of the city are in the settlement expressly made subject to the caveat that the decree is not to be interpreted as requiring the hiring or promotion of a person who is not qualified or of a person who is demonstrably less qualified according to a job-related selection procedure.

Secondly, these provisions for potentially preferential treatment are limited both in time and in effect. They are to expire when the percentage of blacks or women in a particular job approximates the percentage of blacks or women, respectively, in civilian labor force in Jefferson County, Alabama. Additionally, provisions of the settlement provide a mechanism for the decrees to be dissolved after a period of six years. It will be noted that the four criteria for approval of an affirmative action program set forth by the Eighth Circuit in Valentine v. Smith, 654 F.2d 503, 50 LW 2066, 26 FEP Cases 518 (July 21, 1981), are clearly met in the present case.

The objectors treat this case as one in which discrimination on the basis of race or sex has not been established. That is only partially true, at least as it relates to positions in the police and fire departments. This court at the first trial found - and the Fifth Circuit agreed - that blacks applying for jobs as police officers and firefighters were discriminated against by the tests used by the Personnel Board to screen and rank applicants. The evidence presented at the second trial established, at the .01 level of statistical significance, that blacks were adversely affected by the exam used by the Personnel Board to screen and rank applicants for the position of police sergeant. Since governmental employers such as the City of Birmingham have been limited by state law to selecting candidates from among those certified by the Board, one would hardly be surprised to find that the process as a whole has had an adverse effect upon blacks seeking employment as Birmingham police officers, police sergeants, or firefighters - regardless of whether or not there was any actual bias on the part of selecting officials of the City. A natural consequence of discrimination against blacks at entry-level positions in the police and fire departments would be to limit their opportunities for promotion to higher levels in the departments.

Employment statistics for Birmingham's police and fire departments as of July 21, 1981, certainly lend support to the claim made in this litigation against the City - that, notwithstanding this court's directions in 1977 with respect to certifications by the Personnel Board for the entry-level police officer and firefighters positions and despite the City's adoption of a "fair hiring ordinance" and of affirmative action plans, the effects of past discrimination against blacks persist. According to those figures, 79 of the 480 police officers are black, 3 of the 131 police sergeants are black, and none of the 40 police lieutenants and captains are black. In the fire department, 42 of the 453 firefighters are black, and none of the 140 lieutenants, captains, and battalion chiefs are black.

There has been no judicial finding of discrimination against female candidates for positions in Birmingham's police and fire departments, nor indeed was there at the first trial any contention that the examinations administered by the Personnel Board for those positions had any adverse impact upon women to whom the tests were administered. However, evidence at the second trial - as to which no findings have yet been entered - reflected a more immediate form of discrimination against women who might be interested in such positions, rendering them ineligible for appointment to the basic entry-level positions without regard to examination scores. Disqualification from the key entry-level positions also resulted in foreclosing the opportunities for departmental promotions.

For many years announcements for positions as police patrolman and firefighter were restricted to males only. A separate position of traffic citation officer, restricted to females, was created for the City of Birmingham; but it provided no promotional opportunities within the department. In 1970 the separate classification of policewoman was established for

Birmingham. Not until late 1974 - over two years after Title VII became applicable to governmental employment - did the Personnel Board delete the male-only restriction for firefighters and combine the positions of patrolman and policewoman. Minimum height and weight requirements for police officers and firefighters continued to be specified by the Board to the time of the second trial of this case. Presumably in view of the intervening Supreme Court decision in Dothard v. Rawlinson, 433 U.S. 321, 15 FEP Cases 10 (1977), the Personnel Board did not at the second trial, at which these explicit and implicit barriers to employment of women were challenged, seek to defend these practices.

The impact of these restrictions can be seen in the employment statistics for Birmingham's police and fire departments as of July 21, 1981. According to these figures, women constitute 53 of the 480 police officers, 3 of the 131 police sergeants, none of the 40 police leiutenants and captains, none of the 453 firefighters, and none of the 140 lieutenants, captains, and battalion chiefs in the fire department.

While the only judicial finding of discrimination thus far entered has been with respect to the effect upon black applicants of the Personnel Board's tests for police officer and firefighter, it can hardly be doubted that there is more than ample reason for the Personnel Board and the City of Birmingham to be concerned that they would be in time held liable for discrimination against blacks at higher level positions in the police and fire departments and for discrimination against women at all levels in those departments. The proposed consent decrees, by way of settlement for such potential liability, provide appropriate corrective measures reasonably commensurate with the nature and extent of the indicated discrimination. Moreover, as earlier noted, the remedial steps are limited in duration, expiring as particular positions generally reflect the racial and sexual composition of the labor market in the county as a whole; they provide substantial opportunity for employment and advancement of whites and males; they do not require the selection of blacks or women who are unqualified or who are demonstrably less qualified than their competitors. The goals for certification, employment, and promotion as outlined in the proposed decrees, together with various related changes which complement those objectives - such as elimination of height and weight requirements, and the elimination or reduction of certain time-in-grade requirements for promotions - are due to be approved by this court under the teaching of United States v. City of Alexandria, 614 F.2d 1358, 22 FEP Cases 872 (5th Cir. 1980).

The Firefighters Association has argued that, given the vacating by the Fifth Circuit of the panel decision in the City of Miami case, 614 F.2d 1322, 22 FEP Cases 846, no changes in the civil service rules should be approved without its consent as a union, citing Myers v. Gilman Paper Corp., 544 F.2d 837, 14 FEP Cases 218 (5th Cir. 1977). The point, however, is that - unlike the situation in the City of Miami case - none of the rules to be altered under the proposed consent decree is a matter of contract with the union. Rather, the case *sub judice* is like that involved in the City of Alexandria, a decision left intact when rehearing was granted in the City of Miami decision. One may reasonably assume that en banc rehearing was granted to consider the consequences upon a proposed settlement of non-concurrence of a union which was party to collectively-bargained rules, and not for the purpose of reconsidering the basic rules governing judicial approval of proposed settlements.

The Firefighters Association has also attacked the portions of the proposed decrees that would eliminate the requirement that applicants for the firefighter position have a high school diploma (or GED equivalent) and the provision under which the City of Birmingham would agree that applicants would not automatically be disqualified by virtue of a prior criminal conviction or arrest. The Association has not, however, demonstrated why this court should prevent the Personnel Board or Birmingham from making those changes if - whether to aid in settling this litigation or otherwise - they want to do so. Moreover, it should be noted that the elimination of the educational requirement for firefighters is not absolute - under the decree such a requirement can be imposed by the Personnel Board upon proof that it has no adverse impact because of race or sex or that it is valid under the *Uniform Guidelines*. Nor does the proposed decree prohibit Birmingham from considering for particular positions, such as that of firefighter or police officer, the effect of a criminal record - it rather states that in such circumstances the city shall consider the nature of the position, the nature and age of the crime, and the success or failure of rehabilitation efforts.

The court has reviewed with care the provisions of the proposed settlements to which objections have been raised, as well as those portions to which no objection has been raised. Whether or not the proposed decree would in each instance correspond to some finding of discrimination which this court might make or provide the same remedial relief which this court might order is not the question. The settlement represents a fair, adequate and reasonable compromise of the issues between the parties to which it is addressed and is not inequitable, unconstitutional, or otherwise against public policy. Accordingly, the court's approval will be manifested by appropriate orders adopting the decrees tendered.

One further matter should be addressed: the motion to intervene filed by the Firefighters Association, Gray, and Sullivan subsequent to the hearing on the settlement. This litigation has been pending for over five years and has been vigorously

contested by the existing parties through two trials and one appeal. While the Firefighters and Gray were permitted to be heard in opposition to the settlement, and the court fully considered their objections, intervention at this time as parties to the litigation is clearly untimely and must be denied.

Parallel Citations

28 Fair Empl.Prac.Cas. (BNA) 1834

Footnotes

[*] This opinion also covers two other cases consolidated for trial with 75-P-0666-S: Ensley Branch of the N.A.A.C.P. et al. v. Seibels et al., CA 74-Z-12-S; John W. Martin et al v. City of Birmingham et al., CA 74-Z-17-S. Attorneys for the Department of Justice have taken the principal role in presenting the various claims against the defendants.

[1] Claims against other governmental employers serviced by the Personnel Board are not resolved by the proposed decrees but remain subject to further proceedings and trial.

[2] Although written objections were timely filed on their behalf, Morris and the other six persons named in the document did not appear in person or by counsel to be heard in opposition to the settlement. The brief of the City of Birmingham suggests that these objectors are city police officers, and the nature of the objections filed under their name supports that inference.

[3] The proposal of the Guardian Association would freeze all promotions of whites in the police department until blacks were appointed to 4 positions as captain, 8 as lieutenant, and to 25% of the sergeants. It would also call for the hiring of 3 blacks for each white as police officer. Such draconian measures, even if permissible as a part of a judicial remedy, can hardly be viewed as necessary ingredients of a fair and adequate settlement.