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United States District Court, District of Columbia.

Carolee Brady HARTMAN, et al., Plaintiffs,
v.
Charles Z. WICK, Defendant.

CIV. A. No. 77–2019. | April 15, 1988.

Opinion

OPINION

CHARLES R. RICHEY, District Judge.

INTRODUCTION

***1** On January 16, 1988, the Court issued a comprehensive Opinion and Order setting forth the remedies to which the plaintiff class is entitled in this case. *See Hartman v. Wick,* 678 F.2d 312 (D.D.C.1988). Defendant has now asked the Court to reconsider two facets of that decision. Neither law nor equity supports defendant's position, and the Court must therefore deny defendant's motion.

THE COURT PROPERLY FOUND THAT PLAINTIFFS DO NOT HAVE THE BURDEN OF PROVING THEIR MINIMUM QUALIFICATIONS FOR THE JOBS AT ISSUE IN THIS SUIT.

Because defendant had already been found liable for discriminating against members of the plaintiff class, *see Hartman v. Wick,* 600 F.Supp. 361 (D.D.C.1984), the Court found that plaintiffs do not have to demonstrate their minimum qualifications for the jobs at issue in this suit as a prelude to any recovery. *See Hartman v. Wick,* 678 F.Supp. at 332–33. Rather, the Court found that defendant may show that a particular plaintiff is not entitled to recover because, *inter alia,* she did not possess the minimum qualifications for the job for which she applied. *See id.* at 333, 335. Defendant asks the Court to reconsider this finding, but there is no basis on which to do so.

In the seminal case of *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977), the Supreme Court clearly stated the law that governs a plaintiff's burden at the post-liability remedial stage of litigation:

The proof of the pattern or practice [of discrimination] supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy. *The [plaintiff] need only show that any alleged individual discriminatee unsuccessfully applied for a job* and therefore was a potential victim of the proved discrimination.

Id. at 362. Thus, under *Teamsters,* plaintiffs at the remedial stage of a discrimination suit do not have the burden of proving their qualifications, minimal or otherwise, for the job for which they applied. *See also, e.g., Thompson v. Sawyer,* 678 F.2d 257, 286 (D.C.Cir.1982); *Harrison v. Lewis,* 559 F.Supp. 943, 946–47 (D.D.C.1983); *Chewning v. Schlesinger,* 471 F.Supp. 767, 771 (D.D.C.1979).

Defendant maintains that the reasoning in *Teamsters* is inapplicable to this case. First, defendant argues that the *Teamsters* standard applies only to persons already employed by the discriminator. This is not true.

In *Teamsters,* the Supreme Court spoke to the information that nonapplicants, applicants, and employees must adduce or prove at the remedial stage of a discrimination suit. Only nonapplicants who claimed that defendant's discriminatory policies deterred them from applying for the jobs at issue were required to provide any information to the defendant; they must give the defendant whatever information they would have provided on an employment application. In contrast, neither applicants nor employees were required to provide any information to the defendant. Moreover, neither nonapplicants, applicants, nor persons already hired by the defendant were required to *prove* their qualifications for employment. *See International Bhd of Teamsters v. United States,* 431 U.S. at 362, 369, & 369 n. 53.

Thus, there is no support for defendant's proposition. *Teamsters* speaks directly to the question whether a plaintiff must prove qualifications, at the post-liability remedial phase of a discrimination case. The clear answer is that a plaintiff does not have that burden.

***2** Second, defendant implies that the *Teamsters* case, which involved discrimination among applicants and recruits for positions as motor freight drivers, should not be applied to applicants for the heterogenous technical jobs at issue in this suit. The Court must note that, in contrast to defendant's elitist implication that there are no "minimum qualifications" for motor freight drivers, drivers must at a minimum have or be able to obtain a valid license for driving a motor freight vehicle. Moreover, the Court is hard pressed to understand why the fact that there are six job categories at issue in this suit, some of which require technical skills, leads to the conclusion that the clear and unqualified language of the *Teamsters* case is inapposite.

What the Court clearly realizes, however, is that defendant may have difficulty showing lack of qualification because he has not retained applicant files for most of the ten-year period at issue in this suit. While the Court has not subjected defendant to penalty because of this routine destruction of files, it cannot allow the lack of information resulting from defendant's practices to affect the legal requirements governing this suit. If the defendant-discriminator faces difficulties, they are difficulties of his own making, and the law cannot penalize the innocent victims of his discrimination simply in order to ease his tasks.

THE REMEDIAL SCHEME DEVELOPED FOR CLASS MEMBERS WHO WERE FOREIGN SERVICE OFFICER APPLICANTS IS BOTH EQUITABLE AND LEGALLY JUSTIFIED.

Among the class members entitled to relief in this suit are women who unsuccessfully applied for Foreign Service Officer positions within the United States Information Agency during the time period relevant to this suit. *See Hartman v. Wick,* 678 F.Supp. at 338. Because Foreign Service Officer candidates must compete for their positions through the Foreign Service Officer examination process, *see id.* at 339 n. 18, the Court found that the individualized remedial hearings approved in *International Bhd of Teamsters v. United States,* 431 U.S. 324, 372, were not an appropriate remedial tool in this case. Rather, the Court found that the most reasonable, equitable, and appropriate remedy would be to allow class members to compete through the Foreign Service examination mechanism for some number of Foreign Service Officer jobs at USIA that would be set aside for the most qualified members of the plaintiff class.

Defendant has asked the Court to reconsider its decision not to order "*Teamster* " hearings for class members who were Foreign Service applicants. As grounds, defendant asserts that the remedy created for those applicants "constitutes a classification that must pass muster under the Fifth Amendment to the Constitution" and thus may be imposed only when narrowly tailored and necessary to correct past discrimination and when no other remedy can correct the wrong. Defendant is quite wrong to suggest that the Court's remedy creates any Fifth Amendment problems.

Defendant must be reminded that this Court has found that he discriminated against the class members who will be competing for the Foreign Service slots. As such, he errs by relying on *Hammon v. Barry,* 813 F.2d 412 (D.C.Cir.1987), *reh'g denied,* 826 F.2d 73 (D.C.Cir.1987), *reh'g en banc granted,* 833 F.2d 367 (D.C.Cir.1987); *grant of reh'g en banc vacated,* 841 F.2d 426 (D.C.Cir.1988); *petition for cert. filed* (January 11, 1988).

***3** In *Hammon,* the Court of Appeals rejected the district court's finding that there was a continuing legacy of historical discrimination. Quite in contrast to this case, in *Hammon* there was no finding that the defendant had discriminated against the *particular* plaintiffs. The result is that, unlike *Hammon,* in this case there is now a *presumption* that every member of the plaintiff class was the victim of defendant's discriminatory behavior. *See, e.g., International Bhd of Teamsters v. United*

States, 431 U.S. at 372; *Hartman v. Wick,* 678 F.Supp. at 333.

This presumption is commonly borne out or challenged through individualized "*Teamster* " hearings. But the Court is not required to order individualized hearings for Foreign Service applicants, as it did for the rest of the plaintiff class. The law permits such hearings where appropriate, but it does not demand them in all cases. *See, e.g., Segar v. Smith,* 738 F.2d 1249, 1289–90 (D.C.Cir.1984), *cert. denied sub nom. Meese v. Segar,* 471 U.S. 1115 (1985).

Teamster hearings would be inappropriate for the Foreign Service applicants. The undisputed information before the Court (which was provided by defendant through informal discovery) suggests that nearly 33,000 women took the Foreign Service Entrance Exam during the ten-year period relevant to this case. *See Plaintiffs' Opposition to Defendant's Motion for Partial Reconsideration,* at 11. If even one-tenth of these applicants are class members, the cost of the *hearings alone,* conservatively estimated, would near $2 million.[1] If a better alternative exists—as one does here—a court has no business imposing so outlandishly expensive a remedial scheme.

There is another reason why the individualized hearing remedies would be inappropriate for the foreign service applicants. Those applicants *faced discrimination in the testing process.* An individualized hearing could not remedy that discrimination; the defendant would rely on the test score to argue that the applicant was unqualified for the position, and every applicant would then be in the untenable position of convincing the Master or Magistrate of precisely where the tests were flawed and how the tests effected discrimination. These plaintiffs should have the opportunity to take a better test, not an opportunity to prove they were victimized by a discriminatory examination.

Thus, the *Teamster* process could not "ensure that those women most likely to merit appointment as Foreign Service officers achieve that goal within a reasonable time and with no more than a reasonable cost and burden upon defendant." *Hartman v. Wick,* 678 F.Supp. at 339. Because the *Teamster* remedy would be both ineffective and prohibitively costly, the Court imposed a different remedy, and it was proper to do so.

The Court imposed a careful and narrow remedy that offers the only practicable remedy for discrimination against class members who applied for positions as Foreign Service officers.[2] This remedial order fully complies with constitutional command. *See, e.g., Segar v. Smith,* 738 F.2d 1254, 1249, 1293–94 (D.C.Cir.1984), *cert. denied sub nom. Meese v. Segar,* 471 U.S. 1115 (1985). As a result, the Court will not reconsider the remedy it made available to class members who were Foreign Service Applicants.

CONCLUSION

***4** Defendant moved to reconsider two issues decided by the Court's January 16, 1988, Opinion. The first, whether plaintiffs must prove their minimum qualification for the jobs at issue, is a question of law and it is clear: defendant cannot put this burden on plaintiffs' shoulders. The second issue, the propriety of the remedial order with respect to Foreign Service applicants, raises questions of law and equity that the Court resolved properly and sensibly in its January 16, 1988, Opinion. As there is no merit to defendant's motion, the Court will deny it.

The Court will issue an Order, of even date herewith, memorializing these findings.

ORDER

In accordance with the Opinion in the above-captioned case, and for the reasons set forth therein, it is this 15th day of April, 1988,

ORDERED that defendant's motion for partial reconsideration of the Court's January 16, 1988, Opinion and Order shall be, and hereby is, denied.

Footnotes

[1] Plaintiffs state, and the Court agrees, that an "extremely conservative" estimate of the preparation time for each individual case would require is eight hours. *Plaintiffs' Opposition to Defendant's Motion for Partial Reconsideration,* at 13 n. 5. Even if attorney's fees were limited to $75/hour, the cost of the hearings, aside from the cost of the Master or Magistrate's time, would near $2 million.

[2] Specifically, the Court ordered defendant to invite class members with the highest written scores on the Foreign Service written examination to participate again in the rest of the Foreign Service testing process. Those who choose to do so will compete in the next stage of that process, the "Oral Assessment" stage, and will be evaluated alongside all other Foreign Service candidates. Class members who succeed in that process will then face the medical and security checks through which all Foreign Service applicants must go. Those class members who succeed up through this stage will then be evaluated by the "Final Review Panel" but will be compared only to other class members. The top scorers will be offered Foreign Service positions. The Court did not have enough information to determine the precise number of these positions and it asked for additional briefing on this point. *Hartman v. Wick,* 678 F.Supp. at 340.