1979 WL 39
United States District Court; District of Columbia.

Luba S. Kowalyszyn De Medina, Plaintiff
v.
John E. Reinhardt, Defendant.
Toura Kem, Plaintiff
v.
John E. Reinhardt, Defendant.
Carolee Brady Hartman et al., Plaintiffs
v.
John E. Reinhardt, Defendant.

Civil Action No. 77-0360 | Civil Action No. 78-0762 | Civil Action No. 77-2019 | October 24, 1979

Opinion

RICHEY, D.J.

I. Introduction

***1** This class action is brought by five (5) named plaintiffs on behalf of all women who have applied for employment with, or are currently employed by, the United States International Communication Agency (the "Agency"), formerly known as the United States Information Agency. The Agency's largest element is the Voice of America (VOA).

The defendant, John E. Reinhardt, is the Director and Chief Executive Officer of the Agency. He is sued in his official capacity. The Agency is an executive agency of the United States within the meaning of 42 U.S.C. § 2000e-16(a).

This Title VII class action originates out of the attempts of Carolee Brady Hartman, a woman, to gain employment with the Agency as a $^{writer}/_{editor.}$ After exhausting her administrative remedies, Ms. Hartman filed this civil action, on behalf of herself and all other persons similarly situated, on November 25, 1977, in compliance with the jurisdictional prerequisites for a Title VII action set forth in 42 U.S.C. § 2000e-16(c). Ms. Hartman's complaint alleges employment discrimination on the basis of sex, in promotion and hiring practices of the defendant Agency, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* The class was conditionally certified pursuant to Fed. R. Civ. P. 23(b)(2) on April 19, 1978.

[*Consolidations*]

Since that time, four (4) other women have joined Ms. Hartman as named plaintiffs in this action. On September 11, 1978, the Court ordered that Ms. Luba Medina, Ms. Rose Kobylinski and Ms. Josefina Martinez be permitted to intervene as named plaintiffs in this action. The complaint in intervention also alleges employment discrimination on the basis of sex, in promotion and hiring practices of the defendant Agency, in violation of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e *et seq.*

Later, on November 9, 1978, the Court ordered consolidation of a separate Title VII action brought by Ms. Medina against the same defendant, C.A. No. 77-0360, which was then before the Court. This separate, individual Title VII action was filed by Ms. Medina on March 3, 1977. Ms. Medina's complaint alleges employment discrimination on the basis of sex and national origin, in practices of the defendant Agency, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a) and 3(b), and 42 U.S.C. §§ 1981 and 1983.

In addition, *Kem v. Reinhardt,* C.A. No. 78-0762, a Title VII action brought against the same defendant by a rejected job applicant named Toura Kem, was consolidated with this action on November 22, 1978. This separate, individual Title VII action was filed by Ms. Kem on April 29, 1978. Ms. Kem's complaint alleges employment discrimination on the basis of sex, in "certain acts, practices, and courses of conduct" of the defendant Agency, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

The parties agreed that the trial of this case was to be bifurcated into a "liability" stage and a "relief" stage. Issues of entitlement to specific relief by individual members of the class would be postponed until a later stage in the proceedings in the event that plaintiffs were successful in demonstating a pattern or practice of discrimination by a preponderance of the evidence. *See International Brotherhood of Teamsters v. United States* [14 EPD P 7579], 431 U.S. 324, 360 (1977), where the Court stated: "at the initial 'liability' stage of a pattern or practice suit the [plaintiff] is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy." Thus, the issue before the Court may be stated as follows:
***2** Whether the defendant's hiring, promotion and salary practices constitute patterns or practices of discrimination based on sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*[1]

The Court resolves this issue in favor of the defendant. The Court recognizes that statistics can make out a *prima facie* case of employment discrimination. However, the Court finds that the conclusions of the respective statistical studies conducted by the parties' experts are misleading due to a failure to define adequately the relevant labor market from which the Agency draws for qualified personnel. In addition, the plaintiffs' evidence concerning individual instances of discrimination is not persuasive. Accordingly, the Court finds, as hereinafter more particularly set forth, that the plaintiffs' have failed to carry their required burden of proof by a preponderance of the evidence. Additionally, it appears that the Agency has done, and continues to do, all it can to eliminate any pattern or practice of disparate treatment or discrimination on the basis of sex. In accordance with the foregoing, the following constitutes the Court's findings of fact and conclusions of law.

II. Finding of Fact

A. *The Statistical Evidence of the Parties*

Fails Adequately to Define the Relevant

Labor Market From Which the Agency

Draws Qualified Personnel.

1. Plaintiffs have sought to support their Title VII claims through the testimony of Dr. Marc Rosenblum. Dr. Rosenblum is a consulting labor economist by profession and training. He holds a Ph.D. in industrial relations and has worked on more than twenty-five (25) employment discrimination cases as an expert witness.

2. The statistical analysis conducted by Dr. Rosenblum here involved a three-step process.

First, Dr. Rosenblum correlated ("crossmapped") the U.S. Civil Service Commission titles, (i.e., the job categories used by the Agency), with the various job categories used by the U.S. Bureau of the Census.[2]

Second, Dr. Rosenblum focused on fourteen (14) major occupational categories within the Agency, as identified by the Agency Affirmative Action Plan for Fiscal Year 1978, pages B-15, 16, to determine whether women have been underutilized by the Agency in any of those major categories. The categories examined include seventyfive percent (75%) of the jobs at the Agency. He compared the proportion of women within each of these for categories, based on data provided by the defendant,

with the proportion of women available in the relevant labor market, based on data provided by the Bureau of Labor Statistics, United States Department of Labor (i.e., the United States Department of Labor, Bureau of Labor Statistics' annual averages for the year 1978[3]). This witness claimed that there was a statistically significant underutilization of women in six (6) major job categories.

***3** Third, Dr. Rosenblum calculated the number of expected female employees in each of the six (6) job categories, assuming the Agency's hiring practices were free of sex discrimination. To derive the number of expected female employees, the proportion of women available in the relevant labor market in each of these job categories was applied to the total number of Agency employees within the same job categories. The difference in the number of women employed in each job category within the Agency and the number "expected" was then measured by the statistical technique of standard deviation analysis. Next, the standard deviation was translated into a probability that such a difference could have occurred by chance. Under customary scientific practice, 1.65 standard deviations, means that there is 0.05 or five (5) chances in one hundred (100) that such a difference occurred by chance, but this does not mean, based upon all the evidence here, that the difference was caused by any discrimination on account of sex.

3. Dr. Rosenblum also claimed that there was statistically an underutilization of women in six (6) major job categories. Further, he asserted that the probability of such underutilization occurring by chance was less than 0.05 in all six (6) categories. These six (6) categories are: 1) Electronic Technician, 2) Foreign Language Broadcaster, 3) Production Specialist, 4) $^{\text{Writer}}/_{\text{Editor,}}$ 5) Foreign Information Specialist, and 6) Radio Broadcast Specialist. However, for the reasons hereinafter discussed, the Court finds that Dr. Rosenblum's conclusions are entitled to, based upon a consideration of the record as a whole and his credibility as a witness, little probative value or weight.

[*Defendant's Expert*]

4. Dr. Seymour Wolfbein testified as an expert labor economist on behalf of the defendant Agency. Dr. Wolfbein is a nationally recognized manpower expert, with wide experience in the fields of manpower utilization, labor employment patterns and labor statistics.

5. Dr. Wolfbein utilized an approach and methodology quite different from that of Dr. Rosenblum's. The type of analysis performed by Dr. Wolfbein was more relevant to the issues within the case but still deficient in determining whether there was a pattern or practice of discrimination against women at the defendant Agency because of the inherent difficulties involved here.

Dr. Wolfbein first grouped ("crossmapped") the occupational activities at the Agency (professional, managerial and clerical), for which data was available from October, 1969 through December, 1978, into standard occupational classifications, using the most similar job categories prepared by the U.S. Bureau of the Census.[4] However, the job categories used as compared with the jobs in issue at the Agency simply do not match. Since the class herein is an agencywide class consisting of women in all employment categories, Dr. Wolfbein thought it essential that he analyze all such categories at the Agency, which Dr. Rosenblum did not do. The date of October, 1969, was selected as a starting point since that was the date nearest to the 1970 Decennial Census for which data on all job categories was available from the Agency (with the exception of the blue collar field, for which data was available as of June, 1975).

***4** Dr. Wolfbein first compared the Agency's utilization of women in each of these Census categories with the level of their availability in the external labor market, according to the 1970 Census. Comparisons were made with the United States as a whole in the professional and managerial fields and with the District of Columbia Standard Metropolitan Statistical Area for the remainder of the occupations.

6. Defendant accurately summarized Dr. Wolfbein's testimony as follows:

> In terms of the statistical exercise being performed, I would say unequivocally, . . . that this is a picture of an agency which does not underutilize women across the board . . . To put it more positively, it shows a pattern and a practice, in terms of hiring, assignment, promotions, in which the utilization of women meets accepted labor market practice in America statistically.

See, Defendant's Proposed Supplemental Findings of Fact, at 26, (filed June 21, 1979). See also Tr. 53-54, June 1, 1979.

Specifically, Dr. Wolfbein proffered to this Court that the Agency's utilization of women is slightly above its external labor market in professional personnel (19.1% vs. 18.5%) and clerical personnel (82.3 vs. 81.3%), and well above its labor market for managerial personnel (25.2% vs. 15.0%). However, for the reasons hereinafter discussed, the Court finds that Dr. Wolfbein's conclusions, although entitled to much more weight than plaintiffs' expert witness, are not dispositive of the case either. (See Findings of Fact #13 and #14).

7. The relevant external labor market for professional employees at the Agency is the nationwide labor market, but the fact remains that there is no national or even local statistical data which matches those job categories at the Agency and the specific requirements thereof.

[*Class Modification*]

8. The Court notes that Dr. Rosenblum focused on women in several occupations at the professional levels of the Agency. Comparison of the Agency's utilization of women in the clerical positions with their availability in the relevant labor market does not provide a meaningful analysis in light of the traditional predominance of women in these occupations and the scope of the plaintiff's complaint. The plaintiffs do not quarrel with the defendant's position that women in the lower clerical levels are over-represented. Based upon this finding of fact and the record considered as a whole, the Court finds its conditional certification of all women at the Agency as a class was erroneous because the evidence adduced dealt basically, if not only, with the women in the highly technical and specialized fields at the Agency. Accordingly, the class will be modified so as to include all women who have applied for employment with, or are currently employed by, the Agency, other than those in clerical positions.

9. At first glance, using the plaintiffs' classification titles, it would appear there are disparities between the women employed at the Agency and the external labor pool of 1) Electronic Techicians, 2) Radio Broadcast Techicians, 3) $^{\text{Writers}}/_{\text{Editors,}}$ and 4) Foreign Information Specialists.

***5** 10. However, the apparent agreement as to the results between the testimony of the experts concerning the employment of women in these highly specialized fields is, nonetheless, misleading. Both statistical studies require the parties' experts to engage in "cross-mapping", that is, the comparison of figures for job titles defined by different organizations, including the U.S. Civil Service Commission and the U.S. Bureau of the Census, which are different in label as well as job content and requirements. The job categories used by the parties' experts do not correspond with the jobs in the defendant Agency. Neither do plaintiffs' nor defendant's experts adequately explain that the tasks actually performed by the employees at the Agency, in the job categories analyzed, correspond in any more than a very general and speculative way to those utilized by the parties' experts.[5]

11. Cross-mapping of actual employee activities for purposes of comparison with statistics concerning available labor pools is appropriate and useful where the inquiry is of general non-specialized skills. While statistics are helpful and useful in many cases, it must be understood that it cannot be argued or found in this case that precise labor pool availability figures can be derived to determine the number of females available for employment in such specialized fields as, for example, Cambodian language news analyst/writer/broadcaster. The Court finds that both plaintiffs' and defendant's experts have failed to produce sufficiently *precise* labor-pool-availability figures either nationally or locally. Due to the inherent unreliability of broad and general cross-mapping with a specialized variety of highly-skilled positions at the Agency as compared to the available Census and BLS job categories, the "cross-mapping" done here is of little or no value in the case at bar.

B. ***The Evidence of Individual Instances of***

Discrimination Is Not Persuasive.

The plaintiffs' case would be more persuasive if the evidence of individual instances of discrimination had been made clear. While several of plaintiffs' witnesses may have been well-qualified for the positions for which they applied (*e.g.,* Ms.

Kobylinski), the qualifications of most of them are very debatable at best. For example, Ms. Debbie Showalter, a GS-4 secretary with the Voice of America, repeatedly failed a qualifying examination for employment as a writer with the Agency, administered anonymously by the Personnel Department.

Ms. Etel Berger, who contracted with the Voice of America as a purchaser-order vendor for the Brazilian Branch of the Latin American Division in 1960 and worked continuously as a writer-translatorbroadcaster for the VOA until 1978, repeatedly requested her supervisor to hire her as a full-time employee. However, the evidence indicates that she exhibited slowness in completing work assignments and lacked currency in the Portuguese language at the time of her employment.

***6** Ms. Patricia DeLovely, who is employed by the Agency as a GS-14 budget officer in the Central Budget Office, applied for two newly created GS-15 positions within the Central Budget Office. Ms. DeLovely admitted that the person selected for the position she sought was more qualified than she, even discounting for training the selectee received.

Ms. Dorothy Slak, who had been employed by the Agency and its predecessors as a Foreign Service Information Officer for more than twenty (20) years, claims that her grade level (FSIO-4) is well below that of the vast majority of her male counterparts, and her job assignments have allegedly been made on the basis of sex. However, the evidence clearly indicates she was incapable of administering her post in Yugoslavia and generally exhibited poor performance in the later stages of her career in the Foreign service.

Ms. Luba Medina was employed by the Voice of America from 1971 to 1974 when she resigned from the Agency due to undiagnosed health problems. Since her recovery, she has applied for employment with the Agency in several positions but has been rejected. Again, the evidence is clear and convincing that Ms. Medina was unqualified for two positions and tested poorly for a third.

Finally, Ms. Carolee Hartman, the original plaintiff in this case, complains that she should have been considered and hired for a $^{GS\text{-}11}/_{12}$ $^{writer}/_{editor}$ position on *Horizons Magazine,* one of several publications of the Agency. Both Ms. Dorothy Crook, then Editor of *Economic Impact,* another Agency publication, and Mr. Robert Korengold, then Editor of *Horizons Magazine,* testified that Ms. Hartman could not have been seriously considered for the position as she did not possess sufficient professional journalism experience. The Court conclusively accepts the testimony of Ms. Crook and Mr. Korengold on this matter.

[*Assertions Controverted*]

2. Plaintiffs also proffered testimony concerning the atmosphere of discrimination at the Agency. However, the plaintiffs' evidence is far from uncontroverted. Several witnesses, who are members of the class occupying positions of responsibility at the Agency, testified on behalf of the defendant that they had neither perceived, nor experienced, employment practices which were designed to discriminate against, or preclude, the advancement of women in any manner. Many in fact testified that the opposite was true. In addition to this very credible testimony, the fact that these women have attained the positions they now occupy, and have done so by rapid and consistent advancement, is dispositive of the absence of any pattern or practice of discrimination based on sex at the Agency at all relevant periods in this litigation.

For example, Ms. Jane Grymes described her steady advancement in the secretarial career field and, when she reached the top of that field, her move into the administrative career field and subsequent advancement to a GS-14 Management Analyst.

Furthermore, Ms. Juliet Antunes testified convincingly regarding the Agency's commitment to the principles of Equal Employment Opportunity (EEO). As head of the EEO office of the Agency during 1976 and 1977, she described the substantial progress the Agency had made in areas of recruitment, upward mobility, training, minority participation on promotion panels and EEO screening of assignments to the senior levels of the Foreign Service. Laudable examples of such accomplishments by the defendant are the broadcasters intern program, the "new careers" program (designed to stimulate advancement of secretarial employees into mid-level administrative positions), visits to colleges with a predominant minority enrollment and several training programs specifically designed to upgrade the position of women in the Agency workforce.

***7** Ms. Antunes also testified to and described the very small number of EEO complaints coming to her attention while she was Director of the Agency's EEO office. The Court finds her a most credible witness and her testimony persuasive.

III. Discussion.

In order for a plaintiff to prevail in a Title VII class action, a *prima facie* case of discrimination must first be proved by a preponderance of the evidence. The burden then shifts to the defendant to attempt to refute the plaintiffs' *prima facie* case if established. *McDonnell Douglas Corp. v. Green* [5 EPD P 8607], 411 U.S. 792 (1972), *Furnco Construction Corp. v. Waters* [17 EPD P 8401], 438 U.S. 567 (1978).

While it is well established in employment discrimination law that statistics can make out a *prima facie* case in individual Title VII cases or in class actions, it is also well settled that they are not irrefutable and their usefulness depends on all of the surrounding facts and circumstances. As the Supreme Court cautioned in *International Brotherhood of Teamsters v. United States* [14 EPD P 7579], 431 U.S. 324, 340 (1977), statistics "come in infinite variety and, like any other kind of evidence, they may be rebutted."

[*Failure of Proof*]

Here, upon consideration of the record as a whole, the credibility of witnesses and vague statistical data and so-called job comparisons, it is clear that the statistics and data proffered by the parties are of little usefulness.

In this particular case, the statistics suffer from the following deficiency, as noted by the Supreme Court in *Teamsters:* imprecise definitions of the relevant labor market when particular qualifications are required for the job(s) in question. 431 U.S. at 339 n. 20.

The relevant labor market is that market from which the employer draws its employees. *United States v. Ironworkers Local 86* [3 EPD P 8213], 443 F.2d 544 (9th Cir. 1971) *cert. denied,* 404 U.S. 984 (1971). In *Hazelwood School District v. United States* [14 EPD P 7633], 433 U.S. 299 (1977), the Court indicated that statistics comparing the employer's work force and the relevant labor market must be based on the labor pool *truly relevant* to the employer's potential work force. Clearly, the labor market must include only those persons qualified to perform the employer's tasks, within the relevant area and over the appropriate time period.

As indicated in this Court's findings of fact, the process of defining the relevant labor market for the Agency's potential work force is inherently difficult because of the special qualifications required of the Agency's employees. Indeed, the Court has found that the parties' experts have failed to define adequately the relevant labor market from which the Agency draws qualified personnel. As a result, the statistical studies conducted by the experts have little probative value. As the case of *Hazelwood School District, supra,* indicates, statistical analysis based on the available labor pool is inadequate without precise definition of the relevant labor pool. This statistical analysis and data in evidence here, based on the experts' "cross-mapping," fails to produce the required precision due to the special qualifications and highly specialized skills involved in this case, and, therefore, does not support a finding of a pattern or practice of discrimination by the Agency on the basis of sex.

***8** While the plaintiffs' case rests primarily on Dr. Rosenblum's study, the plaintiffs presented some individual testimony concerning employment discrimination at the Agency. However, as the findings of fact make clear, this testimony was so unpersuasive as to make it impossible for the Court to infer class-wide discrimination. In addition, the defendant introduced compelling, credible testimony from women currently employed at the Agency indicating an absence of any policy, pattern or practice of discrimination at the Agency on the basis of sex.

In sum, the Court finds the plaintiffs have failed in their burden of proof.

IV. Conclusions of Law

1. This Court has jurisdiction under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16(c).

2. The class as conditionally certified herein be, and the same hereby is, modified so as to include all women who have applied for employment with, or are currently employed by, the Agency, other than those in clerical positions.

3. The plaintiff-class has not established a *prima facie* case of discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

V. Conclusion

In accordance with the foregoing, the Court finds that the plaintiffs have failed to establish by a preponderance of the evidence an agency-wide pattern or practice of discrimination on the basis of sex. Accordingly, the Court dismisses the class claim against the defendant Agency. An order and judgment in accordance with the foregoing will be issued of even date herewith.

Order

Upon consideration of the entire record herein, and in accordance with the Findings of Fact and Conclusions of Law of even date herewith, it is, by the Court this 24th day of October, 1979,

Ordered, that the class as conditionally certified herein be, and the same hereby is, modified so as to include all women who have applied for employment with, or are currently employed by, the Agency, other than those in clerical positions; and it is

Further ordered, that the class claims in these consolidated proceedings against the defendant shall be, and the same hereby are, dismissed in accordance with the terms of the Findings of Fact and Conclusions of Law of even date herewith; and it is

Further ordered, that judgment on the class claim shall be, and the same hereby is, entered for the defendant, without costs to the plaintiffs.

Parallel Citations

21 Fair Empl.Prac.Cas. (BNA) 75, 21 Empl. Prac. Dec. P 30,432

Footnotes

1 The defendant concedes that the merits of the individual Title VII cases that have been consolidated herein may still have to be addressed at a later proceeding before the Court. See, Defendant's Supplemental Post-Trial Memorandum and Conclusions of Law, at 2, n.1 (filed July 18, 1979).

2 *Alphabetical Index of Industries and Occupations,* U.S. Department of Commerce, Bureau of the Census; issued June, 1971.

3 *Employment and Earnings,* U.S. Department of Labor, Bureau of Labor Statistics, 1978 annual averages, Vol. 26, No. 1, January, 1979.

4 *Supra,* n.2.

5 *Supra,* n.2