1993 WL 488409
United States District Court, N.D. Illinois, Eastern Division.

Glenn KOSKI, Owen Reeves, Fred Winterroth, Jesse Bean, Jerry Myers, Anthony Bishop, and Michael Mobley, individually,
and
Aaron Booker, individually and as a member of a class of persons similarly situated, Plaintiffs,
v.
Terrance GAINER, Harry Orr, John Rednour, David P. Schippers, Richard T. Mitchell, Nancy Beasley, Fred E. Inbau, James E. Seiber, James Redlich, in their individual and official capacities, and the State of Illinois, Defendants.

No. 92 C 3293. | Nov. 22, 1993.

Opinion

MEMORANDUM OPINION AND ORDER

LEINENWEBER, District Judge.

***1** Defendants have moved to dismiss portions of plaintiffs' second amended complaint[1] pursuant to Federal Rule of Civil Procedure 12(b)(6). However, defendants filed an answer in conjunction with their motion to dismiss. Therefore, the court will treat the motion as one under Rule 12(c) for a judgment on the pleadings. *Paist v. Town & Country Corp.,* 744 F.Supp. 179, 181 (N.D.Ill.1990); *Schy v. Susquehanna Corp.,* 419 F.2d 1112, 1115 (7th Cir.1970), *cert. denied,* 91 S.Ct. 51 (1970) ("A motion to dismiss made after the filing of an answer serves the same function as a motion for judgment on the pleadings and may be regarded as one.").

Where no evidence outside the pleadings is submitted, the standard of a Rule 12(b)(6) motion will be applied to a Rule 12(c) motion. *Paist,* 744 F.Supp. at 181, *citing Republic Steel Corp. v. Penn Engineering Corp.,* 785 F.2d 174, 182–82 (7th Cir.1986). No materials outside the pleadings were submitted here. Although defendants' Rule 12(b)(6) motion will be treated as a Rule 12(c) motion, this distinction has no bearing on the court's analysis or the outcome here. *Thomason v. Nachtrieb,* 888 F.2d 1202, 1204 (7th Cir.1989).

For the purpose of deciding defendants' motion, the court assumes the truth of all well-pled factual allegations in the complaint and draws all possible inferences therefrom in favor of plaintiff. *Webster v. New Lenox School Dist. No. 122,* 917 F.2d 1004, 1005 (7th Cir.1990). Dismissal is not warranted unless it appears beyond doubt that plaintiffs could prove no set of facts that would entitle them to relief. *Caldwell v. City of Elwood,* 959 F.2d 670 (7th Cir.1992).

The plaintiffs at issue in this ruling are state police troopers and sergeants who have asserted claims of reverse discrimination. Plaintiffs allege that defendants altered written test scores and used performance evaluations to give blacks an advantage in promotions. Plaintiffs also allege that defendants concealed promotion lists, written scores, performance evaluation scores and seniority scores, as well as a settlement agreement and internal memoranda showing a minority preference policy. They also claim defendants transfer minorities into districts with openings in order to promote minorities instead of the white officers in those districts. In addition, plaintiffs object to the implementation of a settlement agreement which provides for retroactive quota promotions of blacks from June 1990 promotional lists. Plaintiffs allege that, as a result of defendants' actions, they have been passed over for promotions and reasonably expect to be passed over in the future.

Count I contains claims against defendants, Terrance Gainer ("Gainer"), Harry Orr ("Orr"), John Rednour, David Schippers, Richard Mitchell, Nancy Beasly, Fred Inbau, James Seiner and James Redlich, under sections 1981, 1983, and 1985(3) of Title 42 of the United States Code. Count I also contains Title VII claims against defendants Gainer and Orr and against the State of Illinois. Count II is a state tort claim against all defendants except the State, alleging that defendants violated state law and seeking injunctive and monetary relief.

***2** Defendants argue that plaintiffs, Owen Reeves ("Reeves"), Anthony Bishop, Jerry Myers, and Michael Mobley, have failed to state a claim because they have not alleged that they were injured by defendants' actions or shown that they were denied a promotion on an impermissible basis. Defendants also assert that these plaintiffs do not have standing to assert claims for declaratory and injunctive relief or to assert a section 1985(3) claim that defendants engaged in a conspiracy to deprive plaintiffs of their rights because plaintiffs have not suffered any harm.

Defendants misconstrue the type of injury which plaintiffs must allege. The United States Supreme Court recently stated:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this type is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

NE Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 113 S.Ct. 2297, 2303 (1993). Plaintiffs have clearly alleged that defendants have erected a number of barriers making it more difficult for white men to be promoted than for minorities. Plaintiffs have sufficiently pled an injury to withstand defendants' motion to dismiss.

In addition, defendants argue Reeves is now classified as an Asian–American and, therefore, is a minority and within the protected class. However, Reeves was classified as a white male until 1991 and claims he was injured in prior promotional cycles. Moreover, plaintiffs allege that defendants favor black males over all other racial groups. Therefore, Reeves has standing to pursue his claims of discrimination.

Defendants argue that they are entitled to Eleventh Amendment immunity from money damages. However, plaintiffs have not brought any claims for monetary relief against defendants in their official capacities. And, personal capacity suits under section 1983 do not raise Eleventh Amendment issues. *Hafer v. Melo,* 112 S.Ct. 358, 364 (1991). In addition, official capacity suits are not barred insofar as plaintiffs request prospective relief such as an injunction or declaratory judgment. *Scott v. O'Grady,* 975 F.2d 366, 369 (7th Cir.1992), *cert. denied,* 113 S.Ct. 2421 (1993); *Kroll v. Bd. of Trustees,* 934 F.2d 904, 907–08 (7th Cir.1991), *cert. denied,* 112 S.Ct. 377 (1991). The Eleventh Amendment does not bar suits for money damages against states and state officials under Title VII. *Fitzpatrick v. Bitzer,* 96 S.Ct. 2666, 427 U.S. 445 (1976). In Count I, the only claim against the State itself is a Title VII claim. Accordingly, Count I is not barred by the Eleventh Amendment.

***3** Finally, defendants contend that some of plaintiffs' claims are barred by the statute of limitations. They argue that section 1983 claims which arose prior to May 1990, and Title VII claims which arose more than thirty days prior to the filing of a complaint with the Equal Employment Opportunity Commission ("EEOC"), are time-barred. Claims under 42 U.S.C. §§ 1981, 1983, and 1985(3) are subject to a two-year statute of limitations. 735 I.L.C.S. 5/13–202; *Smith v. City of Chicago Heights,* 951 F.2d 834, 836 n. 1 (7th Cir.1992). Defendants argue that because the complaint was not filed until May 19, 1992, claims based on incidents arising prior to May 19, 1990 are untimely and should be dismissed. Under Title VII, claims which arose more than 300 days prior to the filing of a complaint with the EEOC are untimely. *Sofferin v. American Airlines, Inc.,* 923 F.2d 552, 553 (7th Cir.1992). Plaintiffs filed their EEOC complaints between June 2, and June 9, 1992. Defendants argue any claims which arose prior to July 27, 1991 are barred.

Plaintiffs argue that they may avoid the time-barring effect of the statute of limitations through federal equitable tolling. For equitable tolling to apply, plaintiffs must have been unable, despite due diligence, to obtain vital information bearing on the existence of their claim. *Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 451 (7th Cir.1990), *cert. denied,* 111 S.Ct. 2916 (1991). Plaintiffs contend that defendants concealed promotion lists and original scores as well as memoranda describing the preference policies. Therefore, plaintiffs could not know of the changes in scoring or the preference policies which allegedly disadvantaged them. Plaintiffs could not obtain essential information bearing on the existence of their claims. *See Brennan v. Daley,* 929 F.2d 347, 349 (7th Cir.1991). For purposes of this motion, plaintiffs have adequately demonstrated that the statute of limitations is tolled.

Defendants have also moved to dismiss Count II. Count II is a state tort claim against all defendants except the State. Plaintiffs seek injunctive and monetary relief for defendants' alleged violations of the Illinois State Police Act and Merit Board Rules. Defendants argue the court lacks jurisdiction over these tort claims.

A federal court lacks subject matter jurisdiction to compel a state agency or state officials to adhere to state law. *Pennhurst State School & Hosp. v. Holderman,* 104 S.Ct. 900 (1984); *see also Doe by Nelson v. Milwaukee County,* 903 F.2d 499, 505

(7th Cir.1990). In *Pennhurst,* the Supreme Court held that the Eleventh Amendment bars federal courts from considering claims that state officials violated state law when the relief sought has a direct impact on the state itself. A plaintiff cannot obtain a federal order compelling a state to follow state law. *Bates v. Johnson,* 901 F.2d 1424, 1428 (7th Cir.1990). Plaintiff's response to this argument is merely to cite Illinois cases where state courts have compelled state officials to obey their own laws. The fact that a state court has this power does not transfer the same authority to the federal court. Count II is dismissed.

***4** Defendants' motion to dismiss is granted in part and denied in part. The motion to dismiss portions of Count I is denied. The motion to dismiss Count II is granted.

IT IS SO ORDERED.

Parallel Citations

63 Fair Empl.Prac.Cas. (BNA) 939

Footnotes

[1] A third amended complaint has been filed. Three plaintiffs were added and negative verbs and characterizations of defendants' conduct were deleted. However, the complaint is the same in substance. Therefore, the court will apply the motion to dismiss and responsive briefs to the third amended complaint.