1976 WL 577
United States District Court, E.D. Michigan, Southern Division.

Schaefer et al., Plaintiffs
v.
Tannian et al., Defendants.

Civil Action No. 39943 | June 21, 1976

Opinion

FREEMAN, D.J.

Memorandum Opinion

***1** This class action was commenced on April 10, 1973 on behalf of all women who have been employed or were applicants for employment with the Detroit Police Department (DPD) since April 10, 1970. As originally filed, the defendants were the principal officials of the City of Detroit charged with the operation of the DPD and with responsibility for its hiring, assignment and promotion practices. The Detroit Police Officers' Association (DPOA) and the Detroit Police Lieutenants' and Sergeants' Association (DPLSA) were subsequently added as defendants, without objection. These defendants were charged with discrimination on the basis of sex in recruiting, examining, hiring, promoting and compensating employees and potential employees of the DPD in violation of 42 USC § 2000e *et seq.,* and 42 USC § 1983.

After a hearing on plaintiffs' motion for partial summary judgment and for a preliminary injunction, the Court found that the hiring and assignment practices of the DPD illegally discriminated against the plaintiffs on the basis of sex and that injunctive relief was therefore proper. A preliminary injunction was issued on May 13, 1974 which called for specific affirmative action to eliminate the illegal discrimination, including the increased hiring of women. The specific affirmative action ordered is fully set forth in the Court's Memorandum Opinion reported at 394 F.Supp. 1128.

On June 7, 1974, a hearing was held on plaintiffs' second motion for partial summary judgment and for a preliminary injunction. This second motion challenged the practices of the DPD with regard to promotions. This motion was also granted, the Court finding that the promotion practices of the DPD discriminated against the plaintiffs on the basis of sex. A second preliminary injunction was issued on June 7, 1974, ordering specific affirmative action to eliminate this discrimination.

On April 30, 1975, plaintiffs filed a third motion for a preliminary injunction. This time they sought to enjoin the defendants from laying off or demoting any female police officers, sergeants or lieutenants who had been hired or promoted pursuant to the Court's preliminary injunctions of May 13 and June 7, 1974. These layoffs and demotions were threatened as a result of budgetary deficits experienced by the City of Detroit. Those persons subject to layoff and demotion were selected according to the provisions contained in collective bargaining agreements between the City of Detroit and the DPOA and the DPLSA. These agreements provide that layoffs are to be made according to seniority on a "last hired, first fired" basis and when demotions in rank are necessitated, those with the least time in the particular rank are demoted first.

After conducting an extensive hearing and after considering the testimony as well as the oral and written arguments of the parties, the Court concluded that preliminary injunctive relief was again appropriate. In its Memorandum Opinion of May 22, 1975, reported at 394 F.Supp. 1136, the Court held that the proposed layoffs and demotions under the collective bargaining agreements involved would serve to perpetuate past discrimination and were not based on a bona fide seniority system and would therefore constitute discriminatory action based on sex in violation of Title VII of the Civil Rights Act of 1964. The Court also concluded that the prerequisites to the granting of equitable relief had been satisfied and that some measure of relief should be accorded to the class of women whose layoffs and demotions were mandated because they were not able to accumulate sufficient seniority due to the prior sex discrimination practiced by their employer.

***2** Although the Court concluded on April 30 that preliminary injunctive relief was appropriate, a preliminary injunction was not entered at that time. In order to allow the parties to attempt to agree on specific relief, the Court entered only a temporary

restraining order prohibiting all layoffs and demotions of female police officers, sergeants and lieutenants until May 9, 1975. However, as no agreement on relief seemed imminent, the Court did enter a preliminary injunction on May 12, 1975. The order that was entered was fashioned in light of the various proposals of the parties and their potential detrimental effect on the present seniority system as well as the public interest involved.

In order to accord some measure of relief to the victims of past discrimination and, at the same time, to ensure that fewer senior officers would be laid off or demoted, this Court ordered in its preliminary injunction of May 12, 1975, that no federally funded employees, either male or female, be laid off or demoted. As the Court noted in its Memorandum Opinion, 394 F.Supp. 1150:

> Most of these federally funded officers were hired under the Comprehensive Employment and Training Act of 1973 (CETA). These federally funded officers were the most recently hired and their layoffs were mandated, not by the City's budget problems, but because of the seniority provisions encompassed in the DPOA collective bargaining agreement. If these officers, male and female, were not laid off, the City would be obliged to lay off only 550 city-funded officers rather than the 825 officers originally scheduled for layoff. Moreover, approximately three-fifths of these recently hired CETA employees were women and include all of the women hired pursuant to this court's order of May 13, 1974.

The Court's order further provided that the city-funded officers were to be laid off according to the seniority provisions of the DPOA collective bargaining agreement. Recall was also to be based on seniority as called for by the collective bargaining agreement.

After perfecting a timely appeal of the Court's preliminary injunction of May 12, 1975, the defendants entered into an agreement which provided, inter alia, that no police officer would be laid off before July 1, 1976. *See Concerned Police Officers for Equal Justice, et al. v. City of Detroit, et al.,* (E.D. Mich., C.A. No. 5-70768). The defendant DPOA now alleges, however, that the representatives of the City of Detroit intend to lay off 1,327 police officers on or about July 1, 1976. The DPOA further alleges that although the appeal in this case was originally scheduled for oral argument before the Sixth Circuit on April 13, 1976, that hearing was postponed due to the untimely death of Circuit Judge William E. Miller. Although oral arguments were subsequently rescheduled and heard on June 14, 1976, the DPOA contends that it would be unlikely that the Sixth Circuit would render its decision before July 1, 1976, the date on which the City allegedly intends to lay off 1,327 police officers.

***3** This matter is now before the Court on the motion of the defendant DPOA for a stay in the execution of the Court's preliminary injunction of May 12, 1975, pending disposition of the defendants' appeal to the Court of Appeals for the Sixth Circuit. This motion is brought pursuant to Federal Rule of Civil Procedure 62 and Federal Rule of Appellate Procedure 8.

Rule 8(a) of the Federal Rules of Appellate Procedure provides that applications for a stay of an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. Rule 62(c) of the Federal Rules of Civil Procedure, in turn sets forth the applicable rule which permits the district court to suspend or modify injunctive orders during the pendency of an appeal. Under Rule 62(c), the defendant is not entitled to a stay of the Court's injunctive order as a matter of right. *Dewey v. Reynolds Metals Company,* [2 EPD P 10,121] 304 F.Supp 1116, 1118 (W.D. Mich 1969). That rule merely vests discretion in the district court to stay an injunction pending appeal whenever necessary to protect the rights of the adverse party as a matter of general equity principles. The standards to be applied in determining whether a stay of an injunctive order pending appeal should be granted are essentially the same standards that are employed on application for a preliminary injunction. *See 7 Moore's Federal Practice,* P 62.05. Thus, the Court will, therefore, consider defendant's motion in light of the following standards: (1) whether defendant has made a showing that it is likely to prevail on the merits of the appeal; (2) whether defendant will suffer irreparable injury unless the stay is granted; (3) whether a stay would substantially harm the plaintiffs, and finally, (4) the competing public interest involved. *See Dewey v. Reynolds Metals Company, supra,* at 1118.

In support of its motion, the defendant contends that the law upon which the Court's injunctive order was based has recently changed, which suggests that the defendant will likely prevail on the merits of its appeal pending before the Sixth Circuit. The defendant first argues that one of the cases principally relied upon by this Court in its Memorandum Opinion of May 22, 1975, 394 F.Supp 1136, has been recently overruled by the Fifth Circuit Court of Appeals in *Watkins v. United Steelworkers of America, Local No. 2369,* [10 EPD P 10,319] 516 F2d 41 (1975). The defendant also points to the recent decision of the United States Supreme Court in *Franks v. Bowman Transportation Co.,* [11 EPD P 10,777] 96 S Ct 1251 (1976), as casting doubt on this Court's finding that the plaintiffs as a class are likely to succeed on the merits of their claim.

The central question which this Court addressed itself to in its Memorandum Opinion of May 22, 1975, was "whether a seniority system which is neutral on its face nevertheless violates 42 USC § 2000e *et seq.,* or 42 USC § 1983 when it results in the perpetuation of the effects of past discrimination." 394 F.Supp at 1140. In answering that question in the affirmative, this Court relied, at least in part, upon the decision of the district court in *Watkins v. United Steelworkers of America, Local No. 2369,* [7 EPD P 9130] 369 F.Supp 1221 (E.D. La 1974). There, the district court held that a "last hired, first fired" seniority system, utilized for layoff and recall, perpetuated the effects of past discrimination and, therefore, violated Title VII of the Civil Rights Act of 1964.

***4** Although the district court in *Watkins* was subsequently reversed by the Fifth Circuit, the basis for that reversal does not affect this Court's decision in the case *sub judice.* In reversing the district court, the Fifth Circuit placed reliance upon the fact that "[n]o plaintiff ha[d] alleged that he applied for employment with the Company prior to 1965 and was rejected for discriminatory reasons or that he would have applied for employment but for the discriminatory hiring practices of the Company." 516 F2d at 46. It was on the basis of that finding that the Court held that "a longestablished seniority system for determining who will be laid-off, and who will be rehired, adopted without intent to discriminate, is not a violation of Title VII or § 1981." 516 F2d at 45. The court was careful to note, however, what it was not deciding:

> We specifically do not decide the rights of a laid-off employee who could show that, but for the discriminatory refusal to hire him at an earlier time than the date of his actual employment, or but for his failure to obtain earlier employment because of exclusion of minority employees from the work force, he would have sufficient seniority to insulate him against layoff. 516 F2d at 45.

Unlike the record in *Watkins,* the record in this case reflects that the plaintiffs alleged that they were prevented from obtaining sufficient seniority to insulate them against layoff and demotion as a result of the past discriminatory practices of the DPD and that they had suffered discrimination by virtue of the DPD's history of discrimination. Moreover, this Court concluded that those allegations were adequately supported by the record. 394 F.Supp at 1139-1140. These facts substantially distinguish this case from the Fifth Circuit's holding in *Watkins* as specifically recognized by that court's decision. Unlike *Watkins,* this case involves the rights of employees who have shown that they could have attained sufficient seniority to insulate them against layoffs and demotions, "but for the discriminatory refusal to hire [them] at an earlier time than the date of [their] actual employment, or but for [their] failure to obtain earlier employment because of exclusion of minority employees from the work force."

The defendant also contends that in *Franks v. Bowman Transportation Co., supra,* the United States Supreme Court has recently held that "retroactive seniority is an individual right which must be supported by proofs as to each individual" plaintiff *Defendant's Brief in Support of Motion,* p. 3. The defendant asserts that *Franks* therefore casts serious doubt on this Court's finding that the plaintiffs as a class are likely to succeed on the merits of their claim. The defendant has also cited the Second Circuit's decision in *Acha v. Beame,* [11 EPD P 10,740] 351 F2d 648 (1976), in support of its position.

The Court has examined the Supreme Court's decision in *Franks* and concludes that the defendant has misread what the Supreme Court had to say about the appropriateness of retroactive seniority in the context of a class action. *Franks* was a class action and the Court in its opinion specifically approved retroactive seniority as a remedy even though some of the unnamed class members may not in fact have been the actual victims of racial discrimination. The Court stated:

> ***5** Generalizations concerning such individually applicable evidence cannot serve as a justification for the denial of relief to the entire class. Rather, at such time as individual class members seek positions . . . for which they are presumptively entitled to priority hiring consideration under the District Court's order, evidence that particular individuals were not in fact victims of racial discrimination will be material. But petitioners here have carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the respondent and, therefore, the burden will be upon the respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination. Cf. *McDonnell Douglas Corp. v. Green,* [5 EPD P 8607] 411 US at 802, 93 S Ct at 1824, 36 L Ed 2d at 677, *Baxter v. Savannah Sugar Refining Corp.* [7 EPD P 9426] 495 F2d 437, 443-444 (C.A. 5) *cert denied,* [8 EPD P 9789] 419 US 1033, 95 S Ct 515, 42 L Ed 2d 308 (1974). Only if this burden is met may retroactive seniority–if otherwise determined to be an appropriate form of relief under the circumstances of the particular case–be denied individual class members. 96 S Ct at 1268.

The Court in *Franks* therefore made it clear that the burden of showing that certain unnamed members of the class were not

victims of the employer's past discrimination was on the employer once the existence of a discriminatory hiring practice had been demonstrated by the plaintiffs. Defendant's reliance upon *Acha v. Beame, supra,* as suggesting a contrary result is clearly misplaced in light of *Franks.* In all other respects, this Court is convinced that the Supreme Court's decision in *Franks* reinforces and confirms the Court's Memorandum Opinion of May 22, 1975.

The Court has reconsidered its original decision in granting the preliminary injunction of May 12, 1975 in light of the recent developments in the case law and concludes that the defendant has failed to demonstrate that it is likely that it will prevail on the merits of the appeal pending before the Sixth Circuit.

The defendant DPOA, however, also contends that "substantial changes in circumstances" have occurred since the May 12, 1975 preliminary injunction which would justify a stay in the Court's injunctive order. These "changes in circumstances" relate to the defendant's assertion that the City of Detroit now intends to lay off 1327 police officers as opposed to the 813 officers of last year, and that the Court's order would now protect 490 federally-funded officers as opposed to the 264 it would have protected on the date the injunction issued.

Although the number of police officers allegedly scheduled for lay-off has increased since May 12, 1975, that fact does persuade this Court that a stay of its injunctive order would now be proper. In fashioning the relief that was ordered, this Court gave "great regard for the public interest and the present seniority system; well aware of the fact that to order that some women not be laid off might result in the additional layoffs of men." 394 F.Supp at 1150. The Court felt, at the time it granted injunctive relief, that its order would not have that result. The alleged "changes in circumstances" cited by the defendant does not change the Court's view on this matter. The increased number of federally-funded officers protected by the Court's order will still mean that the City will be obliged to lay off fewer city-funded officers. Since the majority of the federallyfunded officers are women, fewer women will be laid off. The Court continues to believe that its order will cause fewer police officers to be laid off; that a lesser percentage of women will still be laid off, and that no officer, male or female, would be laid off who was not originally scheduled for layoff. The public interest will continue to be served by this result since fewer police officers will ultimately be laid off. The defendant has therefore failed to demonstrate to this Court that it will suffer irreparable injury unless the stay is granted when viewed in light of the substantial harm to the plaintiffs and the public interest involved.

***6** For all of the foregoing reasons, defendant's motion for a stay pending appeal is hereby denied.

An appropriate order may be submitted.

Parallel Citations

13 Fair Empl.Prac.Cas. (BNA) 523, 12 Empl. Prac. Dec. P 11,019