1977 WL 15367 (E.D.N.Y.)
United States District Court, E.D. New York.

WHITE, ET AL.
v.
NASSAU COUNTY POLICE DEPARTMENT, ET AL.

No. 76 C 1869. | May. 17, 1977.

Attorneys and Law Firms

Jemera Rone (Blank, Goodman, Rone & Stanley), New York, N.Y., and Williams D. Wells, New York, N.Y., for plaintiffs.

William Gitelman, County Attorney for Nassau County, by John F. Picciano, for county defendants.

Louis J. Lefkowitz, Attorney General of New York, by Arnold Fleischer, for state defendants.

Opinion

GEORGE C. PRATT, District Judge: -

***1** Plaintiffs commenced this sex discrimination action pursuant to Title VII of the Civil Rights Act of 1964, 42 USC §§ 2000 et seq., the fourteenth amendment, articles six and eleven of the New York State Constitution, and New York Executive Law §§ 296 et seq. Alleging that defendants have maintained and continue to maintain a pattern, practice, custom, and policy of discriminating against women applicants and employees and of limiting, segregating, and classifying employees so as to deprive women of employment opportunities, benefits, terms, and conditions of employment equal with men, plaintiffs, on behalf of themselves and those similarly situated, seek declaratory and injunctive relief, compensatory damages, and an affirmative action program.

[PREVIOUS DECISION]

By memorandum and order dated January 11, 1977, the undersigned granted plaintiffs' motion for a preliminary injunction which sought to prevent the Nassau County Police Department (the department) from hiring approximately 100 new police officers from an eligibility list certified by the Nassau County Civil Service Commission in 1976 based upon a 1974 written examination, and from processing those officers through the Police Academy. That decision read in part:

> The motion for a preliminary injunction against the hiring of any new police officers based upon the Civil Service list which was certified in December 1976 is granted, on condition, however, that defendants may hire new police officers based upon the 1974 written examination, provided that new medical-physical tests be offered and administered to those eligible candidates who request reprocessing, and that the new tests be based upon the height, weight, and physical agility standards and tests of the Municipal Police Training Council supplemented by [four other modified tests of speed, strength, and agility].

Subsequently, the department chose to retest under the new guidelines, and has since appointed 81 new police officers to the force, 78 men and 3 women.

Now, by motion argued January 27, 1977, plaintiffs seek class action certification and a definition of the class as:
all women employed in a non-civilian capacity by the department on or after January 1, 1966, *and* those women who in the future will be employed by the department, *and* those women who from January 1, 1966 to the present applied for employment in a non-civilian capacity with the department, or who would have applied but for the defendants' sex discriminatory hiring standards, *and* those women who are members of or might become or have become members of the defendant Union.

Plaintiffs' Memorandum of Law at 7. (emph. supp.)

Plaintiffs admit that "members of the class, e.g. women employed versus rejected applicants, could logically be divided into subclasses at some later stage of the litigation". Plaintiffs' Reply Memorandum of Law at 10. However, there appears to be no logical reason to delay such division when at least three such potential classes are at present readily discernible: (1) All women employed in a non-civilian capacity by the department on or after January 1, 1966; (2) All women who unsuccessfully applied for employment in a non-civilian capacity with the department from January 1, 1966 to the present; and (3) All women who would have applied for employment in a noncivilian capacity with the department but for the department's alleged discriminatory practices. Hence, plaintiffs' motion for class certification pursuant to FRCP 23 should be and has been considered with a view toward certifying one or more of these classes.

Since a named plaintiff must be a member of the class which she seeks to represent, Sosna v. Iowa, 419 U.S. 93, 403 (1975), we begin by analyzing the standing and representativeness of each of the three named plaintiffs, vis-a-vis the three classes described above.

[PLAINTIFFS]

Plaintiff Alice Woodson White was hired as a policewoman in 1968 and is currently employed by the department as a police officer-detective.

Plaintiff Jacqui Harris Wilson also was hired as a policewoman in 1968, but she resigned her position in the department in August 1976 and currently resides in Colorado.

Plaintiff Carolann Calamia has never been employed by the department; she did, however, take the examinations for policewoman on March 18, 1972, and for police officer on February 16, 1974. Moreover, although she is on the list of those who passed the 1974 written exam and would have been able to retake the medical-physical tests pursuant to the preliminary injunction order, this possibility was precluded by the fact that having moved to Maryland, she is no longer a resident of Nassau County and, therefore, was and is ineligible for appointment to the department. NY Public Officers Law, Art II, § 3.

Correlating the potential classes to their prospective representatives, the court finds as follows:

I.

It may well be that a proper, viable class consisting of all women who would have applied to the department but for its alleged discrimination could in some other case be established, but see, e.g., EEOC v. Detroit Edison Co., 515 F.2d 301, 10 FEP Cases 239 (CA6 1975); Castro v. Beecher, 459 F.2d 725, 4 FEP Cases 700 (CA1 1972); Williams v. Wallace Silversmiths, Inc., 14 FEP Cases 301, Civil No. N-74-125 (D Conn, Nov. 11, 1976). However, no such determination is necessary here, for assuming *arguendo* that such a subclass was proper, none of the named plaintiffs is a member of the class. Rather than having been deterred from seeking employment, all three plaintiffs sought employment with the department. Indeed, two of them have actually been employed by the department. Without an adequate representative the court cannot on this motion certify a subclass of women who were deterred from seeking employment.

II.

Nor is there an adequate representative for the potential class of women who have been denied employment due to the alleged discrimination of the defendants. Plaintiffs White and Wilson were not denied employment by the department. Moreover, as more likely representatives of all women employed by the department, White's and Wilson's best interest might well conflict with those of the women who were denied employment, since advancement opportunities and the variety of job assignments within the department are directly related to the number of police officers, men and women, on the force during the applicable period.

Nor is plaintiff Calamia an adequate representative of a class of women denied employment as a result of sex discrimination in the department. She did not score well on the nondiscriminatory written examinations; she failed to avail herself of the opportunity to retake the medical-physical tests in 1977 as permitted by the preliminary injunction; and she has rendered herself ineligible for an appointment to the department by moving to Maryland. Such circumstances might be viewed as evidencing either plaintiff Calamia's failure to epitomize claims typical of the class, see, e.g., O'Connell v. Teachers College, 63 F.R.D. 638, 8 FEP Cases 525 (SDNY 1974); White v. Gates Rubber Co., 53 F.R.D. 412, 4 FEP Cases 293 (D Colo 1971), or her failure to exhibit the interest in the litigation required of a class representative, see, e.g., Hyatt v. United Aircraft Corp., 50 F.R.D. 242, 2 FEP Cases 722 (D Conn 1970); Burney v. North American Rockwell Corp., 302 F. Supp. 86, 1 FEP Cases 776, 71 LRRM 2588 (CD Cal 1969). In either event they clearly indicate that she is not an adequate representative for this potential class.

III.

A class consisting of all women employed by the Nassau County Police Department in a non-civilian capacity on or after January 1, 1966 is ripe for certification at this time, with plaintiffs White and Wilson as its representatives.

A. NUMEROSITY.

Over 38 women have been employed in a non-civilian capacity by the defendant department since January 1, 1966. Although some members of the class, such as

plaintiff Wilson, have since left the force, no further subdivision of the class is required at this time since all allege a sex-discriminatory policy and pattern within the department during their tenure with the department. Although final relief may well have to be tailored to individual circumstances, simple joinder would be impractical. Under the circumstances present here, therefore, the numerosity requirement of FRCP 23 (a)(1) has been met. See e.g., Doglow v. Anderson, 464 F.2d 437 (CA2 1972); Fidelis Corp. v. Litton Industries, Inc., 293 F. Supp. 164 (SDNY 1968).

B. COMMON QUESTIONS.

Plaintiffs allege that the department follows a policy and practice of discrimination against women employees in non-civilial capacities allegedly evidenced by disparate promotional opportunities, job assignments, salaries, etc. which affect all women police officers. In addition, the alleged discriminatory activities or nonactivity of defendant Nassau County Patrolmen's Benevolent Association, plaintiffs' union, would affect all members of this class. Such allegations present common questions of law or fact which predominate in this action as they must under FRCP 23(a)(2). See, e.g., Escalera v. New York Housing Authority, 425 F.2d 835 (CA2), cert. denied, 400 U.S. 853 (1970); Carr v. Conoco Plastics, Inc., 423 F.2d 57, 2 FEP Cases 836 (CA5 1970).

C. TYPICALITY.

Plaintiffs White's and Wilson's claims appear to be typical of the delineated class. See FRCP 23(a)(3). Not only is the threshold for a finding of typicality lower when dealing with charges of a pattern and practice of discrimination, see, e.g., Rosado v. Wyman, 322 F.Supp. 1173 (EDNY), aff'd on other grounds, 437 F.2d 619 (CA2 1970); Leisner v. New York Telephone Co., 358 F.Supp. 359, 5 FEP Cases 732 (SDNY 1973), but the class representatives here could be expected to have encountered the range of alleged discriminatory acts over their years on the force.

D. REPRESENTATIVES.

As already discussed, plaintiffs White and Wilson adequately represent the class of all women employed by the department from January 1, 1966 to the present, and there is reason to believe that plaintiffs' retained counsel will diligently pursue the best interests of this class throughout the litigation. See FRCP 23(a)(4).

FRCP 23(b)(2) permits a class action to be maintained if, assuming the requirements of FRCP 23(a) have been satisfied, the defendants have acted or refused to act on grounds generally applicable to the entire class. Moreover, cases involving employment and promotional discrimination of the sort alleged here appear to be uniquely suited to treatment as a class action pursuant to FRCP 23 (b)(2). See, e.g., Rich v. Martin Marietta Corp., 522 F.2d 333, 11 FEP Cases 211 (CA10 1975); EEOC v. Detroit Edison Co., supra. Since plaintiffs White and Wilson and the class they seek to represent meet the requirements of FRCP 23(a) and since the discriminatory activities complained of are alleged to have been applied generally to all the members of this class, the requirements of FRCP 23(b)(2) have been satisfied.

IV.

Accordingly, plaintiffs' motion for class certification is granted to the extent of certifying a class, represented by Alice White and Jacqui Wilson, consisting of all women who are or have been employed by the department in a non-civilian capacity from January 1, 1966 to the present, and to the extent that his class asserts claims of discrimination against the department and the union. Since there exists no proper representation for the remaining potential classes, and since the claims asserted by the certified class are directed only against two named defendants, the department and the union, the motion is in all other respects denied. Plaintiffs shall provide written notice of the pendency of this action to each member of the certified class.

Settle order on five days' notice, including the text of an appropriate notice to be sent to class members.

SO ORDERED.

Parallel Citations

15 Fair Empl.Prac.Cas. (BNA) 266