1972 WL 273
United States District Court; S.D. Florida, Miami Division.

Maria F. G. Mendoza, Plaintiff
v.
City of Miami Civil Service Board et al., Defendants.

No. 72-1264-Civ-CA | October 24, 1972

Opinion

ATKINS, D. J.

***1** Plaintiff in this cause is a resident alien living in the City of Miami, Florida. On August 8, 1972 she attempted to apply for a position as a bilingual communications operator for the City, but her application was not considered by the City of Miami Civil Service Board because Rule V, Section 3 of the Rules and Regulations of the City of Miami Civil Service Board provides that only United States citizens may be employed by the City.[1] Following the rejection of her application for the abovementioned reason, she filed suit for a declaratory judgment,[2] on behalf of herself and others similarly situated, alleging that this regulation was a violation of both the Equal Protection Clause of the Fourteenth Amendment and Sections 1981 and 1983 of Title 42 of the United States Code. Jurisdiction was posited upon Section 1343(3) of Title 28 of the United States Code. After several abortive attempts, this case is finally in a posture for adjudication, although several pending motions will be dealt with in this opinion.

1 Section 3 of Article V reads in pertinent part: "Citizenship: All applicants must be citizens of the United States. . . ."

2 28 U. S. C. §§ 2201 and 2202 (1972).

Class Action

The plaintiff has a motion for determination of the class, filed pursuant to Rule 23 of the F. R. Civ. P. I find this to be a classic example of the type of action meant to be designated a class action, and I hereby declare the class to be all permanent resident aliens residing in the City of Miami who, but for the enforcement of Rule V, Section 3, would otherwise be eligible to compete for employment by the City of Miami. *See Graham v. Richardson*, 403 U. S. 365 (1971); *Dougall v. Sugarman* [4 EPD P 7568] 339 F. Supp. 906 (S. D. N. Y. 1971), *prob. juris. noted* 407 U. S. 908 (1972).

Motion to Dismiss

The motion by the City of Miami and the City of Miami Civil Service Board for failure to state a claim upon which relief can be granted shall be and hereby is granted. *Ries v. Lynskey*, 452 F. 2d 172 (7th Cir. 1972); *Mayhue v. City of Plantation*, 375 F. 2d 447, 452 (5th Cir. 1967). *Contra Carter v. Carlson*, 447 F. 2d 358 (D. C. Cir. 1971), *cert. granted* 404 U. S. 1014 (1972).

Motion to Strike

The defendants Huttoe and Reese moved to strike paragraphs 6 and 7 from plaintiff's affidavit on the ground that she failed to exhaust administrative remedies and also because they contain mere conclusions. The motion shall be and it hereby is denied.

Motion for a Three-Judge Court

Defendants Huttoe and Reese also moved to vacate the order for a pretrial conference and notice of trial on the ground that a three-judge district court was required to hear the case.[3] The reason advanced for this motion was the fact that the State of Florida has at least two statutes requiring state or municipal employees to be citizens of the United States. Of course, if these statutes were the subject matter of this action, then a three-judge court would be mandated. However, it is quite clear that the sole question pending before the Court is the validity of Rule V, Section 3, and the Supreme Court has settled the question of whether a three-judge court is needed in a suit challenging the validity of a municipal ordinance. *See Spielman Motor Sales Co., Inc. v. Dodge*, 295 U. S. 89 (1935); *Weintraub v. Hanrahan*, 435 F. 2d 461 (7th Cir. 1970). Therefore the motion must be denied.

3 28 U. S. C. §§ 2281 and 2284 (1972).

Motion to Amend

***2** Plaintiff's motion to amend the complaint to include a count alleging a "restriction on the right to travel" shall be and it hereby is denied.

Motion for Summary Judgment

On September 29, 1972 the plaintiff filed, in accordance with Rule 56 of the F. R. Civ. P., a motion for summary judgment. The motion alleged that there were no material facts in dispute and it contained an affidavit executed by the plaintiff, indicating her ability to represent the class of "resident aliens" and alleging the result of her attempt to obtain work with the City of Miami. The defendants filed their opposition to the motion for summary judgment on October 13, 1972, although the failure to file it in a timely fashion has not prevented its consideration.

The motion for summary judgment and the opposition thereto have been considered in accordance with Local Rule 10(J)(2) which provides in part:

> . . . The papers opposing a motion for summary judgment shall include a memorandum of law, necessary affidavits, and a concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed admitted unless controverted by the opposing party's statement.

The material facts alleged to be in dispute include whether: (1) the plaintiff is "qualified in all other respects other than United States citizenship;" (2) David Kennedy is known as "the Chief legislative officer of the City of Miami;" and (3) the plaintiff was "denied the opportunity to apply for employment for a position" with the City of Miami, since the Civil Service Board is the agency in charge of hiring for the City and no special request was made to bring the matter to the attention of the Board. The first fact has no relevance to this inquiry because the relief requested by the plaintiff is not that the Court order her to be hired as a bilingual operator, but only that it declare unconstitutional that part of the regulations that operates to exclude plaintiff from consideration, irrespective of her qualifications. Once that regulation is eliminated, the plaintiff's qualifications will be up to the board to determine.[4] The fact is not material to this inquiry. The second alleged "material fact" is not material at all. Finally, it cannot be deemed material to this action whether or not plaintiff sought a special exception to the otherwise uniform application of Rule V, Section 3. There is no requirement that such a special exception be requested, and of course there could be no denial of review on a theory of failure to exhaust administrative remedies should the request not be granted. *Cf. Shuttlesworth v. Birmingham*, 394 U. S. 147, 151 (1969). Therefore it is quite clear from the defendant's response that there are no material facts in dispute. The question of law remaining is ripe for decision.[5]

4 A determination of job qualifications must be made on a non-discriminatory basis. Should discrimination persist in the screening of applicants based on artificial qualification requirements, the Federal Courts are not powerless to prevent it. *See Cooper v. Allen*, [5 EPD P 7952] 467 F. 2d 836, (5th Cir. 1972) [No. 71-3186, Aug. 29, 1972] slip op. at 8.

5 *Burleson v. Mead Johnson & Co.*, 463 F. 2d 180 (5th Cir. 1972).

***3** The unconstitutionality of the regulation in issue in this action cannot be doubted, absent some specific compelling interest on the part of the City of Miami to prevent the employment of aliens. No such compelling interest has been shown. The only defense the City seems to be able to raise, as it has repeatedly, is not even directed to the "reasonableness" of the regulation. Rather it consists of requesting this Court to stay its action in this cause pending the disposition of the opinion in *Dougall v. Sugarman, supra*, pending before the Supreme Court. However, without even an attempted showing of the reasonableness of the classification I cannot justify withholding adjudication. The Supreme Court in *Graham v. Richardson*, 403 U. S. 365 (1971), has indicated "that an alien's constitutional right to equal protection could not be made to depend upon the concept that government benefits were a privilege, not a right . . . ." *Dougall, supra* at 908. Any further delay in striking down the regulation that denies the resident aliens their constitutional right to equal protection cannot be countenanced. The enforcement of this regulation is in violation of 42 U. S. C. § 1983. Therefore plaintiff's motion for declaratory relief is hereby granted.[6]

6 The request for attorneys' fees in the amended complaint has been reserved by this Court for further consideration.

Parallel Citations

6 Fair Empl.Prac.Cas. (BNA) 490, 6 Empl. Prac. Dec. P

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