Reynolds v. Alabama DOT

United States District Court for the Middle District of Alabama, Northern Division
April 23, 1996, Decided ; April 23, 1996, FILED, ENTERED
CIVIL ACTION NO. 85-T-665-N

Reporter: 1996 U.S. Dist. LEXIS 10691
JOHNNY REYNOLDS, et al., Plaintiffs, v. ALABAMA DEPARTMENT OF TRANSPORTATION, et al., Defendants.

Counsel: [*1] LAURIE EDELSTEIN, Special Master, [PRO SE], Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C., New York, NY. WINN S. L. FAULK, Special Master, [PRO SE], Mobile, AL.

For JOHNNY REYNOLDS, individually on behalf of himself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated, plaintiff: Leonard Gilbert Kendrick, Montgomery, AL. Richard J. Ebbinghouse, Robert L. Wiggins, Jr., Jon C. Goldfarb, Gregory O. Wiggins, C. Paige Williams, Rebecca Anthony, Gordon, Silberman, Wiggins & Childs, Birmingham, AL. Julian L. McPhillips, Jr., McPhillips, Shinbaum, Gill & Stoner, Montgomery, AL. Rick Harris, Glassroth & Associates, Montgomery, AL.

For CECIL PARKER, FRANK REED, OUIDA MAXWELL, MARTHA ANN BOLEWARE, PEGGY VONSHERIE ALLEN, JEFFERY W. BROWN, intervenor-plaintiffs: Leonard Gilbert Kendrick, Montgomery, AL. Richard J. Ebbinghouse, Robert L. Wiggins, Jr., Jon C. Goldfarb, Gregory O. Wiggins, C. Paige Williams, Rebecca Anthony, Gordon, Silberman, [*2] Wiggins & Childs, Birmingham, AL. Julian L. McPhillips, Jr., McPhillips, Shinbaum, Gill & Stoner, Montgomery, AL. Rick Harris, Glassroth & Associates, Montgomery, AL. For ROBERT JOHNSON, - intervenor-plaintiff: Leonard Gilbert Kendrick, Montgomery, AL. Richard J. Ebbinghouse, Robert L. Wiggins, Jr., Jon C. Goldfarb, Gregory O. Wiggins, C. Paige Williams, Rebecca Anthony, Gordon, Silberman, Wiggins & Childs, Birmingham, AL. Claudia H. Pearson, Longshore, Nakamura & Quinn, Birmingham, AL. Julian L. McPhillips, Jr., McPhillips, Shinbaum, Gill & Stoner, Montgomery, AL. Rick Harris, Glassroth & Associates, Montgomery, AL. FLORENCE BELSER, intervenor-plaintiff, [PRO SE], Montgomery, AL. For WILLIAM ADAMS, on behalf of himself and all similarly situated persons (Non-Class Employees), CHERYL CAINE, on behalf of herself and all similarly situated persons (non-class employees), TIM COLQUITT, on behalf of himself and all similarly situated persons (non-class employees), WILLIAM FLOWERS, on behalf of himself and all similarly situated persons (non-class employees), WILSON FOLMAR, on behalf of himself and all similarly situated persons (non-class employees), GEORGE KYSER, on behalf of himself [*3] and all similarly situated persons (non-class employees), BECKY POLLARD, on behalf of herself and all similarly situated persons (non-class employees), RONNIE POUNCEY, on behalf of himself and all similarly situated persons (non-class employees), TERRY ROBINSON, on behalf of himself and all similarly situated persons (non-class employees), TIM WILLIAMS, on behalf of himself and all similarly situated persons (non-class employees), intervenor-plaintiffs: Raymond P. Fitzpatrick, Jr., David P. Whiteside, Jr., Whiteside & Fitzpatrick, Birmingham, AL.

For GARY MACK ROBERTS, defendant: William K. Thomas, R. Taylor Abbot, Jr., Cabaniss, Johnston, Gardner, Dumas & O'Neal, Birmingham, AL. Jeff Sessions, Attorney General, Office of the Attorney General, Alabama State House, Montgomery, AL. Patrick H. Sims, Cabaniss, Johnston, Gardner, Dumas & O'Neal, Mobile, AL. For HALYCON VANCE BALLARD, individually and as Director of Personnel Department, State of Alabama, DEPARTMENT OF PERSONNEL, STATE OF ALABAMA, JAMES E. FOLSOM, JR., as Governor of the State of Alabama, defendants: Bert S. Nettles, Lisa Wright Borden, London, Yancey, Elliott & Burgess, Birmingham, AL. William F. Gardner, William [*4] K. Thomas, R. Taylor Abbot, Jr., Cabaniss, Johnston, Gardner, Dumas & O'Neal, Birmingham, AL. Jeff Sessions, Attorney General, Office of the Attorney General, Alabama State House, Montgomery, AL. For DEPARTMENT OF TRANSPORTATION, STATE OF ALABAMA, defendant: Bert S. Nettles, Lisa Wright Borden, London, Yancey, Elliott & Burgess, Birmingham, AL. William F. Gardner, William K. Thomas, R. Taylor Abbot, Jr., Cabaniss, Johnston, Gardner, Dumas & O'Neal, Birmingham, AL. Jeff Sessions, Attorney General, Office of the Attorney General, Alabama State House, Montgomery, AL. Jack Franklin Norton, Alabama Department of Transportation, Legal Division, Montgomery, AL. Patrick H. Sims, Cabaniss, Johnston, Gardner, Dumas & O'Neal, Mobile, AL.

Judges: Myron H. Thompson, UNITED STATES DISTRICT JUDGE

Opinion by: Myron H. Thompson

Opinion

ORDER

In this lawsuit initiated in May 1985, the plaintiffs charged that the defendants discriminated against them in employment because they are African-Americans, in violation of Title VII of the Civil Rights Act of 1964, as amended, codified at 42 U.S.C.A. §§ 1981a, *2000e through 2000e-17*; the fourteenth amendment to the United States Constitution, as enforced by *42* [*5] *U.S.C.A. § 1983*; and *42 U.S.C.A. § 1981*. The plaintiffs represent a class of African-American merit and non-merit system employees and unsuccessful applicants. The defendants include the Alabama Department of Transportation, the Alabama State Personnel Department, and several state officials. [1] In 1993, after a partial trial, the parties reached a partial settlement, subsequently embodied in three consent decrees. One of the consent decrees was approved by the court on March 16, 1994. [2]

This case is now before the court on the plaintiffs' motion to enforce P 5(b) of article XIII of the 1994 consent decree, otherwise known as consent decree I. The motion has two issues: (1) whether the Department of Transportation is required by P 5(b) to hire ten persons, in addition to the ten persons specifically named [*6] in the article, as Graduate Civil Engineers (GCEs); and (2) whether the department is required to provide certain benefits to the persons it has hired and will hire in the future pursuant to P 5(b).

Ten Additional People. Paragraph 5(b) of article XIII provides that "Up to a maximum of 10 persons, … black persons (if they have Civil Engineering or Civil Engineering Technology degrees) will (subject to availability) be appointed to the GCE job or the job they would now hold with the Highway Department in the absence of the EIT and associated requirements (including the recency of degree requirement), whichever is higher." [3] The department contends, based on the plain meaning of the clause, that it is required to hire only "up to" ten additional persons as GCEs, and thus may hire fewer than ten if it chooses. The plaintiffs contend that the department must hire ten additional persons, and may not hire fewer than ten persons.

[*7] A consent decree or judgment has the attributes of a contract and thus, as with a contract, its scope "must be discerned within its four corners." *United States v. Armour & Co.,* 402 U.S. 673, 682, 91 S. Ct. 1752, 1757, 29 L. Ed. 2d 256 (1971). However, if this cannot be done because the decree is ambiguous, "reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree." *United States v. ITT Continental Baking Co.,* 420 U.S. 223, 238, 95 S. Ct. 926, 935, 43 L. Ed. 2d 148 (1975). In other words, "Assuming that a consent decree is to be interpreted as a contract, it would seem to follow that evidence of events surrounding its negotiation and tending to explain ambiguous terms would be admissible in evidence." *Id.* at 238 n.11, 95 S. Ct.

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[1] The jurisdiction of the court has been invoked pursuant to 28 U.S.C.A. § 1343 and *42 U.S.C.A. § 2000e-5(f)(3)*.

[2] Doc. no. 553. The two others are currently under the court's consideration.

[3] Subparts (a) and (b) of P 5 provide in part: "5. *Offers of employment in the GCE job:*

(a) The following persons (if they have Civil Engineering or Civil Engineering Technology degrees) will be offered employment in the GCE job or in the job they would now hold with the Highway Department in the absence of the EIT and associated requirements (including the recency of degree requirement), whichever is higher, with the following credited service dates:

	CREDITED SERVICE DATE
Alfedo Acoff	March 30, 1983
Peggy Vonsherrie Allen	March 30, 1983
Christopher Zaubuike	March 30, 1983
Jeffery W. Brown	March 30, 1983
Willie F. Franklin	March 30, 1983
Macon Hinton	March 30, 1983
Wayne M. Leonard	March 30, 1983
Ronald D. Newsome	March 30, 1983
Adenrele Odutola	March 30, 1983
Rickey Richardson	March 30, 1983

(b) Up to a maximum of 10 persons, plus one replacement for each person in Paragraph 5(a) who is not appointed for any reason, black persons (if they have Civil Engineering or Civil Engineering Technology degrees) will (subject to availability) be appointed to the GCE job or the job they would now hold with the Highway Department in the absence of the EIT and associated requirements (including the recency of degree requirement), whichever is higher…."

at 935 n.11 (quoting Twenty-fourth Annual Antitrust Review, 72 Col. L. Rev. 1, 23 n.148 (1972)).

As stated, the department contends that it may hire fewer than ten persons if it chooses. This contention must be rejected. [*8] First, the department's reading would render the phrase illogically nugatory because the department could, in its discretion, simply hire no one; thus, it would have no obligation under the clause. Second, this conclusion is reinforced by the circumstances surrounding the submission of the decree to the court for its approval. After the parties had agreed on a proposed consent decree, but before the decree was approved by the court, the parties provided notice to members of the plaintiff class and others regarding the contents of the consent decree. Paragraph 6(1)(4) of the notice, which the court approved on December 10, 1993, provided as follows: "10 additional persons shall be appointed as Graduate Civil Engineers." [4] The parties--including the Department of Transportation--agreed on what the notice should say. Indeed, the joint motion seeking court approval of the contents of the notice [5] was signed by William F. Gardner, who, at that time, represented the department and negotiated the consent decree on the department's behalf.

[*9] Relying on P 6(1)(4) of the notice and on the negotiations that lead to the adoption of the consent decree, the plaintiffs contend that the department must hire ten additional persons, and may not hire fewer than ten persons. The court cannot agree with the plaintiffs either. The plaintiffs would impermissibly read the "up to" language out of the phrase.

The court instead reads P 5(b) of Article XIII to require that the department hire ten additional persons in the jobs described in the article if, after a reasonable and good faith effort, it can find ten persons who are qualified and who are willing to take the job. This conclusion is based upon the court's consideration of the eligibility qualifications for appointment under P 5(b)(i) - (iv). [6] These include the requirement that potential applicants actually applied, or would have applied but for the EIT requirement, and that they possessed a certain engineering degree at the time they applied or would have applied. From this, the court concludes that the "up to" language was used to account for the possibility that there are not ten persons who meet the requirements for eligibility described in P 5(b)(i) - (iv), who can be located [*10] through reasonable efforts, and who would accept a job offer from the department. To account for this possibility, the parties provided that the department need not hire ten persons if ten eligible persons could not be found who would take the job. For example, the department could discharge its obligations under the article by hiring only seven persons, if after a reasonable and good faith effort it could find only seven persons who

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[4] Doc. no. 499

[5] Filed December 9, 1993 (Doc. no. 498).

[6] Paragraph 5(b) further requires that it applies to only those persons who "satisfy the following conditions":

> "(i) They applied during the period since the EIT requirement was adopted for the GCE job or they would have applied for the GCE job but for the EIT requirement, and
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> (ii) They were or would have been rejected because of not having EIT status, or other associated characteristics (including, but not limited to passing the FOE test and satisfying the recency of degree requirement) and
>
> (iii) They had degrees in Civil Engineering and Civil Engineering Technology at the time they applied or would have applied, and
>
> (iv) They would have been certified-out for GCE in the absence of their rejection for lack of EIT status or other associated characteristics as defined above."Subparts (c), (d), and (e) of P 5 further provide:
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> "(c) The credited service date of such of the persons specified in Paragraph 5(b) above as accept such offers will be agreed to by the parties before notice of the offer of employment is given to them, subject to the following:
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> (i) No such credited service date shall be earlier than March 30, 1983.
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> (ii) The standard for determining such service dates will be the approximate date each such person would have been appointed in the absence of the EIT and associated requirements.
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> (d) The maximum number of person provided for by Paragraph 5(a) and Paragraph 5(b) together is 20.

were qualified and willing to work for the department. The court assumes that the department will comply with the requirements of PP 7, 8, 9, 10, and 11 of article XIII regarding notification to persons who might be eligible for appointment under the article and the other mechanics of making job offers, and that it will make all reasonable efforts to hire ten persons.

[*11] ***Other Benefits.*** Whether the department is required to provide other benefits involves an the interpretation of not only P 5 (b) of article XIII, which gives "credited service dates" for persons hired under the article, but also of P 7(e), which describes the method for setting their "starting salary." [7] The plaintiffs contend that the department must credit these persons not only with a "salary" level as if they had been hired at the credited service dates, but also must provide them with sick leave, vacation leave, and retirement benefits as if they had been hired on the credited service dates. The department offers a number of arguments in response. The court agrees with the plaintiffs that the department's arguments are meritless.

[*12] First, relying on P 7(e) of article XIII, the department contends that the phrase "credited service dates" applies only to the "starting salary" and not to sick leave, vacation leave, or retirement benefits. Admittedly, P 7(e) sets forth the method for calculating the "starting salary" for those hired under P 5(b). The department, however, reads the term "starting salary" in P 7(e) too narrowly. "Starting salary" includes sick leave, vacation leave, and retirement benefits. Indeed, the department admits as much when it states that persons hired under P 5(b) should "accumulate both sick leave and annual leave at the same rates they would have accumulated such benefits had they actually begun their employment on March 30, 1983," that is, the credited service date. [8] The department, however, does not go far enough. These persons must not only "accumulate" such benefits at a higher level, they must "start," in the words of the department, with "such benefits had they actually begun their employment on March 30, 1983." After all, P 7(e) uses the term "starting" salary.

[*13] This reading is consistent with intent behind PP 5(b) and 7(e). The apparent objective of these two paragraphs is to put the employee in the position he or she would have been in if the employer had not discriminated. *Cf.* *Crabtree v. Baptist Hospital of Gadsden, Inc.,* 749 F.2d 1501, 1503 (11th Cir. 1985) ("Because the object of the backpay provisions of Title VII is to make employees whole for losses suffered on account of unlawful discrimination, … fringe benefits should be included in backpay"); *see also* *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421, 95 S. Ct. 2362, 2373, 45 L. Ed. 2d 280 (1975); *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211, 252 (5th Cir. 1974). Thus, the department must provide the newly-hired persons with the fringe benefits they would have received if they had been hired on their credited service dates.

The department further contends that providing such benefits would produce a windfall for those it hires under P 5 because they would have received and accumulated the same benefits under the jobs they had prior to being hired by the department. Because the purpose is to make the newly-hired persons whole, not provide a windfall, any [*14] award of fringe benefits must be offset by the fringe benefits the newly-hired persons actually accumulated and used in their prior jobs.

Accordingly, it is ORDERED as follows:

(1) That the plaintiffs' motion to enforce article XIII of consent decree I, filed on June 12, 1995 (Doc. no. 615), is granted to the extent that defendant Department of

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(e) The State Personnel Department agrees to accept the appointment by the State Highway Department of such person named or specified in paragraphs 5(a) and 5(b) above as accept such offer, notwithstanding the inconsistency of such appointment (if any) with the Alabama Merit System Act."

[7] Paragraph 7(e) provides:

"Such of the persons named in Paragraph 5(a) of this Article as accept the offers of employment and are employed at the State Highway Department pursuant to Paragraph 5 of this Article will be credited with employment date service as of March 30, 1983 for purposes of their starting salary level in the job. It is the intention of this provision that such of the persons named in Paragraph 5(a) as are appointed pursuant to Paragraph 5 of this Article of the Settlement Decree will have their starting salary upon such employment equal to the average of the current salaries of the persons in the Graduate Civil Engineer job who started in such job on or about March 30, 1983."

[8] Defendant Department of Transportation's brief, filed on August 30, 1995 (Doc. no, 729), at 2.

Transportation shall, in the in the manner described in this order, comply with P 5(b) of article XIII of the consent decree entered on March 16, 1994 (Doc. no. 553); and

(2) That defendant Department of Transportation shall submit to the court by August 1, 1996, a report reflecting full compliance with P 5(b) as set forth in this order.

DONE, this the 23rd day of April, 1996.

Myron H. Thompson

UNITED STATES DISTRICT JUDGE