Johnson v. Reno

United States District Court for the District of Columbia
October 4, 1993, Decided ; October 4, 1993, Filed
Civil Action No. 93-0206

Reporter: 1993 U.S. Dist. LEXIS 21464

EMANUEL JOHNSON, JR., et al., on behalf of themselves and as Representatives of a Class of all Others Similarly Situated, Plaintiffs FBI AGENTS ASSOCIATION, Plaintiff-Intervenor v. JANET RENO, in her official Capacity as Attorney General of the United States of America, Defendant

Subsequent History: Motion granted by, in part, Motion denied by, in part Johnson v. Reno, 1996 U.S. Dist. LEXIS 5347 (D.D.C., Apr. 17, 1996)

Disposition: Defendant's motion for summary judgment granted and Plaintiff-Intervenor FBIAA's motion for summary judgment denied. Proposed settlement approved.

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Judges: Thomas F. Hogan, United [*8] States District Judge.

Opinion by: Thomas F. Hogan

Opinion

MEMORANDUM OPINION

This is a Title VII suit brought by a group of black Special Agents at the Federal Bureau of Investigation ("FBI") against the Attorney General of the United States. The parties have agreed on a proposed settlement, but the FBI Agents Association ("FBIAA") has been permitted to intervene on behalf of nonblack Special Agents to challenge the proposed settlement as a violation of Title VII. On September 17, 1993, the Court heard arguments of Counsel for all parties on pending motions to dismiss the claims of the intervenors and cross motions for summary judgment. After carefully considering all of the parties' motions, oppositions, replies, oral arguments, and the entire record in this case, the Court granted summary judgment against the intervenors. This opinion explains the Court's reasoning.

BACKGROUND

The plaintiffs, a group of black FBI agents, filed this action on February 1, 1993. In their complaint, the plaintiffs alleged that they and other black FBI agents were the victims of racially discriminatory employment practices at the FBI. The Court certified the plaintiff's class on April 19, 1993.

[*9] Prior to the filing of this action, the plaintiffs and the defendant ("the parties") had spent nearly two years in discussions and negotiations arising from the plaintiffs' allegations. As a result of these extensive discussions, the parties were able to negotiate a settlement agreement that provides both prospective and retroactive relief. The retroactive relief includes specified numbers of promotions, transfers, assignments, training classes, bonuses, and awards for black agents. The prospective relief includes a variety of changes in the FBI's promotion and evaluation practices. The Court has scheduled a fairness hearing to evaluate the proposed settlement agreement.

On May 24, 1993, the Court granted a motion by the FBIAA to intervene on behalf of nonblack FBI agents. The FBIAA's complaint alleges that the proposed settlement agreement violates Title VII because (1) there is no showing of a background of racial discrimination to justify the race-conscious remedial action contained in the settlement agreement; and (2) the agreement allows black FBI agents to participate in the process of redesigning FBI employment and promotion practices but excludes nonblack FBI agents from [*10] the process.

The plaintiffs and the defendant have both filed motions to dismiss the FBIAA's complaint for failure to state a claim under *Rule 12(b)(6)*. In the alternative, the defendant also asks for summary judgment. The FBIAA has replied by filing a cross motion for summary judgment on both counts of its complaint.

ANALYSIS

In considering a motion to dismiss for failure to state a claim, the Court should not dismiss a complaint for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). The Court will only grant summary judgment where, viewing the facts and inferences drawn there from in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *White v. Fraternal Order of Police*, 285 U.S. App. D.C. 273, 909 F.2d 512, 516 (D.C. Cir. 1990). The parties in this case argue based on numerous facts and statistics that are beyond the scope of the FBIAA's complaint. Therefore, the Court will assume *arguendo* that the FBIAA [*11] has stated a claim and will evaluate the pending motions as cross motions for summary judgment.

I. The Proper Standard

There appears to be some confusion among the parties as to the appropriate standard for evaluating the legality of the settlement agreement in this case. This action was

brought under Title VII of the Civil Rights Act, *42 U.S.C. 2000e et seq.* Congress has indicated that there is a strong policy preference favoring the settlement of Title VII cases. *Carson v. American Brands*, 450 U.S. 79, 88 n.14, 67 L. Ed. 2d 59, 101 S. Ct. 993 (1981). Title VII does not prohibit compromise agreements implementing race-conscious remedies, but there must be a reasonable basis for such a compromise agreement. *Kirkland v. New York State Dept. of Correctional Servs.*, 711 F.2d 1117, 1130 (2d Cir. 1983), *cert. denied*, *465 U.S. 1005, 79 L. Ed. 2d 230, 104 S. Ct. 997 (1984)*. Thus, parties may agree to settle a case without an actual admission that discrimination occurred.

In order to lawfully adopt a race-conscious remedy under Title VII, the Court must find that (1) there is an adequate factual predicate of discrimination to justify race-conscious relief; and (2) [*12] the remedy does not unnecessarily trammel the legitimate interests of nonminorities. *Hammon v. Barry*, 264 U.S. App. D.C. 1, 826 F.2d 73, 74 (D.C. Cir. 1987), *cert. denied*, *486 U.S. 1036, 100 L. Ed. 2d 610, 108 S. Ct. 2023, 47 Empl. Prac. Dec. (CCH) P38230 (1988)*. The primary confusion among the parties arises over doubts concerning the appropriate amount of evidence necessary to establish a predicate of discrimination. Under Title VII, the predicate of discrimination necessary to justify race-conscious relief is proven by demonstrating a "manifest imbalance" that reflects an underrepresentation of minorities in "traditionally segregated job categories." *Johnson v. Transportation Agency, Santa Clara, California*, 480 U.S. 616, 631, 94 L. Ed. 2d 615, 107 S. Ct. 1442 (1987). However, under the equal protection clause of the Fourteenth Amendment, strict scrutiny analysis provides that race-conscious relief is unlawful absent a "strong basis in evidence for the conclusion that remedial action is necessary." *City of Richmond v. Croson*, 488 U.S. 469, 500, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989). [1]

[*13] In their motions, the plaintiffs and the defendant argue that the *Johnson* manifest imbalance standard should apply to this case. However, during arguments at the hearing on September 17, the parties seemed to suggest that *Croson*'s strong basis in evidence standard is more appropriate. The FBIAA appears to rely on the *Johnson* standard, although its position is somewhat unclear.

The difficulty in determining the appropriate standard to apply arises from the fact that this case involves a Title VII challenge to a federal agency's attempt to voluntarily incorporate race-conscious relief into a settlement of a Title VII suit. As an initial matter, *Johnson* should certainly be used to determine whether the proposed settlement complies with Title VII. However, the more difficult question concerns what, if any, additional analysis is necessary to determine whether the agreement satisfies the Constitution.

Several courts have indicated that state or local entities that incorporate affirmative action programs into settlements of Title VII challenges must satisfy the *Croson* strict scrutiny standard. *E.g.* *United Black Firefighters Ass'n v. City of Akron*, 976 F.2d 999, 1009 (6th Cir. 1992) [*14] ("strong basis in evidence test" used to determine whether adequate evidence of past discrimination exists to justify consent decree). However, the FBI is a federal agency and as such is not subject to the equal protection clause of the Fourteenth Amendment. While the *Fifth Amendment* has been interpreted as imposing equal protection guarantees similar to those provided by the Fourteenth Amendment, the Court has been unable to find any post-*Croson* cases in which the *Croson* standard has been applied to voluntary race-conscious relief granted by a federal agency in the Title VII context.

In *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547, 111 L. Ed. 2d 445, 110 S. Ct. 2997 (1990), the Supreme Court found that *Croson* did not prescribe the level of scrutiny to be applied to a benign racial classification that was employed by Congress. *Id.* at 565. *Metro Broadcasting* dealt with minority preferences in certain FCC activities, but did not address employment policies or Title VII. Thus, in the Title VII context, while *Johnson* governs private employers and *Croson* sets a constitutional standard for state and local employers, it is somewhat unclear [*15] which standard applies to a race-conscious remedy adopted by the federal government. Since the race-conscious relief in this case was not specifically the result of Congressional activity, it is unclear whether *Metro Broadcasting* should affect the situation in this case. [2]

While the parties' confusion indicates that this case presents [*16] an interesting question of constitutional law, this Court does not need to decide whether the agreement must meet only the requirements of Title VII or

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[1] Under *Croson*'s strict scrutiny analysis, there must be a strong basis in evidence to justify race-conscious remedial relief and the relief must be narrowly tailored to serve a compelling governmental purpose. *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1446 (9th Cir. 1989).

[2] The question is further muddled because it is not clear whether the FBIAA is challenging the settlement agreement solely on Title VII grounds or whether it is also arguing that the agreement is unconstitutional. The complaint and the pleadings tend to argue that the agreement violates Title VII. However, there are a few references to "equal employment rights" and the equal protection clause in the complaint and the FBIAA's motions. *E.g.*, FBIAA Complaint at P 22. In viewing the complaint in the light most

whether it must also satisfy strict scrutiny. Under either standard, the Court is satisfied that the settlement agreement has an adequate factual predicate to justify race-conscious relief. Additionally, the settlement agreement does not unnecessarily trammel the rights of nonminorities. Thus, the proposed settlement agreement is reasonable and violates neither Title VII nor the U.S. Constitution.

II. Count One of the FBIAA's Complaint

The first count of the FBIAA's complaint essentially alleges that the rights of nonblack FBI agents are violated by the proposed settlement agreement because there is no showing of a background of racial discrimination at the FBI. Both the plaintiffs and the defendant have introduced statistical analyses prepared by experts that assess the racial distribution of Special Agents in the FBI. The FBIAA has not introduced evidence from a separate expert challenging the findings of the parties' experts, but rather challenges various aspects of the experts' findings to support the assertion that [*17] an adequate factual predicate of discrimination is absent.

A. Factual Predicate for Race-Conscious Relief

In assessing whether a factual predicate for discrimination exists in a Title VII case, a court can examine statistical evidence, as well as any other evidence introduced by the parties. *Palmer v. Shultz*, 259 U.S. App. D.C. 246, 815 F.2d 84, 96 (D.C. Cir. 1987). Statistical evidence alone can be enough if that evidence indicates a five percent probability of randomness in a two-tailed test. Such a result would require statistical evidence measuring 1.96 standard deviations. *Id.*

A factual predicate of discrimination need only be shown in the areas where race-conscious relief is provided. Although the plaintiffs have challenged numerous aspects of the FBI's employment, affirmative race-conscious relief is only provided in a few areas: (1) six black Special Agents will be promoted to GM 14 positions; (2) nine black GM 14 level Special Agents will be transferred into three specific divisions; (3) 13 black relief supervisors will be promoted to principal relief supervisor positions, (4) 15 black special agents will be placed into in-service training programs of their choice; [*18] (5) 43 black Special Agents will be transferred to Residence Agencies; (6) five black Special Agents will be transferred from secondary SWAT teams to primary teams and five black Special Agents will be given priority consideration for placement in SWAT training programs; (7) 20 black Special Agents will be given priority consideration for technical training; and (8) the plaintiff class will be paid $ 11,989.00 in awards and bonuses. All other relief provided by the settlement agreement would be race neutral and thus requires no factual predicate of discrimination.

1. Promotions and Transfers

With respect to the GM 14 promotions, the settlement agreement only provides relief in three divisions. Under the terms of the agreement, six black agents will be promoted to GM 14 positions in the Criminal Investigative, Intelligence or Inspection Divisions and nine black GM 14 agents will also be transferred into those divisions.

The Court finds that there is a factual predicate to justify this relief. The defendant's expert, Dr. Bernard R. Siskin, found statistically significant shortfalls in the number of black agents transferred or promoted into these divisions. Each of these shortfalls [*19] exceeded 2.4 units of standard deviation. Siskin Declaration at Table 78. Additionally, the plaintiff's expert, Charles R. Mann, found that blacks were: underrepresented in these positions and that the statistical significance of the underselection of black agents in the three divisions exceeded 99 percent. Mann Declaration at P 15. This Court finds that this evidence adequately demonstrates a statistical disparity between the minority percentage in the relevant statistical pool as compared to the minority percentage in the group of persons selected for the positions in question. The statistical analyses thus conform with those generally used in discrimination cases. *United Black Firefighters Ass'n*, 976 F.2d at 1011. This evidence indicates that a manifest imbalance exists in these positions and it provides a strong basis in evidence to justify remedial relief, thus satisfying the factual requirements of both *Johnson* and *Croson*.

In its motions and at the hearing, the FBIAA vociferously challenges these transfers and promotions. The FBIAA's arguments fail to persuade the Court. First, some of the FBIAA's arguments are "bottom line" arguments which the Supreme [*20] Court found to be inadequate to defeat claims of employment discrimination in *Connecticut v. Teal*, 457 U.S. 440, 456, 73 L. Ed. 2d 130, 102 S. Ct. 2525 (1982). The fact that some members of a minority group are treated favorably does not justify discriminatory treatment of other members of that group. *Id.* at 454-455. Second, the arguments are made based upon selective use of various figures and quotations from the parties' experts

favorable to the FBIAA. the Court will interpret these references to equal protection as challenges brought under the equal protection guarantees of the *Fifth Amendment*.

rather than any type of statistical analysis. [3] Such an argument simply fails to raise any legitimate doubt concerning the accuracy of the parties' statistics. Given that these undisputed statistics provide evidence of a very significant disparity, the Court finds that there is a sufficient factual predicate to justify the relief granted in the settlement agreement.

[*21] **2. Other Race-Conscious Relief**

A careful review of the record indicates that there is statistical evidence of discrimination to support each additional grant of race-conscious relief. There is also anecdotal evidence of discrimination that bolsters the persuasiveness of the statistical evidence. The combination of statistical and anecdotal evidence provided by the parties provides an adequate factual predicate to justify the race-conscious aspects of the settlement agreement.

The parties' pleadings and their statistical analyses indicate that there is a statistically significant underrepresentation of blacks among those promoted to principal relief supervisors, those attending training programs, those assigned to resident agencies, and those selected for SWAT teams and other technical teams. Additionally, blacks who received awards and bonuses received statistically significantly less money than nonblacks. However, statistical evidence is not the only valid means of showing discrimination. *United Black Firefighters Ass'n*, 976 F.2d at 1011. The parties also acknowledge that there is anecdotal evidence that suggests that blacks have been discriminated against [*22] in some of these areas. Although the Court could spend a wealth of time delineating the statistics and anecdotal evidence provided by the parties, it will not do so. It is apparent to the Court that, the record fully supports a finding that there is a manifest imbalance in the specific areas in which the settlement agreement grants race-conscious relief. This evidence also provides a strong basis for the conclusion that remedial action is necessary in the areas in which the settlement agreement provides race-conscious relief. Thus, under either *Croson* or *Johnson*, the appropriate factual predicate exists.

B. Impact of the Agreement on Nonblacks

The FBIAA only asserts that the appropriate factual predicate has not been established and does not argue that the race-conscious relief unnecessarily trammels the rights of nonblack FBI Special Agents. This is wise because it is apparent to the Court that the Settlement Agreement does not unnecessarily trammel the rights of nonblacks. [4]

[*23] The plaintiffs brought this case challenging numerous aspects of the FBI's employment practices. However, the settlement agreement provides quite limited and narrowly-tailored relief. No agents will be displaced from their positions. At best, some nonblack agents may see short delays in their advancement. The settlement agreement does not attempt to maintain a racial balance and does not present an absolute bar to the job advancement of nonblacks, it is merely a temporary measure aimed at relieving a manifest racial imbalance in certain areas of the FBI. *See Hammon*, 826 F.2d at 81. The parties produced this settlement after several years of negotiation and the Court finds that these negotiations have not produced an agreement that will be detrimental to nonblacks in any way that violates Title VII or the Constitution.

Viewing the record in the light most favorable to the FBIAA, there is no genuine issue of fact at issue and the plaintiffs and defendant are entitled to a judgment as a matter of law. Thus, the FBIAA's motion for summary judgment on the first count of its complaint is denied and the defendant's motion in the alternative for summary judgment is granted.

[*24] **III. Count Two of the FBIAA's Complaint**

In the second count of the its complaint, the FBIAA challenges the prospective relief granted by the settlement agreement by alleging that the agreement grants black Special Agents numerous rights and privileges concerning the development of the FBI's employment practices and policies. The FBIAA claims that nonblacks are denied similar rights and privileges. While the Court had some initial concerns about this aspect of the agreement, the facts in the record indicate that this is not race-conscious relief. However, even if this were construed as race-conscious relief, it does not constitute a violation of Title VII or the Constitution.

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[3] At oral argument, the attorney for the FBIAA conceded that he was not challenging the statistical findings of the parties' experts. Nevertheless, he asserted that the raw numbers indicate that blacks have been favored and have not been the victims of discrimination.

[4] Applying strict scrutiny analysis, the Court would have to find that the plan is narrowly tailored to meet its objectives. Assuming it were necessary to perform this analysis, the Court has no difficulty concluding that the relief is narrowly tailored and serves a compelling governmental interest. *Davis*, 890 F.2d at 1446. In this case, the race-conscious relief is specifically limited to eliminating alleged discrimination in areas where discrimination is found and does not unnecessarily trammel the rights of nonminorities. Additionally, there is a compelling governmental interest in eliminating racial discrimination in its law enforcement offices.

The second count of the FBIAA's complaint alleges that the nonblacks are excluded from the process of redesigning the FBI's employment practices and policies. In particular, the FBIAA expresses concern about the lack of nonblack representation on a committee that will be created as part of the settlement agreement's prospective relief. Additionally, the FBIAA alleges that black agents will be permitted opportunities to review and comment on proposals and will be provided with access to data that will [*25] be unavailable to nonblack agents.

As part of the settlement agreement's prospective relief, the FBI has agreed to retain outside consultants to examine and develop recommendations concerning the FBI's Career Development Program, Special Agent Performance Appraisal System, Management Aptitude programs, and disciplinary procedures. The settlement agreement provides for the establishment of a three-member committee to monitor and comment on the consultants' proposals and recommendations. This committee will consist of three industrial psychologists. One member will be selected by the plaintiffs, one by the FBI, and the third will be chosen by the other two members of the committee. While this committee will be able to comment on proposals, neither the committee nor the outside consultants have any power to bind the FBI.

The FBIAA argues that allowing black agents to select a member of this committee is impermissible race-conscious relief that unnecessarily trammels the rights of nonblack agents. However, after reviewing all of the record, it is apparent to this Court that the committee is not some sort of race-conscious relief, but merely a race neutral method by which the interested [*26] parties can monitor the progress of the settlement agreement. Monitoring committee that include members of the plaintiff class have been used in other instances. *See, e.g.* *Lamphere v. Brown University*, 706 F. Supp. 131 (D.R.I. 1989); *Luevano v. Campbell*, 93 F.R.D. 68, 92 (D.D.C. 1981). Membership on the committee is not determined on the basis of race; the plaintiff class merely has the opportunity to select one of the members. This is simply not affirmative race-conscious relief that requires a factual predicate of discrimination.

Even assuming that the committee selection process is considered to be race-conscious relief, it appears that the parties have presented adequate statistical and anecdotal evidence of discrimination in the programs on which the committee will be able to comment. Additionally, there is nothing in the record to indicate that the rights of nonblack agents are unnecessarily trammeled by the committee or the process of selecting committee members. The FBI has indicated that nonblack agents will have an opportunity to review and comment on the work of the outside consultants through the Special Agent Advisory Committee (SAAC). [*27] The Court can not see how the rights of nonblack workers are unnecessarily trammeled when they have the same opportunity to comment on the consultants' nonbinding proposals as the members of the committee.

The remaining contentions of the FBIAA have also been effectively refuted by the parties. Although the FBIAA alleges that nonblack agents will be treated differently from blacks in terms of access to statistics and opportunities to comment on those policies that are developed by the FBI without outside consultants, the FBI has submitted a sworn statement directly to the contrary. The statement of Weldon L. Kennedy indicates that all Special Agents will have access to statistical reports. The statement also says that all agents, through the SAAC, will have the opportunity to review and comment on policies and procedures developed without the assistance of consultants. Thus, the record provides no evidence that there is any race-conscious relief in this area or that the rights of nonblacks are in any way trammeled with respect to access to statistics or opportunities to comment on policies and procedures.

In light of the evidence presented, the parties' motions, and their oral argument, [*28] it is clear to the Court that the second count of the FBIAA's complaint raises no genuine issue of material fact. The original parties are entitled to judgment as a matter of law. Thus, the FBIAA's motion for summary judgment on the second count of its complaint is denied and the defendant's motion for summary judgment is granted.

CONCLUSION

For all of the reasons discussed above, the defendant's motion for summary judgment is granted and the FBIAA's motion for summary judgment is denied. The Court will conduct a fairness hearing on October 8, 1993 at 10:00 a.m. pursuant to *Fed. R. Civ. P. 23(e)*.

October 4, 1993

Date

Thomas F. Hogan

United States District Judge

ORDER

Pending before the Court is the Request to Appear at Fairness Hearing of Christopher Kerr. Mr. Kerr requests the Court's permission to appear at the October 8, 1993 hearing that this Court has scheduled pursuant to *Fed. R. Civ. P. 23(e)*.

Having considered Mr. Kerr's request, the oppositions thereto, and Mr. Kerr's reply, it is this 4th day of October, 1993 hereby

ORDERED that Mr. Kerr's request to appear is GRANTED; and it is further

ORDERED that Mr. Kerr will be given fifteen (15) minutes [*29] to present his arguments but is precluded from arguing any issues that have been previously decided by this Court.

Thomas F. Hogan

United States District Judge