UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA, 77 C 1881

Plaintiff,

and

VIRGINIA O'HALPIN, GLADYS A. SHARSHON, MARGARET M. CAVANAGH and JEANETTE TURSELLINO,

Applicants for Intervention as Plaintiffs,

-against-

NASSAU COUNTY, et al.,

Defendants.
----------x

ALICE WOODSON WHITE, et al., 76 C 1869

Plaintiffs,

and

VIRGINIA O'HALPIN, GLADYS A. SHARSHON, MARGARET M. CAVANAGH and JEANETTE TURSELLINO

Applicants for Intervention as Plaintiffs,

-against-

NASSAU COUNTY POLICE DEPARTMENT, et al.,

Defendants.
----------x

MEMORANDUM OF
DECISION AND ORDER

September 19, 1983

A P P E A R A N C E S :

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MISHLER, District Judge

On June 27, 1983, Virginia O'Halpin, Gladys A.

Sharshon, Margaret M. Cavanagh and Jeanette Tursellino (hereinafter "Applicants") moved to intervene in these actions as plaintiffs. They claim that they have an unconditional right to intervene in 77 CV 1881 pursuant to 42 U.S.C. § 2000e-5(f)(1), a permissive right to intervene, and that their motion is timely. Plaintiff United States opposes the motion on the grounds that it was untimely, that the applicants do not qualify for intervention as a matter of right under Rule 24(a), Fed.R.Civ.P. and that permissive intervention under Rule 24(b), Fed.R.Civ.P., is not warranted. The defendant Nassau County opposes the motion for similar reasons.

FACTS

On October 12, 1976, Civil Action No. 76 Civ. 1896 was filed by Alice Woodson White, et al., on behalf of women employees and applicants for employment in the Nassau County Police Department (hereinafter the "NCPD"). The complaint alleged sex discrimination by the NCPD and the Nassau County Civil Service Commission (hereinafter the "NCCSC") in violation of, inter alia, the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII") and the Civil Rights Act of 1966, 42 U.S.C. §§ 1983, 1985(3), 1986 and 1988. District (now Circuit) Court Judge George Pratt entered an Order on May 16, 1977, granting in part plaintiff's motion for class certification. The class was to consist of all women, who, at any time

since January 1, 1966, had been employed by the NCPD in sworn jobs.

Plaintiff United States filed its Complaint, Civil Action No. 77 Civ. 1881, on September 21, 1977, against Nassau County, the Commissioner of Police, and the Nassau County Civil Service Commissioners alleging, inter alia, that the defendants were engaged in a pattern or practice of employment discrimination against women, blacks and Hispanics with respect to job opportunities in the NCPD, in violation of Title VII, the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. § 1221, et seq. (the "Revenue Sharing Act"), the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. § 3766(c)(3) (the "Safe Streets Act"), and the Fourteenth Amendment to the Constitution of the United States.

During the five years following the commencement of the White and the United States actions, there was extensive discovery by all parties, numerous hearings and court orders, and widespread coverage of the litigation by the media. On April 21, 1982, just two months prior to the scheduled June trial date and following a hearing, the District Court approved and entered a

Consent Decree in the United States action. This Decree, agreed to by all of the parties, was designed to correct the NCPD's pattern and practice of discrimination against blacks, Hispanics and women. It provided for extensive prospective relief as well as remedial relief for those individuals who the United States contended were victims of unlawful discrimination.

The Consent Decree in the United States action specifically provided for an award of up to 1.3 million dollars to be divided among those individuals who had been unlawfully discriminated against on the basis of race, sex or national origin, and who would have been hired but for that unlawful discrimination. Relief in the form of job offers and retroactive seniority was also provided. The Consent Decree set forth the requirements that had to be met in order to obtain such relief.

It was uncontested that until 1974 the NCPD maintained dual lines of progression for men and women. For example, on March 18, 1972, the NCPD administered the identical written examination to men and to women for the positions of police patrolman, policewoman, cadet and cadette. Although a substantial number of women took the March 18, 1973 examinations for policewoman and police

cadette and achieved higher scores than did many of the men subsequently appointed, not a single woman was appointed as a result of those examinations. Thus, one sub-class of individuals who were granted relief under the Consent Decree were women who took the March 18, 1972 written examination, and who met the necessary qualifications at the time they sat for the examination and at the time they otherwise would have been appointed. (Consent Decree, Paras. 43, 46).

In effectuating the Consent Decree, the United States determined that Applicants O'Halpin, Sharshon and Tursellino, although having sufficient examination scores, did not meet the age requirements for appointment or hire by the NCPD. Candidates for police patrolman were required to be not less than 20 and not yet 29 years of age on the date of the written examination. On March 18, 1972, Applicants O'Halpin and Sharshon exceeded the County's maximum age requirement for appointment to the rank of police patrolman, and would not have been eligible for appointment even if they had been men. Candidates for police cadet became ineligible for appointment upon their twenty-first birthday. Applicant Tursellino, born May 6, 1952, was 19 years old on March 18, 1972 and therefore was too young to take the police

patrolman examination. She was 22 years old on July 12, 1974, the date upon which males were appointed as cadets. Therefore, Applicant Tursellino also exceeded the County's maximum age requirement for appointment as a police cadet. Thus, Applicant Tursellino would not have been appointed either as a patrolman or a cadet, even if she had been a male.

The United States determined that Applicant Cavanagh had been unlawfully denied appointment to the NCPD and thus was entitled to relief in the form of a back pay award of $6,080.00.[1]/

On August 18, 1982, following a fairness hearing, the District Court approved and entered a Consent Decree in the White action. None of the Applicants were awarded any relief under the White Decree. Applicant Cavanagh was notified on August 3, 1982, as required under Rule 23(c)(2), Fed.R.Civ.P., of the contents of the proposed Consent Decree. Cavanagh was also notified that on August 18, 1982 the court would hear evidence by class members regarding the fairness and adequacy of the Decree. Applicants O'Halpin, Sharshon and Tursellino did not receive relief under the White Consent Decree because they were not class members.

It is now approximately one year since the entry of the consent decrees in the White and in the United States actions. The relief provisions of the White Consent Decree have been fully implemented; the relief provisions of the United States Consent Decree are nearly fully implemented. Applicants at this late date seek to intervene in each of these actions. They seek to have O'Halpin, Sharshon and Tursellino appointed to the NCPD with back pay and retroactive seniority, and to have $100,000 in compensatory and punitive damages awarded to each of the Applicants. (Proposed Complaint, p.9).

DISCUSSION

The initial inquiry in any motion to intervene is whether the motion is timely. NAACP v. New York, 413 U.S. 345, 369 (1973). The timeliness of a motion to intervene is determined by the trial court from all of the circumstances of the case. This determination is within the sound discretion of the court. Id. at 366. The Courts of Appeal have articulated several factors which should be considered in determining whether a motion to intervene has been timely made, among which are:

a. the stage to which the proceedings have progressed when the movant seeks to intervene;

b. the prejudice to the existing parties which might be caused by the resultant delay; and

c. the reason for that delay.

United States Postal Service v. Brennan, 579 F.2d 188, 191 (2d Cir. 1978); United States v. Allegheny-Ludlum Industries, 553 F.2d 451 (5th Cir. 1977); Commonwealth of Pennsylvania v. Rizzo, 530 F.2d 501, 506 (3rd Cir.), cert. denied sub nom., Fire Officer's Union v. Pennsylvania, 426 U.S. 921 (1976); Nevilles v. EEOC, 511 F.2d 303 (8th Cir. 1975). Measured against this three-factor standard, it is clear that the instant motion to intervene comes too late.

Nearly seven years have passed since October 12, 1976, when Alice White filed her complaint against the NCPD; nearly six years have passed since the United States filed its complaint on September 21, 1977; over a year has passed since the United States Consent Decree was entered; and it has been nearly a year since the White Consent Decree was entered. The parties long ago ceased litigating the issues whether Nassau County is liable for violations of Title VII and the relief needed

to prevent future violations and to correct past violations. These issues were resolved by the two Consent Decrees.

In assessing the reason for a delayed motion for intervention, it is important when an individual knows or reasonably should have known that his rights were being affected. NAACP v. New York, supra, 413 U.S. at 366.[2]/ Both the Proposed Complaint and the Notice of Motion clearly reflect that Applicants had knowledge of the proceedings in each of the actions against the NCPD. Applicant Cavanagh received actual notice on August 3, 1982, that the proposed White Consent Decree did not provide her with any monetary relief, and had an opportunity to voice her objections at the August 18, 1982 fairness hearing.

The Applicants were aware of the Consent Decrees, yet they took no substantive action to assert their interests for several years. Applicants seek to rely on United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), to excuse their delay in moving to intervene. However, this reliance is misplaced. Here, as in United Airlines, the district court certified one class of women in a Title VII case and the applicant for intervention

was a putative member of another class which was refused certification. That applicant filed her motion to intervene for the purpose of appealing the adverse class determination order 18 days after the district court's final judgment. Applying the standards it earlier had set forth in NAACP v. Neew York, the Court in United Airlines concluded that as a putative class member, the proposed intervenor acted in a timely manner because she filed her motion within the time period in which the named plaintiffs could have taken appeal. Id. at 396.

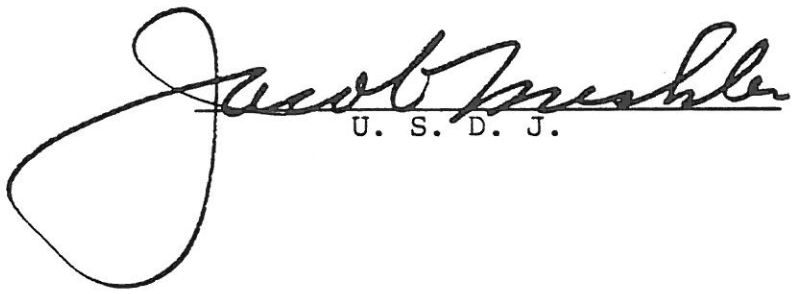
As demonstrated above, it has been at least six years since the White and United States actions were commenced and approximately a year since the Consent Decrees were approved and entered. This is well beyond the time for appeal which, since there was United States involvement, would have been 60 days.

The Applicants attempt to excuse the tardiness of their motion by claiming that the attorney for the United States, Mr. Gadzichowski, privately assured Ms. O'Halpin that the United States Department of Justice was representing her. Mr. Gadzichowski asserts by affidavit that the alleged conversation never occurred. Even if the conversation did occur, it does not justify Ms.

O'Halpin's complete reliance on the conversation once she had received notice of the consent decree and had an opportunity to inspect it. This reliance was not reasonable and the alleged assurances fall far short of conduct which would estop the United States from asserting the untimeliness of the motion to intervene. See Schweiker v. Hansen, 450 U.S. 785, 790 (1981).

The motion to intervene is denied, and it is

SO ORDERED.



U. S. D. J.

FOOTNOTES

1/ The maximum negotiated amount of back pay for any woman in Cavanagh's class was $17,600.00. However, in accordance with Title VII and consistent with the approach taken by the United States with respect to other individuals entitled to relief under the Decree, Cavanagh's relief was reduced to the extent that she successfully mitigated her damages. Cavanagh was appointed as a police officer in the NCPD on February 23, 1977.

2/ In Carey v. Klutznik, 88 F.R.D. 249 (S.D.N.Y. 1980), intervention was held to be untimely although trial on the merits had not yet commenced. The District Court found that in light of the extensive press coverage given to the litigation, Suffolk County was or should have been aware of the pendency of the suit in sufficient time to intervene at an earlier date so as not to have prejudiced the parties to the action.