IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, and VIRGINIA O'HALPIN, GLADYS A. SHARSHON, MARGARET M. CAVANAGH and JEANETTE TURSELLINO, Applicants for Intervention as Plaintiffs, v. NASSAU COUNTY, et al., Defendants.	CIVIL ACTION NO. 77-C-1881
ALICE WOODSON WHITE, et al., and VIRGINIA O'HALPIN, GLADYS A. SHARSHON, MARGARET M. CAVANAGH and JEANETTE TURSELLINO, Applicants for Intervention as Plaintiffs, v. NASSAU COUNTY POLICE DEPARTMENT, et al., Defendants.	CIVIL ACTION NO. 76-C-1869

MEMORANDUM OF PLAINTIFF UNITED STATES IN OPPOSITION TO THE MOTION OF VIRGINIA O'HALPIN, et al., TO INTERVENE AS PLAINTIFFS

On June 27, 1983, Virginia O'Halpin, Gladys A. Sharshon, Margaret M. Cavanagh and Jeanette Tursellino (hereinafter "Appli-

cants") filed a motion to intervene in these actions as plaintiffs. Plaintiff United States opposes the motion on the grounds that: it is untimely; Applicants do not qualify for intervention as a matter of right under Rule 24(a), F.R. Civ. P.; and permissive intervention under Rule 24(b), F.R. Civ. P., is not warranted.

STATEMENT OF THE 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 sworn force of 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") with respect to employment opportunities 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 1866, 42 U.S.C. §§1983, 1985(3), 1986 and 1988. District Court Judge George C. 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 (Memorandum and Order, p.10, Sec. IV).

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, 1/ 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.

1/ Indeed, as early as June 12, 1978, the District Court entered a preliminary injunction order (Memorandum and Order, p. 1) in which the Court noted that this was the thirteenth order issued in these two actions.

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 the United States contended had been unlawfully discriminated against on the basis of race, sex or national origin, and who the United States contended 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 by the individual in order to obtain such relief.

In this regard, it was uncontested that until 1974 the NCPD maintained dual lines of progression for men and women such that only men could be appointed as police patrolmen and police cadets, and only women could be appointed as policewomen and police cadettes. 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. (Nassau County's 7/8/81 Response to Para. 113 of the United States First Request to Admit.) Although a substantial number of women took the March 18, 1972 examinations for policewoman and police cadette and achieved higher scores than did many of the numerous men subsequently appointed to the ranks of police patrolman and police cadet, not a single woman was appointed as a result of those examinations. Thus, one sub-class of individuals provided relief under the Consent Decree consisted of those women who took the March 18, 1972 written examination, and who met the

qualifications for the position of police patrolman or police cadet at the time they sat for the examination as well as at the time they otherwise would have been appointed to the position of police patrolman or police cadet based upon their examination scores. (Consent Decree, Paras. 43, 46).

In accordance with the mechanism for relief set out in the Consent Decree, the United States determined that Applicants O'Halpin, Sharshon and Tursellino, although scoring higher than the general average score of any male appointed either as a police patrolman or a police cadet as a result of the March 18, 1972 examinations, did not meet the age requirements for appointment or hire by the NCPD. (Affidavit of Melissa P. Marshall, 8/16/82, para. 4, a copy of which is attached hereto). 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 (Marshall Affidavit, para. 3). On March 18, 1972, Applicant O'Halpin, born September 20, 1939, was 32 years old and Applicant Sharshon, born November 23, 1940, was 31 years old. Therefore, 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 (Id., para. 4). Candidates for police cadet became ineligible for appointment once their twenty-first birthday was reached (Id., para. 3). 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 who had a lower general average score on the March 18, 1972 exam than Tursellino achieved (Id., para. 4). Therefore, Applicant Tursellino also exceeded the County's maximum age requirement for appointment as a police cadet even if she had been a male. For these reasons, 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. 2/

On August 18, 1982, following a fairness hearing, the District Court approved and entered the Consent Decree in the White action. None of the Applicants here were awarded any relief. In this regard, Applicant Cavanagh was notified on August 3, 1982, as required under Rule 23(c)(2), F.R. Civ. P., of the contents of the proposed Consent Decree. In addition to such notice that she would not receive any relief under the proposed White Consent Decree, Cavanagh was also notified of the August 18, 1982 hearing in which the Court would hear evidence by class members regarding

---

2/ The maximum negotiated amount of back pay for any woman in Cavanagh's class (Consent Decree, para. 43, p. 16) was $17,600.00. However, in accordance with Title VII law, 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 (Marshall Affidavit, para. 4). Cavanagh was appointed as a police officer in the NCPD on February 23, 1977.

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 $100,000.00 in compensatory and punative damages awarded to each of the Applicants (Proposed Complaint, p.9). In the alternative, Applicants seek intervention in order to appeal the denial of a class of applicants in the White action, to obtain reconsideration of the United States Consent Decree regarding relief, and to file an appeal regarding the appropriateness of that relief (Notice of Motion, p.8). As the United States will hereinafter demonstrate, the Court should deny this Motion as untimely. Additionally, even if this Motion had been timely filed, Applicants do not qualify for intervention as of right under Rule 24(a), F.R. Civ. P., nor do they qualify for permissive intervention under Rule 24(b), F.R. Civ. P.

ARGUMENT

1. The Court Should Deny Applicants' Motion To Intervene On The Ground That It Is Untimely.

The threshold question in any motion to intervene, regardless of whether claimed as of right under Rule 24(a), F.R. Civ.

P., or sought permissively under Rule 24(b), is whether the motion is untimely. NAACP v. New York, 413 U.S. 345, 369 (1973). The timeliness of a motion to intervene is to be determined by the trial court from all of the circumstances of the case, and the determination is within the sound discretion of court. Id. at 366. In this regard, 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 (2nd Cir. 1978); United States v. Allegheny-Ludlam 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.

This motion for intervention is being advanced at an extremely late stage. 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 of whether Nassau County is liable for violations of Title VII or what type of relief is required to prevent future violations and to correct for the effects of past violations; these issues were resolved by the two Consent Decrees.

The standard to be applied in the question of timeliness is that of when did an individual know or reasonably should have know that his rights were being affected. NAACP v. New York, supra, 413 U.S. at 366. 3/ 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, of the proposed entry of the White Consent Decree, which did not provide her with any monetary relief, and had an opportunity to voice her objections at the August 18, 1982 fairness hearing. The United States Consent Decree requires, on its face, that in order to obtain relief alleged victims of discrimination had to meet the qualifications for the position of police patrolman or police

---

3/ In Carey v. Klutznik, 88 F.R.D. 249 (S.D. N.Y. 1980), untimely intervention was found before a trial on the merits had even 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, which would not have prejudiced the parties to the action.

cadet at the time they sat for the examinations and at the time they otherwise would have been appointed to the position of police patrolman or police cadet but for their sex. Furthermore, the United States Consent Decree placed a cap on the amount of negotiated back pay awarded to individuals within each class of discriminatees entitled to that relief (United States Consent Decree, para. 46, p. 21).

The Applicants were aware of the Consent Decrees, yet they slept on their rights. 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, even the most cursory review of United Airlines reflects that 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 plaintiff intervention was a putative member of another plaintiff 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. New 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 appeal 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 commenced and approximately a

year since the Consent Decrees were approved and entered. This is well beyond the appeal time which, since there was United States involvement, would have been 60 days.

Courts are reluctant to permit intervention after a judgment or order has resolved the disputed issues because the parties and the court -- having gone to the expense of trial and decision or having accepted a compromise in order to avoid the expense, delay and uncertainty of litigation -- would be forced back to a litigative posture and therefore would be prejudiced. See, e.g., Crown Financial Corp. v. Winthrop Lawrence Corp., 531 F.2d 76, 77 (2nd Cir. 1976) (per curiam); Firebird Society of New Haven, Inc. v. New Haven Board of Fire Commissioners, 66 F.R.D. 457, 464-65 (D. Conn.), aff'd mem., 515 F.2d 504 (2d Cir.), cert. denied, 423 U.S. 867 (1975); Allegheny Corp. v. Kirby, 344 F.2d 571, 574 U.S. 28 (1966); Commonwealth of Pennsylvania v. Rizzo, supra; Sprit v. Teachers Ins. and Annuity Association., 93 F.R.D. 627 (S.D. N.Y. 1982).

This proposition was succinctly stated by the First Circuit in affirming as untimely an attempt to intervene by a group of public employee unions who sought to challenge a similar consent decree, Culbreath v. Dukakis, 630 F.2d 15 at 22 (1st Cir. 1980):

> As long as this suit remains unresolved, the public and private resources invested in it will lie fallow and opportunities to rectify the wrongs of which the plaintiffs complain are unrealized.

For these reasons, courts grant motions to intervene after judgment or order only rarely, and in the most extreme cases. See,

e.g., Delaware Valley Citizens' Counsel for Clean Air v. Commonwealth, 674 F.2d 970, 974 (3rd Cir. 1982); United States v. Allegheny - Ludlum Industries, Inc., 553 F.2d 451 (5th Cir. 1977), cert. denied, 435 U.S. 914 (1978).

The decision in Delaware Valley was recently quoted and relied upon by the Seventh Circuit (per Posner, J.) in denying a motion to intervene filed after entry of a consent decree. United States v. South Bend Community School Corp., _____F.2d_____ (No. 82-2910, 7th Cir., June 23, 1983). The Court there observed (Slip Op. 3-4) that the purpose of the timeliness requirement

> ". . .is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal."

The Court went on to state that the movant class "should have filed within days of the April 17 order, if not sooner." Ibid.

Applicants' Motion for Intervention has come too late; intervention at this time will only cause the plaintiffs, and in particular the United States, to lose their bargains and to suffer prejudice in their attempt to effect fairness in employment. All of the relief in the White action has been fully implemented; back pay has already been distributed. The United States already has allocated all of the negotiated back pay amounts under its Consent Decree and has substantially implemented all of the relief under the Decree. Applicants' motion is untimely and no persuasive circumstances have been offered to excuse that delay. Any intervention at this late date would only create severe prejudice for all parties.

2. The Court Should Deny Intervention As Of Right Under Rule 24(a), F.R. Civ. P.

The Courts have uniformly held that under Rule 24(a), F.R. Civ. P., private individuals are not entitled to intervention as a matter of right in pattern and practice actions, such as the suit brought by the United States under Section 707 of Title VII of the Civil Rights Act of 1964, as amended. See, e.g., United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir., 1975); United States v. City of Philadelphia, 499 F. Supp. 1196 (E.D. Pa., 1980). The courts in these cases set forth two important policies for denying intervention as a matter of right: first, "the policy of voluntary compliance with Title VII [which] could be severely thwarted by the interpositions of objections to settlements," United States v. City of Philadelphia, 499 F. Supp. 1199 (E.D. Pa., 1980); and, second, the "strong judicial policy against non-express private intervention in government enforcement litigation", United States v. Allegheny-Ludlam Industries Inc., supra, 517 F.2d at 844. These same policy considerations mandate denial of a right to intervene in this case.

While Applicants seem to make much of Section 706(f)(1) of Title VII, which allows intervention in an action brought by the United States under Section 706, that assertion overlooks a salient point: this right of intervention is available only to individuals who filed charges with the Equal Employment Opportunity Commission (the "EEOC") and on whose behalf the United

States is suing. None of the Applicants ever filed a charge with the EEOC. Additionally, the United States action was, in effect, litigated as a Section 707, or pattern and practice, suit. In any case, such an intervention provision would not relieve the Applicants of timely filing, as required by Rule 24(a), F.R. Civ. P.

3. The Court Should Deny Permissive Intervention Under Rule 24(b), F.R. Civ. P.

Applicants' motion, in the alternative, for permissive intervention under Rule 24(b), F.R. Civ. P., should be denied. Not only is the motion untimely, but also such intervention would unduly prejudice the adjudication of the rights of the original parties and there is no basis for the relief sought by three of the Applicants.

In each of the Consent Decrees, settlement was reached between the parties and sanctioned by the District Court. Intervention at this late date would upset the mechanisms for hiring relief and would seriously affect the disbursement of the negotiated back pay relief for all of the identified victims of unlawful discrimination.

There is no basis for the relief sought by Applicants O'Halpin, Sharshon and Tursellino. As has already been demonstrated, they failed to meet the age requirements either to take the examinations or to be appointed on the date that their test scores indicated they should have been appointed. They could not have qualified as applicants.

As argued aboved, although Applicant Cavanagh was a class member in each of the actions at bar, she is untimely in her demand for additional money. She is receiving back pay under the United States Consent Decree in exact accordance with other women similarly situated. Intervention at this late date would necessitate relitigating the United States action, which has partially achieved implementation of relief and in any case has earmarked for named individuals all of the funds received in that action. Intervention would only severely prejudice all parties to the actions and prevent orderly compliance with the Consent Decree.

CONCLUSION

For the foregoing reasons, the motion of Applicants O'Halpin, Sharshon, Tursellino and Cavanagh for intervention should be denied.

Respectfully submitted,

JOHN M. GADZICHOWSKI
Senior Trial Attorney
MELISSA PAGE MARSHALL
Trial Attorney
U.S. Department of Justice
Civil Rights Division
Washington, D.C. 20530
(202) 633-3895

Counsel for Plaintiff United States

CERTIFICATE OF SERVICE

I, MELISSA PAGE MARSHALL, hereby certify that on August 16, 1983, I served a copy of the foregoing Memorandum of Plaintiff United States in Opposition to the Motion of Virginia O'Halpin, et al., to Intervene as Plaintiffs and the Affidavit of Melissa P. Marshall, by Federal Express upon the following:

WARREN J. BENNIA, ESQ.
19 West 44th Street, Suite 812
New York, New York 10036

JAMES M. CATTERSON, JR., ESQ.
314 Main Street
Port Jefferson, New York 11777

WILLIAM H. PAULEY, III, ESQ.
Orenstein, Smitow & Pauley, P.C.
750 Third Avenue
New York, New York 10017

MELISSA PAGE MARSHALL
Trial Attorney
U.S. Department of Justice
Civil Rights Division
Washington, D.C. 20530
(202) 633-3895

Counsel for Plaintiff United States of America