

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,)
)
 Plaintiff,) CIVIL ACTION
) NO. M 75-1509
 v.)
)
THE UNIVERSITY OF MARYLAND,)
et al.,)
)
 Defendants.)
_____)

MEMORANDUM IN SUPPORT OF UNITED STATES'
MOTION TO STRIKE DEFENDANTS' MOTION TO DISMISS

The United States has filed a Motion to Strike the Defendants' Motion to Dismiss in this case. This memorandum is submitted in support of the Motion to Strike.

STATEMENT

The United States filed the complaint in this case on October 21, 1975, to enforce the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. The government has alleged that Bettye Thomas was denied the promotional opportunity for which she contracted with the defendants because of her race, and that the defendants have

threatened termination of Bettye Thomas' employment because of the filing of an employment discrimination charge with the Equal Employment Opportunity Commission based on the denial of promotion.

After several stipulations between the parties enlarging the time within which defendants were to answer or otherwise respond to the complaint, defendants served their motion to dismiss by mail on December 23, 1975. Defendants filed their motion pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, alleging the complaint failed to state a claim upon which relief could be granted, to assert the defense of "unclean hands." The "unclean hands" were said to result from the alleged improper motive of the United States in initiating this action. In support of their motion defendants filed a memorandum accompanied by two affidavits and documentary exhibits. The defendants have not served an answer to the complaint.

Defendants' memorandum is replete with unsubstantiated fact allegations and unsupported deductions from those allegations, some relevant to the defense of "unclean hands," others relevant only to the merits of the discrimination charged. The heart of the

defendants' argument is the allegation that although officials of the Department of Justice had determined that the discrimination charge made by Bettye Thomas was without merit, they initiated this action in response to pressure from the NAACP and from the

"Hill."^{*/} The two affidavits filed by the defendants are signed by attorneys formerly or presently representing the defendants and only attest to the truth of facts in the defendants' memorandum of which each attorney has personal knowledge, as well as to the "genuineness" of copies of documentary exhibits.

The motion to strike filed by the United States asks this court to strike defendants' motion to dismiss and supporting documents pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. In support of the motion to strike the government alleges that the defense of "unclean hands" is, as a matter of law, an insufficient defense against the government and subject to strike, and that the allegations in support of the motion to dismiss are subject to strike because they are immaterial to any issue properly before the court and are prejudicially confusing.

*/ Defendants also argue that the same facts which establish improper motive prove that this action was brought in a manner contrary to public policy and for a purpose injurious to the public, all purportedly within the purview of "unclean hands."

ARGUMENT

The Motion to Dismiss

Defendants' motion to dismiss is founded on Rule 12(b)(6) of the Federal Rules of Civil Procedure. Despite the fact that the motion asserts the complaint fails to state a claim upon which relief can be granted because of the "unclean hands" of the plaintiff, the defendants' memorandum contains allegations attempting to controvert the averments of the complaint in this case. Of course, "[f]or purposes of a motion to dismiss the material allegations of the complaint are taken as admitted." Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969); Walker, Inc. v. Food Machinery, 382 U.S. 172, 174-75 (1965); Radovich v. National Football League, 352 U.S. 445, 448 (1957); Tahir Erk v. Glenn L. Martin Co., 116 F.2d 865 (4th Cir. 1941); Midway Enterprises, Inc. v. Petroleum Marketing Corp., 375 F. Supp. 1339, 1340 (D. Md. 1974). The motion to dismiss serves to test the law of a claim, not the supporting facts which are to be tested at trial. Niece v. Sears, Roebuck & Company, 293 F. Supp. 792, 794 (N.D. Okla. 1968).

A motion to dismiss is not a substitute for an answer, */ and defendants' attempt to controvert the

*/ Rule 12 provides for the filing of an answer within ten days of the court's disposal of a motion to dismiss. Jones v. Bales, 58 F.R.D. 453 (N.D. Ga. 1972), aff'd, 480 F.2d 805 (5th Cir. 1973); Stuart Inv. Co. v. Westinghouse Electric Corp., 11 F.R.D. 277 (D. Neb. 1951), appeal dismissed, 192 F.2d 935 (8th Cir. 1951).

averments of the government's complaint have no legal effect. Defendants' motion must be measured by the law supporting it and by facts it discloses independently of the complaint which would necessarily defeat the plaintiff's claim.

"Unclean Hands" is an Insufficient Defense

Defendants' motion to dismiss is based solely on the equitable defense of "unclean hands." As the Supreme Court stated in Johnson v. Yellow Cab Co., 321 U.S. 383, 387 (1944):

"The maxim that he who comes into equity must come with clean hands is not applied by way of punishment for an unclean litigant but 'upon considerations that make for the advancement of right and justice' ... It is not a rigid formula which "trammels the free and just exercise of discretion."

The doctrine is applied not in every case, but to further justice. Houston Oilers, Inc. v. Neely, 361 F.2d 36 (10th Cir. 1966), cert. denied, 385 U.S. 840 (1966).

The maxim is displaced, for example, by overriding public policy. Schnapps Shop, Inc. v. H.W. Wright & Co., 377 F. Supp. 570 (D. Md. 1973) (doctrine inapplicable in private antitrust action where plaintiff allegedly violated state Unfair Sales Act). "From a standpoint of public policy the protection of Constitutional rights transcends in importance the application of the clean hands maxim." General Motors Corp. v. Blevins, 144 F. Supp. 381, 388 (D. Colo. 1956) (doctrine

not applied to plaintiff challenging constitutionality of statute plaintiff allegedly violated). "Unclean hands" is an insufficient defense as a matter of law in this case because: the defense is not applicable against the government where the effect would be to frustrate the laws of the United States or to thwart its public policy; the doctrine is by its own terms inapplicable to conduct which is not directly related to the equity sought to be enforced; and it is against public policy to permit judicial inquiry into the exercise of a government attorney's discretion to prosecute when no illegal or unconstitutional action is alleged.

1. "Unclean Hands" is Inapplicable to the Government.

In Pan American Co. v. United States, 273 U.S. 456, 506 (1927) the Supreme Court held that the general principles of equity are applicable in suits brought by the United States, but that "they will not be applied to frustrate the purpose of its laws or to thwart public policy." See also United States v. Second National Bank of North Miami, 502 F.2d 535, 548 (5th Cir. 1974) cert. denied 421 U.S. 912 (1975); Deseret Apartments v. United States, 250 F.2d 457, 458 (10th Cir. 1957); United States v. City of Milwaukee, 395 F. Supp. 725, 727 (E.D. Wisc. 1975); United States v. McIntire, 370 F. Supp. 1301, 1303 (D. NJ. 1974);

United States v. Philadelphia Electric Co., 351 F. Supp. 1394, 1398 (E.D. Pa. 1972); United States v. Board of Education of Lincoln County, Ga., 295 F. Supp. 1041, 1042 (S.D. Ga. 1968). In upholding the right of the United States to seek annulment of fraudulent contracts made through its corrupt officials in the face of equitable defenses, the court further ruled that the United States does not stand on the same footing as an individual in a suit brought to vindicate the policy of the government. 273 U.S. at 509. Defendants' reliance on United States v. The Thekla, 266 U.S. 328 (1924) for the proposition "that the status of the United States before a court is the same as any citizen for the purposes of doing justice "is misplaced. In that admiralty case the issue was the liability, absent statutory authorization, of the United States for damages resulting from a collision of vessels (one of which the government owned pro hac vice) when the government voluntarily entered its appearance.

The application of the "unclean hands" doctrine against the United States has been rejected specifically by the courts. In an action by the United States to enjoin operation of an unlicensed radio station, the defendant alleged the action was prosecuted by the government because of the defendant's political views. The court ruled the maxim of "unclean hands" not

applicable, without examining the merits of the defense, because of the public interest pursued by the government. United States v. McIntire, 370 F. Supp. 1301, 1303 (D. N.J. 1974). */ Two courts hearing actions by the United States to enforce Title VII of the Civil Rights Act of 1964 refused to consider the defendants' assertion of the "unclean hands" defense because the doctrine would both frustrate the purpose of Title VII and thwart public policy. United States v. Philadelphia Electric Co., 351 F. Supp. 1394, 1398 (E.D. Pa. 1972); United States v. City of Milwaukee, 395 F. Supp. 725, 727 (E.D. Wisc. 1975). **/ The courts' reliance on the strong public interest and congressional policy in

*/ Defendants attempt to distinguish McIntire on the basis of McIntire's failure to deny the allegations of the complaint fails in view of the defendants' necessary admission of the allegations of the complaint in this case for purposes of their motion to dismiss. The additional assertion that the McIntire court denied the equitable defense on the basis of extensive hearings falls before that court's ruling without reaching the merits of the claimed defense. For another case rejecting an "unclean hands" defense based on political motivation for the litigation, See United States v. Cotton Valley Operators Committee, 75 F. Supp. 1 (W.D. La. 1948)

**/ Defendants' efforts to distinguish these cases are also unsuccessful. These courts rejected the "unclean hands" defense on the basis of its impact on the laws of the United States and its public policies, not, as defendants have asserted, on the scope of the government's conduct or its relationship to the matter in litigation. In addition, it is not correct to assert that while in the instant case Bettye Thomas could sue on her own behalf, in the pattern or practice discrimination cases only the government could obtain relief. The subjects of discrimination could have sought relief in either Philadelphia Electric Co. or City of Milwaukee had the government not acted.

in the area of alleviating employment discrimination is the touch stone for deciding the applicability of "unclean hands" to the case now under consideration. The complaint herein was filed specifically to enforce provisions of Title VII of the Civil Rights Act of 1964. The rulings in Pan American Co. v. United States, United States v. Philadelphia Electric Co., and United States v. City of Milwaukee mandate that, as a matter of law, the equitable doctrine of "unclean hands" not be applied against the government in the case because to hold otherwise would be to frustrate the purpose of Title VII and to thwart the congressionally expressed public policy against employment discrimination.

2. The Government's Alleged Conduct is not Related to the Employment Discrimination

The essence of the defendants' claim of "unclean hands" is the allegation that after determining that Bettye Thomas' employment discrimination charge was without merit, government officials nevertheless filed this action because of pressure from the NAACP and from the "Hill." The Fourth Circuit has said of the conduct required to invoke "unclean hands":

"It is well settled, of course, that the court will not close its doors in the face of a suitor, if the misconduct of which he has been guilty is not related to the equity which he seeks to enforce." Mas v. Coca-Cola Co., 163 F.2d 505, 508 (4th Cir. 1947).

The conduct complained of must have an immediate and necessary relationship with the relief sought or right asserted. Republic Molding Corp. v. B.W. Photo Utilities, 319 F.2d 347, 349 (9th Cir. 1963); NLRB v. Fickett-Brown Manufacturing Co., 140 F.2d 883, 884 (5th Cir. 1944); Coca-Cola Company v. Howard Johnson Company, 386 F. Supp. 330, 337 (N.D. Ga. 1974); United States v. Board of Education of Lincoln County, Ga., 295 F. Supp. 1041, 1042 (S.D. Ga. 1968).

Defendants' argument that the alleged conduct in question relates specifically to the matter in litigation is specious. All decisions concerning the initiation of legal action are perforce related to the matter subsequently in litigation. However, as the Court of Appeals stated in Fickett-Brown Manufacturing Co., "The rule purports only to deny relief if the granting of the relief asked will, because of the complained of activities of the litigant, produce an illegal or unjust result." 140 F.2d 883, 884. The important consideration is to what extent the conduct in question has caused actual harm or injustice. Republic Molding Corp. v. B.W. Photo Utilities, 319 F.2d 347, 349-50 (9th Cir. 1963). Fickett-Brown Manufacturing Co. is the case apposite to the instant suit. In Fickett-Brown Manufacturing Co. the NLRB had brought an action to enforce its already issued order against the defendant company. The company asserted the defense of "unclean hands,"

saying the proceeding was brought as part of a scheme against the company by the NLRB and a union. The conduct alleged was clearly related in the general sense to the subject of the proceeding, but the court refused to apply the "unclean hands" defense because granting the relief sought by the plaintiffs would produce no unjust or unlawful result. If this court were to determine that Bettye Thomas had been the subject of employment discrimination by the defendants and so order relief, there would be no injustice or illegal result attributable to the filing of this suit after an alleged determination by government officials that the case was without merit. By its own terms the doctrine of "unclean hands" is inapplicable to this case because the alleged conduct is not directly and necessarily related to the equitable right sought to be enforced.

3. Judicial Inquiry into Prosecutorial Discretion Is Against Public Policy

Defendants' allegation of "unclean hands" in the government's decision to prosecute the instant case is an effort to litigate the exercise of prosecutorial discretion. The defendants' allegation is that the government initiated the suit, knowing it to be without merit. Courts uniformly have rejected efforts to defend government prosecutions by inquiry into the

exercise of a government attorney's discretion to prosecute, when no illegal or unconstitutional action is alleged. Georgia v. Mitchell, 450 F.2d 1317, 1321 (D.C. Cir. 1971); Newman v. United States, 382 F.2d 479, 482 (D.C. Cir. 1967); United States v. Cox, 342 F.2d 167 (5th Cir. 1965), cert. denied, 381 U.S. 935 (1965). In housing discrimination cases brought by the government courts have declined to inquire into the Attorney General's discretionary finding that an issue of public importance supporting governmental action has been raised. United States v. Northside Realty Associates, Inc., 501 F.2d 181 (5th Cir. 1974); United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir. 1973), cert denied, 414 U.S. 826 (1973).

The Fourth Circuit ruled on a case analogous to this action in United States v. Hunter, 459 F.2d 205 (4th Cir. 1972), cert. denied, 409 U.S. 934 (1972). In that litigation the United States sought to enjoin a newspaper's publication of advertising for rental housing with racial designations. The Court of Appeals held an equitable defense based on the failure of the United States to have first sued other, larger newspapers in the same area was invalid, saying that for a court to question the government's choice of a defendant would be an unacceptable interference with executive discretion which would cripple government enforcement in many areas of the law. The public policy

expressed in the just cited cases is clearly applicable to the instant case. As in Hunter, to permit an inquiry into the government officials exercise of their discretion to initiate this action on the basis of an equitable defense that the officials knew the case was without merit would be an improper interference with executive discretion.

Defendants' Pleadings Should Be Stricken

Rule 12(f) of the Federal Rules of Civil Procedure provides in pertinent part:

"Upon motion made by a party ... the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

Professor Moore has described the purpose of the rule as follows:

"It is a reflection of the inherent power of the court to prune down the pleadings so as to expedite the administration of justice and to prevent abuse of its process." 2A MOORE, FEDERAL PROCEDURE ¶ 12.21 (2d ed.)

Motions to strike are not favored by the courts and they will be denied unless the allegations attacked have no possible relation to the controversy and may prejudice the opposing party. Hare v. Family Publications Service, Inc., 342 F. Supp. 678, 685 (D. Md. 1972);

Steuart Investment Company v. Bauer Dredging Coust. Co., 323 F. Supp. 907 (D. Md. 1971). A motion to strike a defense will be sustained if the defense is insufficient as a matter of law and no substantial question of law or fact is presented; Gilbert v. Eli Lilly & Co., 56 F.R.D. 116, 121 (D.P.R. 1972); See Kelly v. Kosuga, 358 U.S. 516 (1959); United States v. 187.40 Acres of Land, Huntingdon Cty., Pa., 381 F. Supp. 54, 56 (M.D. Pa. 1974); Coca-Cola Co. v. Howard Johnson Co., 386 F. Supp. 330 (N.D. Ga. 1974); or if prejudice will result from confusion of the issues created by permitting the challenged matter to remain. Goldberg v. Amalgamated Local Union No. 355, 202 F. Supp. 844, 846 (E.D. N.Y. 1962).

The question in this case is whether the defense of "unclean hands" is insufficient as a matter of law or whether it fairly raises a substantial question of fact or law. Based on the authorities cited and the arguments made above, the defense of "unclean hands" asserted by the defendants is inapplicable against the government in this action as a matter of law and should be stricken as an insufficient defense pursuant to Rule 12(f).

Ordinarily only the objectionable portion of a pleading will be stricken, but the entire pleading may be removed where it is all immaterial or redundant.

Battle v. National City Bank of Cleveland, 364 F. Supp. 416, 419 (N.D. Ohio 1973); Temperato v. Rainbolt, 22 F.R.D. 57 (E.D. Ill. 1958). The mass of unnecessarily pleaded evidence and conclusions filed by defendants in their memorandum in support of the "unclean hands" defense should be stricken also as immaterial to any issue properly before the court and because it prejudicially confuses the issues to be resolved.

Should this court in the exercise of its discretion deny the government's motion to strike, the court is requested to consider the government's arguments in the alternative as a memorandum in opposition to the motion to dismiss. In that event the United States now further urges that complaints are to be construed liberally in favor of plaintiffs and that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-6 (1957); Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969) Wolman v. Tose, 467 F.2d 29, 35 (4th Cir. 1972); Midway Enterprises, Inc. v. Petroleum Marketing Corp., 375 F. Supp. 1339, 1340 (D. Md. 1974). For purposes of the motion to dismiss a court must consider in the light most favorable to the

plaintiff whether the complaint is sufficient to constitute a valid claim. Tahir Erk v. Glenn L. Martin Co., 116 F.2d 865 (4th Cir. 1941); McIver v. Russell, 264 F. Supp. 22 (D. Md. 1967). The allegations of the complaint in this case state fully the elements of a cause of action under Title VII of the Civil Rights Act of 1964, as amended. Defendants' motion to dismiss filed before their answer in this case perforce admits the allegations of the complaint and asserts a defense unrelated to the merits of the complaint. Even if the government fails to satisfy the court that the defense of "unclean hands" is insufficient against the government in this case as a matter of law, defendants have failed to make the required showing beyond doubt that plaintiff can prove no set of facts which would entitle him to relief. The motion to dismiss, therefore, should be denied. */

Bifurcated Trial

Pursuant to the court's request for briefing of the question of the possibility and propriety of the

*/ If the court denies the government's motion to strike and proceeds to consider defendants' motion with other matters outside the pleadings pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure, the government respectfully requests notice of the court's decision and the opportunity to file pertinent materials to counter defendants' affidavits in the case, as well as to raise the issues of the admissibility of defendants' evidence and the competency of their affiants. Johnson v. RAC Corp., 491 F.2d 510 (4th Cir. 1974).

court's separation of the merits of the "unclean hands" defense for trial subsequent to the trial on the merits of the discrimination claim the following discussion is provided.

Rule 42(b) of the Federal Rules of Civil Procedure provides the trial court with authority to order a separate trial of any separate issue or any number of issues. The purpose of the rule is to further convenience, avoid delay and prejudice, and serve the ends of justice. Separate trials are a matter for the informed discretion of the trial court. Molinaro v. Watkins-Johnson CEI Division, 60 F.R.D. 410, 413 (D. Md. 1973). The factors guiding the exercise of that discretion are many and varied. Separate trials have been held where the effect would be to save trial time or effort or to make trial of other issues unnecessary, as where a single issue may be dispositive of a case. Richmond v. Weiner, 353 F.2d 41, 44 (9th Cir. 1965), cert. denied, 384 U.S. 928 (1966); Molinaro v. Watkins-Johnson CEI Division, 60 F.R.D. 410, 413 (D. Md. 1973). A Court of Appeals has noted, "One of the purposes of Rule 42(b) is to permit deferral of costly and possibly unnecessary discovery proceedings pending resolution of potentially dispositive preliminary issues." Ellingson Timber Co. v. Great Northern Ry., 424 F.2d 497, 499 (9th Cir. 1970), cert. denied, 400 U.S. 957 (1970).

A useful summary of factors which may be considered by a court in exercising its discretion is found in Reading Industries, Inc. v. Kennecott Copper Corp., 61 F.R.D. 662, 664 (S.D. N.Y. 1974).

"... (1) are the issues sought to be separately tried significantly different from one another? (2) are the issues triable by jury or by the court? (3) does the posture of discovery as to the respective issues suggest that they should or should not be tried together? (4) will the separate issues require the testimony of different witnesses and documentary proof? (5) will the party opposing the severance be prejudiced if it is granted."

Applying the above factors to the case at hand it is apparent that the issues of "unclean hands" and employment discrimination are eminently suitable for separate hearings. They are significantly different, and require different discovery and different proof. A failure to separate the issues would result in prejudice to the government from the inherent confusion created by a joint hearing. Assuming, arguendo, that approximately equal trial time and discovery effort would be required for trial of either issue, no savings in those areas could be assured by scheduling the separate hearings in either possible order. It is true, however, that delaying the "unclean hands" trial until after a decision on the merits of the discrimination claim might make unnecessary the disruption of the activities of senior government officials by defendants' discovery

efforts and the inevitable procedural delays associated therewith. It would also reduce the delay in resolving the merits of this case for Bettye Thomas whose termination of employment is imminent.

It is clearly within the court's discretionary power to separate the issues of "unclean hands" and "employment discrimination" for separate trials. The interests of justice and economy suggest that the court should separate the issues and postpone the hearing on "unclean hands" until disposition of the discrimination issue.

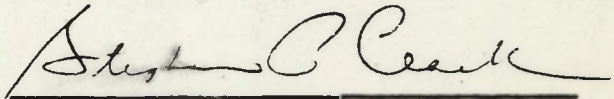
CONCLUSION

Based on the reasons and arguments stated above the United States' Motion to Strike defendants' Motion to Dismiss should be granted as an appropriate application designed to expedite the administration of justice and to prevent abuse of the court's process by restricting the pleadings in this case to matters properly before the court.

Respectfully submitted,

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