1980 WL 18575
United States District Court,
N.D. Florida.

INCREASE MINORITY PARTICIPATION BY AFFIRMATIVE CHANGE TODAY OF NORTHWEST FLORIDA, INC. (Impact)
v.
FIRESTONE

No. TCA 79–895.
|
Nov. 7, 1980.

Attorneys and Law Firms

Brian Norton, Kent Spriggs, Spriggs & Henderson, P. A., Tallahassee, Florida; Steve Keller, Ben Patterson, Patterson & Traynham, Tallahassee, Florida, for plaintiffs.

Steve Nall, General Counsel, Department of State, Tallahassee, Florida; Pam Lutton, Assistant Attorney General, Civil Litigation Division, Department of Legal Affairs, Tallahassee, Florida, for defendants.

Opinion

STAFFORD, J.

***1** This is an action complaining of racial discrimination in employment practices in violation of 42 USC § 2000e, et seq. (Title VII of the Civil Rights Act of 1964) as well as 42 USC § 1981 and 1983. The following motions are presently before the court for consideration, hearing having previously been held: (1) plaintiffs' motion to certify the class (Documents 61 and 96), which defendants actively oppose (Documents 96 and 124) and (2) defendants' motion to dismiss or for a more definite statement (Document 75), which plaintiffs resist (Documents 80 and 130).

Plaintiffs seek class certification in this case, pursuant to Rule 23(b)(2), Fed R Civ P, of a class of "all past, present, and future black persons employed by the Florida Department of State and of all past, present, and future black applicants for employment with the Florida Department of State." Plaintiffs Diann Walker, Louvenia Jones, Pearlie Williams, Gracie Holton, Rosa Henderson, Clifford Simmons, Gregory Crawford, Marguerite Stewart, Barbara King and Dorothy Roberts are black employees of the Department of State of the State of Florida, of which defendant Firestone is Secretary. Plaintiffs Charles Stewart and Delores Colston are unsuccessful black applicants for employment with defendants. Plaintiff IMPACT (Increase Minority Participation by Affirmative Change Today of Northwest Florida, Inc.) is a Florida non-profit corporation established for the purpose of improving the working status of its members (Department of State employees) and eliminating the effects of past and present discrimination. All the plaintiffs have perfected jurisdiction under Title VII by filing charges with the Equal Employment Opportunity Commission and having been issued Right to Sue letters.

Defendant George Firestone is the duly elected Secretary of State of the State of Florida, in which capacity he is sued under the various statutes stated above. The State of Florida is named in the amended complaint as a defendant under Title VII.

Plaintiffs allege a pattern and practice of discrimination among employees of and applicants for employment with the entire Department of State.[1] 42 USC 2000e(f) expressly excludes coverage of certain positions from "employee" status under Title VII:

> "The term 'employee' means an individual employed by an employer, except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision."

The parties and the court agree that the Secretary of State, the Assistant Secretary of State, the Chief Cabinet Aide, the two Deputy Secretaries of State, and the General Counsel do not qualify as "employees" as defined by the Act. 42 USC § 2000e(f). Defendants assert that an executive secretary, two executive assistants and an internal auditor are exempt as "personal staff" under § 2000e (f). Given the Congressional intention that the

exemption of § 2000e(f) should be narrowly construed, plaintiffs contest defendants' assertion. Cf., Howard v. Ward County, 418 F Supp 494 (DND 1976) and Wall v. Coleman, 393 F Supp 826 (SD Ga 1976).

***2** In accordance with testimony adduced at the hearing on April 15, 1980, and subsequent submissions to the record, the court determines that the Executive Assistant II position (# 00004) of Ms. Dorothy Payne, the Secretary's Employee Relations Director, and Ms. Pamela Pingree, the Secretary's Legislative Liaison and Appointment Secretary (# 00298), as well as position # 00030, the Internal Auditor, Ms. Ronicka Jones, and position # 00045, the Secretary's Executive Secretary, Ms. Debbie Waliga, must be considered personal staff positions. (Defendants' composite Exhibit A). Additionally, the court finds that the record supports a finding that the regional program administrator (position # 00199) and the four regional office supervisors (positions # s 00323, 00594, 00608, and 00368) and seven division directors are "policy-making" appointees of the Secretary of State. Neither the above-identified personal staff members or the policy-making appointees are covered by the Career Service System of the State of Florida.

Plaintiffs' cause of action under Title VII may not be addressed to these statutorily exempt positions of employment. However, plaintiffs' causes of action pursuant to §§ 1981 and 1983 are not limited in like manner.

Certification of the requested class is sought under Rule 23(b)(2), Fed R Civ P, which permits maintenance of a class action "if the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive relief or corresponding declaratory relief with respect to the class as a whole."

There is little or no dispute between the parties with respect to the propriety of plaintiffs' use of Rule 23(b)(2) rather than another subsection of Rule 23 as the vehicle for maintenance of their class action. The drafters of Rule 23 intended subsection (b)(2) to be especially applicable in the context of civil rights litigation where "a party is charged with discriminating unlawfully against a class usually one whose members are incapable of specific enumeration." 1966 Committee Notes to Rule 23, Subdivision (b)(2). The Fifth Circuit has repeatedly approved the use of this form of class action in civil rights cases, because racial, ethnic or sex "discrimination is almost by definition class discrimination." Hebert v. Monsanto, 576 F.2d 178 (5th Cir1978). See also East Texas Motor Freight v. Rodriguez, 431 U.S. 395, 405 (1977); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir1968). Here, plaintiffs allege the existence of a general pattern and practice by defendants of discrimination against blacks in matters of employment policy, including hiring, promotion, evaluation, discipline, and termination. These allegations bring the case within Rule 23(b)(2). Moreover, it is amply clear that plaintiffs' demand for back pay in addition to equitable relief is not inconsistent with maintenance of the class action under Rule 23(b)(2) rather than 23(b)(3). Bolton v. Murray Envelope Corp., 553 F.2d 881, 885 (5th Cir1977).

***3** In addition to the requirements of Rule 23(b)(2), plaintiffs must also meet the four general prerequisites to a class action found in Rule 23(a). Johnson v. American Credit Co. of Georgia, 581 F.2d 526, 530 (5th Cir1978). That subsection allows a class action "only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." The court concludes that plaintiff has satisfied all these provisions and that a class action is properly certifiable.

The so-called "numerosity" requirement of Rule 23(a)(1) is easily satisfied in this instance and not seriously contested by the defendants. Plaintiffs' 1979 statistics show that of some 400 employees of the Secretary of State, 86 were black. In addition, plaintiffs claim that at least 109 black persons have been terminated within the two years preceding this lawsuit. The class also contains unknown applicants for employment whose numbers and identities are not ascertainable. The joinder of unidentifiable persons "is certainly impracticable." Jones v. Diamond, 579 F.2d 1090 (5th Cir1975). The defendants apparently concede that plaintiffs' proposed class satisfies the numerosity requirement of Rule 23(a)(1).

In this Circuit the Rule 23(a)(2) and (3) "commonality" and "typicality" requirements may be satisfied by an "across the board" attack on the defendant's allegedly unequal employment practices. Satterwhite v. City of Greenville, 578 F.2d 987, 993–4 n 8 (5th Cir1978); Hebert v. Monsanto Co., 576 F.2d 77, 80 (5th Cir1978) vacated on other grounds, 580 F.2d 178 (5th Cir1978); Payne v. Travenol Laboratories, Inc., 565 F.2d 895 (5th Cir1978), cert. denied 439 U.S. 835, 99 S Ct 118, 58 L

Ed2d 131 (1978); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir1969); Jack v. American Linen Supply Co., 498 F.2d 122 (5th Cir1974); Long v. Sapp, 502 F.2d 34 (5th Cir1974). The plaintiffs allege herein that the discrimination practiced against them is the result of patterns and practices of discrimination within defendants' agency. These claims and the exhibits offered in support of them are sufficient to meet Rule 23(a)(2) and (3) standards.

Defendants contend that the class requested is too broad in that the claims of the named plaintiffs are not typical of all other members of the proposed class. Defendants claim that plaintiffs within the office/clerical category have not shown a sufficient nexus with persons who perform functions in other EEOC categories to allow their inclusion in the same class and that each named plaintiff should be permitted to represent only a subclass of employees or applicants of the same division in which that named plaintiff held or applied for a position. Defendants also contend that there is inherent conflict between supervisory and non-supervisory personnel, preventing their inclusion in one class.

***4** Defendants' contentions regarding typicality and standing are contrary to the law of this circuit. It is true that "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403 (1977) quoting Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974). Nevertheless, the Fifth Circuit has "applied a broad approach to standing, stressing the individual's role as private attorney general taking on the mantle of the sovereign." Huff v. N.D. Cass Co. of Alabama, 485 F.2d 710, 714 (5th Cir1973) (en banc). A full discussion of the "typicality" requirement in the context of employment discrimination actions was rendered in Hebert v. Monsanto, 576 F.2d 77 (5th Cir1978); vacated on other grounds, 580 F.2d 178 (5th Cir1978):

> "Finally, appellant contends the court erred in determining that appellant's claim was not representative of the claim of the class. This so-called typicality requirement insures that the class action will not be a mere procedural umbrella for individual claims. Of course, although there need not be identity of claims, there must be common elements of law or fact such that the class action would be an economical way of prosecuting and defending claims. Therefore, the question is whether Hebert's claim of racial discrimination although limited to the particular facts of Hebert's employment history, is nonetheless sufficiently typical of the other members' claims to permit the maintenance of a class action. Appellee contends that because appellant's claim concerns only the trucking activities of the company and other claimants are from different departments, appellant's claim is neither factually nor legally typical. We recognize, however, that the typicality requirement is not so rigid as to comprehend only similar fact situations. If class actions were limited to factual typicality, class actions under Title VII would be impossible because, except in rare cases, the facts would not be identical. It would be a better test for typicality to consider whether the types of facts or evidence were typical of the class. For example, if all claims, although of different job classifications, depended upon statistical evidence, and the statistics evidenced a policy of discrimination, typicality would be satisfied. In the instant case appellant objects to a company-wide pattern of racial discrimination, of which the discrimination practiced against him was merely a part. The same type of evidence will be offered, involving both statistics and historical hiring patterns. The common goal of this evidence is the proof of the question of fact common to all of the class members, the company-wide policy to discriminate. See Johnson v.

> Georgia Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir1969). Not only is there typicality of claims, but there is also typicality of interest. All are seeking injunctive relief from an alleged broad based discriminatory network. Finally, it has been recognized that racial discrimination is almost by definition class discrimination and hence the class action is a most appropriate tool for dealing with a problem. Huff v. N.D. Cass Co., 485 F.2d 710, 713–14 (5th Cir1973); Georgia Power Co. v. EEOC, 412 F.2d 462, 468 (5th Cir1969). Because broadly based racial discrimination by definition is class discrimination, and the same types of evidence will be used to prove such a broadly based policy, we hold that the court erred in holding that appellant's claim was not typical of the class."

***5** 576 F.2d at 80–81. The same considerations apply whether the issue of standing is raised under the 23(a)(2) "commonality" standard or the 23(a)(3) "typicality" standard, as is shown by the Fifth Circuit's language in the foregoing passage from Hebert speaking of "common elements of law or fact." Id. at 80.

The named plaintiffs' testimony established that their discrimination claims are not noticeably different although they arise from various divisions of the department and different categories of employees. Obviously, individual factual patterns will differ. "It is not necessary that the representative suffer discrimination in the same way as other class members, but it is necessary that she suffer from the discrimination in some respect." Satterwhite v. City of Greenville, 578 F.2d 987, 993–4 n 4 (5th Cir1978). The plaintiffs have alleged an overall pattern and practice of discrimination applying to all black employees. The hearing testimony has shown no antagonism or conflict of interest necessitating the establishment of subclasses of supervisory and non-supervisory employees in this case. Neither has such testimony established a necessity for subclasses corresponding to the various divisions into which the Department of State work force is divided. Cf. Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 253 (3rd Cir1975); Briggs v. Brown & Williamson Tobacco Corp., 414 F Supp 371, 378 (ED Va.1976); Wofford v. Safeway Stores, Inc., 78 FRD 460, 490–1 (ND Cal 1978).

The standards to be met concerning adequate representation of the class under Rule 23(a)(4) are set out in Johnson v. Georgia Highway Express, Inc., supra, in a quote from the Second Circuit's opinion in Eisen v. Carlisle & Jacquelin, 319 F.2d 555, 562 (2d Cir1968):

> "An essential concomitant of adequate representation is that the party's attorney be qualified, experienced, and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class."

417 F.2d at 1125. No objection has been raised here to the qualifications of plaintiffs' counsel. The "conflicts" which defendants perceive between certain plaintiffs' claims and those of the class do not amount to the sort of antagonistic interests that would defeat maintenance of a class action. Defendants insist that supervisory personnel possess interests antagonistic to non-supervisory personnel and that supervisory personnel in this case are in the untenable position of complaining about hiring, disciplining, and evaluating practices in which they participate. Plaintiffs testified that no such antagonism exists herein and that the alleged overall pattern and practice of discrimination creates typical claims throughout the department for all black employees, both non-supervisory and supervisory, the latter of which are themselves subject to discipline and evaluation by their supervisors.

***6** The court concludes that plaintiffs have satisfied the requirements of Rule 23(a) and (b), FR Civ P. Therefore, certification of one class of "all past, present and future black persons employed by the Florida Department of State and all past, present and future black applicants for employment with the Florida Department of State"[2] is held to be appropriate in this case at this time. There are

present in the instant case certain factors not discussed above which lead the court to conclude that subdivision of the class may be necessary at some later time for determination of appropriate relief, should liability be established in this action. An order certifying a class, after all, may be revisited and amended prior to a decision on the merits, if such revision proves to be necessary. Rule 23(c)(1).

The court finds no merit in defendants' argument that the class herein must be restricted to those persons subjected to the conditions of which plaintiffs complain during the 180–day period prior to the filing of plaintiffs' EEOC charges. Plaintiffs' allegations in this case are of continuing violations of Title VII, rather than of continuing impact of past violations. Cf., United Airlines v. Evans, 431 U.S. 553 (1977) and International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); Reed v. Lockheed Aircraft Corp., 613 F.2d 757 (9th Cir1980); Fowler v. Birmingham News Co., 608 F.2d 1055 (5th Cir1979); Clark v. Olinkraft, Inc., 556 F.2d 1219 (5th Cir1977); Kyriazi v. Western Electric Co., 461 F Supp 894 (D NJ 1978).

Similarly, the class is not limited to persons who could have suffered discrimination in violation of §§ 1981 and 1983 within the two years preceding the filing of the complaint herein. Plaintiffs seek both back pay and equitable relief. The Florida statute of limitations governing actions founded on statutory liability, which this court must apply in the absence of limitations within §§ 1981 and 1983, is Section 95.11(3)(f), which provides a four-year limitational period. See White v. Padgett, 475 F.2d 79 (5th Cir1973) cert. denied 414 U.S. 861 (1974). Such limitations will affect determinations of liability and relief, but need not affect certification of the class.

All Citations

Not Reported in F.Supp., 1980 WL 18575, 24 Fair Empl.Prac.Cas. (BNA) 572, 30 Fed.R.Serv.2d 934

Footnotes

[1] ....

[2] ....