1974 WL 146
United States District Court; M.D. North Carolina.

Willie S. Griggs et al., Plaintiffs
v.
Duke Power Company, Defendant.

No. C-210-G-66
|
January 10, 1974

GORDON, Ch. J.

[*Background Facts*]

***1** In a Memorandum Order dated December 23, 1970, this Court described this action as presenting a "curious procedural phenomenon"; it has now progressed beyond curious and borders on the macabre. Although originally denominated as a class action, the plaintiffs were divided into three separately defined, finite groups by the Fourth Circuit Court of Appeals. *Griggs v. Duke Power Company,* [2 EPD P 10,143] 420 F. 2d 1225 (4th Cir. 1970). Following the Fourth Circuit's lead, the Supreme Court also dealt with the plaintiffs in three distinct groups. *Griggs v. Duke Power Company,* [3 EPD P 8137] 401 U. S. 424 (1971). Plaintiffs, however, continue to contend that for purposes of injunctive relief they represent a class of all black persons who may be employed subsequent to October 20, 1966 (the date this action was initiated). For all practical purposes, it is clear that this suit is no longer, if it ever was, a class action. Therefore, it is concluded that this Court's Order of June 19, 1967, permitting this suit to be brought as a class action, was implicitly dissolved by the decision of the Court of Appeals.[1]

In the Court of Appeals the plaintiffs were grouped as follows:

*Group A*–Four plaintiffs without a high school education who were hired by defendant *after* adoption of the education-test requirements (Griggs, Hatchett, Clarence Purcell and Broadnax).

*Group B*–Three plaintiffs who had met the high school education requirement (H. Martin, Jumper and Boyd).

*Group C*–Six plaintiffs without a high school education who were hired prior to adoption of the education-test requirement (Blockstock, William Purcell, Jackson, Hairston, Galloway and Tucker).

The Fourth Circuit granted injunctive relief to the Group C plaintiffs, denied relief to the Group A plaintiffs, and held that the claims of the Group B plaintiffs were moot. On December 23, 1970, this Court entered an order effectuating the relief granted to the Group C plaintiffs by the Court of Appeals. On March 8, 1971, the Supreme Court gave relief to the Group A plaintiffs.

[*Relief*]

***2** Plaintiffs returned again to this Court on September 8, 1971, with a motion for entry of appropriate relief. In addition to seeking injunctive relief for the Group A plaintiffs pursuant to the Supreme Court's decision of March 8, plaintiffs also raised new allegations of Title VII violations against the Group C plaintiffs after the January 9, 1970, decision of the Court of Appeals, and allegations of Title VII violations against the Group B plaintiffs. Because of these new factual allegations of discrimination, evidentiary hearings were held to determine what, if any, further relief should be given the Group C plaintiffs, and what if any, relief should be given the heretofore unsuccessful Group B plaintiffs.

With respect to the Group B plaintiffs, it is concluded that their allegations are not properly before this Court, and the Court's disposition of Group B claims in the December 23, 1970, order is reaffirmed. That order concluded:

> "The Court feels that the proper course to be taken for members of this group is to file their complaints with the Equal Employment Opportunities Commission. Since the District Court and the Court of Appeals determined that the members of Group B were entitled to no relief, their present allegations are not properly before

this Court."

With respect to the Group A plaintiffs, an appropriate order pursuant to the Supreme Court's mandate in *Griggs v. Duke Power Company,* [3 EPD P 8137] 401 U. S. 424 (1971), granting injunctive relief similar to that previously received by Group C plaintiffs was entered on September 25, 1972.

Now then, we come to the real gravamen of plaintiffs' motion, *i.e.,* defendant's alleged discriminatory employment practices against the Group C plaintiffs after the decision of the Fourth Circuit Court of Appeals. Before discussing the post January 9, 1970, employment histories of the Group C plaintiffs, it is appropriate to set out the standard of conduct which the decision of the Court of Appeals requires of defendant, Duke Power Company.

"Once we have determined that certain of the plaintiffs are entitled to relief the next question for consideration is the nature and extent of relief to be provided. Those six Negro employees without a high school education or its equivalent who were hired prior to the initiation of the educational requirement are entitled to injunctive relief under § 706(g) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5(g). The educational and test requirements are invalid as applied to their eligibility for transfer and promotion. *Thus, on remand, the district court should award proper injunctive relief to insure that these six employees are considered for any future openings without being subject to the educational or testing requirements. This will work no hardship upon the company since the relief provided will simply require it to consider those Negro employees equally with similarly situated white employees, many of whom do not have a high school education or its equivalent. If a Negro employee is advanced to a job in one of the better departments and his inability to perform the duties of the job is demonstrated after a reasonable period the company will be justified in returning him to his previous position or placing him elsewhere.* As Judge Butzner said in *Quarles,* [1 EPD P 9843] 279 F. Supp. 505, 521 (E. D. Va. 1968), *supra:*

***3** "'If any transferee fails to perform adequately within a reasonable time * * * he may be removed and returned to the department and job classification from which he came, or to another higher job classification for which the company may believe him fitted.'

*"In granting relief, the district court should order that seniority rights of the six Negro employees who are victims of discrimination be considered on a plant-wide, rather than a departmental, basis.* To apply strict departmental seniority would result in the continuation of present effects of past discrimination whenever one of the six is considered in the future for advancement to a vacant job in competition with a white employee who has already gained departmental seniority in a better department as a result of past discriminatory hiring practices." 420 F. 2d at 1236. (Emphasis added.)

[*Basis of Motion*]

The heart of plaintiff's motion rests upon the circumstances of several promotion offers made by defendant to the plaintiffs, several vacancies not offered to plaintiffs, and most particularly the treatment of plaintiff Lewis Hairston, Jr. The Court does not propose to enter into a detailed discussion of the evidence,[2] rather, each Group C plaintiff's employment history will be summarized.

(1) Junior Blackstock was a janitor in the labor department earning $2.125 per hour on January 9, 1970. At the time of this hearing he had received two job promotions, was in the operations department, and was earning $3.765 per hour. During this same period he had turned down two other promotion offers.[3]

(2) Clarence Jackson was in the labor department earning approximately $2.125 per hour on January 9, 1970. According to his testimony and defendant's evidence, he is now a learner in the operation department and is earning $2.94 per hour. Jackson also received two other job promotion offers outside the labor department during this period and declined them both.[4]

(3) James S. Tucker was in the labor department earning approximately $2.125 per hour on January 9, 1970. At the time of this hearing he had been promoted to a learner in the maintenance department earning $3.02 per hour. Tucker also received two other job promotion offers outside of the labor department during this period and refused them both.[5]

(4) William Purcell was in the labor department earning approximately $2.125 per hour on January 9, 1970. At the

time of this hearing Purcell had been promoted to the operations department, was classified as a utility operator and was earning $3.675 per hour. Purcell had also received the same two offers for promotion and had refused them both.[6]

***4** (5) Eddie Galloway was a semi-skilled laborer in the labor department earning approximately $2.125 per hour on January 9, 1970. At the time of this hearing he was still classified as a semi-skilled laborer in the labor department earning $2.645 perhour. Galloway also refused the same two offers refused by the other Group C plaintiffs.[7]

(6) Lewis Hariston, Jr., was in the labor department earning approximately $2.125 per hour on January 9, 1970. At the time of this hearing he was still in the labor department earning $2.645 per hour. Unlike the other Group C plaintiffs, Mr. Hairston accepted the first offer of promotion out of the labor department which came along. The position offered was that of "test assistant" in the testing department and it raised Hairston's wages to $2.45 per hour.[8] After five weeks at this job it was determined that Hairston could not handle it, and he was returned to the labor department.

The demotion of Lewis Hairston, Jr., is the focal point of plaintiff's allegations of racial discrimination. After careful consideration of the entire record (particularly the testimony of Hairston, himself, and of Val White, "test man"), the Court is convinced that race was not a factor in Hairston's demotion.

"Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissable classification." *Griggs v. Duke Power Company,* [3 EPD P 8137] 401 U. S. 424, 430-431 (1971).

The evidence clearly indicates that Lewis Hairston received all of the consideration in his attempt to become a test assistant that he or anyone could reasonably expect. In twenty-five working days on the job he was unable to master aspects of the test assistant's duties which the evidence shows was usually learned in a week or less. Moreover, he was receiving generous amounts of individual training and attention–particularly from Mr. Val White.[9]

***5** In addition to the test assistant job which Hairston accepted, each of the Group C plaintiffs was offered and declined a job as a watchman. Plaintiffs contend that these offers were not made in good faith, and as evidence thereof, show that shortly after the offers defendant eliminated the watchman jobs and contracted the function to an independent security agency. The implication being that defendant was going to transfer several of the plaintiffs to watchmen and then terminate them without further employment by contracting the jobs to the independent security force. This is clearly not a tenable assumption, and certainly too speculative to justify a finding of racial discrimination.[10] It is impossible to believe that defendant would be so obtuse as to consider such a blatantly heavy-handed tactic, even assuming, *arguendo,* that defendant did wish to discriminate against the plaintiffs. There is no inconsistency in defendant's offering these jobs to plaintiffs, and then atfer unanimous refusal, deciding to contract the function to an independent concern. That contracting the watchmen's function to an independent third party had been considered prior to making the offers to plaintiffs appears to be immaterial.[11]

[*Court's Holding*]

The most significant facts appearing to the Court are that four of the six Group C plaintiffs have been promoted into higher status, higher paying, previously all white jobs in departments offering the top wage scale in the Dan River Steam Station. Another plaintiff, Lewis Hairston, was offered and accepted a job which, unfortunately, proved to be too much for him. In addition, the testimony and exhibits show that the Group C plaintiffs were considered equally with similarly situated whites for vacancies as they occurred, and promoted to them as their abilities allowed. It is simply unrealistic to argue discrimination with respect to the two engineering and two electrician vacancies. Clearly, none of the plaintiffs or any similarly situated white employees were qualified for these positions. The same may be said for the second test assistant vacancy which occurred on or about March 1, 1971. It must not be forgotten that the purpose of Title VII is equal employment opportunity and elimination of discrimination; the Act does not require that the unfit or

unqualified be preferred over the qualified simply because they are members of a minority group.

***6** Accordingly, counsel for the defendant will forthwith present a proposed order denying the motion for entry of appropriate relief.

**All Citations**

Not Reported in F.Supp., 1974 WL 146, 7 Fair Empl.Prac.Cas. (BNA) 363, 7 Empl. Prac. Dec. P 9304

## Footnotes

[1] This works no hardship upon plaintiffs, and indeed, is more a matter of semantics than substance. This is so because at no time has this or any other Court passing upon this controversy found defendant to be actively discriminating against blacks hired after July 2, 1965, the effective date of the 1964 Civil Rights Act. [1 EPD P 9917] 292 F. Supp. 243, 248 (1968); [2 EPD P 10,143] 420 F. 2d 1225, 1235, 1236 (1970); [3 EPD P 8137] 401 U.S. 424, 432 (1971). The discrimination suffered by the plaintiffs was the residual effect of discrimination practiced by defendant prior to July 2, 1965. Therefore, unless this Court should now find that defendant has engaged in discriminatory employment practices subsequent to the January 9, 1970, decision of the Court of Appeals, there is no basis for this Court to issue injunctive relief encompassing all black persons subsequently employed at defendant's Dan River Steam Station. Members of such a class have the entire arsenal of Title VII at their disposal today.

[2] For a complete statement of the facts surrounding this case see *Griggs v. Duke Power Company,* 292 F. Supp. 243 (1968); 420 F. 2d 1225 (1970); 401 U. S. 424 (1971).

[3] *See* Transcript of July 14, 1972, (pp. 51-70). Hereinafter the transcript of July 14, 1972, will be referred to as "I" followed by the page number, and the hearings held on July 24, and August 1, 1972, (pp. 1-342 in two volumes) will be referred to as "II" followed by the page number.

[4] *See* I (pp. 43-50); and Defendant's Exhibit #4.

[5] *See* I (pp. 32-42); and Defendant's Exhibit #4.

[6] *See* II (pp. 3-18); and Defendant's Exhibit #4.

[7] *See* II (pp. 19-30); and Defendant's Exhibit #4. In his testimony Mr. Galloway complained particularly about not being offered an opportunity for a vacancy of an electrician's job in the plant. The following dialogue occurred during cross examination and is illustrative of Mr. Galloway's qualifications for the job.

" : Mr. Galloway, are you an electrician by trade? Have you ever done any electrical work?

"A: I've done a little.

"Q. You have?

"A: Yes Sir.

"Q: Well can you tell me the difference between alternating current and direct current?

"A: Well, now I haven't did that much electricity . . ." II (pp. 24-25)

Moreover, there was testimony from Mr. R. K. Lemmons, Assistant Plant Superintendent, that Mr. Galloway has had heart problems and for that reason has been restricted to relatively light work, *i. e.,* janitorial duties. II (p. 142).

[8] *See* I (pp. 10-31); and Defendant's Exhibit #4.

[9] *See* II (pp. 199-306).

[10] This does not mean that the Court disbelieves the testimony of the plaintiffs. On the contrary, it is quite likely that the plaintiffs who refused the job did genuinely believe that the offer was a bad faith attempt to eliminate their employment. However, the Court cannot infer such an intention by the defendant as a fact. Fear and distrust are unfortunate products of any labor dispute, but they are beyond the power of any court to remedy. After five years of litigation and widespread publicity it is only natural for the plaintiffs to be skeptical of all actions by the defendant which affect them.

[11] The testimony of Mr. R. K. Lemmons, Assistant Plant Superintendent, satisfactorily explains the business judgments surrounding the circumstances of the offer of the jobs to plaintiffs and the subsequent decision to employ an independent contractor. *See* II (pp. 106-108, 145-150).