1972 WL 234
United States District Court; W.D. Oklahoma.

United States of America, Plaintiff
v.
Lee Way Motor Freight, Inc. et al., Defendants.
J. W. Walter, Plaintiff
v.
Same.

No. CIV-72-445
|
No. CIV-72-166
|
December 21, 1972

EUBANKS, D. J.

[*Issues Presented*]

***1** Currently before the Court for disposition are two motions. One is a motion of Defendant for partial summary judgment. The other is a motion of the Plaintiffs to strike Defendant's demand for a jury trial. These motions will be considered in the order mentioned.

[*Back Wages*]

Defendant in its scholarly and persuasive Brief calls attention to the difference in the wording of the two sections of the Civil Rights Act of 1964, one of which allows a suit by a private individual and the other of which allows the Attorney General to bring the suit. With reference to that section that allows an individual complainant to bring a suit, 42 U. S. C. 2000e-5(g), said section, in speaking of the relief that may be awarded to a person discriminated against with regard to employment because of his race, generally provides that the Court may enjoin the violator and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees *with or without back pay*. (Emphasis mine) Defendant then focuses attention upon the wording of Section 2000e-6(a), which allows a suit to be brought by the Attorney General, and accurately states that nowhere therein is anything said about recovery of back pay in suits brought by the Attorney General. Therefore, the Defendant alleges that it is entitled to partial summary judgment in Civil Action No. 72-445, so as to eliminate the prayer of the Plaintiff for back pay for employees allegedly discriminated against. Defendant then argues that under the doctrine of *expressio unius est exclusio alterius,* the Plaintiff cannot recover on the back pay portion of its prayer in the consolidated suit brought by the Government. Otherwise stated, Defendant says that Congress was careful to provide for the recovery of back pay in suits brought by individuals under the Civil Rights Act, but by omitting such proviso from the section allowing suits by the Attorney General the Congress has clearly limited the relief attainable in a suit brought by the Attorney General to injunctive relief.

[*Holding on Back Wages*]

If this were a case of first impression, I am frank to admit that I am inclined to believe that I would follow the convincing argument presented by Defendant. However, I am persuaded that a contrary result has been reached in at least one, and possibly two cases handed down by the appellate courts. In *United States v. Hayes International Corporation,* [4 EPD P 7690] 456 F. 2d 112, the Court reversed a holding by a District Judge that back pay could not be awarded. There, the District Court had refused to entertain a claim for back pay because the issue was not specifically raised until the post-trial stage of the litigation. The Court of Appeals for the Fifth Circuit, in speaking on this ruling by the trial judge, said:
"The back pay issue was not specifically raised until the post-trial stage of the litigation. The district court accordingly refused to entertain it. We think that the broad aims of Title VII require that this issue be developed and determined. It should be fully considered on remand." Fed. R. Civ. P. 15(a); see *Rosen v. Public Service Electric and Gas Co.,* 3 Cir. 1969, [1 EPD P 9980] 409 F. 2d 775, 780 n. 20.

***2** The United States in its Brief argues that the Court reached the same conclusion in *United States v. St. Louis-San Francisco Railway Co.,* [4 EPD P 7862] 464 F. 2d 301, but the ruling by the Ninth Circuit in the last mentioned case is not as clear as that of the Fifth Circuit case of *Hayes.* The Ninth Circuit, at Page 311, said:

> "No back pay will be awarded. In reaching this decision, we have taken into consideration the fact that the train porters (and the Government) took the position that a complete merger of the two crafts was required with full seniority carryover. Since this demand has been denied by this Court, it cannot be said that Frisco acted in bad faith or erred in refusing to voluntarily grant that request. Moreover, it would be impossible to determine on what date those train porters who are now physically unqualified to become brakemen, became physically unable to perform."

Other cases are cited by both sides in their excellent briefs, but I believe it is unnecessary to mention these other citations since the foregoing seem dispositive of the back pay issue.

Accordingly, the Motion of Defendant for Summary Judgment is denied.

[*Demand for Jury Trial*]

The Defendant has filed its Demand for a Jury Trial in these consolidated cases. However, Defendant readily admits that if its Motion for Summary Judgment be upheld a jury trial would not be warranted. Again, Defendant makes an excellent argument that a litigant may not be deprived of the constitutional guarantees of the Seventh Amendment merely because the legal issues could be characterized as being incidental to the equitable interests. However, once again the cases cited to us and discovered by our independent research indicate that the great weight of authority is to the effect that in Title VII cases a jury trial may not be had. *Johnson v. Georgia Highway Department,* [2 EPD P 10,119] 417 F. 2d 1122, specifically so holds. Other cases reaching the same result are: *Robinson v. Lorillard Corp.,* [3 EPD P 8267] 444 F. 2d 791, 802 (4th Cir. 1971); *King v. Laborers Intern. U. of No. America, U. L. No. 818,* [3 EPD P 8198] 443 F. 2d 273, 279 (6th Cir. 1971); *Gillen v. Federal Paper Board Co.,* [2 EPD P 10,265] 55 F. R. D. 383 (D. Conn. 1970); *Cheatwood v. South Central Bell Telephone,* [1 EPD P 9971] 303 F. Supp. 754 (M. D. Ala. 1969).

Accordingly, the Motion of Plaintiffs to Strike Defendant's Demand for Jury Trial is sustained.

All Citations

Not Reported in F.Supp., 1972 WL 234, 5 Empl. Prac. Dec. P 8402, 16 Fed.R.Serv.2d 1547

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