UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

VERSUS

EAST BATON ROUGE PARISH SCHOOL BOARD

CIVIL ACTION

NO. 97-264-A

Consolidated With:

DOROTHY BANKS, ET AL

VERSUS

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL

CIVIL ACTION

NO. 98-974-A

RULING ON MOTIONS

This matter is before the court on a motion by defendants[1] for summary judgment in Civil Action No. 98-974-A. Also pending is a motion by defendants to dismiss Count III of the complaint. Both motions are opposed. There is no need for oral argument. Jurisdiction is based upon 28 U.S.C. § 1331.

This employment discrimination case challenges certain employment practices of defendant East Baton Rouge Parish School Board connected with the implementation of a consent decree between the School Board and the Department

[1] Defendants are the East Baton Rouge Parish School Board, school board members, Ingrid Kelley, Warren L. Pratt, Jr., Dr. Press L. Robinson, Sr., Jacqueline Mims, Patricia Hayne-Smith, Noel Hammatt, Roger Moser, Daniel R. Henderson, Eldon Bodoux, Dalton Devall, William P. Black, and Human Resources Supervisor, James Manley.

of Justice. Plaintiffs[2] are sixteen women who have all been employed by the School Board in "Janitor I" positions. Plaintiffs essentially claim that they sought employment in the new "Janitor" positions created pursuant to the consent decree and that defendants discriminated against them on the basis of their gender and in retaliation for their having filed a prior state lawsuit alleging employment discrimination in janitor positions. More specifically, plaintiffs claim that defendants retaliated against them and discriminated against them by imposing a reading test and providing less hourly pay in the new "Janitor" positions.

The following facts (as taken from defendants' statement of uncontested facts) are undisputed:

1. "Plaintiffs herein are among those plaintiffs who filed lawsuit in June, 1993 against the East Baton Rouge Parish School Board in state court alleging a violation of state law for the reduction of their hours in violation of L.R.S. 17: 422.5, as well as employment discrimination on the basis of sex in violation of L.R.S. 23: 1006 and L.R.S. 51: 2231, et seq., Louisiana's anti-discrimination statutes."

2. "In April, 1997, a lawsuit was filed [by the United States Department of Justice in this court] against the East Baton Rouge Parish School Board alleging discrimination in the hiring and promotion for Janitor II and Janitor III positions on the basis of sex

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[2] Plaintiffs are Dorothy Banks, Tina Brooks, Shirley Brown, Annette Gray, Mary L. Holmes, Annie Johnson, Amy Lane, Rosa Malveau, Dorothy McPipe, Alma Newman, Maggie Tucker, Bertha Twine, Berthella Wallace, Edna Welch, Mary Williams and Nellie Williams.

in violation of Title VII, 42 U.S.C. § 2000e, et seq." United States of America v. East Baton Rouge Parish School Board, Civil Action No. 97-264-A.

3. "A settlement between the School Board and the Department of Justice was negotiated in the form of a consent decree."

4. "The consent decree was provisionally approved by [this court] on April 8, 1997, subject to a Fairness Hearing to consider any objections to the proposed decree."

5. "Pursuant to Order of this Court, a copy of the Notice of Fairness Hearing, as well as the Court's Order scheduling the hearing for June 20, 1997, was mailed to all female janitors employed by the School Board or who had applied for employment in a janitorial position on or after January 1, 1986 until March 31, 1997."

6. "The Notice of Fairness Hearing was also advertised in the local newspaper called the 'Advocate'."

7. "Plaintiffs herein were among the 2,336 people to whom the Notice of Fairness Hearing and Order were mailed as was required by this Court's order of April 8, 1997, and as was specifically provided in the injunctive provisions of the consent decree."

8. "Specifically, the consent decree stated that Janitor I 4-hour and Janitor I (12 month) positions were included within the coverage of the consent decree."

9. "The consent decree also provided that Janitor I employees were to be given an opportunity, by seniority, with a first right of refusal, to be employed in the new full-time janitor position created pursuant to the consent decree."

10. "All of the named plaintiffs herein were among the list of 2,336 people to whom the Notice of Fairness Hearing and Order were mailed."

11. "Of the 2,336 notices mailed to persons potentially affected by the consent decree, 575 were returned to the post office, which number represented 490 actual persons as there were duplicate mailings to some persons on the list."

12. "None of the notices mailed to the plaintiffs herein were returned by the post office."

13. "Counsel for plaintiffs herein, Nancy Picard appeared at the June 20, 1997 Fairness Hearing on behalf of the named plaintiffs she represents in the state lawsuit against the School Board, which plaintiffs are among those named as parties to the instant lawsuit."

14. "Prior to appearing at the hearing, Ms. Picard also filed objections to the consent decree on or about April 29, 1997."

15. "Following the Fairness Hearing, this Court approved the consent decree on June 20, 1997."

16. "In the fall of 1997, plaintiffs herein were among those persons contacted by the Human Resources Department for the Maintenance Department of the School Board and directed to report to the School Board office, if they were interested in applying for the new Janitor position, to participate in testing designed to evaluate the applicant's qualifications for the new full-time Janitor position."

17. "Those persons who reported, including plaintiffs herein, except for Dorothy Banks, Amy Lane and Bertha Twine, were given a practical test to evaluate their skills in operating equipment and in performing certain required tasks of the job."

18. "Applicants were also tested on their ability to read at an eighth grade level."

19. "The consent decree approved by this Court in June, 1997, also provided that those applicants selected for possible employment in the new Janitor or Lead Janitor positions might be required by the School Board 'to pass additional lawful and job-related selection devices or requirements.'"

20. "On November 18, 1998, plaintiffs herein filed the instant lawsuit in the United States District Court for the Middle District of Louisiana, after having filed charges with the Equal Employment Opportunity Commission on behalf of themselves and others similarly situated, charging the School Board with discrimination against them on the basis of their sex, as well as retaliation for their being parties to the state lawsuit."

I. Motion for Summary Judgment

Defendants move for summary judgment on the grounds that this lawsuit is an impermissible collateral attack upon employment practices implemented pursuant to the consent decree entered in Civil Action No. 97-264-A. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[3]

The salient issue is whether the claims asserted by plaintiffs are barred by the collateral attack prohibition of Title VII, 42 U.S.C. §2000e-2(n), which provides in pertinent part:

> (n) **Resolution of challenges to employment practices implementing litigated or consent judgments or orders**
> (1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).
> (B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws--
> (i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had--
> (I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and
> (II) a reasonable opportunity to present objections to such judgment or order...
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> * * *
>
> (2) Nothing in this subsection shall be construed to--
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> * * *
>
> (B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;
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> * * *

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[3] Fed. R. Civ. P. 56(c)

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

Defendants contend that the claims made by plaintiffs are barred by subparagraph (n)(1). According to defendants, plaintiffs are challenging employment practices that "implement" and come "within the scope of ... a consent judgment... that resolves a claim of employment discrimination under... Federal civil rights laws". Defendants further contend that dismissal of the claims on this basis would comport with due process. Defendants argue that plaintiffs had notice of the consent decree sufficient to alert them that their interests might adversely be affected and that objections were actually filed on their behalf.

In opposition, plaintiffs make a three-fold argument. First, plaintiffs contend that they do not contest an employment practice that implements a consent decree because the consent decree does not specifically call for a reading test or set the level of pay for the "Janitor" positions. Second, plaintiffs contend that the exception set forth in paragraph(n)(2)(B) applies because they were "members of a group on whose behalf relief was sought in such action by the Federal Government". Third, plaintiffs contend that, even if this action would be otherwise barred, the statute must be applied consistent with due process requirements as set forth in paragraph (n)(2)(D). Plaintiffs contend that they must be afforded an opportunity to be heard regarding practices that were established subsequent to the consent decree.

In response to a notice to counsel, the United States (plaintiff in the consolidated action) has filed a brief expressing the view that this action is not

precluded by § 2000e-2(n) for two reasons. First, the government argues that plaintiffs are not challenging an employment practice that "implements" and is "within the scope of" the consent judgment. While the decree calls for the creation of the Janitor position, the government notes that it does not specifically provide the qualifications or level of pay. Moreover, the government argues that the challenged employment practices cannot be said to implement the consent decree if those actions violate Title VII. To the contrary, the consent decree expressly required the selection process to be conducted "in a lawful nondiscriminatory manner pursuant to the requirements of Title VII. Exh. E, p. 8, ¶ 22. Secondly, the government argues that plaintiffs did not receive sufficient notice that the consent decree might adversely affect them because the salary and job qualifications were not specified therein.

In its latest response, the School Board concedes that the specific qualifications and salary schedules were not set forth in the four corners of the consent decree. The School Board argues, however, that the qualifications and salary schedules were "an integral part of arriving at the terms of the consent decree and what was subsequently implemented."

Having carefully considered this matter, the court finds that § 2000e-2(n) does not bar this action for the reasons advanced by plaintiffs and the government. While the Janitor positions were created pursuant to the consent decree, there are no provisions setting forth the specific qualifications or salary for that position. The

parties to the consent decree generally agreed that the School Board would establish the salary schedules for the Janitor and Lead Janitor positions. Exh. E, ¶ 12. They further agreed that the School Board would conduct the selection process (which might include "additional lawful and job-related selection devices or requirements) in a nondiscriminatory manner. Exh. E, ¶¶ 6, 22. Because there are no provisions in the consent decree establishing a reading test or the level of pay, the challenged actions are not within the scope of the decree. See, **Boston Police Superior Officers Federation v. City of Boston**, 147 F.3d 13 (1st Cir. 1998).

The court further agrees that plaintiffs had insufficient notice for this action to be precluded under §2000e-2(n). Paragraph (n)(1)(B)(i)(I) requires that prior to the entry of the consent judgment the plaintiff receive notice "sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order..." Plaintiffs were not given notice of the specific manner by which the School Board would address the pay scale and qualifications for the Janitor positions. Consequently, they had no opportunity to make objections regarding the salary and the reading test.

Moreover, the legislative analysis of the bill that resulted in the amendment of Title VII to include §2000e-2(n) provides:

> Under specified conditions, Section 11 of the bill would preclude certain challenges to employment practices specifically required by court orders or judgments entered in Title VII cases. This Section would

bar such challenges by any person who was an employee, former employee, or applicant for employment during the notice period and who, prior to the entry of the judgment or order, received notice of the judgment in sufficient detail to apprise that person that the judgment or order would likely affect that person's interests and legal rights; of the relief in the proposed judgment; that a reasonable opportunity was available to that person to challenge the judgment or order by future date certain; and that the person would likely be barred from challenging the proposed judgment after that date. The intent of this section is to protect valid decrees from subsequent attack by individuals who were fully apprised of their interest in litigation and given an opportunity to participate, but who declined that opportunity.

In particular, the phrase 'actual notice . . . apprising such person that such judgment or order might adversely affect the interests and legal rights of such person,' means of course that the notice itself must make clear that potential adverse effect. And this, in turn, means also that **the discriminatory practice at issue must be clearly a part of the judgment or order**. Otherwise, it cannot credibly be asserted that the potential plaintiff was given adequate notice. Thus, where it is only by later judicial gloss or by the earlier parties' implementation of the judgment or order that the allegedly discriminatory practice becomes clear, Section 11 would not bar a subsequent challenge. Moreover, the adverse effect on the person barred must be a likely or probable one, not a mere possibility. Otherwise, people would be encouraged to rush into court to defend against any remote risk to their rights, thus unnecessarily complicating litigation. Finally, the notice must include notice of the fact that the person must assert his or her rights or lose them. Otherwise, it will be insufficient to apprise the individual 'that such judgment or order might adversely affect' his or her interests.
(Emphasis added.) 137 Cong. Rec. S15472-01, S15477.

The court additionally agrees with plaintiffs that the proviso contained in (n)(2)(B) would appear to be applicable on its face. The consent decree provided injunctive relief in favor of Janitor I employees (which included the plaintiffs) by giving them an opportunity, by seniority with a first right of refusal, to be employed in the new full-time Janitor positions created pursuant to the consent decree.

Defendants offer no reason why plaintiffs should not be considered as "members of a group on whose behalf relief was sought in such action by the Federal Government."

Instead, defendants vaguely respond that if plaintiffs are members of such a group then they are in "privity" with the federal government; and they are accordingly precluded from collaterally attacking the consent decree. While defendants apparently contend that either "claim preclusion" or "issue preclusion" applies, defendants fail to show that the requisite elements for either have been met. As previously noted, the consent decree did not establish the qualifications or the salary for the Janitor positions.[4] The claims asserted here had not even accrued at the time the consent decree was entered. Consequently, the issues to be decided in this case were neither litigated nor resolved by the consent decree. Neither claim

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[4] Res judicata or claim preclusion bars the litigation of claims that either have been litigated or should have been raised in an earlier suit. The four elements of claim preclusion are: (1) The parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded to a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions. **In re Southmark Corp.**, 163 F.3d 925 (5th Cir.1999).

Collateral estoppel (or issue preclusion) has three elements: (1) the issue at stake must be identical to the one involved in the prior action; (2) the issue must have been actually litigated in the prior action; and (3) the determination of the issue in the prior action must have been a necessary part of the judgment in that earlier action. However, issue preclusion differs from claim preclusion because issue preclusion does not always require complete identity of the parties. **Next Level Communications LP v. DSC Communications Corp.**, --- F.3d ----, 1999 WL 409645 (5th Cir. Jun 21, 1999) (NO. 98-40682).

preclusion nor issue preclusion has any application under the circumstances. See, **Barfus v. City of Miami**, 936 F.2d 1182 (11th Cir. 1991).

II. Motion to Dismiss

Defendants move to dismiss the § 1983 claims on the grounds that plaintiffs fail to allege a separate constitutional or statutory basis apart from Title VII. This argument clearly lacks merit. Plaintiffs have alleged sexual discrimination, which is a violation of the Fourteenth Amendment. Plaintiffs may bring claims under both §1983 and Title VII. See, **Southard v. Texas Bd. of Criminal Justice**, 114 F.3d 539 (5th Cir. 1997).

The School Board and the individual defendants in their official capacities further contend that they are entitled to qualified immunity because plaintiffs have failed to allege that their constitutional rights were violated through the execution of an official policy or custom of the School Board. In this instance, "official policy" would include a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the School Board ... or by an official to whom the School Board has delegated policy-making authority. See, **Eugene v. Alief Independent School Dist.**, 65 F.3d 1299 (5th Cir. 1995), cert. denied, 517 U.S. 1191, 116 S.Ct. 1680, 134 L.Ed.2d 782 (1996).

In their complaint, plaintiffs allege that the members of the school board:

> "... established the conditions, qualifications and job description for a full-time janitorial position with the intent to retaliate against female employees who had filed a lawsuit with the School Board; alternatively,

> the conditions that they placed on this new position had a discriminatory impact on the plaintiffs."

The court concludes that this is sufficient (albeit barely) to allege that the constitutional violations were the result of an official policy of the school board. While the individual defendants, including James Manley, contend that they have been sued in their official capacities, plaintiffs fail to specify whether the defendants are sued in their individual or official capacities. Since the School Board has been made a defendant, the court will assume that the individual defendants are sued only in their individual capacities.

Finally, the individual defendants (including James Manley) argue that they are immune from individual liability because plaintiffs have not actually asserted any violation of their constitutional rights. However, as noted previously, plaintiffs have alleged sexual discrimination, which is a violation of the Fourteenth Amendment. The court finds that this argument lacks merit.

Accordingly, the motion by defendants (doc. no. 15) for summary judgment is hereby DENIED and the motion by defendants to dismiss count III (doc. no 5) is

hereby DENIED. In view of the government's response that it is monitoring the proceedings in Civil Action No. 98-974-A, the court will vacate the prior order consolidating these two matters.

Baton Rouge, Louisiana, July 30, 1999.

JOHN V. PARKER,
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA