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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

DOROTHY BANKS, ET AL

CIVIL ACTION

VERSUS

NO. 98-974-A

EAST BATON ROUGE PARISH
SCHOOL BOARD, ET AL

RULING ON MOTION FOR SUMMARY JUDGMENT

This matter is before the court on motion of defendant East Baton Rouge Parish School Board for Summary Judgment (Doc. No. 73). There is no need for oral argument. Plaintiffs have filed a memorandum in opposition. This court has jurisdiction pursuant to 28 U.S.C. § 1331.

Background

Plaintiffs are sixteen women formerly or currently employed as janitors by the East Baton Rouge Parish School Board ("School Board"). Prior to 1992, the School Board employed janitors in three different designations. These jobs were titled janitor I, janitor II, and janitor III. The janitor I position involved employment for six hours a day during nine months of the year. Most of the janitor I positions were filled by female employees. The janitor II position involved work essentially identical to

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that performed by janitors I, with the addition of traditionally "male" duties, such as lawn care and other outside chores. The janitor II position was an eight hour a day, year round position. Most of the janitor II positions were filled by males. The janitor III designation was a full time position entailing work identical to the other two positions, with the addition of some supervisory functions, such as locking up the buildings, and supervising late cleaning crews.

Plaintiffs were employed in the janitor I position. In June of 1992, the School Board decided to cut the hours of the janitor I job from six hours a week, to four. Some benefits were also eliminated. In June of 1993, 46 female janitorial employees, including the plaintiffs, filed suit against the School Board in the Nineteenth Judicial District Court, Parish of East Baton Rouge. The suit alleged that the reduction in hours and benefits had a disparate impact on female employees in violation of La. R.S. 51:2231, et seq., as well as intentional discrimination in violation of La. R.S. 23:1006. This lawsuit is still pending.

Shortly after the filing of the state court lawsuit, the United States Department of Justice began an inquiry into the hiring practices of the School Board with regard to the placement of women in the janitor II and III positions.

In 1996, the School Board began evaluating all positions within the district with an eye toward eliminating inefficient use of resources. Pursuant to this effort, it was decided that the three-tiered janitor position would be eliminated, and replaced with two new positions, janitor, and lead janitor. The janitor position would correspond

with the old janitor I and janitor II positions. The lead janitor position would be the equivalent of the old janitor III classification. Both positions were to be full time jobs, with medical benefits. The School Board decided that present janitorial employees who did not wish to apply for the new positions could keep their old jobs.

The School Board also states that it had determined that its janitors were overpaid, through reference to Louisiana Department of Labor statistics for average salaries in the region. Accordingly, the School Board changed the pay scale system for janitors, which resulted in lower hourly pay. A testing procedure was put into place for applicants to the new janitor I positions. Applicants were required to take a "practical" test, involving the use of maintenance equipment, and a reading test. Applicants for the new lead janitor position were not required to take these tests.

The reading requirement was implemented following an incident in which at least one School Board employee was sickened due to a custodian's failure to follow printed instructions on the use of a pesticide. The School Board states that it conducted an investigation into the reading ability of its janitorial employees, which revealed that many of them were illiterate. The School Board felt that safety concerns demanded that its new janitors read at least at the eighth grade level. The School Board states that this reading level was determined based upon the fact that the safety guidelines of the Occupational Safety and Health Administration (OSHA) were written on the eighth grade level, as were most Material Safety Data Sheets. Applicants for the new lead janitor position were not subjected to the reading test.

The School Board's plan for the new janitor positions was incorporated into a consent decree between the School Board and the U.S. Department of Justice in June, 1997. The reading requirement was not specifically made a part of the consent decree, although the decree did state that "[a]pplicants selected for possible employment as Janitors or Lead Janitors may be required by the School Board to pass additional lawful and job-related selection devices or requirement." **Consent Decree** (defendants' Exhibit H), p. 8.

In the fall of 1997, the plaintiffs were contacted by the office of Mr. James Manley, Personnel Supervisor for the Maintenance Department of the School Board, regarding their interest in applying for the new janitor position. While all of the plaintiffs passed the practical test, all but one failed the reading test. The plaintiffs who failed the reading test were given the option of remaining in their old janitor I jobs, or taking the new janitor position on a probationary basis. Attendance at adult reading classes at night was a condition of this probation. Those accepting the probationary position would be paid at the lowest step in the new pay scheme until such time as they were able to satisfy the reading requirement. At that point, they would be moved up the salary scale to reflect the position on the scale that they had occupied in their old janitor I jobs.

The plaintiffs state that Mr. Manley gave conflicting information regarding the consequences of failing the reading test, and accepting the probationary janitor position. According to the plaintiffs, some were told that if they failed the reading test

a second time, that they would be terminated. Others were told by Manley that he did not know what would happen to them if they failed to pass the reading test. The plaintiffs state that all were told that if they decided to take the new janitor position on a probationary basis, that they could not return to their old janitor I positions. The plaintiffs also state that they were told that remaining in their current positions while preparing to retake the reading test was not an option.

The plaintiffs filed suit in this court in November, 1998, claiming unlawful retaliation and disparate impact under Title VII. Plaintiffs allege that the School Board established the conditions, qualifications, and job description for the new full time janitor position with the intent to retaliate against them for their participation in the earlier state court discrimination suit. Alternatively, the plaintiffs claim that the condition placed on the new janitor position, specifically the reading requirement, had a disparate impact on female employees.

Summary Judgment Facts

Defendants have submitted a statement of uncontested facts in support of their motion for summary judgment, in accordance with Local Rule 56.1. The plaintiffs have responded, admitting some of these facts, and denying others. For the purpose of this court's decision on the instant motion, the following material facts are admitted:

5. Plaintiffs herein are among those plaintiffs who filed a 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.

14. In April, 1997, a lawsuit was filed 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 in violation of Title VII, 42 U.S.C. §2000e, et. seq., by the United States Department of Justice.

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

16. The consent decree also required that the part-time Janitor I's would be given the opportunity to apply for the new Janitor position if they met the qualifications.

19. Beginning in approximately 1996, the School Board, through its then Associate Superintendent for Human Resources and Instruction, Christine (Chris) Arab, began evaluating all school system positions, including job descriptions and salary schedules, in an attempt to pinpoint those departments within the school system which were operating inefficiently.

20. The goal of this study was to illuminate areas in which the school system could save money and then use the funds for its instructional services.

21. All janitor and custodian classifications were included in this study.

29. An incident occurred where a custodian improperly used a chemical to eliminate ants from an office complex, causing at least one of its employees to require medical attention.

30. Upon questioning the custodian involved, Mr. James Broussard, former Risk Manager for the School Board, concluded that the employee involved could not read.

31. Mr. Broussard conducted an informal survey among the custodian supervisors and principals of schools regarding the perceived literacy problem among custodial and janitorial staff.

33. Mr. Broussard believed that the safety guidelines of OSHA were written at an eighth grade reading level.

34. Following this investigation, Mr. Broussard recommended to Mrs. Arab, his supervisor, that a reading requirement be placed into the job descriptions of the janitorial and custodial staff to avoid future incidents whereby persons could be injured due to an employee's inability to read and follow the directions provided on the chemicals used in everyday cleaning of the schools in the system.

37. In the fall of 1997, plaintiffs herein were among those persons contacted by the Human Resources Department for the Physical Plant Services department of the School Board and directed to report to the Maintenance office complex to participate in testing designed to evaluate the applicant's qualifications for the new full-time Janitor position.

38. The Janitor I's were given the option of choosing to go forward with the application process or to remain in their position as a Janitor I.

39. 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.

40. The practical test evaluated an individual's ability to operate a lawn mower, a weed-eater, a floor buffing/cleaning machine, to climb ladders safely, to change light bulbs in the flourescent lighting fixtures in the schools, to change air conditioning filters, etc.

41. Plaintiffs were also subjected to a written Test of Adult Basic Education.

44. The requirement of an ability to read at an eighth grade level was included on the job description for the new Janitor position.

45. It was also provided in the Consent Decree approved by the court in June, 1997 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."

56. Some plaintiffs who participated in the testing were contacted by Mr. James Manley to discuss their performance on the tests.

57. All plaintiffs passed the practical test, but only one plaintiff scored at an eighth grade reading equivalency on the Test of Adult Basic Education.

58. Even though most of the plaintiffs did not meet the reading requirement for the job, they were given the option of remaining in their Janitor I positions or taking the new position on a probationary basis, even if their reading level was at the kindergarten level. At such time as they reached an eighth grade reading level, each plaintiff would be eligible for permanent status in that position.

69. 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.

70. Plaintiffs alleged that the establishment of the conditions, qualifications and job description for the new full-time janitor position, including the requirement that applicants pass both the practical and reading tests before becoming eligible for employment in the position, was done by the defendants "with the intent to retaliate against female employees who had filed a lawsuit with the School Board [or] alternatively, the conditions that [the defendants] placed on this new position had a discriminatory impact on the plaintiffs."

Discussion

A. Retaliation under Title VII

The plaintiffs claim that the School Board established the new janitor position, with its attendant requirements, with intent to retaliate against them for their state court discrimination suit, in violation of Title VII §704(a), as amended, 42 U.S.C.A. § 2000e-3(a).

Title VII provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C.A. § 2000e-3(a).

In order to state a prima facie retaliation claim under Title VII, a plaintiff must show three elements. First, that he or she engaged in an activity protected from retaliation under Title VII. Second, that he or she was subjected to an adverse employment action. Third, the plaintiff must show a causal connection between the protected activity, and the alleged retaliatory action. **Shirley v. Chrysler First, Inc.**, 970 F.2d 39, 42 (5th Cir. 1992); **Mayberry v. Vought Aircraft Co.**, 55 F.3d 1086 (5th Cir. 1995).

The defendants do not dispute the fact that participation in a lawsuit alleging discrimination is a protected activity under Title VII. The School Board, however,

disputes the remaining two elements, arguing that there was no adverse employment action taken against the plaintiffs, and even if there was, no causal connection can be established between such action, and the protected activity.

The plaintiffs characterize the adverse employment action in this case as "a bogus reading prerequisite established to block (the plaintiffs') promotion to a full time position." **Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment**, p. 15. The plaintiffs argue that the School Board's actions left them confronted with the choice of accepting a the new janitor position on a probationary basis, with the attendant burdens of adult reading classes and ongoing uncertainty about their employment futures if they failed to pass the reading test, or remaining in their janitor I positions with no benefits, and no hope of promotion.

The meaning of "adverse employment action" has been clarified by Fifth Circuit case law. In **Dollis v. Rubin,** 77 F.3d 777 (5th Cir. 1995), the court stated that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." **Id** at 781-82. Ultimate employment decisions include actions such as "hiring, granting leave, discharging, promoting, and compensating." **Id**. at 782. (Citing **Page v. Bolger**, 645 F.2d 227, 233 (4th Cir.)(en banc), *cert. denied*, 454 U.S. 892, 102 S.Ct. 388, 70 L.Ed.2d 206 (1981)); **Mattern v. Eastman Kodak Company**, 104 F.3d 702 (5th Cir. 1997). Thus, actions taken by

an employer that fail to rise to the level of "ultimate employment decisions" are not "adverse employment actions" within the meaning of Title VII.

The defendants argue that this standard precludes a finding that their decision to implement the new janitor position, with its attendant reading requirement, constituted an adverse employment decision within the meaning of Title VII. The School Board points to the fact that the plaintiffs were allowed the choice to keep their janitor I jobs, or to apply for the new janitor position, and argues that whether or not the plaintiffs passed the reading test did not affect their status as employees fo the School Board.

The only category of actions cited in **Dollis** to which the School Board's decision to implement the new janitor position with its reading requirement might correspond is "promotion." Thus, it could be argued that the School Board's decision effectively denied the plaintiffs a promotion, which could constitute an ultimate employment decision. The move from janitor I to the new janitor position, however, was not a part of any internal ordered scheme of promotion to which the plaintiffs were entitled, either from years of service, or job performance. Instead, the janitor position was a new job, for which the plaintiffs were given a right of first refusal before the position was offered to the public. Given this fact, and given the additional fact that the plaintiffs had the choice of staying where they were with no adverse consequences, this court finds that implementation of the new janitor position was not an ultimate employment decision.

Accordingly, the plaintiffs have failed to state a prima facie case of retaliation under Title VII. The defendants are entitled to summary judgment on this issue.

B. Disparate Impact

In the alternative, the plaintiffs argue that the reading requirement had a disparate impact on female employees within the meaning of Title VII. The plaintiffs contend that they were the only School Board employees impacted by the reading requirement, as they were the only current employees interested in moving into the new janitor position, whose additional hours and benefits constituted a promotion for them. Current janitors II, by contrast, could simply choose to remain in their full time janitor II positions, or apply for lead janitor positions, thereby circumventing the reading requirement.

In order to establish a claim of disparate impact employment discrimination, a class of plaintiffs must show that a facially neutral employment practice results in a significantly adverse impact on a protected class. **Griggs v. Duke Power Company**, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

The facts of this case, however, do not readily lend themselves to analysis under a disparate impact theory. The disparate impact theory is usually applied to show that an employment practice results in a sexual or racial disparity in the workforce. The plaintiffs complain of the fact that the reading test was applied to them, while mostly male janitor II employees could avoid the test, either by

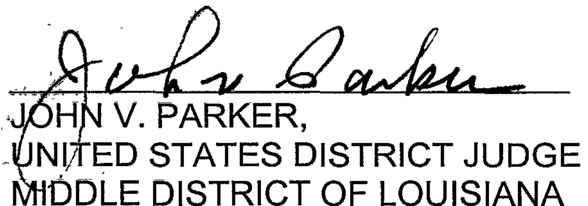
remaining in their janitor II positions, or by applying for lead janitor positions, for which no reading test was mandated.

In **Pouncy v. Prudential Insurance Company of America**, 688 F.2d 795 (5th Cir. 1982), the court stated that "[t]he disparate impact model applies only when an employer has instituted a specific procedure, usually a selection criterion for employment, that can be shown to have a causal connection to a class based imbalance in the workforce." **Id**. at 800. Later in the opinion, the court again stressed that "the disparate impact model requires proof of a causal connection between a challenged employment practice and the composition of the workforce." **Id**. at 801.

The plaintiffs have failed to show that the reading requirement resulted in a sex based imbalance in the School Board's workforce. The fact that the institution of this requirement fell totally on part time female janitorial employees may reflect a pre-existing imbalance resulting from other factors, but the disparate impact theory properly focuses on results.

Accordingly, the defendants' Motion for Summary Judgment (Doc. No. 73) is hereby **GRANTED** and this action shall be dismissed.

Baton Rouge, Louisiana, June 5, 2001.



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