For Opinion See 2004 WL 835620, 2004 WL 726110, 2004 WL 434210, 2002 WL 31478261

United States District Court, N.D. Illinois.
John MCGEE and Thomas Malone, Plantiffs,
v.
ILLINOIS DEPARTMENT OF TRANSPORTATION, Kenneth Chlebicki, Dennis Mahoney, and John Kos, Defendants.
No. 02 C 0277.
July 18, 2002.

Jury Trial Demanded

Plaintiffs' Response to Defendants' Motion to Dismiss

Magistrate Judge Schenkier (by consent).

I. *INTRODUCTION*

John McGee and Thomas Malone worked as Highway Maintainers for the Illinois Department of Transportation for over two decades apiece. In the fall of 2000, they were both promoted to higher positions after this Court entered a consent decree in *Massie v. IDOT,* No. 96 C 4830. The *Massie* consent decree sought to undo decades of discrimination against African American IDOT workers by ordering several promotions, implementing a new rotation policy, providing monetary relief to class members, and instituting a no-retaliation policy throughout IDOT. Problems began to arise immediately, however. Mr. McGee and Mr. Malone experienced harassment, discrimination, and retaliation from the first day on their newjobs. They initially sought relief under the consent decree, but IDOT's investigation (using procedures that the parties drafted at the instruction of the Court last summer) came to nothing. In *each and every case* that IDOT investigated a complaint under the consent decree, it found *no evidence of discrimination* and recommended that *no action be taken.* Frustrated and harassed on a daily basis, the plaintiffs then elected to exercise their right to file a lawsuit and seek a jury trial on their claims under Sections 1981 and 1983 and Title VII.

Defendants' motion to dismiss plaintiffs' complaint is remarkable more for what *itfails to say* than for what it does. Without a shred of support in this or any other circuit, defendants ask the Court to dismiss a Title VII complaint wholesale - one that is not barred by any legal principle. As shown below, defendants' motion must be denied.

II. *ARGUMENT*

A. There is no authority for dismissing plaintiffs' Title VII claims.

Defendants ask the Court to dismiss plaintiffs' Title VII claims outright, arguing (at 7-9) that the plaintiffs' *only recourse* is to bring an enforcement action under the *Massie* consent decree, and accusing plaintiffs (at 8-9) of wasting judicial resources by duplicating an action already filed under the consent decree. Defendants misrepresent the record: *there is only one pending action* - the instant case. There is no contempt action pending on behalf of Mr. McGee or Mr. Malone under the *Massie* consent decree. Although the plaintiffs did file a motion for rule to show cause last summer, the Court denied it on June 21, 2001 without prejudice as premature and plaintiffs did not refile it.[FN1]

> FN1. Because the Court never reached the merits of the argument, IDOT cannot argue that the principles of *resjudicata* or collateral estoppel apply here, since there has been no prior final judgment on the merits under the consent decree. *Smith v. City of Chicago,* 820 F.2d 916, 917 (7th Cir. 1987).

As such, plaintiffs are not barred from suing IDOT for the discrimination, retaliation and harassment they experienced after they were promoted under the *Massie* consent decree. The decree itself does not (and cannot) preclude plaintiffs from filing Title VII lawsuits for wrongs that occurred after the *Massie* settlement as IDOT implies (at 7). IDOT's single authority, *Serlin v. Arthur Andersen & Co.,* 3 F.3d 221 (7th Cir. 1993), offers no support: that case involved two parallel actions that were pending at the same time. Here, there is only one pending action - the instant case.

Plaintiffs note that even if there *were* two simultaneous proceedings under the *Massie* consent decree and in this case, *Serlin* would, in fact *preclude* dismissal of this action: “a suit is duplicative if the ‘claims, parties, and available relief do not significantly differ between the two actions.’ ” *Id.* at 223. Here, the parties, claims, standards of proof, and relief available to Mr. McGee and Mr. Malone are entirely different in this forum than those available under the *Massie* consent decree.

1. The parties differ.

Here, the plaintiffs seek redress against both IDOT and the individual defendants (supervisors and officials) who either caused or allowed the discriminatory and retaliatory acts to take place. There is no provision in the consent decree to hold individual wrongdoers accountable for their actions, and the individual defendants in this action were not parties to the *Massie* case.

2. The scope of plaintiffs' claims differ.

The plaintiffs' claims are dissimilar in the two forums. Under the *Massie* consent decree, they must prove that IDOT violated the terms of a contract, *Rumpke of Indiana Inc. v. Cummins Engine Inc.,* 107 F.3d 1235, 1243 (7” Cir. 1997), which itself is limited to the specific provisions of the consent decree. By contrast, plaintiffs may seek a jury trial in this action for violations of Sections 1981

and 1983 and Title VII, including claims for retaliation, discrimination and harassment with respect to training, terms and conditions of employment, hostile work environment, interference with access to full and equal benefits of the laws, and deprivation under color of law of any rights, privileges, or immunities secured by the Constitution and laws. Plaintiffs in this action also have the ability to amend their complaint if future circumstances warrant (to add claims for constructive discharge, for example). Their claims and potential claims are thus far broader than those available under the consent decree, and their access to ajury is a clear distinction between this action and an action to enforce the consent decree. *See Dunlap v. City of Chicago,* 435 F.Supp. 1295, 1301 (liability ofjury trial in civil lawsuit and lack thereof in contempt proceeding weighed against issue preclusion).

3. The standard of proof differs.

Furthermore, the standard of proof under the consent decree requires proof by clear and convincing evidence - far higher than the preponderance of the evidence standard that applies to plaintiffs' civil lawsuit. *Goluba v. SchoolDistrict of Ripon,* 45 F.3d 1035, 1037 (7th Cir. 1995) (“[t]o win a motion for civil contempt, a party must prove ‘by clear and convincing evidence’ that the opposing party violated a court order”; *citing Stotler and Co. v. Able,* 870 F.2d 1158, 1163 (7th Cir.1989)); *Hayden v. Oak Terrace Apartments,* 808 F.2d 1269, 1270 (7th Cir. 1987); *Shakman v. Democratic Organization of Cook County,* 533 F.2d 344, 351 (7th Cir. 1976). *See also Dunlap,* 435 F.Supp. at 1300 (difference between burdens of proof in contempt proceeding and civil lawsuit an important factor in rejecting claim preclusion argument).

4. The available relief differs.

Plaintiffs here bring a new action for discrimination, retaliation, and harassment that arose after they were promoted to new positions under the *Massie* consent decree. The potential damages they can seek in this action include compensatory damages for both monetary and nonmonetary losses, punitive damages, injunctive relief, and costs and fees. By contrast, the consent decree does not specify the types of damages available. Civil contempt is the remedy for a violation of a consent decree, the nature of which is determined by the court. *International Union, United Mine Workers of Am. v. Bagwell,* 512 U.S. 821, 826-28 (1994); *Connolly v. J.T. Ventures,* 851 F.2d 930, 932 (7th Cir. 1988). In a contempt proceeding, the Court is limited to imposing sanctions against IDOT alone, whereas plaintiffs seek relief against the individual defendants in the instant action.

In sum, plaintiffs have the right to choose this forum to seek redress for the treatment they received by IDOT and the individual defendants, and IDOT has failed to advance a single argument (or cite a single authority) that supports its motion to dismiss the Title VII claims. As such, Counts III and IV of plaintiffs' complaint should stand.

B. Defendants do not seek dismissal of plaintiffs' Section 1981 and 1983 claims against the individuals defendants.

Defendants argue (at 4) that plaintiffs' Section 1981 and 1983 claims should be dismissed under the principle of Eleventh Amendment immunity. Plaintiffs agree that states and their agencies that have not waived immunity are generally not subject to private lawsuits for money damages, absent special circumstances. *Alabama v. Pugh,* 438 U.S. 781, 782 (1978); *Gleason v. Board of Educ.,* 792 F.2d 76, 79 (7th Cir.1986). However, plaintiffs may maintain Section 1981 and 1983 actions against the *individual defendants* in their individual capacities. *Hafer v. Melo,* 502 U.S. 21, 23 (1991) (state officials sued in their individual capacities are "persons" for purposes of Section 1983); *Kroll v. Board of Trustees of University of Illinois,* 934 F.2d 904, 907 (7th Cir. 1991) ("[p]ersonal-capacity suits raise no Eleventh amendment issues even though an official might have the requisite nexus to the state in order for his or her actions to be labeled state action). Additionally, plaintiffs may maintain actions against the individual defendants in their *official capacities* for certain types of damages: "official-capacity actions may not be barred by the Eleventh Amendment insofar as they request prospective relief- *i.e.,* an injunction or a declaratory judgment and monetary damages that are 'ancillary' to either." *Id.* at 908. IDOT apparently agrees, having made no argument that the Section 1981 and 1983 claims against the individual defendants should be dismissed. As such, the Court should not dismiss the plaintiffs' Section 1981 and 1983 claims (Counts I and II) against the individual defendants in their personal or official capacities.

C. Plaintiffs have properly pled their Section 1983 claim.

IDOT also argues (at 5) that plaintiffs' Section 1983 claim should be dismissed as to all defendants because plaintiffs have "fail[ed] to identify the underlying constitutional right(s) that Defendants have purportedly violated." On the contrary, "[b]y the plain terms of Section 1983, two - and only two - allegations are required in order to state a cause of action under the statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo,* 446 U.S. 635, 640 (1980). Accordingly, plaintiffs met this standard by alleging race discrimination (an equal protection violation) in their complaint. See, for example:
2. After the entry of the consent decree, the two plaintiffs in this action, both of whom were class representatives in the *Massie* case, were promoted to higher positions under the decree and took part in implementing other aspects of the decree. They immediately began to experience race discrimination, harassment, and retaliation as a result of their promotions, their participation in the consent decree, and their opposition to the discrimination, harassment and retaliation that commenced by IDOT officials who were not parties to the *Massie* lawsuit.
15. Mr. McGee has been treated differently than other Lead Workers and has been prevented from performing the duties of his position because of his race and his

participation in the *Massie* decree. This differential treatment is severe and pervasive and has materially altered the terms and conditions of his employment.
22. Mr. Malone has been treated differently than other HCEOs and has been prevented from performing the duties of his position because of his race and his participation in the *Massie* decree. This differential treatment is severe and pervasive and has materially altered the terms and conditions of his employment.
41. The defendants have wilfully and intentionally violated Section 1983 by the discrimination and retaliation alleged above, which deprived the plaintiffs of their rights under state and federal civil rights laws and the U.S. Constitution. The individual defendants, as supervisory employees of the State of Illinois, acted under color of state law. The defendants, who are the plaintiffs' direct supervisors or the supervisor of other defendants, either participated in directly or knew of the discriminatory and retaliatory conduct alleged above. The defendants knew of this conduct for several months, yet they failed to act to prevent future harm, and, indeed, continued to engage in or tolerate the discriminatory and retaliatory behavior after the plaintiffs began to pursue their complaints and failed to take remedial action.

Complaint ¶¶2, 15, 22, 41 (emphasis added).[FN2]

> FN2. Defendants do not argue that plaintiffs' Section 1983 claim is preempted by their Title VII claims, which, in any case, do not preempt a cause of action for intentional discrimination in violation of the Constitution, *Waid v. Merrill Area Public Schools,* 91 F.3d 857, 861-862 (7th Cir. 1996), *Trigg v. Fort Wayne Community Schools,* 766 F.2d 299, 300-01 (7th Cir.1985).

The Supreme Court has explicitly declined to apply a heightened pleading standard to Section 1983 cases. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, et al.,* 507 U.S. 163, 168 (1993) ("[w]e think that it is impossible to square the 'heightened pleading standard' [on review] with the liberal system of 'notice pleading' set up by the Federal Rules. Rule 8(a)(2) requires that a complaint include only 'a short and plain statement of the claim showing that the pleader is entitled to relief' "). Plaintiffs have given defendants the required "full and fair notice" of their the nature of their claims. *Walker v. Benjamin,* 2002 WL 1313006, *6 (7th Cir. June 18, 2002) (plaintiff bringing Section 1983 action was not required to "set out in detail all of the facts upon which he bases his claim. Rule 8(a) requires only that the complaint give the defendants fair notice of what the claim is and the grounds upon which it rests"); *Scott v. City of Chicago,* 195 F.3d 950, 951 (7th Cir. 1999) ("[a] complaint need not reference every element of a legal theory to satisfy Rule 8(a)(2)'s requirements"); *Conley v. Gibson,* 355 U.S. 41, 47 (1957). Defendant's citation of *Kyle v. Morton High School,* 144 F.3d 448 (7th Cir. 1998) serves only to support plaintiffs' position; there, the Seventh Circuit reiterated that Rule 8 requires only "minimal notice of the claim" for a complaint to survive a motion to dismiss. *Id.* at 455. Here, defendants are fully aware of the nature and grounds of plaintiffs' claims.

III. *CONCLUSION*

For all the reasons presented above, the plaintiffs respectfully request that the Court deny defendants' motion to dismiss plaintiffs' complaint.

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