

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

JESSE W. WILLIAMS, SHERIFF)
OF PATRICK COUNTY, a Consti-)
tutional Officer of the)
Commonwealth of Virginia)
and elected under the laws)
of the Commonwealth,)

Defendant.)

CIVIL ACTION
NO. 83-0094-D

MEMORANDUM OF PLAINTIFF UNITED STATES
IN OPPOSITION TO THE MOTION OF DEFENDANT
JESSE W. WILLIAMS, SHERIFF OF PATRICK COUNTY,
TO DISMISS, PURSUANT TO RULE 12(b)(6), F.R.CIV.P.

INTRODUCTION

On June 29, 1983, plaintiff United States filed its complaint in this action, alleging that defendant Jesse W. Williams, Sheriff of Patrick County, has engaged and continues to engage in discriminatory practices against women on the basis of their sex with respect to employment as sworn officers in the Patrick County Sheriff's Department (the "PCSD"), in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. In its complaint, the United States alleged (Complaint, para. 7) that Sheriff Williams has implemented and continues to implement these discriminatory practices, among other ways, by:

a. failing or refusing to recruit, select, hire and appoint women as sworn officers on an equal basis with men;

b. applying standards to women that differ from those applied to men in the selection of sworn officers and that are not job related;

c. failing or refusing to establish and follow valid and objective standards in the selection of sworn officers which do not unlawfully discriminate against women;

d. providing women employees in the PCSD with terms and conditions of employment less favorable than those provided to men employees; and

e. failing or refusing to take appropriate action to eliminate discrimination against women employees and applicants for employment in the PCSD, and to redress the wrongs suffered by those women who were the subjects of past discriminatory practices.

On July 21, 1983, Sheriff Williams filed a motion to dismiss the United States' complaint, pursuant to Rule 12(b)(6), F.R.Civ.P. That motion was unaccompanied by any supporting papers, and simply stated that dismissal was sought on the ground that the United States' complaint failed to state a claim upon which relief can be granted. Thereafter, on July 28, 1983, Sheriff Williams filed a memorandum and an affidavit executed by the Sheriff in support of his motion. In his memorandum, Sheriff Williams contends (p. 6) that the United States' complaint should be dismissed for failure to state a claim because, argues the Sheriff, deputy sheriffs in the PCSD are not "employees" within the meaning of Title VII and, thus the Sheriff is exempt from coverage under the Act. By order entered August 22, 1983, the Court ruled that it would hold in abeyance consideration of defendant's motion until all discovery by the parties had been completed and this action was ready for trial.

ARGUMENT

THE MOTION OF DEFENDANT JESSE W. WILLIAMS, PURSUANT
TO RULE 12(b)(6), F.R.CIV.P., TO DISMISS THE
COMPLAINT OF THE UNITED STATES SHOULD BE DENIED.

- A. Although Section 701(f) Of Title VII Exempts Certain
Classes Of Persons From The Definition Of Employees
Covered Under The Act, Congress Intended That Such
Exemption Be Construed Narrowly

Section 703(a) of Title VII prohibits an employer from engaging in any employment practice which discriminates against employees or applicants for employment on the basis of race, color, religion, sex or national origin. 42 U.S.C. 2000e-2(a). Section 701(b) of Title VII provides for coverage under the Act of employers having fifteen (15) or more employees, 42 U.S.C. 2000e-(b), and Section 701(f) defines the term "employee" as:

... an individual employed by an employer, except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. 42 U.S.C. 2000e-(f).

Thus, the exemption from the definition of "employee" which is provided by Section 701(f) does not apply, unless it can be shown that the person employed is an elected public official or is:

1. chosen by an elected public official to be on his personal staff; or
2. appointed by an elected official to a policymaking position; or

3. an immediate advisor to an elected official regarding the exercise of the constitutional or legal powers of the official's office.

See, e.g., Anderson v. City of Albuquerque, 690 F.2d 796, 800 (10th Cir. 1982); Gearhart v. State of Oregon, 410 F. Supp. 597, 600 (D. Ore. 1976).

Further, the legislative history of Section 701(f) demonstrates that Congress clearly intended that this exemption be construed very narrowly, and those courts which have addressed this issue have so held. Anderson v. City of Albuquerque, supra, 690 F.2d at 800; Gearhart v. State of Oregon, supra, 410 F. Supp. at 600; Howard v. Ward County, 418 F. Supp. 494, 502 (D. N.Dak. 1976).

As the joint House-Senate conference committee reported with respect to the exemption provided by Section 701(f):

It is the intention of the conferees to exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisors or to policymaking positions at the highest levels of the department or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level. It is the conferees intent that this exemption shall be construed narrowly. Also, all employees subject to State or local civil service laws are not exempted. Joint Explanatory Statement of Managers at the Conference on H.R. 1746, 1972 U.S. Code Cong. & Adm. News, p. 2179, at p. 2180. [emphasis supplied]

Again, the Section by Section Analysis of Title VII that was reported to the Senate reflects that Section 701(f):

... is intended to exclude from the definition of 'employee' as used in Title VII those persons elected to public office in any State or political subdivision. The exemption extends to persons chosen by such officials to be on their personal staff, appointees of such officials to be on their personal staff, appointees of such officials on the highest policymaking levels such as cabinet members or other immediate advisors of such elected officials with respect to the exercise of the Constitutional or legal powers of the office held by such elected officer. The exemption does not include civil service employees. This exemption is intended to be construed very narrowly and is in no way intended to establish an overall narrowing of the expanded coverage of State and local governmental employees as set forth in section 701(a) and (b) above. Section-by-Section Analysis of H.R. 1746 as Reported to the Senate on March 6, 1972, 118 Cong. Rec. at 7166-67. [emphasis supplied]

Indeed, during the Senate debate on this Section, Senator Ervin, the sponsor of the original Senate amendment containing the exemption, agreed with Senator Williams that the purpose of the Ervin amendment to the Section is:

... to exempt from coverage those [persons] who are chosen by the Governor, or by the Mayor or the county supervisor, whatever the elected official is, and who are in a close personal relationship and an immediate relationship with him. Those who are his first line advisors... 118 Cong. Rec. 4493 (1972). [emphasis supplied]

As the above discussion makes clear, Congress intended that the exemption provided by Section 701(f) was to have a very limited reach.^{1/}

- B. The Motion Of Defendant Jesse W. Williams, Pursuant To Rule 12(b)(6), F.R.Civ.P., To Dismiss The Complaint Of The United States Properly Should Be Treated As A Motion For Summary Judgment, Pursuant To Rule 56, F.R. Civ.P.; And Under Rule 56, The Burden Is Upon Sheriff Williams To Demonstrate Clearly That There Is No Genuine Issue of Material Fact, And Any Doubt As To The Existence Of Such An Issue Should Be Resolved Against Him

Rule 12(b)(6), F.R.Civ.P., which governs motions to dismiss for failure to state a claim, provides in relevant part that where:

... matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56...

Since Sheriff Williams has presented an affidavit executed by him in support of his motion to dismiss, his motion must be treated as one for summary judgment since his affidavit has not been excluded by the Court.

^{1/} We note that in Kyles v. Calcasieu Parrish Sheriff's Department, 395 F. Supp. 1037 (W.D. La. 1975), a case referred to by the defendant here (Memorandum, pp. 3-4), the district court never analyzed, or even made mention of, the legislative history of Section 701(f). Instead, as the court in Gearhart v. State of Oregon, supra, 410 F. Supp. at 601 n. 4, observed, the Kyles court's decision was based upon the peculiarities of Louisiana law and the court never reached the question of exemption under Section 701(f).

While the court in Brewster v. Shockley, 554 F. Supp. 365 (W.D. Va. 1983) referred to the Kyles' criteria in analyzing Section 701(f), it is significant that Judge Williams nevertheless denied defendants' motion to dismiss in Brewster, ruling that the matter deserved a full evidentiary airing at trial.

Rule 56(c), F.R.Civ.P., provides, in relevant part, that summary judgment may be granted only upon a showing 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.

The courts have uniformly applied a rigorous standard which must be met by a movant for summary judgment. As the Court of Appeals for this Circuit has instructed in Phoenix Savings and Loan, Inc. v. Aetna Casualty and Surety Co., 381 F.2d 245, 249 (4th Cir. 1967):

It is well settled that summary judgment should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances. Neither should summary judgment be granted if the evidence is such that conflicting inferences may be drawn therefrom, or if reasonable men might reach different conclusions [citations omitted]. Burden is upon the party moving for summary judgment to demonstrate clearly that there is no genuine issue of fact, and any doubt as to the existence of such an issue is resolved against him [citations omitted].^{2/}

Further, on a motion for summary judgment, the test is not whether the movant has established a fact by the preponderance of the evidence but, rather, whether there exists a genuine issue of material fact. Ransburg Electro-Coating Corp. v. Lansdale Finishers, Inc., 484 F.2d 1037, 1039 (3rd Cir. 1973). Thus, it is

^{2/} See also, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Cole v. Cole, 633 F.2d 1083, 1089-90 (4th Cir. 1980), Morrissy v. Proctor & Gamble Co., 379 F.2d 675, 677 (1st Cir. 1967); Clark v. Western Chemical Products, 557 F.2d 1155, 1157 (5th Cir. 1977); Clausen & Sons, Inc. v. Theo Hamms Brewing Co., 395 F.2d 388, 389 (8th Cir. 1968); Bankers Trust Co. v. Trans-america Title Insur., 594 F.2d 231 (10th Cir. 1979).

the duty of the trial court to determine whether a genuine issue of material fact exists, and not how it is to be decided. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Phoenix Savings and Loan, Inc. v. Aetna Casualty and Surety Co., supra; Cole v. Cole, supra; Commercial Metals Co. v. Walker, 439 F.2d 1103, 1104 (5th Cir. 1971). As the Court of Appeals for the Seventh Circuit succinctly stated in Homan Mfg. Co. v. Long, 242 F.2d 645, 656 (7th Cir. 1957):

A summary judgment proceeding is not a substitute for a trial, but rather a judicial search for determining whether genuine issues exist as to material facts. [citations omitted] The lower court cannot try out factual issues on a motion for summary judgment because once such an issue is found the court's function on that aspect of the case ends.

Indeed, summary judgment should be denied not only where the factual record before the court is incomplete, Phoenix Savings and Loan, Inc. v. Aetna Casualty and Surety Co., supra, 381 F.2d at 252; Virgil v. Time, Inc., 527 F.2d 1122, 1131 (9th Cir. 1975), cert. denied, 425 U.S. 998 (1975), but also where a fuller development of the facts may serve to clarify the legal issue or to assist the trial court in determining the application of the law to the case. See, e.g., Robert Johnson Grain Co. v. Chemical Interchange, 541 F.2d 207, 210 (8th Cir. 1976).

C. Defendant Jesse W. Williams Has Failed To Demonstrate Clearly That There Is No Genuine Issue Of Material Fact And, Thus, His Motion Should Be Denied

As is hereafter demonstrated, defendant Jesse W. Williams' motion falls far short of the standard which must be met for the granting of summary judgment.

In arguing that sworn officers in the PCSD are part of the Sheriff's personal staff and appointees on a policymaking level and, thus, exempt by Section 701(f) from coverage under Title VII, the defendant first observes (Memorandum, p.2) that under Virginia law the Sheriff is an elected constitutional officer, and that deputy sheriffs are appointed by the Sheriff as opposed to being hired on the basis of certain job qualifications. We recognize that the Sheriff is an elected constitutional officer, Constitution of Virginia, Art. VII, §4, and Va. Code Ann. §24.1-86, and we so alleged in our complaint (para. 3). We also recognize that deputy sheriffs are appointed by the Sheriff, Va. Code Ann. §15.1-48. However, defendant's suggestion that deputy sheriffs do not have to meet certain minimum job qualifications is erroneous. Thus, Virginia law requires that a candidate for any police officer or deputy sheriff position throughout the State must: (a) be a United States citizen; (b) undergo a background investigation; (c) be a high school graduate or have a G.E.D.; (d) possess a valid Virginia driver's license; and (e) undergo a complete physical examination. Va. Code Ann. §15.1-131.8 (Cum. Supp. 1983). Virginia law further requires that all law enforcement officers in the State, whether they be employees of a police department or a sheriff's department, Va. Code Ann. §9-169 (Cum. Supp. 1983), successfully complete a compulsory training course administered by the Virginia Department of Criminal Justice Services,^{3/} Va. Code Ann. §14.1-73.2 (Cum. Supp. 1983); Va. Code

^{3/} Prior to July 1, 1982, this compulsory training course was administered by the Virginia Criminal Justice Services Commission. Va. Code Ann. §9-107 - 9-111.2 (Cum. Supp. 1983).

Ann. §9-170 (Cum. Supp. 1983), and failure to comply with such training standards shall result in forfeiture of employment and benefits. Va. Code Ann. §9-181 (Cum. Supp. 1983).

Aside from these State requirements, all applicants for employment in the PCSD are required to complete and submit a "County of Patrick, Virginia Application for Employment," detailing their personal record, education, military service, personal references and employment history (Deposition of Jesse W. Williams 8/11/83, Govt. Ex. 16 attached thereto); and applicants for deputy, as well as dispatcher, jobs in the PCSD are required to obtain a score of at least 70 on a law enforcement related written examination administered by the Sheriff before they will be given further consideration for employment (Id., Govt. Ex. 6 attached thereto).^{4/} All employees of the PCSD are subject to a performance review on at least an annual basis (Id., Govt. Ex. 17 attached thereto). Lastly, all employees of the PCSD are required to adhere to published "Rules and Regulations" issued by the Sheriff which provide for the discharge, suspension, reduction in rank or other adverse administrative proceeding for any violation thereof (Id., Govt. Ex. 8 attached thereto).^{5/}

^{4/} Indeed, one of the two written examinations used alternatively by the PCSD is a police officer examination which was developed at the request of the International Association of Chiefs of Police under the direction of the Director of Personnel Research of the former United States Civil Service Commission (Id., Govt. Ex. 10 attached thereto).

^{5/} These Rules and Regulations prohibit, inter alia: the conduct of personal business while on duty; the failure to log "in" and "out" of service whenever on patrol; the presence of more than two officers in a restaurant at one time; and the use of snuff or chewing tobacco while on duty.

Defendant's assertion that deputy sheriffs in the PCSD are members of the Sheriff's personal staff also overlooks the reality that, under State law, the number of deputies the Sheriff is allowed to employ, as well as their salary range and expense allowance, is fixed by the Virginia Board of Compensation. Va. Code Ann. §14.1-70 - 14.1-79 (Cum. Supp. 1983). Indeed, Section 14.1-73.1:2 of the Virginia Code, adopted in 1980, specifically provides that:

The salary range of any full-time deputy sheriff who is primarily a courtroom security officer, a correctional officer or a law-enforcement officer and, if employed on or after July one, nineteen hundred seventy-four, also has a high school education or the equivalent thereof, shall be equivalent at all times to that of a correctional officer within the classification and pay system for State employees and shall be administered in accordance with regulations for that system administered by the Department of Personnel and Training. The Governor shall provide the Compensation Board the salary range and regulations within that system as of July one, nineteen hundred eighty and as of any subsequent date on which changes in the salary ranges and regulations may be adopted.

Further, under Virginia law, deputy sheriffs also are considered employees for purposes of vacation and sick leave, and are entitled to receive for each year of service at least two weeks vacation with pay and at least seven days sick leave with pay. Va. Code Ann. § 15.1-19.3. Lastly, deputy sheriffs are covered by the Virginia Workman's Compensation Act, Va. Code Ann. §65.1-4, the Virginia Retirement Act, Va. Code Ann. §51-111.10, and the Federal social security program for State and local employees, Va. Code Ann. 51-111.2.

Defendant next asserts (Memorandum, p. 5) that there exist factors unique to the PCSD which cause him to believe that sworn officers in the PCSD are "part of the Sheriff's 'personal staff' and, of necessity, appointees on the policy making level" exempt from coverage under Section 701(f) of Title VII. Defendant suggests that the "rural nature of Patrick County," together with "the necessarily close working relationship" between the Sheriff and his staff, calls for a finding that sworn officers are more than just "nondiscriminatory, non decision-making personnel" (Memorandum, p. 5). In this regard, defendant refers to District Judge Williams' recent decision in an employment discrimination suit brought by a woman on the basis of sex against the Sheriff of Wythe County, Virginia, Brewster v. Shockley, 554 F. Supp. 365 (W.D. Va. 1983). In Brewster, the court stated (Id. at 371) that it would be improper to consider all deputy sheriffs, presumably throughout Virginia, per se employees within the meaning of Title VII, because to do so would be to ignore differences that may exist between sheriff's departments in rural counties, such as Wythe, and sheriff's departments in urban counties. Defendant, however, cannot ground his motion to dismiss on Judge Williams' decision in Brewster because the court there overruled defendants' Rule 12(b)(6) motion to dismiss - which, like the instant motion, contended that deputy sheriffs are not employees under Title VII. The Court in Brewster pointed out (Id. at 371) that consideration of that issue required a full development of all of the evidence; and the Court, thus, set that case for trial. So

by inference, the exemption of all of these other sheriff's departments - based upon the small population or rural nature of the county would fly in the face of clear Congressional intent to the contrary.

Lastly, defendant argues (Memorandum, p. 6) that the affidavit of Sheriff Williams in support of his motion "bears out the intimate relationship" between he and the sworn officers of the PCSD. The only basis advanced by defendant for so arguing is his assertion (Memorandum, p. 6) that: "All the officers, although nominally assigned to specific duties, are expected to and do in fact perform all the functions and exercise all the powers associated with the office of Sheriff."

Initially, we do not believe that the Sheriff's affidavit shows that there exists an "intimate relationship" between he and the sworn officers in the PCSD. Indeed, nowhere in his affidavit does the Sheriff state, or even imply, that any of the sworn officers in the PCSD advise him on policy matters or regarding the constitutional or legal powers of his office, or serve in any capacity other than as "nonconfidential, nonpolicy-making public employes," Ramey v. Harber, supra, 589 F.2d at 754. Further, the Sheriff's statement (Affidavit, p. 1) that the sworn officers in the PCSD are merely informally assigned to various positions (e.g. supervisor, investigator, road deputy, court security deputy and correctional officer), is belied by the facts. Thus, the Sheriff has a formal job title and job description for each sworn and non-sworn position in the PCSD, which details the duties the person employed in that position is expected to per-

form (Williams Dep. 8/11/83, Govt. Exs. 12-15 attached thereto).^{7/} and specific persons are employed by the Sheriff in specific positions (Williams Dep. 8/11/83, Govt. Exs. 33-55 attached thereto). Indeed, the Sheriff's "Rules and Regulations" clearly state that all employees of the PCSD may be "reduced in rank or subject to other administrative proceedings" for any violation thereof, and require that orders of the Sheriff's supervisor, as well as the Sheriff himself be promptly complied with (Williams Dep. 8/11/83, Govt. Ex. 8 attached thereto). Lastly, the Sheriff's own daily activity reports from 1980 through 1983 reflect that only on extremely rare occasions has any employee of the PCSP in fact performed any duties not part of his or her job title and description (Williams Dep. 10/12/83, Govt. Exs. 82C-82N attached thereto).

The forgoing discussion, at a minimum, establishes that the defendant has failed to carry his burden of demonstrating clearly that there is no genuine issue of fact as regards the employment status of sworn officers in the PCSD, for the purpose of coverage under Title VII. Phoenix Savings and Loan, Inc. v. Aetna Casualty and Surety Co., supra; Brewster v. Shockley, supra. On the contrary, the Virginia law referred to by the United States (governing such matters as the number of deputies the Sheriff may


^{7/} None of these job titles and job descriptions state or even infer that the employee is expected to advise the Sheriff on policy matters or regarding the constitutional or legal powers of his office.

employ, their compensation and fringe benefits, and compulsory training with removal from employment for failure to comply), together with the documentary evidence submitted by the United States, point to just the opposite conclusion, i.e., that sworn officers in the PCSD are employees within the meaning of Title VII and are not exempt by Section 701(f) from coverage under the Court.

CONCLUSION

For the foregoing reasons, the motion of defendant Jesse W. Williams to dismiss the complaint of the United States should be denied.


Respectfully submitted,


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CERTIFICATE OF SERVICE

I, JOHN M. GADZICHOWSKI, do hereby certify that on January 5, 1983, I served a copy of the foregoing Memorandum of Plaintiff United States In Opposition to the Motion Of Defendant Jesse W. Williams, Sheriff of Patrick County, To Dismiss, Pursuant to Rule 12(b)(6), F.R.Civ.P. by Federal Express, upon:

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