1976 WL 22840
United States District Court, N.D. Ohio.

THE SHIELD CLUB, et al.
v.
THE CITY OF CLEVELAND, et al.

No. C 72-1088. | Sep. 29, 1976.

Attorneys and Law Firms

Edward R. Stege, Jr., Cleveland, Ohio, for plaintiffs.

Malcolm C. Douglas, Cleveland, Ohio, for city defendants.

Niki Z. Schwartz, Cleveland, Ohio, for Richard J. Faragher and Fraternal Order of Police.

Opinion

WILLIAM K. THOMAS, District Judge:

***1** Intervenor Faragher, Fraternal Order of Police (hereinafter intervenor FOP), "moves the court to reconsider or modify its orders of March 17 and March 18, 1975, enjoining the promotion of four candidates for sergeant, in the light of the subsequently decided case of Washington v. Davis," 44 LW 4789, 12 FEP Cases 1415 (U.S. June 7, 1976). Intervenor FOP recognizes that,

> On July 9, 1975, the United States Court of Appeals for the Sixth Circuit entered an order affirming this court's orders of March 17 and 18, 1975, on intervenor Faragher, Fraternal Order of Police's appeal from those orders.[1]

In that order of affirmance, quoted in full in the margin,[2] the Sixth Circuit stated:

> ***2** [U]pon examination of the record, we find that the district court did not abuse its discretion in exercising its continuing jurisdiction to effectuate the purpose of its prior order.

The court of appeals then entered the order on which intervenor FOP bases its motion:

> IT IS ORDERED that the orders appealed from and entered on March 17 and March 18, 1975, are affirmed, without prejudice, however, to any right in the district judge to consider the matter further in the light of Washington v. Davis, 44 LW 4789, 12 FEP Cases 1415 (U.S. June 7, 1976), if found to be applicable.

After quoting this order, Intervenor FOP thus explains its motion:

> It is just such further consideration that intervenor Faragher, Fraternal Order of Police, seeks by this motion. The orders of March 17 and March 18, 1975, modified and purported to implement the underlying order of July 6, 1974. That order was expressly predicated upon the express findings that "decisions rendered in Title VII cases, such as Griggs v. Duke Power Co., 401 U.S. 424, 3 FEP Cases 175 (1970) apply equally to actions brought under the century old Civil Rights Act, 42 U.S.C. §§ 1981 and 1973."[3] That conclusion was expressly rejected by the Supreme Court in Washington v. Davis, supra, which held that actions brought under those Acts require proof of intentional racial discrimination. No such findings were made with respect to the 1972 promotional examination for the position of sergeant, and indeed, no such findings could have been made.

I.

***3** In Washington v. Davis the Supreme Court reviewed a ruling of the D.C. Circuit Court of Appeals, which had previously reversed the district court. The court of appeals held that Test 21 (a federal Civil Service examination administered generally to prospective government employees) violated the equal protection component of the Fifth Amendment solely upon the ground that Test 21 racially discriminated against black applicants for police positions in the District of Columbia because of its disproportionate racial impact-four times as many blacks as whites failed the examination. The Supreme Court reversed, holding that the court of appeals erroneously applied Title VII standards of discrimination, as declared in Griggs v. Duke Power Co., 401 U.S. 424, 3 FEP Cases 175 (1970), to the constitutional question. Explicating the standard for proof of racial discrimination in violation of the Equal Protection Clause, the Davis decision declared that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." 44 LW at 4792, 12 FEP Cases at 1419. The Court recognized:

> [V]arious Courts of Appeals have held in several contexts, including public employment, that the

> substanitally disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications.[12] The cases impressively demonstrate that there is another side to the issue; but, with all due respect, to the extent that those case rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement.

44 LW at 4793-94, 12 FEP Cases at 1421. (In n.12 the listed decisions include Castro v. Beecher, 459 F.2d 725, 4 FEP Cases 700 (1 Cir. 1972), which is one of the cases this court followed in its July 6, 1974 ruling. See n. 3, supra.)

[PROOF OF PURPOSE]
Intervenor FOP's statement that Washington v. Davis "requires proof of intentional racial discrimination" implies that to establish racial discrimination in violation of the Equal Protection Clause there must be a showing of overt or express discrimination. Davis makes it clear that the Court did not intend such an interpretation of its ruling. The Court stated:

> This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving constitution-based claims of discrimination....

***4** 44 LW at 4792, 12 FEP Cases at 1419. Moreover, concerning the vital question of how one proves a racially discriminatory purpose, the Court noted:

> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another....

Id. at 4792-93, 12 FEP Cases at 1420.

It is the totality standard of proof of racial discrimination delineated in Washington v. Davis that would control if the Sixth Circuit's charge to this court (order of July 9, 1976) were construed to require this court to retry the case involving the sergeant's promotional examination. Intervenor FOP apparently so reads the court's order when it urges this court to "reconsider or modify its prior rulings on the 1972 promotional examination in the light of Washington v. Davis." Although intervenor FOP speaks of reconsideration, a retrial would be necessary if, indeed, the court of appeals' order requires this court to reconsider its 1974 Memorandum and Order in light of Washington v. Davis.

Retrial of the issues involved in the sergeant's promotional examination could not be conducted on the 1974 record unless the parties were to agree to thus proceed. It is not likely that this would happen. To meet the stricter applicable standards of Washington v. Davis, it may be anticipated that the plaintiff would request that the 1974 record be augmented. Since Title VII standards were accepted by all the parties and the standards recently announced in Washington v. Davis were not asserted by any party at the 1974 trial, this court in the interest of justice would permit such augmentation of the record.

[CLAIM]
As noted in this court's opinion of July 6, 1974, in making the claim of discrimination the plaintiffs identified a series of practices of the City defendants. One of these was

> (c) The discriminatory assignment of black and Hispanic officers to positions within the Department which afford little opportunity to study for and gain experience relevant to the promotional examination.

This court's opinion of July 6, 1974, did not discuss or rule on this claim. In its Memorandum and Order just filed on the issue of transfer and assignment of police officers within the Department, this court concluded:

> Hence, the continuing marked underrepresentation of minority police officers, existing on July 6, 1974, when it was called to the attention of the administrators of the Cleveland Police Department, in the 1st and 2nd Districts and certain special units, without explanation or justification, requires the conclusion, now made, that the Chief of Police had and continues to have a racially discriminatory purpose in perpetuating such marked underrepresentation, and in administering the transfer and assignment process.

***5** In any retrial of the issues involved in the decision concerning the 1972 sergeant's promotional examination this court necessarily would incorporate this conclusion as binding upon the parties and as bearing on plaintiffs' claim (c). Therefore, the plaintiffs, as well as the other parties, would be permitted to offer any evidence that bears on plaintiffs' claim (c).

Because of the severability of the different charges of discrimination raised by the plaintiffs' complaint ("recruitment, testing, screening and hiring of new patrolmen, and in the assignment, treatment and promotion of current police officers") and the distinct and separate nature of the issue of plaintiffs' claim of racial discrimination in promotions, centering in the trial on the validity of the 1972 sergeant's promotional examination, it seems clear that this court's permanent injunction, reflected in its Memorandum and Order of July 6, 1974, was "final" and appealable. See Lummus Co. v. Commonwealth Oil Refining Co., 297 F.2d 80, 89 (2 Cir. 1961). However, none of the parties appealed. Nevertheless, because of the recent entrance on the scene of Washington v. Davis this court could not say that the litigation of the promotions issue "has reached such a stage that [the] court sees no really good reason for permitting it to be litigated again," Id. at 89. Yet in any relitigation of the promotions issue, the equities of the situation would require that such issue be retried *de novo* without limitation to the previous record.

[INTERVENING ACT]

Since this court's decision on the promotions issue, an intervening act of the Civil Service Commission has generally mooted the issue of the validity of the 1972 sergeant's promotional examination. Defendant Civil Service Commission complied with this court's order that it "accomplish their previously announced intention of preparing new promotional examinations for the position of sergeant of police." Engaged by the Commission, Dr. Norman D. Henderson thereafter prepared a new sergeant's promotional examination which was held by this court to be racially neutral. Thereafter that examination was conducted on December 9 and 10, 1974.

Bearing in mind this general mooting of the promotions issue, the retrial of the issue would therefore affect, insofar as the persons on the 1972 sergeant's eligibility list are concerned, only the four police officers on whose behalf intervenor FOP appealed. Hence retrial of the promotions issue in light of Washington v. Davis should only be undertaken if that indeed was the charge of the court of appeals.

In its order of July 9, 1976, the court of appeals juxtaposed the orders of this court of March 17 and 18, 1975, which it affirmed, with its further statement that this affirmance was "without prejudice, however, to any right in the district judge to consider the matter further in the light of Washington v. Davis ... if found to be applicable." By juxtaposing this last statement with this court's orders of March 17 and 18, 1975, it seems plain, and this court so understands it, that the court of appeals was saying that the "matter" which this court should consider "in the light of Washington v. Davis," if it has "any right," is the orders of March 17 and 18, 1975. Moreover, the matter which is to be considered cannot be construed as the July 6, 1974, Memorandum and Order, since there is no mention of that Memorandum and Order as the "matter" which may now be considered. Therefore, the court proceeds to consider its March 17 Memorandum and Order in light of the totality standard of racially discriminatory purpose enunciated in Washington v. Davis.

II.

***6** In the Memorandum and Order of March 17, 1975, it was observed:

> The court's interim orders of July 6, 1974, may not be read as a direction that 22 sergeants should be appointed by the Director of Public Safety. As the orders reveal, granting him the right to make further appointments was permissive not mandatory. Thus the

> Director of Public Safety was only permitted to make additional appointments of sergeants as needed, to prevent any interim breakdown in the efficient performance of essential police functions.

It was further stressed that

> ... the main purpose and subject of the relief ordered by this court on July 6, 1974, has now been accomplished by the preparation and taking of a content validated job related sergeant's promotion examination with a reliability of .92. Therefore, the benefit of this exam should be derived by the City of Cleveland at the earliest reasonable time. This court therefore concludes that an appropriate modification in the prior order of this court is essential to put into effect at the earliest practicable date the results of the new sergeant's promotion examination.

In the memorandum the court held that the unfilled vacancies that had arisen in the position of police sergeant during January and the first two weeks of February 1975 required treatment in two groups. It was held that since the last of the promotional tests was given on January 31, 1975, the appointments to vacancies arising prior to that date should be allowed to stand. Differentiating the February sergeant vacancies, this court held:

> The three sergeant vacancies resulting from the two captaincy retirements of February 7 and 10, and the lieutenancy retirement of February 5, 1975, cause this court to infer and conclude that the timing of these retirements was primarily induced by the impending expiration of the sergeant's eligible list on February 14, 1975.

The court then held that these vacancies should

> ... be filled from the new list when certified ... because of the clear inference, now made, that but for the rushed retirements these vacancies would not have occurred until after February 14, 1975. The sergeant vacancy in February occurred by reason of the death of Sgt. William Kahoe on February 13, 1975. It is concluded that this vacancy also would not have been filled the very next day had the eligible list not been due to expire.

Under the City Charter and the rules of the Civil Service Commission, the Director of Public Safety, as the appointing authority, makes the promotional appointments in order of position on the Civil Service promotional list for the particular position (sergeant in this case). However, the Director of Public Safety only acts upon certification by the Chief of Police that there is a vacancy to be filled from the promotional eligibility list. Because of the Chief's integral part in the filling of promotional vacancies, the Director of Public Safety and the Chief of Police are regarded as the administrators who make the appointments. Hence it becomes essential to determine whether in the rush to bring about the filling of the four sergeant vacancies occurring between February 5 and February 14, 1975 (the expiration date of the 1972 sergeant's eligibility list), the Chief of Police acted with racially discriminatory purpose. Chief Rademaker was then Chief and Lloyd Garey was then Assistant Chief.

[NEW FINDINGS]

***7** In view of the new issue that has arisen in light of Washington v. Davis, the court necessarily is free to make new findings on this issue and is free to do so on all the evidence in the total record of the case. This court has now found in its Memorandum and Order of September 27, 1976, that acts committed with a racially discriminatory purpose were performed by the Chief of Police in administering the transfer and assignment process during a period of time that encompassed February 1975. These acts performed with racially discriminatory purpose may be considered as like or similar acts in determining the present issue.

Personnel records in evidence for October 1, 1974, and September 22, 1975, permit the finding that in February 1975 there were 203 sergeants in the Cleveland Police Department, and that only seven or eight of this total were black officers. One black officer held a higher rank in the Department, having been promoted from lieutenant to captain in January 1975. The Chief of Police knew that the next four officers who would fill the vacancies on the

1972 sergeant's eligibility list were white. He did not know how black officers had scored in the new sergeant's promotional examination conducted on December 9 and 10, 1974. Indeed this was not known by any of the parties or the court until the hearing of March 13, 1975, when Dr. Norman D. Henderson's preliminary report on the sergeant's examination was disclosed to counsel and the court. However, the Chief of Police did know that the court had previously determined that the new sergeant's promotional examination was racially neutral and job-related. The Chief of Police also knew that in the "admittedly neutral examination of February 23, 1974," relating to the hiring of new policemen, and also prepared by Dr. Henderson, "[r]oughly 39% of the first 400 persons who passed the test [were] minorities."[4] Hence it would have been reasonable to assume that black officers would finish high on the new sergeant's promotional exam (actually of the first 100 the first black is number 65, the next is number 80, and the next is number 91).

Finally, the Chief of Police knew that the court had determined "that the seniority points rule is likely to have a racially disproportionate impact upon future promotions and has insufficient job relatedness to support its continued use," and that therefore the Civil Service Commission was ordered "in any future police promotional tests to refrain from the use of seniority points." The use of seniority points in the 1972 sergeant's eligibility list, and the absence of seniority points in the certification of the new list because "the seniority points rule is likely to have racially disproportionate impact," provides another factor to be considered in determining what induced the rush to fill the four sergeant vacancies created between February 5 and February 14, 1975.

[CONCLUSION]

***8** Considering the totality of the foregoing relevant factors together with the like and similar acts reflecting racially discriminatory purpose previously mentioned, this court infers and finds that given the rush to fill the four sergeant vacancies created between February 5 and February 14, 1975, the Chief of Police acted with a racially discriminatory purpose in attempting to fill these four vacancies from the 1972 sergeant's eligibility list rather than from the racially neutral and job-related new sergeant's eligibility list, which was about to be certified. This conclusion is consistent with but fleshes out the conclusions reached in the Memorandum and Order of March 17, 1975.

In its Memorandum and Order of March 17, 1975, this court stated:

> [I]t is presumed that each [of the four white officers adversely affected by the court's ruling] took the new examination. It is not presently known how any of these officers fared on the examination. Given the reliability of the new examination it may be presumed that if each of these men is qualified to fill the position of sergeant of police, it seems likely that each will have scored sufficiently high on the new examination to be appointed from the new eligibility list.

All four officers denied promotion by this court's order of March 17, 1975, took the new sergeant's promotional examination. One of these officers stands number 62 on the new eligibility list, while the others stand number 146, number 357, and number 421. After examining these results, the court's conclusions just quoted are reaffirmed.

The four vacancies, filling of which from the 1972 sergeant's eligibility list was enjoined, were eventually filled by officers appointed from the new sergeant's eligibility list, certified May 27, 1975. These were white officers. Nevertheless, allowing this court's injunction of March 17, 1975, to stand may still affect whether a black officer (number 65) is appointed from the new list. This seems likely because the last officer appointed sergeant (July 24, 1976) from the current eligibility list, stood number 46.

Upon the entire record and for the reasons stated the court denies intervenor FOP's motion to modify this court's orders of March 17 and 18, 1975.

IT IS SO ORDERED.

Footnotes

1 The Memorandum and Order of this court dated March 17, 1975 in its terminal paragraph stated:

> "With respect to the four February, 1975 vacancies, actual and resulting, in the position of police sergeant, Safety Director Carney and the other City defendants are enjoined from filling those

vacancies from the 1972 sergeant's eligible list, and are directed to fill those vacancies from the 1975 sergeant's eligible list, when certified. In all other respects the motion of the plaintiffs to modify this court's order of July 6, 1974, is denied."

2 July 9, 1976. Before: PHILLIPS, Chief Judge and LIVELY and ENGEL, Circuit Judges.
"This is an appeal from orders of the district court enjoining City defendants from promoting to the position of police sergeant candidates from a 1972 sergeant's eligibility list. The order modified a prior order of July 6, 1974 which permitted defendants to make scheduled promotions until the implementation of a racially neutral promotional examination. Finding that four vacancies occurring in February were primarily induced by the impending expiration of the 1972 eligibility list on February 14, 1975, the district court concluded that the said vacancies should be filled from the new eligibility list compiled pursuant to the new promotional examination. Intervenor-defendant-appellant Faragher, as representative of the members of the Cleveland Lodge of the Fraternal Order of Police, contends that the district court abused its discretion in modifying its prior order. However, upon examination of the record, we find that the district court did not abuse its discretion in exercising its continuing jurisdiction to effectuate the purpose of its prior order. Accordingly,
IT IS ORDERED that the orders appealed from and entered on March 17 and March 18, 1975, are affirmed, without prejudice, however, to any right in the district judge to consider the matter further in the light of Washington v. Davis, 44 LW 4789, 12 FEP Cases 1415 (U.S. June 7, 1976), if found to be applicable."
ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman, Clerk

3 Intervenor's quote is extracted from the following paragraph of this court's Memorandum and Order of July 6, 1974, relating to promotional exams:
"Title VII of the Civil Rights Act of 1964, was extended to public employers, 42 U.S.C. §§ 2000e-2000e-17, effective March 24, 1972. Plaintiffs do not base their case on Title VII, relying instead on sections 1981 and 1983, as seen. However, decisions rendered in Title VII cases, such as Griggs v. Duke Power Co., 401 U.S. 424, 3 FEP Cases 175 (1970) apply equally to actions brought under the century old Civil Rights Acts, 42 U.S.C. §§ 1981 and 1983. In its opinion of December 21, 1972, this court noted that 'courts have been quick to apply Griggs to public employment cases involving policemen, firemen, and teachers.' See Castro v. Beecher, 459 F.2d 725, 732, 4 FEP Cases 700 (1 Cir. 1972), and the recent case of Vulcan Society of New York City Fire Department, Inc. v. Civil Service Comm'n, 490 F.2d 387, 6 FEP Cases 1045 (2 Cir. 1973)."

4 P. 6 of this court's Memorandum and Order of July 6, 1974, relating to transfer and assignment of officers.