83-5038

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

JEFFREY WASHINGTON, et al.,

Plaintiff-Appellees

and

JOSEPH MONTANTI,

Applicant for Intervention-Appellant

v.

STATE OF NEW JERSEY, et al.,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES AS APPELLEE

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QUESTION PRESENTED

Whether the district court properly denied as untimely the motion of a white firefighter candidate to intervene for the purpose of challenging the hiring relief provided to minority firefighter candidates by a July 27, 1982 consent order between the United States, the City of Jersey City and the State of New Jersey.

STATEMENT OF THE CASE

A. Background.

The United States filed this action on October 4, 1977 against the State of New Jersey, one state official and twelve cities in New Jersey, including Jersey City, alleging that defendants were engaged in a pattern or practice of employment discrimination against blacks and Hispanics with respect to hiring and promotion within the cities' fire departments, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., and the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. 1221 et seq. (SA. 1-6).[1/] One of the employment practices specifically alleged by the United States to be unlawful was the cities' use of State-constructed written examinations in the selection of firefighters which had an adverse impact upon blacks and Hispanics, as compared to white Anglos, and which had not been demonstrated to be job-related (Ja-I-3).

Largely as a result of their use of these written examinations, the cities appointed and employed disproportionately small numbers of minority firefighters in comparison to their actual availability in the labor market. With respect to Jersey City, the record reflects

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1/ Throughout this brief, the abbreviation "SA." refers to the Supplemental Appendix filed by the United States with this brief. "A." refers to the Appendix filed by Joseph Montanti with his brief.

that from 1972 (when Title VII became effective upon state and local governments) through 1977, the City appointed a total of 108 firefighters, only two (or 1.9%) of whom were minorities; and these two minorities, appointed in 1977, were the first post-Act minority appointments in the City's fire department (SA. 28). By mid-1978, blacks and Hispanics comprised only 2.8% of the City fire department's total complement of 671 uniformed personnel (SA. 27).

In January, 1980, the State of New Jersey notified the United States that, in response to Jersey City's desire to appoint an additional fifteen (15) firefighters from the eligibility list which resulted from the State's 1978 written examination, the State intended to certify to the City twenty persons (all of whom were white) from amongst whom the City could make its selections (SA. 7). The United States thereupon moved the district court for an order enjoining the City from making these firefighter appointments, alleging that the 1978 written examination had an adverse impact upon blacks and Hispanics, had not been shown to be job-related and, thus, was violative of Title VII (ibid.). In a decision entered in February, 1980, the court concluded, upon uncontroverted evidence, that the United States had made a prima facie showing that the written examination was unlawful, and that the City's continued use of the eligibility list would cause irreparable harm to blacks and Hispanics. However, since Jersey City had expressed an urgent need for additional firefighters, the court directed that the City could make its desired fifteen appointments, so long as a certain number of those appointees were black or Hispanic (SA. 7-13).

B. The 1980 Consent Decree.

On May 30, 1980, the district court entered a consent decree, agreed to by the United States and all defendants, which was designed to correct the defendants' pattern or practice of discrimination against blacks and Hispanics in the cities' fire departments. The decree, as it pertained to Jersey City, required that the City: not engage in any act or practice that unlawfully discriminates against blacks or Hispanics with respect to employment in the City's fire department; actively recruit qualified black and Hispanic applicants for firefighter jobs; seek, through recruitment combined with the use of nondiscriminatory selection procedures, to meet minority employment objectives for the job of firefighter; and submit to the United States, every sixty (60) days, a report setting forth the number of anticipated firefighter appointments, including the race and national origin of the expected appointees, during the following sixty (60) day period (A. 1-14).

The consent decree prohibited Jersey City from making any firefighter appointments from the eligibility list that resulted from the 1978 written examination, unless (1) such appointments were consistent with the decree's minority employment objectives so as to not adversely affect blacks and Hispanics, or (2) an emergent need for such appointments was demonstrated by the City (A. 3).

Following the entry of the consent decree, the State of New Jersey provided written notification to each person on the then exist-

ing eligibility list that, pursuant to the consent decree, it was likely that the list would soon be terminated. That notice also invited these persons to apply to take a new written examination that would be administered later in 1980. In fact, Jersey City made no further appointments from that eligibility list, and it was terminated.

Joseph Montanti, a white firefighter candidate, had taken the 1978 written examination for firefighter for Jersey City and was ranked number 152 on the eligibility list which resulted from that examination (A. 27). As a result of the appointment, as well as the disqualification and withdrawal of higher-ranked candidates from that list, Montanti had reached the top of that list by February 1980, when the district court entered its preliminary injunction. Following the entry of the May, 1980, consent decree, Montanti received a copy of the notice from the State as described above (A. 28). He challenged neither the February court order nor the May consent decree.

C. Enforcement of 1980 Consent Decree.

In late 1980, the State administered a new written firefighter examination for Jersey City, as well as for other cities throughout the State; and in January, 1981, an eligibility list based upon the results of that examination was established for Jersey City. Joseph Montanti took the examination and was ranked 181 on the list. In violation of the reporting provisions of the 1980 consent decree, Jersey City, in 1981, without first notifying the United States, appointed

a total of 74 firefighters in rank order from this eligibility list, some 22 (or approximately 28%) of whom were black or Hispanic (SA. 16-17).

In addition to these 74 appointments, the City, in October, 1981, responding to an alleged growing manpower shortage which had forced the City's fire department to close down three of its fire companies (SA. 95-105), commenced processing additional firefighter candidates for appointment from the newly developed list. On February 18, 1982, Jersey City notified the next sixty-one (61) candidates ranked on the list (after disqualification and withdrawals) to report for appointment as firefighters on March 5, 1982 (SA. 54). Eleven of the sixty-one (or 18%) were black or Hispanic.

The City gave no advance notification to the United States of its intention to appoint these firefighters, and it was not until March 2, 1982 that the government first learned of the planned appointments, just three days before they were scheduled to be made (SA. 17). A hurried effort to resolve the matter amicably failed, and the United States then moved, on March 5, 1982, for an order temporarily restraining the City from making the appointments, claiming that the selections had been made in a manner inconsistent with the 1980 consent decree (SA. 14-15).[2/]

2/ The 1980 written examination had a pass rate among whites of 81.5%, while the pass rate among blacks was 43.5% and the pass rate among Hispanics was 46.2% (SA. 23). No showing had been made that the exam was job-related.

On March 5, 1982, the day the appointments were to occur, the district court granted the United States' motion and restrained the City from making any appointments pending a hearing. On March 22, 1982, during the hearing, the court, by consent of the parties, preliminarily enjoined the planned appointments, and approved in lieu thereof a City proposal to appoint thirty (30) of the designated sixty-one (61) firefighter candidates on the following basis: eleven (or approximately 37%) of the 30 appointees would be black or Hispanic candidates taken from among the 61 receiving the February 18 notice; the remaining 19 appointees were to be taken from the eligibility list in descending rank order (SA. 61-64). During the hearing, the parties also assured the court that they would try to resolve what should be done with the remaining 31 firefighter candidates who had been notified by the City in February that they would be appointed earlier that month (SA. 62-63). Despite this arrangement, the City subsequently refused to appoint any of the 30 firefighters as contemplated.

In May, 1982, a motion to intervene was filed by Jeffrey Washington, et al., a class composed of most of the sixty-one (61) firefighter candidates, both white and minority, who originally had been notified they were to have been appointed on March 5, 1982. In their proposed complaint in intervention, the claimants alleged that the City had failed to honor its obligations under the 1980 consent decree, and that the City's refusal to appoint them was

the result of the City's desire "to continue to violate the terms of the Consent Decree by failing to appoint sufficient numbers of black and Hispanic persons to the position of firefighter" (SA. 106-114). As relief, they sought an order directing the City to comply with the 1980 decree and to appoint them, together with such additional persons as the court deemed necessary (SA. 113).

On May 24, 1982, following a hearing, the district court granted intervention. That decision was embodied in an order on June 15, 1982, which also established an expedited discovery schedule (SA. 30-33). Following June depositions and other discovery activity,[3/] the United States, on July 13, 1982, filed a motion for an order enforcing the 1980 consent decree and requested injunctive relief (SA. 35-38).

On the scheduled date of an evidentiary hearing on the motion to enforce the consent decree, July 27, 1982, the district court approved and entered a consent order, agreed to by the United States, Jeffrey Washington, et al., Jersey City and the State of New Jersey (A. 17-23). That consent order required, among other things, that Jersey City:

3/ Discovery included the depositions of the Mayor of Jersey City, the City's Director of Administration, the Director of the City's Department of Public Safety and the Chief of the City's fire department. The Chief of the City's fire department testified that up to five of the fire department's 29 fire companies were shut down as a result of retirements and vacations - a situation the Chief deemed critical, because such a manpower shortage increased the response time to a fire or related emergency, thereby increasing the risk of injury and property damage (SA. 95-105).

> * * * offer appointment as a firefighter in the City's Fire Department, and if such offer is accepted, appoint on or before August 16, 1982, each of those sixty-one (61) persons whom the City previously notified was to have been appointed on March 5, 1982, plus a sufficient number of blacks and Hispanics who took the 1980 written examination for firefighter in the Jersey City Fire Department so that the proportion of blacks and Hispanics among such total firefighter appointments shall be no less than 36%. 4/

Pursuant to the July 27 consent order, the City appointed a new class of firefighters on August 16, 1982, which was composed of 58 of the original 61 firefighter candidates,[5/] plus an additional 18 minority firefighter candidates from the eligibility list which resulted from the 1980 written examination.

4/ Thirty-six percent (36%) represented the actual minority applicant flow for the job of firefighter (SA. 19). As the consent order reflects (A. 19), the parties could not reach agreement as to the source from which the additional blacks and Hispanics should be selected so that the hiring of minorities would approximate the minority applicant flow. The United States contended that these minorities should be selected only from among the blacks and Hispanics who had failed the 1980 written examination, since the exam had been used on a pass/fail basis, had an adverse impact upon minorities and had not been shown to be job-related. The City and the State contended that these minorities should be selected from among the blacks and Hispanics already on the eligibility list which resulted from that exam. The consent order provided for the resolution of that issue by the court. In approving and entering the consent order, the district court agreed with the City and the State, and directed the City to select the additional blacks and Hispanics from the 1981 eligibility list (SA. 86).

5/ The City refused to appoint three of the original 61 firefighter candidates - including Jeffrey Washington, a black and the named plaintiff-intervenor - on the alleged ground that they did not meet the City's residency requirement. The district court found that the City's reason for denying appointment to these three firefighters was pretextual, and the court ordered their appointment. That order, is the subject of a separate appeal pending before this Court, United States and Washington, et al. v. State of New Jersey and Jersey City, No. 82-5727.

D. Joseph Montanti's Motion to Intervene.

On August 16, 1982, the same date upon which Jersey City was scheduled to make the firefighter appointments pursuant to the July 27 consent order, Joseph Montanti through his attorney, presented to Chief Judge Fisher of the United States District Court,[6/] an order to show cause why the planned appointments should not be enjoined, together with a proposed complaint in intervention. In his proposed complaint, he alleged that the appointment of these lower-ranked minority candidates discriminated against him on the basis of race, in violation of Section 703(f) of Title VII, 42 U.S.C. 2000e-2(j), as well as the Fourteenth Amendment (A. 35-40).

Montanti asked that the City be temporarily restrained from making any firefighter appointments pending a hearing, and that the United States, Jersey City and the State of New Jersey show cause why a permanent injunction should not be entered prohibiting Jersey City from making any firefighter appointments in any manner other than in rank order from the eligibility list which resulted from the 1980 written examination. Chief Judge Fisher held an in-chambers discussion with counsel for Montanti and all of the parties, during which counsel for the parties opposed Montanti's request for intervention. After that discussion, Chief Judge Fisher stated that he would not rule upon Montanti's request to intervene, and expressed

6/ Montanti presented these papers to Chief Judge Fisher, since the trial judge, District Judge Sarokin, was on vacation at the time.

the view that the matter properly should be addressed by the trial judge. Thus, the scheduled appointments for August 16 were allowed to proceed.

On September 9, 1982, Montanti, through his attorney, formerly filed his motion papers with the district court seeking leave to intervene.[7/]

E. The District Court's Decision.

In an unpublished opinion issued on October 29, 1982, the district court denied Montanti's motion to intervene as untimely. Citing and relying upon NAACP v. New York, 413 U.S. 345 (1973), and Pennsylvania v. Rizzo, 530 F.2d 501 (3d Cir.), cert. denied, 426 U.S. 921 (1976), the court concluded that Montanti was out of time for failing to file his motion before entry of the 1980 consent decree, waiting, instead, to seek intervention until after the decree's subsequent implementation in July, 1982, (A. 42). The court also determined that granting Montanti's motion would prejudice severely those firefighters who had already been hired pursuant to the decree (ibid.).

7/ Apparently, Montanti never filed with the court the papers he tendered to Chief Judge Fisher, and there is no record indication that those papers were otherwise transmitted to the docket clerk for filing.

ARGUMENT

THE DENIAL OF INTERVENTION ON TIMELINESS GROUNDS SHOULD BE VACATED AND REMANDED TO THE DISTRICT COURT FOR RECONSIDERATION

Montanti appeals from the district court's denial of his motion to intervene as of right,[8] pursuant to Rule 24(a)(2), Fed. R. Civ. P.[9] The sole issue for resolution by this Court is whether the intervention motion was timely filed. In the district court, the government argued against intervention, pointing to the extended delay between entry of the original May 30, 1980, consent decree and Montanti's intervention request more than two years later as reason for denial. The court below was apparently persuaded by that argument and used the 1980 consent decree as the bench mark for measuring timeliness. It, therefore, found Montanti's intervention to be untimely.

8/ Montanti only challenges the denial of his intervention as of right (Br. 15) and, thus, has abandoned his request for permissive intervention under Rule 24(b)(2), Fed. R. Civ. P.

9/ Rule 24(a)(2) provides, in relevant part, that:

> Upon timely application anyone shall be permitted to intervene in an action * * * when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Regrettably, the United States now believes that it was in error in urging that the district court focus on the original May 1980 consent decree as the measure of timeliness in this case. At the time that decree was approved, the eligibility list implicated in Montanti's underlying claim of discrimination had not yet been developed. Indeed, it was the 1980 consent decree that led to the development of a new written examination for firefighters and the compilation of a new eligibility list.

Montanti's claim is that minority candidates who ranked below him on that eligibility list were, by consent order dated July 27, 1982, jumped over him and hired solely because of race. Putting aside the merits of that contention for purposes of this appeal, the United States believes, after further analysis, that the present timeliness question must be measured from the July 27, 1982, date. We find it difficult to conclude that Montanti's rights were directly implicated prior to that date, or, if they were, that the City was in some respect failing to represent his interest. Intervention in such circumstances would likely have been denied had it been sought prior to public disclosure of the terms of the July 27, 1982 order.

In reaching this conclusion, albeit belatedly, we are persuaded by the following considerations.

Montanti's timeliness must be measured from the point at which he should reasonably have known that his interest might be affected by the litigation. Bolden v. Pennsylvania State Police, 578 F.2d 912 (3rd Cir. 1978); United States v. South Bend Community School Corp., No. 82-2910 (7th Cir. June 23, 1983). The district court's opinion suggests that it considered Montanti's motion to intervene as an attack on the relief ordered in the 1980 consent decree. Indeed, if this were the situation, his motion would be, without doubt, untimely. See Pennsylvania v. Rizzo, supra; United States by Bell v. Allegheny - Ludlum Industries, Inc., 553 F.2d 451 (5th Cir. 1977) (delay of nine months after entry of consent decree); United States v. United States Steel Corp., 548 F.2d 1232 (5th Cir. 1977) (delay of one year after entry of decree). Montanti, however, has specifically disclaimed any intention to challenge the 1980 consent decree (Br. 14). His complaint in intervention was occasioned by and focused specifically on the nature of the relief in the July 27, 1982 order. It was this order that determined that a specific number of minority firefighters who ranked below Montanti on the eligibility list would be hired ahead of

him. Because the 1980 consent decree only committed the parties to increasing minority representation among firefighters through enhanced recruitment and nondiscriminatory hiring practices, Montanti could not have foreseen the relief ordered on July 27, 1982. It was only with entry of that order that the interest he seeks to assert arose. Montanti could not have known prior to entry of the July 27, 1982 consent order that the court would order the hiring of 18 minority candidates who would be selected by skipping over white candidates, including himself, who ranked higher on the civil service list.[10/]

Indeed, because Montanti's interest did not arise until July 27, 1982, he would not have been entitled to intervene prior to that date. As discussed, his interest was in not being passed over for a firefighter job because of his race. Prior to July 27, 1982 he had not suffered, nor could he foresee this injury. No minority applicants who ranked below him on the eligibility list had been hired ahead of him, nor had any firefighters on the list been skipped because of their race.

10/ This conclusion is consistent with Pennsylvania v. Rizzo, supra, where the proposed intervenors, a fire officers' union and individual firemen, argued that they were not aware that promotions might be affected by that Title VII suit. This Court, however, concluded that the extensive publicity surrounding each step of the litigation of that case alerted them to the nature of the relief that was eventually ordered. In this case, which, unlike Rizzo, was resolved by a consent decree, the nature of the eventual relief was not apparent until entry of the July 1982 consent order.

Although the City agreed on March 22, 1982, to hire 30 firefighters, including 11 minorities, five of whom would be hired out of rank order, it never performed the hiring. Moreover, even if it had, Montanti would not have had a sufficient interest to support his intervention at that time. Because he would not have been skipped, he would not have had the personal, "significantly protectable interest", Donaldson v. United States, 400 U.S. 517, 531 (1971), that is required by Rule 24(a)(2), Fed. R. Civ. P. That interest did not arise until July 27, 1982, when the court ordered that minorities who ranked below him on the eligibility list should be hired ahead of him.

Moreover, even if Montanti were deemed to have had a sufficient interest to intervene prior to July 27, 1982, his interest would have been adequately represented by Jersey City. Until it capitulated on July 27, 1982, the City opposed vigorously any effort to require hiring of minorities ahead of whites who ranked higher on the eligibility list. The City, prior to July 1982, had hired some 74 firefighters in rank order from the eligibility list. It had opposed the United States' effort, beginning in March 1982, to force it to conform its hiring practices to the 1980 consent decree. Although it agreed on March 22, 1982, to hire 30 firefighters, including 11 minorities, it subsequently reneged on its agreement and refused to hire at all.

The City opposed the motion to intervene of the 61 firefighters

who it had intended to hire on March 5, 1982. Until July 27, 1982, it appeared that the City would proceed to trial in opposition to the United States' July 13, 1982 motion to enforce the consent decree and the complaint in intervention of Jeffrey Washington, et al. It was not until July 27, 1982, with entry of the consent order, that Jersey City first took a position in this case that demonstrated that it was not representing his interest. Particularly in view of the presumption of adequate representation that arises when a governmental representative is in the case, Pennsylvania v. Rizzo, supra, Montanti was justified in not moving to protect his interest, even if it had arisen, prior to July 27, 1982.

Selecting the proper starting point for calculating timeliness obviously does not end the inquiry, however. In the instant case, Montanti first sought to challenge the July 27 appointment order almost three weeks after it was announced. His August 16 motion came on the exact day that the ordered appointments were to take place.[11/] In such circumstances, Montanti must carry the heavy burden of demonstrating that he acted to protect his interest in a timely manner. As this Court recently stated in Delaware Valley Citizens' Council for Clean Air v. Pennsylvania, 674 F.2d 970, 974 (1982),

"a motion to intervene after entry of a decree should be denied except

11/Montanti asserts that he had attempted to have his application heard as early as August 16, 1982. At that time, he was told that Judge Sarokin would have to hear his motion, but was on vacation. His motion was filed and heard promptly after Judge Sarokin returned.

in extraordinary circumstances."[12/]

Montanti asserts that the City's sudden and unanticipated appointment of minority firefighters whose rank on the eligibility list were below his more than justifies intervention. Further, since he seeks at this stage only "rightful place" relief with respect to those minorities jumped ahead of him, his motion, if granted, would not jeopardize the bulk of the appointments already made. There is, thus, in Montanti's view, no overriding reason to deny him intervention.

Resolution of this issue cannot, in our considered judgment, occur on the present appeal, given the current state of the record. A mere three weeks would in the normal course of events seem to be timely. There are, however, mitigating circumstances - such as Montanti's intimate familiarity with this litigation, his advance notice of the scheduled August 16 date for making appointments and the diligence with which he may have sought counsel - that might suggest a contrary conclusion. It has, for example, been suggested in dictum by one court of appeals that a motion to intervene seeking to challenge a court-approved consent decree might well have to be filed "within days of the * * * order, if not sooner" in order to satisfy the timeliness

12/ See also United States v. South Bend Community Corp., supra; United States v. Allegheny-Ludlum Industries, supra; United States v. United States Steel Corp., supra.

requirement. United States v. South Bend Community School Board, supra, Slip op. 3-4.

Whether that reasoning has application here can only be answered on an informed basis by further development of the record. Accordingly, it is our belief that the case should be remanded to the district court for further consideration of the intervention motion in light of the above analysis. The error committed below was in no small measure due to the United States' failure to appreciate that Montanti's interest first became directly implicated on July 27, 1982, not two years earlier with the May 1980 consent decree as we had argued. In view of this mistake, we believe a remand to the district court to permit the parties, and the court, to evaluate Montanti's motion on a factual record on the proper timeframe is the fairest and most appropriate disposition of the present appeal.

CONCLUSION

For the foregoing reasons, the order denying Montanti's motion to intervene should be vacated and the case remanded to the district court for a reopening of the record and further consideration.

Respectfully submitted,

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