1985 WL 1415
United States District Court, N.D. Alabama, Southern Division.

IN Re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION

No. CV 84–P–0903–S. | February 19, 1985.

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Opinion

OPINION

??, United States District Judge.

***1** The defendants in these 'reverse discrimination' cases have moved for partial summary judgment, seeking to dismiss portions of the plaintiffs' claims predicated upon the plaintiffs' higher rankings and test scores on selection procedures of the Personnel Board. The court concludes that, although the motions in their present form should be denied, an order should be entered which will likely have the same practical effect on further proceedings.

I. Background.

The present litigation stems from three cases instituted in 1974 and 1975 against the Jefferson County Personnel Board and various governmental agencies served by the Board, including the City of Birmingham. Two of these earlier suits were brought as class actions, charging racial discrimination against blacks in hiring and promotions; the third was brought by the United States, charging a pattern and practice of discrimination against both blacks and women. Among other allegations, the plaintiffs contended that the registers used to determine persons eligible for hiring or promotion were the product of discriminatory tests administered by the Board to screen and rank applicants and that the employing agencies engaged in still further discrimination when selecting individuals from these already tainted lists.

The cases were consolidated for trial in 1976 on the initial issue of the validity of tests used to screen and rank police and firefighter applicants. The court found that the tests had a severe adverse impact on blacks and were not sufficiently job related to be valid under 42 U.S.C. § 2000e–2(h). The Board was directed to include in its future certifications to the employers a sufficient number of black applicants to avoid any adverse impact caused by these tests. This decision was affirmed in all major aspects. Ensley Branch of NAACP v. Seibels, 616 F.2d 812 (5th Cir.), cert. denied sub nom. Personnel Board v. United States, 449 U.S. 1061 (1980).

A second consolidated trial was held in 1979 regarding many other examinations and screening devices of the Board that likewise appeared to have an adverse impact on blacks or women. Experts for both sides presented extensive evidence regarding the effect and validity of these tests and procedures. While awaiting the court's decision, the parties engaged in extensive settlement negotiations that ultimately culminated in proposed consent decrees to resolve the litigation.[1] The settlements with the Board and with the City of Birmingham included both provisions benefiting specific plaintiffs or class members—such as back pay and preferential hiring or promotion—and provisions benefiting the entire class—such as goals for certification and selection of minority candidates in future hiring and promotional decisions.

On August 18, 1981, after a fairness hearing to consider the objections of all interested parties, the court approved the consent decrees with the Personnel Board and the City of Birmingham. The following day, the Birmingham Firefighters Association #117 and two of its members moved to intervene, contending that the decrees would adversely affect their rights. The court denied their request as untimely. This ruling was later upheld by the Court of Appeals. United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1984).

***2** Several white male firefighters then filed an independent action against the Board and the City of Birmingham, attacking the consent decree as discriminatory. Although denying their application for a preliminary injunction against enforcement of the decrees,[2] the court recognized that the consent decrees might not bar all claims of 'reverse discrimination' since they had not been parties to the prior suits. Several other suits were subsequently filed as individual or class actions by white males, contending that promotions made by Birmingham purportedly to comply with the consent decree discriminated against them because of their race or sex. These cases have been consolidated for pretrial purposes under the master caption of the 'Birmingham Reverse Discrimination Employment Litigation.'

II. Scope of Pending Motions.

The City and the intervening defendants[3] have moved for partial summary judgment as to those portions of the plaintiffs' claims that are premised on the plaintiffs' higher test scores or ranking on the Board's eligibility register. Many, although not all, of the facts that may have some bearing on this motion are not genuinely in dispute.

Paragraph 5 of the Consent Decree with Birmingham provides as follows:

> 'In order to correct the effects of any underrepresentation of blacks and women in the City's workforce caused by any alleged prior discriminatory employment practices, the City agrees to adopt as a long term goal, subject to the availability of qualified applicants, the employment of blacks and women in each job classification . . . in percentages which approximate their respective percentages[4] in the civilian labor force of Jefferson County . . ..'

In paragraphs 6–8 of the decree the City agreed that in order to achieve these long term employment goals it would attempt, 'subject to the availability of qualified [minority] applicants,' to fill a specified percentage of vacancies on an annual basis

with such applicants, this percentage ranging from 15% to 50% depending on the particular job or department. In short, qualified minority applicants were to be given a preference for a portion of the subsequent job vacancies until the long range employment goals were reached or the decrees expired.[5]

The plaintiffs in these cases contend that they would have been selected for post-decree promotions but for their race or sex. They assert that Birmingham's obligations under the consent decree cannot be relied upon by it in defense and that, indeed, employment decisions made in order to comply with the requirements of paragraphs 5–8 would necessarily constitute impermissible discrimination. As has been discussed with counsel earlier in these proceedings, the court is persuaded that the defendants can, however, defend these reverse discrimination claims if they establish that the challenged promotions were made because of the requirements of the consent decree.[6] See Palmer v. District Board of Trustees, 748 F.2d 595 (11th Cir. 1984).[7]

***3** As a secondary contention, the plaintiffs argue that the decree cannot be used to justify a race-conscious or gender-conscious promotion if that action is not required by the decree.[8] They then note the provisions of paragraph 2 of Birmingham's consent decree:

> 'Nothing herein shall be interpreted as requiring the City to hire unnecessary personnel, or to hire, transfer, or promote a person who is not qualified, or to hire, transfer or promote a less qualified person in preference to a person who is demonstrably better qualified based on the results of a job related selection procedure.'

Plaintiffs contend that by virtue of this provision the decree does not require, and hence provides no protection against a claim of reverse discrimination based on, the selection of a less qualified black or woman. Plaintiffs propose to establish that they were demonstrably better qualified than the successful minority applicants and for this purpose will cite the higher scores they received on the Board's promotional tests, which they assert are job related selection procedures.

The City and the intervening defendants assert that promotions of qualified minority candidates to meet the remedial goals established in the consent decree would not constitute unlawful discrimination, whether such promotions be mandated by the decree or merely permitted by it. They further contend that, even if their defense based on the decree is limited to employment decisions mandated by it, scores by applicants on the Board's tests—and in turn the position of such persons on the Board's eligibility register—would be immaterial in ascertaining whether the decree did or did not require particular promotions of minority applicants.

The pending summary judgment motions are focused on this latter contention; namely, that scores on the Board's promotional tests should not be considered in deciding whether particular applicants were demonstrably better or less qualified for purposes of paragraph 2. The ruling on these motions[9] has potentially great significance not only on the ultimate merits of the controversy, but also on the scope and length of further discovery and trial. Indeed, if test scores will be relevant in deciding the applicability of paragraph 2, one may expect a substantial controversy between the parties regarding the validity of each test as a 'job related selection procedure' for purposes of that paragraph.[10]

III. Discussion.

The basic facts regarding the procedures by which applicants are certified by the Board to the employing agencies have been stated in earlier decisions and need not be repeated in detail. In order to fulfill its responsibilities under state law, the Board develops and periodically administers tests to persons interested in civil service positions who satisfy any prerequisites for appointment established by the Board. For very practical reasons, these tests only purport to measure a sample of the knowledge, skills, and abilities that may be needed for successful performance of a particular job.[11]

***4** An applicant's raw test score—which for some jobs is a composite of weighted scores on different segments of the examination—is converted by the Board into a single numerical score. Applicants scoring below the minimum established by the Board are eliminated from further consideration. To the converted test score of any 'passing' applicant, the Board adds (as required by state law) one point for each year of the applicant's classified service, up to a maximum of 20 points. These individuals are placed on the Board's 'Eligible Register' in the order of their combined total of test points and seniority points. The Board does not disclose this Register to the employing agencies or to the applicants. It does, however, provide to each applicant information about his or her own score and position number on the Register; to the extent they share this

information, applicants are able to construct the equivalent of the Register.

When advised that a governmental employer wishes to make a promotion, the Board submits to the employer a 'Certification of Eligibles,' which contains the top three names then remaining on the Register.[12] Under the consent decrees the Board may certify the names of additional qualified minority applicants from further down on the Register 'whenever such action is necessary to provide the City with a certification list that contains sufficient numbers of blacks and females to meet the goals' of the decrees.

The certification sent by the Board does not reflect the test scores or Register ranking of the persons so certified. Birmingham acknowledges however that those making employment decisions 'assume' that the order of names on the certification indicates their relative standing on the register—that is, that the second name on the certification is lower on the Register than the first name and higher on the Register than the third name.[13] Plaintiffs do not contend that the relative placement on the Register of the applicants establishes in and of itself that the higher ranked applicants are demonstrably better qualified for promotion.[14] Rather, they argue that the tests are job related selection procedures and accordingly that under paragraph 2 of its decree the city would not be required to promote applicants with lower test scores. They assert that city officials either know these scores or by inference from the certification can determine the relative scores of the various candidates. Alternatively they argue that, regardless of the knowledge the city may have about test scores when deciding whom to promote, they—the plaintiffs—should be entitled in a subsequent claim of discrimination to demonstrate their superior qualifications by reference to the test scores and thereby show that the city could have promoted them without violating the consent decree. This latter contention should be addressed first because, if plaintiffs succeed on this point, there would be no need to determine what information city officials may have had about test scores when deciding on promotions.

***5** Paragraph 2 provides in relevant part as follows: 'Nothing herein shall be interpreted as requiring the City . . . to promote a person who is not qualified or . . . to promote a less qualified person in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure.' The obvious purpose of the paragraph was to relieve the city from responsibility under the decree if, although otherwise mandated by the decree, it should reject a minority candidate because of the results of a job related selection procedure showing that person to be unqualified or demonstrably less qualified. In evaluating any failure by the city to meet its obligations under the decree, the court would focus its attention on the information the city had when it declined to appoint the minority candidates and not on subsequently obtained information that played no part in those appointments. Such a proceeding might well include further studies regarding the job-relatedness of the selection procedures upon which the city relied in making its employment decisions; however, there would be no need to determine whether promotional criteria not considered by the city might have been valid.

Although the context is different in this litigation involving claims of reverse discrimination, the answer is the same. In short, the effort by plaintiffs to show that promotions of minority candidates were not mandated by the decree because of paragraph 2 will depend upon their establishing, at a minimum, that when making those selections the city had information demonstrating that such candidates were less qualified. Consideration must therefore be given on these Rule 56 motions to the question of what information regarding test scores city officials may have had when deciding whom to promote from the Board's 'Certification of Eligibles.'

It cannot be genuinely disputed that the city officials have not been provided by the Board with test scores or ranking, seniority points, final scores or ranking, or position number on Register.[15] This is not to say, however, that city officials have absolutely no knowledge about such matters.

First, the appointing officials may be provided by or through the applicants themselves information about test scores or rankings. As earlier noted, applicants are provided information about their own scores and Register position and by sharing this information they can develop an approximation of the Register.[16] According to depositions and affidavits submitted by plaintiffs, these unofficial listings are sometimes posted at fire stations or other locations where they are viewed by supervisors who may be involved in deciding on appointments when vacancies occur. It is unclear whether these posted listings disclose merely the projected positions on the eligibility register or also the final grade based on test scores and seniority.

Second, the appointing officials can draw some inferences about test scores from the Certification of Eligibles provided by the Board. Since the officials 'assume'—an assumption which, to the extent pertinent, appears consistent with the actual practice of the Board—that the eligibles are listed on the certificate in the same order in which they appear on the Eligibility Register, the total of the converted test score and seniority points of the individual who, for example, is second on the certificate may be assumed to be higher than those for individuals lower on the certificate but less than that for the individual highest on the certificate. Appointing officials may already know or be able to determine from city records how many

seniority points various individuals on the certificate would have been awarded. By considering these seniority points, an appointing official could infer that a person would have had a higher converted test score than those individuals lower on the certificate with the same or a greater number of seniority points, and a lower converted test score than those higher on the certificate with the same or a lesser number of seniority points.[17] No such inference, however, could be drawn when comparing an individual with those lower on the certificate having fewer seniority points or with those higher on the certificate having more seniority points.

***6** Knowledge of relative test scores, whether inferred from the certificate of eligibles or learned from information supplied by applicants, would not however establish that a particular applicant would be 'demonstrably better qualified' than another with a lower score. That a test may be valid for both screening and ranking purposes does not mean that as between two individuals the one with the higher score is better qualified than the one with the lower score. Rather, the validity of a test is assessed in the context of its ability to make job-related measurements that are reliable and valid for groups of individuals. Any attempt to assess the relative qualifications of two individuals on the basis of their test scores is a risky process, and at a minimum requires knowledge of the magnitude of the difference in their scores if not also the significance of that difference given the characteristics of the measuring device. The need for such information under paragraph 2 of the consent decree is highlighted by the language of that paragraph relieving the city from its minority employment goals only if such minority applicants are 'demonstrably' less qualified.[18] (Emphasis added.)

The 'Rule of Three'—under which employing agencies have been empowered by state law to select any of the three names submitted by the Board—implicitly recognizes this fundamental concept that the Board's tests, even if sufficiently job related when considered for a group of applicants, are not necessarily a proper measurement of relative qualifications of particular individuals. Under this rule, the city has been free to select the person on the certification with the lowest test score, and this has been true even though that person's test score may have been significantly lower than those of others certified. Moreover, given the role of seniority points, the persons certified for consideration might have converted test scores as much as twenty points below those of persons not certified for consideration and those with the highest test scores may not receive consideration until after many persons with lower scores have been selected.[19]

What this means is that the certification would not have provided city officials with sufficient information to relieve it from its obligation to meet the employment goals established by the decree. In turn, the plaintiffs in this reverse discrimination case cannot prevail on a claim that minority appointments were not required under paragraph 2 by relying on the limited knowledge about test results that could be derived from the Board's certifications.

The materials submitted by plaintiffs in opposition to the Rule 56 motion do, however, create a genuine issue as to the extent of knowledge that city officials may have had about actual test scores as a result of information provided by the employees themselves. It may be—although this appears very doubtful—that the city officials making (or recommending) promotions did on some occasions have sufficient reliable information about these test scores and about the significance of the differences in these scores to have been justified in not promoting a minority applicant. In such a circumstances, the unsuccessful white male may be able to establish, subject to providing additional proof regarding the validity of the test,[20] that the promotion of the minority applicant was not required by the decree and was in turn discriminatory. The court therefore cannot say at this time that the defendants are entitled to summary judgment against all efforts of plaintiffs to show information regarding test scores or that information regarding validity of these tests will necessarily be irrelevant.[21]

***7** Although the pending motion for summary judgment is therefore due to be denied, the fact remains that the plaintiffs are not likely to prevail on this part of their reverse discrimination claims, in which event the validity of the Board's tests will not be relevant. Considering the substantial time and expense of discovery and trial that might be wasted on exploration of the validity of these tests, the court concludes (1) that under Fed. R. Civ. P. 42(b) issues regarding the validity of such tests should be severed for subsequent trial, as necessary, after resolution of the other issues in this litigation and (2) that under Fed. R. Civ. P. 26 further discovery into such issues should be deferred until after this initial trial.

As earlier noted, the United States has asked for permission to realign itself with the plaintiffs. The defendants oppose this request, noting that the decree (to which the United States was a party) provides as follows:

> '3. Remedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of, this Consent Decree shall not be deemed discriminatory . . . and the parties hereto agree that they shall individually and jointly the defend the lawfulness of such remedial measures in the event of challenge by any other party to this litigation or by any other person or party who may seek to challenge such remedial measures through intervention or collateral attack.
>
> . . . .

> '54. Compliance with the terms and conditions of this Consent Decree shall constitute compliance by the City with all obligations arising under Title VII . . . as raised by the plaintiffs' complaints. Insofar as any of the provisions of this Consent Decree or any actions taken pursuant to such provisions may be inconsistent with any state or local civil service statute, law or regulation, the provisions of this Consent Decree shall prevail in accordance with the constitutional supremacy of federal substantive and remedial law.'

To the extent the United States in good faith believes that actions of the city are discriminatory against the plaintiffs and are neither required nor permitted by the Consent Decree, it may support the plaintiffs' position in this litigation without violating the terms of the consent decree and accordingly may be allowed to align itself as a party plaintiff.

In its brief supporting the plaintiffs on these pending summary judgment motions, the United States has advanced arguments that appear to be contrary to its obligations under the Decree and inconsistent with positions it pressed so vigorously in the earlier litigation. It seems to be contending that promotion of a minority candidate with lower test scores would never be required by the Decree and would constitute a prima facie case of impermissible reverse discrimination and, indeed, that the city would have a duty to seek such information before considering appointment of a minority candidate. Such a position could hardly be consonant with its obligations to uphold the decree, which clearly contemplated that a portion of new appointments would go to minority candidates lower on the eligibility registers. Its apparent change in position is particularly questionable in view of the fact that it has contended—and documented with extensive evidence in the earlier litigation—that the tests have discriminatory impact against minority candidates and are not sufficiently job related to be valid ranking devices under 42 U.S.C. § 2000e–2(h).[22] Although permitting the United States to align itself with the plaintiffs, the court will insist that the United States act in accord with its obligations under the Decrees.

ORDER

***8** In accordance with the accompanying Opinion, it is hereby ORDERED as follows:

1. The Motions for Partial Summary Judgment filed by the defendants are DENIED.

2. Pursuant to Fed. R. Civ. P. 42(b), issues regarding the effect and validity of Personnel Board tests are severed for subsequent trial after resolution of the other issues in this case.

3. All discovery pertaining to the effect and validity of such tests is deferred until completion of the initial trial.

4. The United States' Motion to Strike Affidavits or Portions Thereof is DENIED.

5. The United States' Motion to Realign as a Party-Plaintiff in Bennett v. Arrington, CV 82–P–0850–S is GRANTED, subject however, to the limitations discussed in the accompanying Opinion.

Parallel Citations

37 Fair Empl.Prac.Cas. (BNA) 1, 36 Empl. Prac. Dec. P 35,022

Footnotes

1 The parties recognized that, regardless of the decision on the second trial, a protracted third trial would be needed regarding the particular practices of the various governmental employers. Although some evidence concerning these practices had already been obtained and indeed introduced in evidence, extensive additional discovery was likely. The settlement discussions were pursued with the objective of avoiding the time and expense of further discovery and trial and in recognition of the inherent risks of litigation regarding both the issues under submission and those remaining to be tried.

2 This ruling was upheld by the Court of Appeals in United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1984).

3 The persons who represented the class of blacks in one of the earlier actions and were parties to the consent decrees were allowed, on timely motion, to intervene as additional defendants in these 'reverse discrimination' cases. Similarly, the United States, as a

party to the earlier consent decrees, was allowed to intervene; in January 1985 it requested permission to realign itself with the plaintiffs, with whose interests its own position regarding 'reverse discrimination' was more compatible.

[4] For blacks the appropriate percentage is approximately 28%; for women, approximately 39%. The consent decree provides a mechanism for adjusting these goals with court approval for jobs requiring professional degrees, licenses, or certificates.

[5] Under paragraph 55 of the city's decree, the court is authorized to dissolve the decree after six years from its entry—approximately 2–½ years from now. Any of the parties, including the United States (which now appears to oppose at least some aspects of the decree), may make such a motion, and the court is to consider whether the purposes of the decree 'have substantially been achieved.'

[6] The Court of Appeals had pretermitted ruling on this issue in the intervention proceedings. See United States v. Jefferson County, 720 F.2d 1511, 1518 (11th Cir. 1983): 'The consent decree would only become an issue [in an independent action asserting specific violation of their rights] if the defendant attempted to justify its conduct by saying that it was mandated by the consent decree. If this were the defense, the trial judge would have to determine whether the defendant's action was mandated by the decree and, if so, whether that fact alone would relieve the defendant of liability that would otherwise attach. This is, indeed, a difficult question. . . . We should not, however, preclude potentially wronged parties from raising such a question merely because it is perplexing. Since we assume that the forum hearing any future suit by the would-be intervenors alleging discrimination would consider their claims carefully, we hold that the district court was justified . . . in denying intervention.'

[7] The affirmative action aspects of the decrees regarding employment and promotion of blacks in the police and fire departments can be justified on the basis of the judicial findings—affirmed on appeal—that such persons had been unlawfully discriminated against in testing for entry level positions in those departments. The other affirmative action aspects of the decrees, although not based on judicial findings of discrimination, pass muster under the standards set in Valentine v. Smith, 654 F.2d 503, 510 (8th Cir.), cert. denied, 454 U.S. 1124 (1981), cited with approval in the Palmer case, 748 F.2d at 600.

[8] This position stems from language in United States v. Jefferson County, 720 F.2d 1511, 1518 (11th Cir. 1983), in which the appellate court noted that an element in a defense based upon the consent decree would be 'whether the defendant's action was mandated by the decree.' (Emphasis added.) The later decision of that court (by a panel with two of the judges who were on the Jefferson County case) in Palmer, supra, suggests a test more favorable to the defendants. In the present litigation the court has deferred its ruling as to the proper standard until the factual basis of the claims and defenses have been more fully developed.

[9] Despite plaintiffs' arguments to the contrary, a motion under Fed. R. Civ. P. 56 is not an inappropriate vehicle for presenting this issue to the court. A defendant 'against whom a claim . . . is asserted' may move under Rule 56(b) for summary judgment in its favor 'as to . . . any part thereof;' and under Rule 56(d) the court may determine what 'material' facts are controverted. Moreover, the motion may, to the extent appropriate, be treated as one for a protective order under Rule 26(c) against discovery that would be an 'undue expense or burden' or as one under Fed. R. Evid. 104 for a pretrial motion on the admissibility of evidence.

[10] In such a controversy the position of two of the major parties might be the reverse of that in the earlier litigation. The United States, which previously had attacked the various tests as not sufficiently job related, may attempt to support their validity; on the other hand, the City may seek to challenge the validity of the tests.

[11] For example, although the position of police sergeant may require both the ability to accurately shoot a firearm and knowledge of constitutional law, the Board does not attempt to measure applicants' abilities with firearms and attempts to measure their knowledge of constitutional law by asking some representative questions.

[12] If multiple appointments to the same job are contemplated, the Board certifies an additional name from the top of the Register for each additional position.

[13] The United States makes a curious attack upon the inclusion of such 'assumptions' in the affidavits of the city's officials, asserting that such represents matters beyond their personal knowledge and hence impermissible under Fed. R. Civ. P. 56. These objections are without merit, for these 'assumptions' are not being presented as evidence of what the Board actually does in making certifications, but only as evidence of the state of mind of the officials in using the certifications.

[14] Although the validity of bona fide seniority systems is recognized under Title VII, it could hardly be contended that because of longer city service an individual would be demonstrably better qualified for promotion.

[15] No dispute arises from the fact that at an earlier stage in these proceedings a city official did have this information regarding a particular position (Fire Lieutenant Examination, January 26, 1982). The official has explained by affidavit when and how this information was obtained and for what purpose it was used. In short, these items were procured by the city from the Board through discovery requests after a claim of reverse discrimination was made and were used only in the course of that proceeding.

[16] These informal compilations are not necessarily reliable. As indicated in these same depositions, information may not be obtained from all applicants and the information provided by the applicants is not always accurate.

17 A limited additional inference could be drawn in such circumstances as to the magnitude of the difference; namely, the difference in converted test scores would have been no less than the difference in seniority points.

18 Of the common meanings of the word 'demonstrably,' the ones most suitable in this context are 'obviously' or 'clearly.'

19 As an example, the person who received the highest test score on the January 1982 fire lieutenant exam had only 4 seniority points and was ranked 19th on the eligibility register.

20 The court disagrees with the defendant's contention that paragraph 2 could apply only if the city officials at the time of making their selections also had detailed information supporting the validity of the tests.

21 Plaintiffs contend that, irrespective of its relevance on the city's defense premised on the consent decree, the validity of the tests may also be material in the plaintiffs' establishment of a prima facie case of discrimination (that test scores, if the tests were valid, would help prove they were qualified for the position filled by a minority applicant) or to show that any defense based on selection of the better qualified candidate would have been pretextual. While this may be true, it does not appear that the defendants in this litigation will be challenging the plaintiffs' qualifications or claiming that they selected the better qualified candidate.

22 The United States might, of course, be justified in changing its position regarding the impact and validity of these tests if it had obtained new evidence demonstrating its earlier views were incorrect. There is no indication that any such new evidence has surfaced.