1994 WL 562180

United States District Court, N.D. Illinois, Eastern Division.

UNITED STATES of America, Plaintiff,
v.
STATE OF ILLINOIS, a State of the United States of America, City of Aurora, a municipality of the State of Illinois, and Board of Trustees of the City of Aurora Police Pension Fund, Defendants.
CITY OF AURORA, Cross-claimant,
v.
STATE OF ILLINOIS, Board of Trustees of the City of Aurora Police Pension Fund, Cross-defendants.

No. 93 C 7741. | Sept. 12, 1994.

Attorneys and Law Firms

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Opinion

MEMORANDUM OPINION AND ORDER

HART, District Judge.

***1** Plaintiff United States brought this action pursuant to 42 U.S.C. § 12117 contending that defendants' conduct violates Title I of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101–17. Named as defendants are the State of Illinois, the City of Aurora ("Aurora"), and the Board of Trustees of the City of Aurora Police Pension Fund (the "Fund"). Plaintiff contends that defendants violate the ADA by excluding police officers and firefighters with certain disabilities from qualifying for pension benefits. Aurora has filed crossclaims against the State and the Fund seeking indemnity and injunctive relief in the event that Aurora is found liable for violating the ADA. Presently pending are the State's and the Fund's motions to dismiss the claims and crossclaims against them. The motions are pursuant to both Fed.R.Civ.P. 12(b)(1) and 12(b)(6).

The complaint in this case contains few factual allegations. It consists almost entirely of a recitation of Illinois law pertaining to pensions for police officers and firefighters of municipalities with populations of less than 500,000.[1] Illinois statutes establish rules for police and firefighter pensions in the covered municipalities. *See* 40 ILCS 5/3 & 4. The statutes provide that the pension funds are to be administered by a five-member board. 40 ILCS 5/3–128, 4–121.[2] The provision challenged as being a violation of the ADA is the provision permitting the pension board to separately determine whether a police officer or firefighter is physically and mentally fit to perform the duties of the job. *See* 40 ILCS 5/3–106(2), 4–107(b)(2).[3] Persons found by their employing municipality to be physically and mentally fit to perform their duties can still be found ineligible by the Pension Board and thus continue in their employment without being eligible for pension benefits. *See Holmes v. Illinois Municipal Retirement Fund,* 185 Ill.App.3d 282, 540 N.E.2d 1122, 1124 (2d Dist.), *appeal. denied,* 127 Ill.2d 616, 545 N.E.2d 110 (1989); *Esner v. Board of Trustees of Fire Pension Fund of Village of North Riverside,* 68 Ill.App.3d 541, 386 N.E.2d 288, 290 (1st Dist.1979). A finding of lack of fitness to qualify for pension coverage can be based on the employee being significantly more prone to disability than the average police officer or firefighter. *Esner,* 386 N.E.2d at 290.

The complaint does not identify any particular police officer or firefighter who is currently disputing his or her eligibility for

a police or fire pension. It is generally alleged that defendants "have pursued and continue to pursue policies and practices that discriminate in employment on the basis of disability...." In plaintiff's memorandum in response to defendant State's motion to cite additional authority, plaintiff represents that there are approximately 560 state-mandated municipal pension funds and that subsequent to July 26, 1992, a number of police officers and firefighters in those plans have been denied admission to pension plans based on disability.

***2** Plaintiff identifies three specific individuals, one of whom, Kevin Holmes, is an Aurora police officer. Holmes was hired in 1985. That year, he was denied admission to the Fund on the ground that he was insulin-dependent. *See Holmes v. City of Aurora,* 1993 WL 512629 *1 (N.D. Ill.Dec. 9, 1993); *Holmes v. Aurora Police Pension Fund Board of Trustees,* 217 Ill.App.3d 338, 577 N.E.2d 191, 193 (2d Dist.), *appeal denied,* 142 Ill.2d 654, 584 N.E.2d 129 (1991). He applied again in 1988, but was turned down again and review was denied on the ground that the unappealed 1985 decision was *res judicata. See id.* Holmes is still an Aurora police officer. In *Holmes v. City of Aurora,* he is challenging the denial of his admission to the Fund on the ground that it violates Part A of Title II of the ADA, 42 U.S.C. §§ 12131–34, which prohibits discrimination in services, programs, and activities of a public entity, and the Rehabilitation Act of 1973, 29 U.S.C. § 794.[4]

Defendants raise various grounds for dismissal of the complaint. The jurisdictional grounds will be considered first. The State contends there is no case or controversy. It argues that there is no allegation of any employee who is presently being affected by the State's enforcement of the challenged statutes. In response, however, plaintiff contends that three specific employees and a number of other unnamed employees are presently adversely affected by the statutes in that, consistent with the statutes, they are being denied admission to pension funds. There is an existing injury and an actual controversy. *See EEOC v. City of Evanston,* 854 F.Supp. 534, 538 (N.D. Ill.1994); *EEOC v. Bloomingdale Fire Protection District,* 1990 WL 92883 (N.D. Ill. June 27, 1990).

It is also contended that there is no case or controversy as to the State because it is not the employer of any affected employee. Resolution of that issue is dependent on determining whether the State is a covered entity against whom this Title I action may be brought. Both the State and the Fund contend they are not covered entities under Title I because they are not employers of the affected employees. Being an employer covered by the ADA is a jurisdictional requirement. *Doe v. William Shapiro, Esq., P.C.,* 852 F.Supp. 1246, 1249 (E.D.Pa.1994); *Perra v. LaSalle County Veterans Assistance Commission,* 1994 WL 444799 *1 (N.D. Ill. Aug. 115, 1994).

Title I of the ADA prohibits discrimination by a "*covered entity* ... against a *qualified individual with a disability* because of the disability of such individual in regard to ... employee compensation ... and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). "The term 'covered entity' means an employer, employment agency, labor organization, or joint labor-management committee." *Id.* § 12111(2). "The term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person." *Id.* § 12111(5)(A).[5] "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). There is no express requirement that the covered entity be an employer of the qualified individual. The State's Eleventh Amendment immunity is expressly waived. *Id.* § 12202. The parties agree that Title VII of the Civil Rights Act of 1964 ("Title VII") and Age Discrimination in Employment Act ("ADEA") contain provisions similar to the ADA, *see* 42 U.S.C. § 2000e(b), 2000e–2(a); 29 U.S.C. § 623(a)(1), 630(b), and that Title VII and ADEA cases are useful in construing the pertinent provisions of the ADA. *See Janopoulos v. Harvey L. Walner & Associates, Ltd.,* 835 F.Supp. 459, 462 (N.D. Ill.1993).

***3** The State concedes that it is an employer, but contends that it cannot be liable under the ADA because it is not the employer of the municipal police officers and firefighters allegedly discriminated against. Under Title VII, the Seventh Circuit has held that employers are prohibited from engaging in any unlawful activity prohibited by Title VII, even if not the employer of the person claiming discrimination. *Doe v. St. Joseph's Hospital of Fort Wayne,* 788 F.2d 411, 422–24 (7th Cir.1986). *See also Evanston,* 854 F.Supp. at 537–38 (applying same holding to ADEA). There is nothing in the language of the ADA that suggests a different construction. The claim against the State satisfies the literal requirements of the ADA. The State is an employer and therefore is a covered entity under the ADA. By being denied admission to a pension plan because of a disability, a police officer may be denied compensation or a term, condition, or privilege of employment, *see Northen v. City of Chicago,* 841 F.Supp. 234, 236 (N.D. Ill.1993), because of a disability.

The ADA is silent as to requiring a direct employment relationship for liability and, as the Seventh Circuit held in *St. Joseph's Hospital,* such a requirement should not be read into the statute. Other courts have concluded that state entities may be held liable under Title VII and the ADEA for enforcing statutes or regulations affecting employee compensation or benefits. *See Evanston,* 854 F.Supp. at 537–38; *Barone v. Hackett,* 602 F.Supp. 481, 483 (D.R.I.1984); *EEOC v. State of*

Illinois, 1990 WL 56147 *2 (C.D. Ill. Jan. 25, 1990). *Fields v. Hallsville Independent School District,* 906 F.2d 1017, 1020 (5th Cir.1990), *cert. denied,* 498 U.S. 1026 (1991), is to the contrary, but it is inconsistent with Seventh Circuit precedent. Unlike the Seventh Circuit's holding in *St. Joseph's Hospital,* the Fifth Circuit requires a direct employer/employee relationship, including the right to control and direct the work. *See Fields,* 906 F.2d at 1019–20. *See also Ehret v. State of Louisiana,* 1992 WL 46347 *2–4 (E.D. La. March 4, 1992). This court has jurisdiction over the claim against the State, an employer under the ADA which affects the relevant employees, compensation or terms, conditions, or privileges of employment. *See Evanston,* 854 F.Supp. at 537–38 (holding that State is a proper party in ADEA suit involving firefighter pensions).

The Fund is different. The Fund's own employees number less than 15 persons. Therefore, the Fund is only a covered entity if it is considered to be an employer of the police officers or an agent of the police officers' employer, that is an agent of Aurora.[6] Most courts that have considered the issue have held that the ADA does not apply to the administrator of a benefit fund. *Pappas v. Bethesda Hospital Association,* ——F.Supp. ——, ——, 1994 WL 460141 *2–3 (S.D. Ohio June 29, 1994); *Dodd v. Blue Cross & Blue Shield Association,* 835 F.Supp. 888, 891 (E.D. Va.1993); *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England,* 826 F.Supp. 583, 585–86 (D.N.H.1993). *Contra Mason Tenders District Council Welfare Fund v. Donaghey,* 1993 WL 596313 (S.D.N.Y. Nov. 19, 1993). However, a number of Title VII and ADEA cases have held that benefit funds may be liable under those acts. *See Spirt v. Teachers Insurance & Annuity Association,* 691 F.2d 1054, 1063 (2d Cir.1982), *vacated & remanded on other grounds,* 463 U.S. 1223 (1983) (collecting cases); *Grossman v. Suffolk County District Attorney's Office,* 777 F.Supp. 1101, 1104–05 (E.D.N.Y.1991). *Contra Peters v. Wayne State University,* 691 F.2d 235, 238 (6th Cir.1982), *vacated & remanded on other grounds,* 463 U.S. 1223 (1983).

***4** In *St. Joseph's Hospital,* the Seventh Circuit favorably quoted the standard applied in *Spirt.* "Further, other circuits have held that an 'employer,' for purposes of a Title VII claim, may be 'any party who significantly affects access of any individual to employment opportunities, regardless whether that party may technically be described as an 'employer' of an aggrieved individual as that term has generally been defined at common law." *St. Joseph's Hospital,* 788 F.2d at 424 (quoting *Spirt,* 691 F.2d at 1063). Citing *City of Los Angeles Department of Water & Power v. Manhart,* 435 U.S. 702, 718 n. 33 (1978), *Spirt* also holds that an employer's delegation of responsibility for employee benefits to another will not insulate that agent from liability under Title VII.

In the present case, the Fund has responsibility for determining who qualifies for admission to the pension plan. Therefore, it has the power to significantly affect access to employee benefits which are a portion of a police officer's or firefighter's compensation. While Aurora contributes to the Fund, it is left to the Fund to make decisions as to who qualifies.[7] Thus, the administration of pension benefits has been delegated to the Fund. Here, the Fund may be held liable under the ADA either because it is an employer under the ADA or an agent of the employer. *Spirt,* 691 F.2d at 1062–63. This court has jurisdiction over the claim against the Fund.

Defendants argue that applying the ADA to them is retroactive enforcement of the ADA which did not go into effect until July 1992. However, persons, including Aurora police officer Kevin Holmes, continued to be denied admission to pension plans after July 1992. This is not retroactive enforcement of the ADA. *Holmes,* 1993 WL 512629 at *4–5.

The Fund contends that the ADA's insurance exclusion excludes application of the ADA to it in this case. The ADA provides:

> Subchapter I through III of this chapter and title IV of this Act: shall not be construed to prohibit or restrict:—
>
> (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (3) a person or organization covered by this chapter from establishing, Sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.
>
> Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapters I and III of this chapter.

***5** 42 U.S.C. § 12201(c).

The Board contends that classification of insurance risk consistent with state law is sufficient, that this statute does not require actual examination of the risk involved. It also contends that there can be no subterfuge because subterfuge is limited to affecting non-fringe benefit aspects of employment and because the classifications could not be intended as a subterfuge because based on a statute passed before the ADA went into effect. Plaintiff contends that a lack of a relationship to an underwriting risk is clear from the fact that people are either admitted to the pension plan, or denied admission, not charged different rates based on actuarial risk. Plaintiff also contends that denial of qualification, for regular retirement benefits bears no relationship to any risk that a person will become disabled prior to reaching the regular age for retirement. Plaintiff also contends that the fact that the statute and plan were in effect prior to the enactment of the ADA does not prevent them from presently being a subterfuge for the continued exclusion of disabled persons from the pension plan.

In *Holmes,* 1993 WL 512629 at *6, the court denied summary judgment on this issue. "This court finds that there is a factual dispute regarding whether the insurance exemption should apply in this case. Plaintiff argues that the Board's decision to deny plaintiff admission into the Pension Fund constitutes a subterfuge because it is based on stereotypical notions and myths about people with diabetes and not based on sound actuarial principles as is required by the ADA. Plaintiff contends that defendant Board did not consider the cost or feasibility of providing plaintiff with the retirement, disability and survivors' benefits that are part of the benefits provided to non-disabled police officers." *Id.* The holding in *Holmes* that actuarial facts can be considered is consistent with the ADA's legislative history. *See, e.g.,* H.R.Rep. No. 485, 101st Cong., 2d Sess 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 494. Also, when the statute and plan went into effect are not factors to be considered in determining whether they presently are subterfuges for discrimination. 29 C.F.R. Part 1630, App. § 1630.16(f); H.R.Rep. No. 485, 101st Cong., 2d Sess. 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 494. Whether the Fund is excluded from liability pursuant to § 12201(c) cannot be resolved on this motion to dismiss.

The Fund also contends that accommodating disabled employees would be an undue hardship and therefore is not required. *See* 42 U.S.C. § 12112(b)(5)(A). Whether an accommodation would be an undue hardship is an affirmative defense that requires the consideration of a number of factors. *See* 42 U.S.C. § 12111(10)(B). It is not an issue that can be raised or resolved on a motion to dismiss.

Last, the State alternatively moves for a more definite statement. As was previously stated in court, that motion will be denied.

***6** The State's and Fund's motions to dismiss the complaint will be denied. Still to be resolved are the motions to dismiss the crossclaims.

Aurora has filed a crossclaim against the State alleging that, to the extent Aurora is found liable and has to pay increased benefits, it is entitled to reimbursement from the State pursuant to the Illinois State Mandates Act, 30 ILCS 805. To the extent it is found liable, it also seeks declaratory and injunctive relief as to the Illinois statutes that violate the ADA. Since, the declaratory and injunctive relief duplicates relief plaintiff seeks against the State, it is unnecessary to resolve whether Aurora can also seek that relief. That aspect of the claim will be dismissed without prejudice. It will only be considered whether Aurora can seek indemnity from the State.

Aurora's only claim for monetary relief against the state is pursuant to the State Mandates Act. That claim is barred by the Eleventh Amendment unless the State has waived that immunity. *See Atascadero State Hospital v. Scanlon,* 473 U.S. 235, 237–40 (1985). The Mandates Act provides for judicial review of administrative decisions. The statute provides: "The decision of the State Mandates Board of Appeals shall be final subject to judicial review." 30 ILCS 805/8(d). Lacking an express statement that such review may be sought in federal court, this provision is insufficient to constitute a waiver of Eleventh Amendment immunity. *See In re Secretary of Department of Crime Control & Public Safety,* 7 F.3d 1140, 1146–47 (4th Cir.1993); *cert. denied,* 114 S.Ct. 2106 (1994). The crossclaim for monetary relief is barred by the Eleventh Amendment.

The crossclaim against the State will be dismissed without prejudice.

In its answer brief, Aurora represents that its crossclaim against the Fund is based on an Aurora ordinance that provides: "No City of Aurora employee shall be denied equal access to City benefits due to a disability as defined in 42 U.S.C. § 12101." This ordinance establishes "personnel principles and policies." There is nothing in the ordinance indicating that it creates a right of action for damages. Since Aurora fails to point to a basis for claiming liability for a violation of the ordinance, the crossclaim against the Fund will be dismissed.

IT IS THEREFORE ORDERED that defendant Board of Trustees, Rule 12 motion [7–1] is denied and its motion to dismiss crossclaim [36] is granted. Defendant State of Illinois's motion to dismiss or alternatively to strike [9–1,2] is denied and its motion to dismiss crossclaim [28–1] is granted. The crossclaim is dismissed. Defendants, the Board of Trustees and State of Illinois shall answer the complaint by September 30, 1994.

Parallel Citations

3 A.D. Cases 1157, 6 A.D.D. 1040, 5 NDLR P 341, Pens. Plan Guide (CCH) P 23904I

Footnotes

[1] Under the pertinent state pension laws, a municipality is defined as: "Any city, village or incorporated town of 5,000 or more but less than 500,000 inhabitants .... and (2) any city, village or incorporated town of less than 5,000 inhabitants which, by referendum ... adopts this Article." 40 ILCS 5/3–103 (police pensions). *See also* 40 ILCS 5/4–103 (firefighter pensions). Chicago is the only Illinois city with a population greater than 500,000.

[2] The powers and duties of the boards are set forth in 40 ILCS 15/3–131 to 3–140.1, 4–122 to 4–129.1.

[3] The definition of a police officer under the statute includes being "found upon examination of a duly licensed physician or physicians selected by the board to be physically and mentally fit to perform the duties of a police officer." 40 ILCS 5/3–106(2). Similarly, the statute provides that firefighter eligibility for the pension system requires that, within three months after appointment, "he or she [be] found upon a medical examination by a duly licensed physician selected by the board to be then physically and mentally fit to perform the duties of a firefighter." *Id.* 5/4–107(b)(2).

[4] That is what was claimed as of December 1993. *Holmes v. City of Aurora,* 1993 WL 512629 at *1. The docket in this court, however, indicates the complaint has since been amended.

[5] At the time this case was filed, an employer had to have 25 or more employees. Whether that number or the lower number presently in effect applies to this case need not be decided; neither defendant is an employer of 15 to 24 employees.

[6] The parties are silent as to the number of Aurora employees or Aurora police officers. It is assumed that both those numbers are 25 or more. The parties should bring the true number to the court's attention if it could affect jurisdiction.

[7] State law determines the amount of benefits, as a percentage of the employee's salary. *See* 40 ILCS 5/3–111, 3–111.1, 3–114.1, 3–114.2, 4–109, 4–109.1, 4–109.2, 4–110, 4–110.1, 4–111.