

1976 WL 621
United States District Court, E.D. Michigan, Southern Division.

Grace Schaefer et al., Plaintiffs
v.
Philip G. Tannian et al., Defendants.

Civil Action No. 39943 | August 27, 1976

Opinion

FREEMAN, D.J.

*1 This class action was commenced on April 10, 1973, on behalf of all women who have been employed or were applicants for employment with the Detroit Police Department (DPD) since April 10, 1970. As originally filed, the defendants were the principal officials of the City of Detroit charged with the operation of the DPD and with the responsibility for its hiring, assignment and promotion practices. The Detroit Police Officers' Association (DPOA) and the Detroit Police Lieutenants' and Sergeants' Association (DPSLA) were subsequently added as defendants, without objection. These defendants were charged with discrimination on the basis of sex in recruiting, examining, hiring, promoting and compensating employees and potential employees of the DPD in violation of 42 USC § 2000(e) *et seq.*, and 42 USC § 1983.

On May 13, 1974 [7 EPD P 9404], this Court granted plaintiffs' motion for partial summary judgment and held, on the basis of undisputed facts, that the defendants had violated Title VII of the CRA of 1964 by fostering a broad-based pattern and practice of discrimination based on sex in hiring and assignment policies. The Court found that the record in this case presented "impressive evidence" establishing that the hiring and assignment policies of the DPD had the unlawful effect of limiting, segregating and classifying women employees and applicants for employment in a way which would both deprive them of employment opportunities and otherwise adversely affect their status as employees because of their sex. *See* the Court's Memorandum Opinion reported at 394 F. Supp. 1128.

In keeping with the Congressional purposes implicit in Title VII, this Court also entered a preliminary injunction on May 13, 1974. That injunction called for affirmative action to eliminate, once and for all, the unlawful discrimination in the DPD's hiring and assignment policies. By that injunction, the DPD was specifically ordered to administer all future written entrance examinations to men and women alike, and to expedite the examination and oral interview process for those women who had been denied the opportunity to take an entrance examination or be interviewed in the past. The DPD was further ordered to assign all employees to divisions of the Police Department without regard to sex, and to begin immediately the use of recruiting material which stresses the equal role of men and women in the Department. Finally, to ensure that women, as a class, would be provided their rightful place in the Department, the DPD was ordered to hire at least one qualified female for each male hired into the Department until further order of the Court, or until the list of eligible female applicants who had applied prior to the date of that injunction was exhausted.

On June 7, 1974 [8 EPD P 9605], this Court granted plaintiffs' second motion for partial summary judgment and found, on the basis of undisputed facts, that the DPD had also violated Title VII of the CRA of 1964 by fostering promotional policies and practices which discriminated against the plaintiffs on the basis of sex. A second preliminary injunction was issued on that same date, ordering the DPD to take affirmative action to eliminate discrimination in its promotional policies and practices. The DPD was ordered to increase the number of women in classes to be held for candidates for promotion to the rank of sergeant and was otherwise required to promote persons to the rank of sergeant without regard to sex.

*2 On April 30, 1975, plaintiffs presented the Court with their third motion for a preliminary injunction. This time they sought to enjoin the defendants from laying off or demoting any female police officers, sergeants, or lieutenants who had been hired or promoted pursuant to the Court's preliminary injunctions of May 13 and June 7, 1974. These layoffs and demotions were threatened as a result of the budgetary deficits which the City of Detroit has, and continues to, experience. Those persons subject to layoff and demotion were selected according to the provisions contained in the collective bargaining agreements between the City of Detroit and the DPOA and the DPLSA. These agreements provide that layoffs are to be made according to seniority on a "last hired, first fired" basis and when demotions in rank are necessitated, those with the least time

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in the particular rank are demoted first.

After conducting a hearing and after considering the testimony as well as the oral and written arguments of the parties, the Court concluded that the plaintiffs were entitled to an extra measure of relief. The Court found that the relief granted plaintiffs by the Court's prior injunctive orders would be diminished if the proposed layoffs and demotions were carried out under the collective bargaining agreements because a disproportionately heavy burden would fall on newly hired policewomen. This result was certain to occur because newly hired policewomen were prevented by the past discriminatory practices of the DPD from obtaining sufficient seniority to withstand the layoffs and demotions. The Court held that, under these circumstances, the "last hired—first hired" seniority system would serve to perpetuate the past discrimination previously found unlawful under Title VII of the CRA of 1964 and the equities of the case justified the granting of further injunctive relief. See the Court's Memorandum Opinion reported at [9 EPD P 10,142] 394 F. Supp. 1136.

In an attempt to accord an extra measure of relief to the victims of past discrimination and, at the same time, to ensure that fewer senior officers would be laid off or demoted, this Court ordered in its preliminary injunction of May 12, 1975, that no federally funded employees, either male or female, be laid off or demoted. This order was fashioned in light of the various proposals of the parties, the congressional purposes underlying Title VII as well as the public interest involved. It was admittedly a compromise between conflicting interests.

In fashioning the May 13, 1975, preliminary injunction, this Court concluded that since federally funded officers were the most recently hired, their layoffs were mandated not by the City's budgetary problems, but because of the seniority provisions encompassed in the collective bargaining agreement. The Court reasoned that if federally funded officers, male or female, were not laid off, the City would be allowed to lay off fewer police officers benefiting not only plaintiffs, but the public as well. Moreover, at that time, the Court was advised that all of the women hired pursuant to the Court's order of May 13, 1974, were federally funded under the Comprehensive Employment and Training Act of 1973 (CETA), and that all of the newly hired women officers would therefore be protected from layoff. This fact, however, has subsequently been shown to be incorrect.

*3 After perfecting a timely appeal of the Court's preliminary injunction of May 12, 1975, the defendants requested this Court to stay the execution of the injunction pending the disposition of their appeal. That stay was denied. See the Court's Memorandum Opinion, Civil No. 39943 [12 EPD P 11,019] (June 21, 1976).

On June 25, 1976 [12 EPD P 11,049], the Sixth Circuit Court of Appeals handed down its *per curiam* decision on defendants' appeal from this Court's May 12, 1975, preliminary injunction. The Sixth Circuit vacated that portion of the preliminary injunction which had restrained the layoff of federally funded male police officers. The Court, however, declined to vacate or otherwise disturb that portion of the preliminary injunction restraining the layoff of federally funded female officers. The Sixth Circuit remanded the case back to this Court in light of the recent United States Supreme Court decision in *Franks v Bowman Transportation Co.*, [11 EPD P 10,777] 44 U.S.L.W. 4356 (March 23, 1976) which was decided after this Court entered its preliminary injunction of May 12, 1975. In remanding, the Sixth Circuit stated that the *Franks* decision "appears to require individual determinations as to the remedial seniority status to be accorded to victims of discriminatory hiring practices."

On June 29, 1976, the plaintiffs applied for a temporary restraining order supplementing ^{and/or} amending this Court's preliminary injunction of May 12, 1975, in light of the June 25, 1976, *per curiam* decision of the Sixth Circuit. The plaintiffs requested that the City be restrained from laying off any female police officer employed by the DPD, pending this Court's determination of each officer's individual entitlement to an award of retroactive seniority. It was at this time that the Court first learned of the fact that some of the newly hired women police officers were not funded with federal funds under the CETA program.

On June 30, 1976, this Court granted plaintiffs' application for a temporary restraining order. The Court temporarily restrained the City from laying off any female police officer, whether hired with federal funds or the regular funds of the City of Detroit. The Court further ordered that an expeditious hearing or hearings be held to determine which female police officers, whose layoffs were temporarily enjoined, are entitled to continued protection under Title VII of the CRA of 1964.

In providing the plaintiffs with added protection under the temporary restraining order and by maintaining the *status quo*, the Court was hopeful that the parties could reach an agreement on the relief to be accorded each member of the class who were in fact the victims of hiring discrimination as well as the formulation of guidelines for making individual determinations, if necessary. Additional hearings were scheduled for that purpose and further oral and written arguments were required. Unfortunately, however, the parties have been unable to reach an agreement on all of these matters. Having considered the

respective positions of the parties and the arguments and evidence submitted in support of those positions the Court is now obliged to render its decision on the appropriate remedy to be accorded plaintiffs as well as the means for giving the remedy effect.

[Seniority Relief]

*4 Having granted plaintiffs' motions for partial summary judgment of May 13 and June 7, 1974, this Court established the liability of the defendants under Title VII of the CRA of 1964, as a matter of law. Thus, the only question to be decided at this point in the litigation is the determination of an appropriate remedy. At a hearing held on August 11, 1976, the defendants conceded that "retroactive seniority is an appropriate remedy for this case." In view of the nature of the broadbased pattern and practice of discrimination in the hiring and assignment policies of the DPD, which this Court found on the basis of undisputed facts, and in light of the statutory purposes to be served by Title VII, this Court agrees that retroactive seniority is appropriate as a form of relief for this case.

In *Franks v Bowman Transportation Co.*, *supra*, the Supreme Court held that "classbased seniority relief for identifiable victims of illegal hiring discrimination is a form of relief generally appropriate" under Title VII, and that the federal courts have broad equitable discretion to fashion retroactive seniority under the remedial provisions of title VII, namely 42 USC § 2000(e)-5(g). This holding was based on the "makewhole" purposes of the Act—the idea that "adequate relief may be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of the application."

Finding that retroactive seniority is an appropriate remedy and within this Court's equitable powers under Title VII, as interpreted by the Supreme Court in *Franks*, there remain two further questions to be decided: First, who in the class is entitled to retroactive seniority, and second, how much retroactive seniority should be granted to each member of the class. These questions raise a multitude of other problems concerning the burden of proof; the procedure for making individual determinations in the context of a class action, and the means for computing the period of time encompassed by an individual award of retroactive seniority. In addressing these questions the Court will provide general guidelines for resolving these matters.

[Eligibility for Relief]

The *Franks* decision has particular relevance in determining who in the class is entitled to retroactive seniority. *Franks* was a class action and the Court specifically noted in its opinion that retroactive seniority is an appropriate remedy even though some of the unnamed class members may not in fact have been the actual victims of discrimination. The Court stated:

Generalizations concerning such individually applicable evidence cannot serve as a justification for the denial of relief to the entire class. Rather, at such time as individual class members seek positions ... for which they are presumptively entitled to priority hiring consideration under the District Court's order, evidence that particular individuals were not in fact victims of racial discrimination will be material. But petitioners here have carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the respondents and, therefore, the burden will be upon the respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination. ... Only if this burden is met may retroactive seniority—if otherwise determined to be an appropriate form of relief under the circumstances of the particular case—be denied individual class members. (citations omitted)

*5 In granting plaintiffs' motions for partial summary judgment, the Court has acknowledged that the plaintiffs have satisfied their burden of demonstrating the existence of a discriminatory hiring pattern and practice. *Franks* therefore establishes that the defendants now have the burden of proving that individual members of the class were not in fact the victims of discriminatory hiring practices. This burden may be satisfied by showing that a member of the class was initially denied employment for failing to meet non-discriminatory requirements of the job; for example, by failing to meet the height, weight and vision requirements for all police officers.

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In support of their claim to retroactive seniority, the plaintiffs have submitted to the Court a number of affidavits wherein individual members of the class have stated that they were initially denied employment with the DPD on a date prior to the time they actually obtained employment. The Court has carefully reviewed these affidavits and has found at least a few instances where the individual member of the class was initially denied employment with the Department for non-discriminatory reasons. This fact was brought to the attention of the parties at the August 25, 1976, hearing, and the parties have indicated to the Court that they will agree upon which members of the class fall within this category and are therefore ineligible for an award of retroactive seniority. The Court orders that the parties expedite the process of identifying members of the class that are not entitled to an award of retroactive seniority.

[Calculation of Seniority]

The final question that must be determined raises the difficult, if not impossible, task of ascertaining how much retroactive seniority should be granted to each member of the class otherwise entitled to such relief. An exact reconstruction of each individual's seniority status, as if discrimination in hiring had not occurred, is beyond the realm of what this Court can, and should, be expected to do. Thus, "unrealistic exactitude" in computing individual retroactive seniority cannot be required. See *Pettway v. American Cast Iron Pipe Co.*, [7 EPD P 9291] 494 F. 2d 211, 260 (5th Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.*, [7 EPD P 9233] 491 F. 2d 1364, 1380 n. 53 (6th Cir. 1974).

The defendants contend that an award of retroactive seniority should be based on the date upon which a written application for employment was filed with the DPD as adjusted by an average quarterly processing time for male applicants, which was admittedly shorter than the processing time for female applicants. The plaintiffs argue that an award of retroactive seniority based on the date of application would not place them in their "rightful place" in the seniority system because women had been deterred from filing an application by the discriminatory hiring practices of the Department. The plaintiffs contend that individual members of the class should be restored to the position in the workforce they would have held absent the discrimination, and that some date prior to the date of application should, in most cases, apply. The plaintiffs, however, concede that they cannot provide the Court with guidelines for ascertaining retroactive seniority in making an individual determination under their theory.

*6 The plaintiffs, by way of advocating their position, have raised certain questions of fact relevant to the determination of fixing a date for retroactive seniority. First, the plaintiffs have asserted that the reputation of the DPD for discrimination based on sex was a major factor that deterred women applicants from filing a written application for employment. In reviewing the record in this case, the Court finds that the plaintiffs have failed to establish a discriminatory reputation on the part of the DPD that was sufficiently known in the community to have the effect claimed by the plaintiffs. Allegations based solely on the alleged discriminatory reputation of the DPD will therefore not serve to justify an award of retroactive seniority beyond the date of application. The plaintiffs have also claimed that the DPD had a practice that was in disregard of an admitted Departmental policy permitting all applicants, men and women, to file written applications for employment. The plaintiffs contend that this practice denied women applicants the opportunity to file application forms. An evidentiary hearing was held on this matter on August 19, 1976, and after considering all the evidence submitted, the Court concludes that the plaintiffs have failed to establish that there was, in fact, a DPD practice that denied women applicants the opportunity to file a written application. The Court concedes, however, that in light of the discriminatory hiring requirements applied to women, it would have been a "futile gesture" for a woman applicant to request an application after learning that she failed to meet the requirements for the job. Thus, allegations based solely on an alleged practice of the DPD in refusing women applicants the opportunity to file an application for employment will not serve to justify an award of retroactive seniority beyond the date of actual employment, but evidence establishing that a woman applicant failed to file an application after being informed of the discriminatory hiring requirements of the DPD may be relevant.

In reviewing the affidavits submitted by individual members of the class in support of an award of retroactive seniority, the Court finds that many of the statements contained therein are based upon allegations that are too subjective in nature to be proved by tangible, or other corroborative evidence. In many cases, the claim to an award of retroactive seniority beyond the date of the written application is likely to fail for lack of convincing evidence.

The Court concludes, however, that those members of the class who were in fact the victims of discrimination in hiring are, under the *Franks* decision, presumptively entitled to at least an award to retroactive seniority dating back to the date of the first written application filed with the DPD as adjusted by the quarterly average processing time for male applicants. The DPD will therefore be ordered to realign its present seniority system to provide seniority status to all identifiable victims of

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illegal hiring discrimination dating back to the date of their first written application filed with the DPD as adjusted by the quarterly processing time for males.

*7 Those members of the class who are claiming retroactive seniority beyond the date of the first written application for employment will have the burden of proving by clear and convincing evidence that they had attempted to apply at such earlier date, but were denied employment because of the discriminatory hiring practices of the DPD. See *Pettway v American Cast Iron Pipe Co.*, [7 EPD P 9291] 494 F. 2d 211 (5th Cir. 1974); *Johnson v Goodyear Tire & Rubber Co.*, [7 EPD P 9233] 491 F. 2d 1364 (6th Cir. 1974). Ordinarily, tangible evidence will be the most reliable evidence to substantiate such a claim. Other evidence, such as corroborative testimony, or a college transcript showing that the individual claimant fulfilled the two year college requirement for women policewomen may also be considered. But in no case should mere allegations based upon the alleged reputation of the DPD for discrimination or the alleged practice of the DPD to refuse women written application forms be relied upon to support the claim.

To provide those identifiable members of the class who were in fact the victims of hiring discrimination with an opportunity to claim retroactive seniority beyond the date of the first written application for employment, the Court will appoint, pursuant to Rule 53 of the FRCP, a Special Master or Masters to hear such claims and make specific findings of fact in accordance with the guidelines established by this opinion. The Court will at a later date fix a time limitation for the filing of individual claims before the Master or Masters appointed by the Court. The parties are invited to recommend to the Court a person or persons to be considered for appointment as Master as well as recommendations for compensating such Master.

In holding that all identifiable victims of hiring discrimination in the class are presumptively entitled to an award of retroactive seniority dating back to the first written application for employment, as adjusted by the quarterly average processing time for males, this Court believes that it has provided the plaintiffs with yet another extra measure of relief for the harm they have suffered. While this relief, standing alone, is not “complete relief” in terms of what the plaintiffs claim, it does provide an immediate seniority status benefit, and when added to what the Court has previously ordered, it goes a long way in satisfying the statutory purposes for which Title VII of the CRA of 1964 was designed to serve. The Court has also provided the plaintiffs with the opportunity to recover more, if they can prove it.

Given that the resolution of individual claims submitted to the Special Master or Masters will be likely to prolong this litigation for months to come, and that many of these claims do not have a high probability of success, and given the adverse effect that will likely occur in the administration of the DPD, the Court hereby vacates the preliminary injunction entered on May 12, 1975, and the temporary restraining order of June 30, 1976. Accordingly, layoffs in the DPD may proceed under the terms of the collective bargaining agreement.

*8 All women police officers are hereby awarded retroactive seniority to the date of their first written application, if they meet the requirements in effect for male applicants at that time. That application date is to be adjusted by the mean processing time for male applicants, and that adjustment is to be computed in an expeditious manner so that the seniority list can be properly realigned. Women police officers who believe that they are entitled to an earlier application date should begin to prepare their claims for submission to the Court and the Master. In the interim, no officer of the Detroit Police Department is entitled to special protection from layoff other than by the terms of this opinion.

An appropriate order shall be submitted.

Parallel Citations

12 Empl. Prac. Dec. P 11,226