

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
TIMOTHY D. POPE, )  
 )  
Plaintiff-Intervenor, )  
 )  
JOHNNY REYNOLDS, et al., )  
 )  
Plaintiff-Intervenors, )  
 )  
EUGENE CRUM, JR., et al., )  
 )  
Plaintiff-Intervenors, )  
 )  
v. ) CIVIL ACTION NO.  
 ) 2:68cv2709-T  
TOMMY G. FLOWERS, et al., )  
 )  
Defendants. )  
 )  
ALABAMA STATE CONFERENCE )  
OF NAACP BRANCHES, )  
 )  
Amicus Curiae. )

ORDER

This case is now before the court on a motion to  
intervene, filed by Loyd Arrington, Quinton Beard, John  
D'Arville, Janet Justice, and Billy Stephens (the Arrington

movants), and a motion for class certification, filed by plaintiff-intervenor Timothy Pope and the Arrington movants. For following reasons, the court agrees with plaintiff United States of America that these motions should be held in abeyance until the court makes a final decision on the scope of discovery and the scope of its inquiry into the joint motion to terminate the no-bypass rule.

#### I. Background

On May 20, 2003, the United States and the defendants filed a joint motion to terminate the no-bypass rule in this long-running employment discrimination case. This court granted motions to intervene by the Reynolds and Crum classes (African-American employees of ALDOT and all state agencies, respectively), and Timothy Pope, a white employee of the Alabama Department of Corrections who says he was denied a promotion because of the no-bypass rule. These were permissive interventions.

This court instructed the parties to agree on a discovery plan, but they could not do so. The United States, the defendants, and Pope argued that discovery should be limited to an analysis of the data underlying the statistical report that the original parties had submitted, which purports to show that the no-bypass rule is no longer necessary. The Reynolds and Crum intervenors wanted discovery to be much broader, encompassing information about specific instances of alleged discrimination across the State government. The Reynolds and Crum intervenors argued that the question of whether the no-bypass rule was still necessary could require an agency-by-agency or classification-by-classification analysis.

This court approved the more limited proposed discovery plan of the United States, the defendants, and Pope. However, the court left open the possibility that it would allow more discovery after reviewing the Reynolds and Crum intervenors' rebuttal report.<sup>1</sup>

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1. Order, filed April 7, 2004 (Doc. no. 674).

## II. Discussion

### A. Motion to Intervene

The Arrington movants are non-black merit system employees of the State of Alabama. They each work for a different state agency. The Arrington movants "seek to vindicate and protect interests similar to intervenor Pope's." Specifically, they want to argue that the no-bypass rule should be terminated because it is unconstitutional race-based discrimination, which is one of the arguments that intervenor Pope has made. However, they say they need to intervene because Pope may not be able to represent adequately their interests "with regard to the issues and claims asserted in the Crum and [Reynolds] complaints-in-intervention."

At this point, it would be premature to decide whether the Arrington movants should be allowed to intervene. Intervention as of right is appropriate only when, among other requirements, the proposed intervenor's interest is not adequately represented by the existing parties. Fed. R.

Civ. P. 24(a). As long as the scope of discovery and the court's inquiry remain focused on how the no-bypass rule works in state government as a whole, there is no need to allow intervention by non-black employees of each individual state agency. Indeed, the motion for class certification seems to admit this point when it says that "the Frazer no-bypass rule affects all non-blacks negatively and equally, [so] none of the class representatives or class members possess interests in this matter that are or will be potentially antagonistic to one another."<sup>2</sup>

Of course, if, after reviewing the Reynolds and Crum intervenors' rebuttal report, the court decides to widen the scope of discovery to include information that is specific to particular state agencies, then granting the Arrington movants' motion for intervention might be appropriate. Thus, the court declines to address the merits of the motion for intervention until after it has decided on the scope of

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2. Motion for class certification, filed April 21, 2004 (Doc. no. 677), at 2.

discovery and the scope of its inquiry into the no-bypass rule.

B. Motion for class certification

Intervenor Pope and the Arrington movants have also moved for certification of a class of all non-black merit system employees of the State of Alabama. Of course, if the Arrington movants had filed this motion themselves, then its success would be dependent on the success of their motion to intervene. See Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 596 n.14 (7th Cir. 1993) (holding that unsuccessful movants for intervention did not have standing to appeal the denial of their motion for class certification). However, since Pope, who has already intervened, also filed the motion for class certification, class certification might be appropriate even if the Arrington movants are not proper intervenors.

However, for reasons similar to those explained above, this court will not address at this time the merits of the

motion for class certification. Motions for class certification are to be decided "at an early practicable time," Fed. R. Civ. P. 23(c)(1)(A), but it will not be practicable to decide this motion until it is clear what the scope of the court's inquiry into the joint motion to terminate the no-bypass rule will be. For instance, at this point it is not practicable to determine what questions of law or fact are common to the putative class, since it is not clear whether the inquiry into the no-bypass rule will include an agency-by-agency analysis.

Further, the court notes that at this point, Pope and the Arrington movants have not proven that class certification is appropriate, as they have not presented any evidence at all.

For the foregoing reasons, it is ORDERED that Loyd Arrington, Quinton Beard, John D'Arville, Janet Justice, and Billy Stephens' motion to intervene (Doc. no. 676) and plaintiff-intervenor Timothy Pope and the Arrington movants' motion for class certification (Doc. no. 677) are

conditionally denied with leave to ask for reconsideration after the court makes a final determination as to the scope of discovery and the scope of its inquiry into the joint motion to terminate the no-bypass rule.

Done, this the 28th day of March, 2005.

          /s/ Myron H. Thompson            
UNITED STATES DISTRICT JUDGE