

UNITED STATES OF AMERICA, Plaintiff, v. THE CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants. FONTAINE DAVIS, et al., Plaintiffs, v. CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants

Nos. C-84-7089 MHP, C-84-1100 MHP

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

ORDER

Pursuant to the Consent Decree filed May 20, 1988, this court has jurisdiction over all individual claims of racial discrimination or harassment filed under the Decree's complaint procedure. The matter is now before the court on defendant City's motion to exclude certain claims as untimely and to require a more definite statement of other claims. Having considered the submissions of the parties, the court grants defendant's motion to dismiss claims for violations occurring before March 9, 1981. Plaintiffs are ordered to provide dates for alleged "continuing" violations and other claimed violations.

Discussion

A. Motion to Dismiss

Under the Consent Decree, section VI, paragraph 19, all black uniformed employees of the San Francisco Fire Department and two named former employees, who claim to have been subjected to "racial harassment or other forms of racial discrimination since March 9, 1981, shall be entitled to present their claims for resolution" under the system established by the Decree. At issue in the pending motion is the meaning of the Decree's March 9, 1981 date. The City has moved to dismiss 72 of [*2] the 313 claims filed as untimely, contending that the claimed incidents of harassment or discrimination occurred before March 9, 1981 and are therefore barred under the Decree. Plaintiffs-intervenors oppose the motion to dismiss, claiming that under Title VII¹ "continuing violation" doctrine, harassment which occurred before March 9, 1981 is compensable if additional incidents occurred after that date.

¹ The Decree states at paragraph 19(i) that section 1981 (42 U.S.C. § 1981), section 1983 (42 U.S.C. § 1983) and Title VII (42 U.S.C. § 2000e) of the Civil Rights Act are applicable to "all decisions regarding standing, liability, and remedies" under the Decree.

1. Continuing Violation Under Title VII

Under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(e), a charge must be filed within 180 days after the occurrence of the unlawful employment practice. Claims not filed within the statutory period are not actionable. *United Airlines, Inc. v. Evans*, 431 U.S. 553, 554-59 (1977). This limitations period [*3] serves both to preserve the rights of aggrieved employees and to "protect employers from the burden of defending claims arising from employment decisions that are long past." *Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980).

Where an employer's *policy*, rather than a discrete act is challenged, however, an employee may attack the current existence of the policy as well as each manifestation of it under the "continuing violation" theory. *See Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 724 & nn. 66, 67 (D.C. Cir. 1978) (quoting Title VII legislative history on "violations [that] are continuing in nature"). The continuing violation concept was designed to ensure that employees victimized by discriminatory policies would not be foreclosed by the statute of limitations from bringing suit once the policy was actually applied to them. *See, e.g., Perez v. Laredo Junior College*, 706 F.2d 731, 733 (5th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984) ("if the statutory violation occurs as a result of a continuing policy, itself illegal, then the statute does not foreclose an action aimed at the company's enforcement of the policy within the [*4] limitations period"). Continuing violation theory has also been applied in discrimination cases brought under section 1981 and section 1983 of the Civil Rights Act. *See, e.g., Chung v. Pomona Valley Community Hospital*, 667 F.2d 788, 791 (9th Cir. 1982) (adopting continuing violation rule for section 1981 action).

The continuing *impact* of a past act of discrimination, however, is not actionable. *Evans*, 431 U.S. at 558 (1977) (discriminatory act upon which timely charges not brought may be relevant background evidence but is not legally actionable). *See also Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 924 (9th cir.), *cert. denied*, 459 U.S. 971 (1972) (continuing violations most likely to occur in placements or promotions).

The applicability of continuing violation theory to discrimination which is comprised of a series of of harassment, rather than discriminatory placements or promotions pursuant to a *policy*, is uncertain. Of the courts which have considered the issue, some have held that while claims of harassment, like claims related to promotion or layoff, may be continuing, *compensation* is limited to incidents occurring within the statutory [*5] period. *See, e.g., Scott v. City of Overland Park*, 595 F. Supp. 520, 526 (D. Kan. 1984) (granting motion to dismiss harassment claims outside the statutory period); *Loo v. Gerarge*, 374 F. Supp 1338, 1340 (D. Haw. 1974) ("Once a disparaging remark is made, or a transfer is denied . . . it is, without more, a completed and isolated act: such practices do not give the plaintiff a perpetual right to file charges."); *Brooks and Robertson v. Illinois Range Co.*, No. 85- C-7969 (N.D. Ill. 1987), 1987 U.S. Dist. Lexis 6176 (rejecting argument that all discriminatory conduct during plaintiff's eight years of employment constituted single, continuing violation). At least one court has found to the contrary. *Korpai v. A.W. Zengeler's Grande Cleaners, Inc.*, No. 85- C-9130 (N.D. Ill. 1987), 1987 U.S. Dist. Lexis 5322 (allegations of national origin harassment over several years did constitute continuing violation). Still other courts have viewed incidents occurring before the statutory period as evidence relevant to an employer's motive or intent with regard to current practices. *See Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1295 (7th Cir. 1987) (evidence [*6] of racial incidents over a decade of employment used as background to evaluate current incidents of different treatment of black employee).

2. Continuing Violation Under the Consent Decree

In the instant case, however, this court need not undertake the task of resolving the scope of the continuing violation doctrine as it applies to allegations of racial harassment. The Decree itself forecloses, in this case, the interpretation urged by plaintiffs. The Decree states that firefighters "who claim that they have been subjected to racial harassment or other forms of racial discrimination *since March 9, 1981*, shall be entitled to present their claims for resolution under the system outlined [in paragraph 19]." (emphasis added). The plain meaning of this language is that only discrimination *suffered since March 9, 1981* is actionable. Under plaintiffs' interpretation, the March 9, 1981 date would be meaningless. Plaintiffs contend, for example, that even the complaints which allege only incidents occurring before March 9, 1981 without any mention of continuing violations should be compensable, since they should be "read in the context of the policy and atmosphere of racial harrasment [*7] alleged in the complaints filed by other Black firefighters." Plaintiff's Opposition at 6 n.2 (discussing claims of two firefighters who allege no continuing violation and

no incidents after March 9, 1981). Such an interpretation would render any and all claims by current firefighters actionable, no matter how old or how isolated the claim. This was not the intent of the parties or the court in adopting paragraph 19.

The court finds that claims of discrimination suffered before March 9, 1981 (except those alleging discrimination related to the filing of charges with respect to the 1978 lieutenant's exam, as allowed under the Decree) are barred by paragraph 19 of the Consent Decree. Evidence of such incidents, however, may be introduced insofar as it is probative of defendant's motive or intent with regard to discrimination actionable within the Decree's parameters. *See United Airlines, Inc. v. Evans*, 431 U.S. 553, 558 (1977) (prior acts as relevant background to assessment of current practice).

Accordingly, defendant City's motion to dismiss claims as untimely is GRANTED with respect to the seventh claims noted on pages 3 and 4 of the Uhl Declaration in Support of Motion to Dismiss. [*8] Evidence of these alleged acts of discrimination may be admitted insofar as relevant to a determination of motive, intent, knowledge or other permissible purpose regarding claims which arose after March 9, 1981.

B. Motion for a More Definite Statement

The City has moved for a more definite statement of the forty-four claims it has labeled Category IV and Category V. These include twenty-four claims in which the date of the occurrence described is omitted or not specific, as well as twenty claims which allege violations both before and after March 9, 1981. Plaintiffs oppose the motion, contending that the complaints, submitted on a form drafted by the parties, meet the liberal pleading requirement of Federal Rule of Civil Procedure 8.

The court notes that both defendant's motion and plaintiffs' response characterize the stage of the proceedings somewhat inaptly. These claims are now at pretrial, not an initial pleading stage. At this point in the action, therefore the court has great discretion with regard to "the formulation and simplification of the issues." Fed. A. Civ. Pro. 16(c)(1).

Accordingly, consistent with its ruling on time-barred claims, the court orders that plaintiffs [*9] must specify exactly which incidents or acts of the twenty claims that plaintiffs have termed "continuing" have taken place since March 9, 1981. Those occurring before March 9, 1981 will be dismissed. As to the pre-March 1981 conduct which plaintiffs intend to use for evidentiary purposes as allowable under part A.2 above, plaintiffs shall identify each incident by time, place and participants to enable the court to assess its evidentiary value.

For the claims as to which dates are uncertain, plaintiffs must specify, to the best of their ability, the date of the claimed discrimination and any other identifying information. The court orders defendant to provide all relevant materials to plaintiffs. For claims depending upon information allegedly in the sole possession of defendant, plaintiffs must indicate the basis for their assertion of a timely claim and provide sufficient information from which defendant can identify the appropriate records.

CONCLUSION

Defendant's motion to dismiss claims for instances of discrimination occurring before March 9, 1981 is GRANTED. Evidence of such discrimination may be introduced only insofar as it is relevant to timely charges. Plaintiffs [*10] are to specify the dates of all alleged "continuing" violations, and provide, to the best of their ability, dates of occurrence for all claimed violations.

IT IS SO ORDERED.