1974 WL 168
United States District Court; N.D. California.

Gene C. Bernardi, Plaintiff
v.
Earl F. Butz, Secretary, United States Department of Agriculture, Defendant.

No. C-73-1110 SC
|
April 17, 1974

CONTI, D.J.

[*Background of Case*]

***1** Plaintiff brings this action on behalf of herself and all other female employees of the U.S. Department of Agriculture similarly situated, for wrongful and discriminatory denial of promotional opportunities in the Department. Plaintiff claims that such denial constitutes discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended in 1972 to encompass discrimination in the employment policies and practices of the federal government. 42 U.S.C. § 2000e-16.

The case is before this court on defendant's motions to dismiss and for summary judgment.

Before turning to defendant's contentions with reference to these motions, the background of plaintiff's lawsuit must be reviewed.

On July 9, 1968, plaintiff was hired as a sociologist at Pacific Southwest Forest and Range Experiment Station (hereinafter PSFRE) at grade level GS-9. Plaintiff was promoted to GS-11 on May 18, 1969. In June, 1971, plaintiff's performance was evaluated by a research panel (a procedure adopted by PSFRE earlier that year), and on June 18, 1971, the panel found plaintiff's performance level to be GS-11. A PSFRE personnel officer reported his findings of a desk audit of plaintiff's position on June 25, 1971, and affirmed the panel's evaluation. During this time, plaintiff's immediate supervisor re-wrote her position description, allegedly to enhance plaintiff's chance for promotion. Plaintiff contends such revision was contrary to her interests.

Plaintiff subsequently requested evaluation by a new panel. On October 27, 1972, the second panel, after considering documents submitted by plaintiff, determined her position properly graded at GS-11. On November 6, 1972, the personnel officer recommended that plaintiff's position be reclassified as GS-12. This recommendation was not accepted by the Director of Personnel Management who felt that GS-11 was the proper classification. Plaintiff there-after filed a classification appeal with the Civil Service Commission, pursuant to 5 U.S.C. § 512. On February 23, 1973, the Commission sustained the defendant's determination that GS-11 was a proper classification.

On December 5, 1972, plaintiff filed a complaint of discrimination. All alleged instances of discrimination were related specifically to plaintiff's failure to receive her allegedly deserved promotion. The only reference to the possible discrimination against others "similarly situated" is the presentation of the following breakdown:

". . . Out of approximately 118 female employees, approximately 6 female employees are GS-11 or above (5%), while out of approximately 232 male employees, about 121 (53%) are GS-11 and above."

Plaintiff herself stated "These statistics are not raised to 'prove' complainant's allegations, rather, they are offered here to give context to the complaint."

The above complaint was processed by defendant, pursuant to the provision of 5 C.F.R. § 713.201 et seq. An attempt was made by an EEOC counselor to resolve the complaint informally. This effort included extensive interviews with plaintiff and individuals who had participated in plaintiff's position evaluation. No informal resolution was possible; hence, an exhaustive investigation was performed by an EEOC investigator.

***2** On May 31, 1973, plaintiff was notified of defendant's proposed decision on her administrative complaint, and on June 26, 1973, said proposed decision was made final. Plaintiff was fully notified of her right to an administrative hearing on the matter, and chose instead to

bring this suit.

Plaintiff also filed a third-party complaint alleging employment discrimination on the bases of sex and race. A complete investigation was made by defendant into plaintiff's allegations, and a final decision was rendered on July 17, 1973. Neither the investigation of the third-party complaint nor of plaintiff's personal complaint produced any finding of discrimination. All documents relating to this third-party complaint, as well as the administrative record of plaintiff's individual complaint, are before this court.

[*Subject Matter Jurisdiction*]

Defendant first prays for dismissal of this action for want of subject matter jurisdiction. The issues here are: (1) whether the 1972 amendments to the Equal Employment Opportunity Act, P.L. 92-261 (42 USC § 2000e-16), enacted March 24, 1972, apply retroactively; and (2) if not, whether the alleged discrimination occurred before March 24, 1972. Defendant urges that the crux of the discrimination allegation refers back to June of 1971, when plaintiff was evaluated as GS-11 rather than GS-12. Further, the majority view of recent cases supports defendant's contention that the statutory provision should be of prospective application only. *Place v. Weinberger,* [6 EPD P 9010] – F.Supp. –, Civ. No. 38902 (E.D. Mich. 7-5-73); *Palmer v. Rogers,* [6 EPD P 8822] – F.Supp. –, Civ. No. 1016-72 (D.D.C. 9-7-73); *Mosely v. United States,* [6 EPD P 8875] – F.Supp. – (Civ. No. 72-380-S, S.D. Cal. 1-23-73).

Without the jurisdictional assistance of 42 U.S.C. § 2000e-16, the doctrine of sovereign immunity bars the action, and this court would have to dismiss for want of subject matter jurisdiction.

Plaintiff argues that *Place v. Weinberger,* supra, held only that "past consequences of past discrimination" were not covered by § 2000e-16, whereas the present case involves past and present consequences of discrimination. However, the plaintiff in *Place* similarly argued that the complaint was "aimed at the continuing policy of sexual discrimination . . . even though acts prior to March 24, 1972, are used as evidence to support this conclusion." The court rejected that claim and stated:

". . . this is a case where both the allegedly neutral employment practice and the preceding discriminatory act occur prior to the passage of the 1972 amendment."

This court, however, declines to so conclude in the instant case.

The court finds that the alleged acts of discrimination occurred both before and arguably after the March 24, 1972 date at which the Act begins to take effect. Defendant's argument that the period of alleged discrimination occurred solely before that date is not accepted. Defendant's motion to dismiss on these grounds is, therefore, denied.

[*Scope of Judicial Review*]

***3** The court now turns to defendant's motion for summary judgment. The initial issue to resolve with reference to this motion is the scope of review.

The Equal Employment Opportunity Act of 1972 maintained the distinction between private and federal employees. Private employees, upon compliance with limited procedures before the Equal Employment Opportunity Commission (EEOC), have the right to bring a civil action on the merits in the appropriate federal court. In the case of federal employees, § 2000e-16 provides in pertinent part:

"(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit . . . or by the Civil Service Commission upon appeal from a decision or order of such (governmental) . . . unit on a complaint of discrimination . . . an employee or applicant for employment, if aggrieved by the final disposition of his complaint or by failure to take final action on his complaint, *may file a civil action* . . . in which . . . the head of the department, agency or unit . . . shall be the defendant." (Emphasis added.)

The question here is whether the grant of a "civil action" by the above provision is to be interpreted to demand a trial de novo, or rather a review of the administrative record.

In the case of *Thompson v. U.S. Dept. of Justice,* [6 EPD P 8905] 360 F.Supp. 255 (N.D. Cal. 1973), Judge Wollenberg concluded that a trial de novo was required by the Equal Employment Opportunity Act. Subsequent

decisions in the cases of *Handy v. Gayler,* [6 EPD P 8913] No. 72-824-N (D.Md. 10-3-73), *Williams v. Mumford,* Civ. No. 1633-72 (D.D.C. 8-20-73), and *Hackley v. Johnson,* [6 EPD P 8725] 360 F.Supp. 1247 (D.D.C. 1973), led to reconsideration of that conclusion in *Thompson.* See *Thompson v. U.S. Dept. of Justice,* Civ. No. C-73-219 ACW, Order Granting Summary Judgment (N.D. Cal. 3-1-74) [7 EPD P 9209]. Presently, no authority convinces this court that a trial de novo is required here. To the contrary, the thorough analysis of the purpose and legislative history of the Equal Employment Opportunity Act by Judge Gesell in *Hackley,* supra, compels this court to conclude that a trial de novo is not required by the Act.[1]

Such a requirement would inevitably result in much duplication of administrative efforts. Further, that duplication would cover intricate areas of regulations governing job qualifications, promotion and training–areas in which the administrative agencies have attained and are expanding their expertise. Indeed, the court may in its discretion expand its review if necessary to take testimony to supplement the record, grant relief on the record, or even remand to the agency for further proceedings. *Hackley v. Johnson,* supra, 360 F.Supp. at 1252; *Handy v. Gaylor,* supra. Neither an automatic trial de novo, nor absolute adherence to the administrative record is the proper rule in all such cases. The court in each case should closely examine the administrative record, and substantial weight should be given to the findings of such agencies to which Congress specifically directed the primary responsibility of resolving disputes pursuant to the 1972 Act.

***4** The court has thoroughly reviewed the administrative record with reference to the plaintiff's personal claims of sex discrimination, and finds that no expansion of that record is necessary. The fact that plaintiff decided not to have an administrative hearing does not compel this court to allow a hearing de novo. Plaintiff was appraised of her right to such hearing, and knowingly and voluntarily waived that hearing. This court declines to establish a rule whereby a plaintiff becomes entitled to a trial de novo solely by declining to respond to an offer for an administrative hearing. See *Thompson v. U.S. Dept. of Justice,* Civ. No. C-73-214 ACW (Order Granting Summary Judgment) supra.

[*Supporting Evidence*]

Moreover, the court finds that the clear weight of the evidence adduced from a complete and impartial inquiry into plaintiff's allegations, supports the administrative decision that discrimination on the basis of sex was absent in plaintiff's case. In view of this finding, summary judgment in favor of defendant must be granted.

[*Class Action*]

Plaintiff also seeks to pursue her claim as a class action. However, as summary judgment has been granted as to plaintiff's individual claims, she can no longer serve as representative of any class. A decision on the status of this action as a proper class action is, therefore, unnecessary.[2]

[*Order*]

In view of the above, and after thorough review of the extensive proceedings relating to these motions, it is the order of this court that:

(1) Defendant's motion to dismiss for lack of subject matter jurisdiction be, and is hereby denied;

(2) Defendant's motion for summary judgment be, and is hereby granted.

All Citations

Not Reported in F.Supp., 1974 WL 168, 8 Fair Empl.Prac.Cas. (BNA) 479, 7 Empl. Prac. Dec. P 9381

Footnotes

1 Senator Harrison Williams, a leading sponsor of the bill, stated with reference to the provision establishing the right

to sue in Federal Court: ". . . a provision (enabling) an aggrieved Federal employee to file an action in the U.S. District Court *for a review of the administrative proceeding record* after final order by his agency or by the Civil Service Commission if he is dissatisfied with the decision." (118 Cong. Rec. 2780, (Feb. 22, 1972)) (Emphasis added)

[2] It is further unnecessary to decide the merits of plaintiff's third-party complaint.