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United States District Court, N.D. Illinois.

Glenn KOSKI, et al., Plaintiff,
v.
Terrance GAINER, et al., Defendant.

No. 92 C 3293. | March 27, 1997.

Opinion

MEMORANDUM OPINION AND ORDER

LEINENWEBER, District Judge.

*1 Plaintiffs brought this action against various officers and directors of the Illinois State Police (“ISP”) to challenge the ISP’s hiring and promotion practices. Plaintiffs are two groups of white males. The first are men whom the ISP did not hire as state troopers allegedly because they were not members of a minority race or women. The second are men who already worked for the ISP and allege that the ISP failed to promote them to sergeant or master sergeant because they were not members of a minority race or women. All plaintiffs base their claims on violations of 42 U.S.C. § 2000e *et. seq* (“Title VII”), and 42 U.S.C. §§ 1981, 1983, and 1985.

Pending before the court are certain parties’ cross-motions for summary judgment. One is brought by plaintiffs Glenn Koski, Anthony Bishop, Owen Reeves, Jeffery Hanford, Fred Winterroth, Jesse Bean and Jerry Myers who are members of the second group. They claim that the undisputed evidence demonstrates that defendants engaged in reverse-race and gender discrimination by promoting women and minorities instead of plaintiffs, who claim they were more qualified.

Defendants bring their own motion for summary judgment that raises three defenses. First, defendants claim that plaintiffs failed to demonstrate that they were more qualified for promotion regardless of race and gender. Second, defendants argue that certain claims of three defendants are barred by the statute of limitations. Finally, defendants assert that their affirmative action program does not violate the equal protection clause.

BACKGROUND

The relevant facts of this controversy center around the methods and goals of the ISP’s hiring and promotion system. The court ruled previously that defendant’s hiring system violated the Constitution. *See Koski v. Gainer*, No. 92 C 3293, 1995 WL 599052, at *10 (N.D.Ill. Oct.5, 1995). Here, the court faces only the ISA’s promotion scheme. The parties agree on the following facts. The ISP has set up a merit board that reviews all applications for promotion. In theory, the board reviews each application and computes a rank index score based upon the following criteria: 1) 50% written examination; 2) 45% performance evaluation; 3) 5% seniority. Those scoring in the 65th percentile are considered “certified for promotion” and the merit board considers those with the highest 10 scores “equally-eligible” for promotion.

Defendants admittedly have a goal of achieving racial and gender parity in all of their sworn ranks (i.e., troopers and sergeants). When a minority or gender group lags in a particular sworn rank, that group is deemed “underutilized.” When a group is underutilized and a member of that group is eligible for promotion but not selected, state law requires defendants to “justify [their] decision not to promote the minority candidate.”

EQUAL PROTECTION

The court turns first to the issue of violations of the equal protection clause. Plaintiffs' main argument is that the ISP employed an affirmative action program ("AAP") that blatantly and unfairly favored women and minorities. Defendants respond that, before the court may explore the constitutionality of the AAP, plaintiffs must provide some evidence that they would have been hired but for the plan. As to the AAP's constitutionality, defendants do not dispute that their AAP favors women and minorities; rather, they argue that the AAP is narrowly tailored to suit their compelling governmental interest.

*2 In order to establish a prima facie violation of the equal protection clause based on racial or gender discrimination, plaintiffs must demonstrate that: 1) they are members of a protected class; 2) they are similarly situated to members of the unprotected class; and 3) they were treated differently from members of the unprotected class. *Johnson v. City of Fort Wayne*, 91 F.3d 922, 944-45 (7th Cir.1996); *Sims v. Mulcahy*, 902 F.2d 524, 538-39 (7th Cir.1990). Plaintiffs must also prove that defendants acted with discriminatory intent. *Johnson*, 91 F.3d at 945. If plaintiffs meet this burden, defendants have two choices. First, they may articulate a legitimate non-discriminatory reason for the action alleged to be discriminatory. *Sims*, 902 F.2d at 539. If defendants succeed, plaintiffs must demonstrate that the proffered reason is a pretext for discrimination. *Id.* If defendants choose not to challenge the notion that they have discriminated, they must prove that any discrimination was narrowly tailored to meet a compelling governmental interest. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 721, 102 L.Ed.2d 854 (1989). However, in order to rely on the AAP as evidence of discriminatory treatment, plaintiffs must establish that defendants actually employed the AAP in rejecting their applications for promotion. *Whalen v. Rubin*, 91 F.3d 1041, 1046 (7th Cir.1996).

Plaintiffs have established such a prima facie case. They have demonstrated that they were members of a protected class, i.e., a racial and gender category. They have demonstrated that they were similarly situated to members of other racial and gender classes in that they were all certified for promotion. Lastly, plaintiffs have established they were treated differently than their similarly-situated peers. It is undisputed that the AAP's avowed goal was to achieve racial and gender parity among the sworn ranks of the ISP. The method of achieving this goal was to give favorable treatment to minority and female applicants in the form of a special justification any time an eligible minority or woman was not promoted. This method, standing alone, would violate the Equal Protection Clause. Therefore, plaintiffs have established a prima facie case.

However, defendants assert three defenses to plaintiffs' prima facie case. First, defendants argue that plaintiffs failed to demonstrate that defendants actually relied on the AAP in denying plaintiffs' promotions. *See Whalen, supra*. Plaintiffs point to out-of-rank promotions and internal memoranda indicating defendants made conscious efforts to achieve their goal of racial parity. Defendants point to evidence that a multitude of factors were weighed in each of defendants' promotion decisions, and that, in each case, the applicant chosen over a particular plaintiff was more qualified. Given that the question of reliance is essentially a question of fact, *see Whalen*, 91 F.3d at 1046, and that issues of material fact exist, summary judgment for either party is improper. *See id.* at 1045 ("The mere existence of an affirmative action policy is ... insufficient to prove that [a defendant] actually intentionally discriminated..."). Without a causal connection between the AAP and plaintiffs' hiring claim, the court does not reach the issue of the plan's validity. *Id.* However, defendants may prevail on summary judgment if, assuming *arguendo* that they relied on the AAP, they meet their burden on other issues.

*3 Defendants next claim incorrectly that plaintiffs bear the burden of establishing that they would have been promoted but for the discrimination. Rather, it is defendants who bear the burden of establishing that plaintiffs would not have been promoted irrespective of any racial or gender discrimination. *See Doll v. Brown*, 75 F.3d 1200, 1202-03 (7th Cir.1996). As discussed above, defendants must come forward with a legitimate non-discriminatory reason for their failure to promote plaintiffs. *Sims*, 902 F.2d at 539. The court's discussion of whether defendants relied on the AAP provides the same justification for denying summary judgment on the issue of whether a legitimate non-discriminatory reason existed for discharge. Defendants present evidence that they considered relevant, legitimate factors in deciding not to promote plaintiffs while plaintiffs present evidence that defendants considered illegitimate, discriminatory factors. This factual dispute precludes a finding of summary judgment as to this issue.

Assuming *arguendo* that they discriminated against plaintiffs, defendants may still be entitled to summary judgment if they can demonstrate they narrowly tailored their AAP to meet a compelling governmental interest. Defendants point to the under-representation of women and minorities in sergeant and master-sergeant ranks, which they claim establish a compelling need for affirmative action. They claim that:

the disproportionately low numbers of minorities and females in the supervisory ranks, in addition to the fact that minorities and females were not hired and represented in the ISP in numbers proportionate to their work force numbers, provide the ISP with a compelling interest to institute a plan to address

this under-representation.

Def. Resp. Br. at 19. Furthermore, defendants state that they used the various percentages of hired troopers to determine the appropriate percentages for promoting sergeants. Despite this explanation, defendants fail to erase all issues of fact concerning the propriety of their statistical analysis.

Specifically, two fact issues cloud defendants' analysis. First, it is not clear to the court why the use of the percentage of troopers should be the benchmark for defendants' "parity goal" for the percentage of sergeants. Although defendants hired many women and minorities as troopers pursuant to consent decrees and affirmative action programs, it is undisputed that, with regard to those hiring AAPs, the court previously determined that issues of fact precluded summary judgment for defendants because it was unclear how defendants arrived at their target numbers. *See Koski*, 1995 WL at *12. The unreliability of the hiring data weakens the foundation upon which defendants currently rest the propriety of their promotion goals. If the hiring data may be unreliable and the promotion goals are based on the hiring data, the promotion "parity goals" are infected with the same lack of conclusiveness to warrant summary judgment. Therefore, defendants are not entitled to summary judgment on the issue of compelling interest. Because defendants must establish a compelling interest in order to legitimize their AAP (assuming *arguendo* that it is discriminatory), summary judgment on plaintiffs' equal protection claims is improper, and the court does not reach the issue of whether any compelling interest was narrowly tailored. The court turns next to plaintiffs' claims under Title VII.

TITLE VII

*4 To establish a claim under Title VII, plaintiffs must present evidence of discriminatory promotion practices through direct evidence or through the burden-shifting method outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Here, plaintiffs have direct evidence of discrimination: the AAP that favors minorities and women. Such evidence is sufficient on its face to satisfy plaintiffs' burden. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120, 105 S.Ct. 613, 621, 83 L.Ed.2d 523 (1985) (finding facially discriminatory practice to be direct evidence of Title VII violation). However, as with their equal protection claims, plaintiffs must establish that the decision not to promote them was a direct result of defendants' AAP. *Gilty v. Village of Oak Park*, 919 F.2d 1247, 1252 (7th Cir.1990). Just as factual disputes prevented the summary resolution of the equal protection claims, so too must it forestall the resolution of the Title VII claims.

STATUTE OF LIMITATIONS

Alternatively, defendants argue that the statute of limitations bars three plaintiffs—Koski, Bishop and Reeves—from pursuing claims arising out of their 1985 and 1986 promotion denials.

Constitutional claims under Sections 1981 and 1983 must be brought within two years from the accrual date of the injury. *Smith v. City of Chicago Heights*, 951 F.2d 834, 836–37 n. 1 (7th Cir.1992). Claims under Title VII must be brought within 300 days from the accrual date of the injury. 42 U.S.C. § 2000e–5(c). The accrual date is not necessarily the date that a plaintiff actually was injured; rather, it is the date that a plaintiff discovered his injury. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir.1992). In addition, a plaintiff may toll the limitations period under theories of equitable estoppel, fraudulent concealment and equitable tolling. A defendant will be equitably estopped from asserting a limitations defense if the defendant promised the plaintiff that it would not plead such a defense. *Id.* at 450–51. Fraudulent concealment occurs when the defendant actively misleads the plaintiff as to whether he has been injured. *Id.* at 451. The doctrine of equitable tolling allows a plaintiff to avoid a limitations bar if, despite his due diligence, he is unable to obtain vital information bearing on the existence of his claim. *Id.* This third doctrine does not toll the limitations period until he is certain of his claim; rather, it tolls the period until plaintiff is aware of a possible claim. *Id.* Under any limitations calculation, the date of accrual is the date that plaintiff determines he has been injured—not the date that he determines the injury was unlawful. *Thelan v. Bob's Big Boy*, 64 F.3d 264, 267 (7th Cir.1995). Moreover, though a statute of limitations is an affirmative defense, the burden is on the plaintiff to demonstrate that his claim falls within the limitations period. *Knox v. Cook County Sheriff's Police Dept.*, 866 F.2d 905, 907 (7th Cir.1988).

*5 All three plaintiffs brought their claims six years after they were passed over for promotion. The accrual date for their

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injury did not occur on the date they determined they had suffered discrimination; rather it occurred on the date that they suffered their injury, which was the date they were passed over for promotion. Thus for all plaintiffs, the accrual date occurred in 1985 or 1986.

Plaintiffs Bishop and Koski were both aware of the fact that they were passed over for promotion in 1985 and 1986. Therefore, each has the burden to establish that an equitable theory prevents the limitations bar from taking effect.

Koski's argument against the bar is best described as equitable tolling. Thus, he must establish that he was unable by reasonable diligence to gain information essential to his claim. *See Cada*, 920 F.2d at 452. Koski explains that he relied on his supervisors' representation that all eligible applicants (i.e., those ranked in the top ten) were considered equally. In addition, Koski complains that defendants did not post the promotion lists ranking the eligible candidates, preventing him from determining who had been promoted over him. Defendants respond that Koski, himself, admits that he felt discriminated against at the time he was passed over and that Koski knew that the person promoted instead of him was African-American. Koski's allegations fail to preserve a theory of fraudulent concealment because defendant did not engage in any affirmative deceit. *See Thelan*, 64 F.3d at 268. Whether Koski presents sufficiently the defense of equitable tolling depends on whether he exercised due diligence in discovering his injury. However, since it is unclear whether a person in Koski's position would have acted differently from Koski, it is a question for the jury to determine whether Koski acted with reasonable diligence to obtain information that would have supported his claim.

As for Bishop, he claims the limitations period should be tolled by defendants' fraudulent concealment. Bishop states that his supervisor told him that he was not promoted due to the seniority of the person chosen. This statement, if true, would establish that defendants' actively misled Bishop as to the reason he was not promoted; such conduct would have impaired Bishop's ability to determine whether he had a claim. Since defendants deny this contention, summary judgment on this issue is likewise improper.

Finally, Reeves also claims that the limitations period barring his claim should be tolled due to defendants' fraudulent concealment of pertinent information. Reeves claims that he complained about possible discrimination to defendants' equal employment opportunity officer, Parker. Parker allegedly told Reeves that the ISP had an obligation to give preferences to minorities and that there was nothing Parker could do. Defendant contends that Reeves' conversation with Parker must be viewed as Reeves' utilization of an internal grievance program, and, as such, cannot form the basis of equitable tolling. *See Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976); *Vitug v. Multistate Tax Comm'n*, 860 F.Supp. 546, 551 (N.D.Ill.1994). Defendants correctly state the rule, but apply it in the wrong context. The Supreme Court has held that the *pendency* of an internal grievance program does not toll the limitations period for an employment discrimination claim. *Electrical Workers*, 429 U.S. at 235, 97 S.Ct. at 446. However, the Court has said nothing about possible fraudulent concealment from a company's grievance officers. Nonetheless, the fact that Parker told Reeves that, in essence, defendants used race as a factor in their promotion decisions placed Reeves on immediate notice that he had a claim. Rather than fraudulently conceal, Parker provided a basis for a claim. Therefore, summary judgment is proper in favor of defendants on plaintiff Reeves' claim arising out of the 1986 promotional cycle.

CONCLUSION

*6 In conclusion, plaintiffs' motion for summary judgment is denied. Defendants' cross-motion for summary judgment is granted in part and denied in part. Judgment is entered in favor of defendants on plaintiff Reeves' claim arising out of the 1986 promotional cycle.

IT IS SO ORDERED.