Koski v. Gainer

United States District Court for the Northern District of Illinois, Eastern Division
January 15, 1998, Decided ; January 15, 1998, Filed
No. 92 C 3293

Reporter: 1998 U.S. Dist. LEXIS 299
GLENN KOSKI, et al., Plaintiffs, v. TERRANCE GAINER, et al., Defendants.

Counsel: [*1] For GLENN KOSKI, FRED WINTERROTH, JESSE BEAN, JERRY MYERS, ANTHONY BISHOP, AARON BOOKER, OWEN REEVES, DALE VOLLE, JAMES HARTE, plaintiffs: Kimberly Ann Sutherland, Attorney at Law, Chicago, IL.

For TERRANCE GAINER, HARRY ORR, JOHN REDNOUR, DAVID P SCHIPPERS, RICHARD T MITCHELL, NANCY BEASLEY, FRED E INBAU, JAMES E SEIBER, JAMES REDLICH, STATE OF ILLINOIS, defendants: Paula J. Giroux, Illinois Attorney General's Office, Chicago, IL.

Judges: Harry D. Leinenweber, Judge, United States District Court.

Opinion by: Harry D. Leinenweber

Opinion

REMEDIES

CLASS HIRING CLAIM

On May 6, 1993, the court allowed plaintiff's motion for class certification. At plaintiff's request the class was defined as:

> all white males applicants for hire with the Illinois State Police, from 1975 to the present, who were eliminated from contention, or whose hire date was delayed, by the imposition of a higher cut-off score for white male applicants on the written entrance test than for applicants of all other race/sex groups.Aaron Booker was the named class representative. He applied to the Illinois State Police ("ISP") and took the written examination in 1985. His score was 73. In that year the [*2] cutoff point for white males was 82 but for minority males it was 72 [1].

The written examination is the first step in a six-step application process. Step two is a physical ability test, step three is a background check, step four is a psychological evaluation, step five is an oral interview, and step six is a medical examination. A candidate, who successfully completes all six steps of the process, is placed on a certified list by the ISP Merit Board, the body that oversees the process of application and testing. Candidates for cadet training (the last step) are taken from the certified list by the Merit Board. The written examination numerical cutoff is set to narrow down the pool of applicants. [*3] The differential cutoff was adopted by the Merit Board to increase the percentage of minorities in the applicant pool that could proceed to the second step. The Board adopted the differential cutoff because minorities, who passed the exam, dropped out at a rate at least twice that of while male applicants in the succeeding steps. When a need for new ISP personnel arose, the Director of the ISP notified the Merit Board of the number of new hires it wanted sent to the cadet class for training. If a candidate successfully passed the training class, he was sworn in as a trooper. In 1985, there were 519 white males and 72 minority males that scored higher than Booker. There were 27 minority males that year who received passing grades that were the same as or lower than Booker's. 236 candidates were selected by the Merit Board for the cadet training program in 1985. A total of 901 candidates of all classes scored higher than Booker that year.

The defendants previously moved for summary judgment on Booker's claim, and based its argument against class certification, on its contention that Booker could not show any injury because his test score was so low and there were so many applicants [*4] scoring above him that he would not have been hired even if the cutoff for white males was lowered to that of minority males. The court denied summary judgment and certified the class because Booker did show an injury that was addressable by Title VII, namely, that he had been "denied the opportunity to compete for a job because of his race and sex," which is

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[1] The cutoff point for all minority males, including blacks and Hispanics, was the same in 1985. The cutoff point for white females was 74 that year. In 1987, the white male cutoff was 78. The cutoff for all other classifications was 77. In 1989, the cutoff for white males was 78. The cutoff for all others was 76.

specifically outlawed by Title VII. Koski v. Gainer, 1993 U.S. Dist. LEXIS 6262, slip op. May 6, 1993, p. 6. The court noted that the issue of liability could be separated from the remedy, *i.e.*, whether the plaintiff was discriminated against rather than whether he should be hired. Id., p. 7. This comports with Rule 23(c)(4)(A) which provides for the resolution of common issues in the class action format and individual issues separately in individual actions. *See* Wright, Miller, Kane, *Federal Practice and Procedure*, § 1709, p. 271-273.

The court has found that defendant violated § 1983, as well as Title VII, by denying the plaintiff class members the opportunity to participate in the next six steps of the application process solely because of their race. Plaintiff now wants the court to order the defendant to exempt him and the class [*5] members from having to reapply and again take the written examination. He also asks that he and the class members be excused from any current restrictive requirements that were not in place in the years in which they were passed over. The first part of the request is reasonable, but the second part of the request is not. The new requirements are intended to improve the quality of the ISP for the benefit of the citizens and taxpayers of the State of Illinois and are presumably reasonable. At least the plaintiff does not take issue with them. The importance of competent state troopers to the safety of the people of Illinois is certainly as important as competent fire fighters were to the people of Evanston. *See*Evans v. City of Evanston, 881 F.2d 382, 385 (7th Cir. 1989) (Where a class of women, who failed to pass an agility test that irrationally disqualified women, were told that they would have to pass a new test because of the passage of time and the importance of agility to firefighting.) This is the type of impact that an equity court must take cognizance of in determining what type of equitable relief to grant.

Whether a class member would ultimately have been hired for [*6] the cadet class in 1985 would have depended on a great number of factors which would have been determined in the six succeeding steps thirteen years ago. The written examination was only the first of seven steps. What can be said on behalf of the plaintiffs is that they were denied the opportunity to take these next six steps or go as far as they could in the process. Whether the class members would have passed any or all of the remaining steps is speculative at this time. It is even more speculative whether, even if they passed all of these steps, they would have been selected for cadet training, considering how far down Booker and the class members were on the exam list.

While there was evidence that some blacks were discriminatorily selected for the cadet program over equally qualified white males (this was due to the fact that blacks were expected to drop out at a higher rate and the ISP was engaged in affirmative action) by definition none of the whites that were passed over are members of the class. There was no evidence that any minority male was hired for the cadet class that scored the same as or lower than Booker did. Therefore there was no evidence that Booker lost a position [*7] due to the discriminatory conduct. There also was no evidence introduced by plaintiff of the number of whites in the relevant work force so that the shortfall in white employment could be determined. (We know there was none introduced by defendant). All we know is that the relevant work force does not mirror the percentage of whites in the population at large. The percentage of whites in the relevant work force is undoubtedly much higher than the percentage of whites in the population. As previously noted, minorities, who pass the written exam, fall out in the succeeding steps at approximately twice the rate for white applicants. Because no specific shortfall can be documented the court is not in the position that the court found itself in EEOC v. O & G Spring and Wire, 38 F.3d 872, 879-80 n. 9 (7th Cir. 1994) to determine from the evidence the hiring shortfall due to discrimination. A proven shortfall is necessary to fashion a monetary remedy.

A mitigating factor favoring the defendant is the extreme black vs. white disparity in the ISP work force in 1974 compared to the population at large, when it embarked on its affirmative action program. In 1974 fewer than 1.7% of the ISP [*8] workforce was black although the percentage of blacks in the population was 14.7%. As the court said earlier, such numerical disparity does not in and of itself prove the level of discrimination necessary to justify an affirmative action program, but the disparity gives one reason to believe that, had the defendant probed a little harder, it might have been able to determine the percentage of blacks in the relevant workforce in 1974, and the percentage might well have been considerably higher than 1.7%.

What Booker lost as a result of the actions of the ISP was a chance to be employed as an ISP cadet. The Seventh Circuit has recently discussed favorably the theory of recovery for loss of chance in employment discrimination cases. Doll v. Brown, 75 F.3d 1200, 1206 (7th Cir. 1996). That court used as an example of this theory of recovery a hypothetical case of four equally qualified individuals, passed over in favor of an underqualified individual for a prohibited reason. None of the four could prove that he was the one discriminated against. To award all four individuals complete back pay would be punitive to the employer since only one of the four could have been employed. To [*9] award none any back pay would be a windfall to the discriminatory employer. But to award each

of the four 25% of the back pay would be a reasonable resolution for the discriminatory act. Nevertheless, the court cautioned that a lost chance to be actionable should by necessity exceed a *de minimis* threshold so as to avoid flooding the court with speculative cases. Booker and the class have failed to prove that they had any substantial chance to make it to the cadet training level had they not been discriminated against. So their lost chance is completely speculative. They therefore are not entitled to damages on the lost chance theory.

Plaintiff also requests that the court enjoin the defendant from unconstitutional conduct, but the ISP on its own in 1990, prior to the filing of this lawsuit, did away with the disparate cutoffs of which the class complains. Therefore an injunction is not in order. The plaintiff requests a multitude of additional conditions for injunctive relief, but the court finds them unnecessary and irrelevant.

The defendant is ordered to notify the class members that, if they currently qualify for appointment to the ISP, they will be considered to have passed [*10] the written entrance exam and they may proceed with the application process to permit them the opportunity to make the next certified list.

PROMOTION CLAIMS

In its September, 29, 1997 order, the court found in favor of plaintiffs, Winterroth, Volle, Hanford, Roberts, Bean and Bolerjack on both their § 1981 and Title VII claims. The court found in favor of plaintiff Myers on his § 1981 claim but against him on the Title VII claim. On October 17, 1997, the court, on reconsideration, found in favor of plaintiff Koski both his § 1981 and Title VII claims for promotion in 1994.

Glen Koski

The defendant admits that Koski should receive a promotion to the rank of Master Sergeant and back pay. Koski has computed his back pay entitlement with prejudgment interest at $ 33,390.07. However this includes overtime, premium pay, command time, and car usage without any explanation. The court will order Koski promoted to the rank of Master Sergeant immediately with seniority retroactive to November, 1994, and award him back pay, pension, and interest, but without the four other items. The plaintiff is ordered to recompute the back pay with interest. The court also awards Koski [*11] the sum of $ 15,000 for emotional distress.

Fred Winterroth

The defendant likewise admits that Winterroth is entitled to a promotion and back pay. Accordingly Winterroth is ordered to be promoted to the rank of Sergeant retroactive to May 1, 1992. As with Koski the court awards him his back pay, meaning the difference between a trooper's pay and a sergeant's pay for straight time, plus interest. Winterroth is awarded the sum of $ 15,000 for emotional distress.

Jesse Bean

The defendant argues that there was only one position open in District 8 and that it should go to Winterroth because he was higher on the promotion list. This however goes against the court's finding that both Winterroth and Bean were passed over for the two openings for Sergeant, one of which went to a less qualified minority male and the other to a less qualified female, both of which ranked below Winterroth and Bean. Therefore the court orders Bean to be promoted to the position of Sergeant retroactive to May 1, 1993. He is awarded back pay with interest, the same as Winterroth. He is also awarded $ 15,000 as emotional distress.

Jeffrey Hanford and Lester Roberts

The court ruled that Hanford [*12] and Roberts had wrongly been passed over for promotion by an African-American. However there were two other white males who were also passed over for promotion. Therefore, what Hanford and Roberts lost was the chance to be considered for promotion to the rank of sergeant with the other two white males. The court therefore will not order either Hanford or Roberts to be promoted but will grant them, in accord with the lost chance doctrine described favorably in Doll v. Brown, 75 F.3d 1200, 1206-7 (7th Cir. 1996), with a portion of their wage loss. The award will be based on the probability of Hanford, Roberts, Brian Mahoney, the white male who ranked number one, and Mark Zadnik, the white male who ranked number two. Since there was no evidence, good or bad, concerning Mahoney and Zadnik, the court will base the probability on a sliding scale, 50% chance for Mahoney, 25% for Zadnik, 15% of Hanford and the remaining 10% for Roberts. Therefore the court awards Hanford 15% of his lost back pay from May 1, 1993, plus prejudgment interest, and 15% of the present value of the future pay and retirement benefit differential. Roberts is awarded 10% of the same. In addition Hanford is awarded [*13] $ 2,250, and Roberts is awarded $ 1,500 for emotional distress.

Dale Volle

Volle's claim likewise suffers from the problem shared by Hanford and Roberts. There were two white males that scored higher who were likewise passed over. Therefore the court will award him for lost chance 15% of the back pay, front pay, and retirement benefit differential plus

prejudgment interest. In addition, he is awarded $ 2,250 for emotional distress.

James Bolerjack

Bolerjack was first on the list for promotion to the rank of Master Sergeant. The court found that he was passed over in violation of § 1981 and Title VII. Accordingly, the defendant is ordered to promote Bolerjack to the position of Master Sergeant retroactive to November 29, 1991. He is also awarded back pay and retirement differential, plus prejudgment interest. He is also awarded $ 15,000 for emotional distress.

Jerry Myers

Myers was successful on his § 1981 claim and the court is advised that he has already been promoted thus mooting his claim. He was unsuccessful on his Title VII claim so he is not entitled to any damages.

The parties are ordered to meet and attempt to agree on the dollar amounts awarded and [*14] the prejudgment interest. Plaintiff is to submit a proposed judgment order on the 30th day of January, 1998.

Harry D. Leinenweber, Judge

United States District Court

Dated: January 15, 1998