UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

DOROTHY BANKS, ET AL

VERSUS

EAST BATON ROUGE PARISH
SCHOOL BOARD, ET AL

CIVIL ACTION

NO. 98-974-A

RULING

Subsequent to granting a motion for summary judgment upon all of the claims of plaintiffs under Title VII, 42 U.S.C. §2000e, et seq. (doc. 97), the court informed the parties that it was considering the propriety of granting summary judgment *sua sponte* on the remaining claims of plaintiffs under 42 U.S.C. §1983 (doc. 99) and invited both sides to submit briefs on that issue. Both sides have responded and the court has carefully reviewed the matter.

The court is now convinced that the same undisputed material facts that mandated dismissal of the Title VII claim also mandate dismissal of the §1983 claims.

There is no need for oral argument.

Facts and Procedure History

Plaintiffs are sixteen women formerly or currently employed as janitors by the East Baton Rouge Parish School Board ("School Board"). Prior to 1992, the School

Board employed janitors in three different designations. These jobs were titled janitor I, janitor II, and janitor III. The janitor I position involved employment for six hours a day during nine months of the year. Most of the janitor I positions were filled by female employees. The janitor II position involved work essentially identical to that performed by janitors I, with the addition of traditionally "male" duties, such as law care and other outside chores. The janitor II position was an eight hour a date, year round position. Most of the janitor II positions were filled by males. The janitor II designation was a full time position entailing work identical to the other two positions, with the addition of some supervisory functions, such as locking up the buildings, and supervising late cleaning crews.

Plaintiffs were employed in the janitor I position. In June of 1992, the School Board decided to cut the hours of the janitor I job from six hours a week, to four. Some benefits were also eliminated. In June of 1993. 46 female janitorial employees, including the plaintiffs, filed suit against the School Board in the 19th Judicial District Court, Parish of East Baton Rouge. The suit alleged that the reduction in hours and benefits had a disparate impact on female employees in violation of La. R.S. 51:2231, *et seq.*, as well as intentional discrimination in violation of La. R.S. 23:1006. The lawsuit is still pending.

For purposes of this issue before the court, the following material facts (which are the same undisputed facts in the court's prior ruling [doc. 97]) are admitted.

5. Plaintiffs herein are among those plaintiffs who filed a lawsuit in June, 1993 against the East Baton Rouge Parish School Board in state court alleging a violation of state law for the reduction of their hours in violation of L.R.S. 17:422.5, as well as employment discrimination on the basis of sex in violation of L.R.S. 23:1006 and L.R.S. 51:2231, et. seq., Louisiana's anti-discrimination statutes.

14. In April, 1997, a lawsuit was filed against the East Baton Rouge Parish School Board alleging discrimination in the hiring and promotion for Janitor II and Janitor III positions on the basis of sex in violation of Title VII, 42 U.S.C. §2000e, et. seq., by the United States Department of Justice.

15. A settlement between the School Board and the Department of Justice was negotiated in the form of a consent decree.

16. The consent decree also required that the part-time Janitor I's would be given the opportunity to apply for the new Janitor position if they met the qualifications.

19. Beginning in approximately 1996, the School Board, through its then Associate Superintendent for Human Resources and Instruction, Christine (Chris) Arab, began evaluating all school system positions, including job descriptions and salary schedules, in an attempt to pinpoint those departments within the school system which were operating inefficiently.

20. The goal of this study was to illuminate areas in which the school system could save money and then use the funds for its instructional services.

21. All janitor and custodian classifications were included in this study.

29. An incident occurred where a custodian improperly used a chemical to eliminate ants from an office complex, causing at least one of its employees to require medical attention.

30. Upon questioning the custodian involved, Mr. James Broussard, former Risk Manager for the School Board, concluded that the employee involved could not read.

31. Mr. Broussard conducted an informal survey among the custodian supervisors and principals of schools regarding the perceived literacy problem among custodial and janitorial staff.

33. Mr. Broussard believed that the safety guidelines of OSHA were written at an eighth grade reading level.

34. Following this investigation, Mr. Broussard recommended to Mrs. Arab, his supervisor, that a reading requirement be placed into the job descriptions of the janitorial and custodial staff to avoid future incidents whereby persons could be injured due to an employee's inability to read and follow the directions provided on the chemicals used in everyday cleaning of the schools in the system.

37. In the fall of 1997, plaintiffs herein were among those persons contacted by the Human Resources Department for the Physical Plant Services department of the School Board and directed to report to the Maintenance office complex to participate in testing designed to evaluate the applicant's qualifications for the new full-time Janitor position.

38. The Janitor I's were given the option of choosing to go forward with the application process or to remain in their position as a Janitor I.

39. Those persons who reported, including plaintiffs herein, except for Dorothy Banks, Amy Lane, and Bertha Twine, were given a practical test to evaluate their skills in operating equipment and in performing certain required tasks of the job.

40. The practical test evaluated an individual's ability to operate a lawn mower, a weed-eater, a floor buffing/cleaning machine, to climb ladders safely, to change light bulbs in the flourescent lighting fixtures in the schools, to change air conditioning filters, etc.

41. Plaintiffs were also subjected to a written Test of Adult Basic Education.

44. The requirement of an ability to read at an eighth grade level was included on the job description for the new Janitor position.

45. It was also provided in the Consent Decree approved by the court in June, 1997 that those applicants selected for possible employment in the new Janitor or Lead Janitor positions might be required by the School Board "to pass additional lawful and job-related selection devices or requirements."

56. Some plaintiffs who participated in the testing were contacted by Mr. James Manley to discuss their performance on the tests.

57. All plaintiffs passed the practical test, but only one plaintiff scored at an eighth grade reading equivalency on the Test of Adult Basic Education.

58. Even though most of the plaintiffs did not meet the reading requirement for the job, they were given the option of remaining in their Janitor I positions or taking the new position on a probationary basis, even if their reading level was at the kindergarten level. At such time as they reached an eighth grade reading level, each plaintiff would be eligible for permanent status in that position.

69. On November 18, 1998, plaintiffs herein filed the instant lawsuit in the United States District Court for the Middle District of Louisiana, after having filed charges with the Equal Employment Opportunity Commission on behalf of themselves and others similarly situated, charging the School Board with discrimination against them on the basis of their sex, as well as retaliation for their being parties to the state lawsuit.

70. Plaintiffs alleged that the establishment of the conditions, qualifications and job description for the new full-time janitor position, including the requirement that applicants pass both the practical and reading tests before becoming eligible for employment in the position, was done by the defendants "with the intent to retaliate against female employees who had filed a lawsuit with the School Board [or] alternatively, the conditions that [the defendants] placed on this new position had a discriminatory impact on the plaintiffs."

On September 15, 2000, the defendants filed a motion for summary judgment as to the plaintiffs' claims under Title VII (doc. 73). The individual defendants also moved for summary judgment on the basis of their claim of qualified immunity (doc.

65), and for summary judgment as to the claims of plaintiffs Dorothy Banks, Bertha Twine, and Amy Lane (doc. 69).

On June 5, 2001, the court granted the defendants' Motion for Summary Judgment as to the Plaintiffs' claims under Title VII (doc. 97). In that ruling, the court held that the plaintiffs' allegations failed to satisfy the requisite elements of a Title VII retaliation claim. Specifically, the court held that the actions complained of by the plaintiffs were not "adverse employment actions" in light of **Dollis v. Rubin**, 77 F.3d 777 (5th Cir. 1995), which held that only "ultimate employment decisions," such as "hiring, granting leave, discharging, promoting, and compensating," could qualify as "adverse employment actions." **Id**. at 782. On July 18, 2001, the court informed the parties that it was considering granting summary judgment, on its own motion, as to the plaintiffs' remaining sex discrimination claim under 42 U.S.C. §1983 (doc. 99). The parties have responded to the court's notice with memoranda.

DISCUSSION

As set forth in **Southard v. Texas Board of Criminal Justice**, 114 F.3d 539 (5th Cir. 1997):

> "To assert a cause of action for retaliation for the exercise of a federally protected right, a plaintiff must show that she:
> 1) engaged in a protected activity;
> 2) an adverse employment action followed;
> and

3) there was a causal connection between the activity and the adverse action." 114 F.3d at 554.

In **Southland**, plaintiff claimed that the retaliatory action against her was less favorable work assignments. The Court stated:

> "Not every negative employment decision or event is an adverse employment action that can give rise to a discrimination or retaliation cause of action under section 1983. ... Adverse employment actions include discharges, demotions, refusals to hire, refusals to promote, and reprimands. ... Undesirable work assignments are not adverse employment actions. ... 114 F.3d at 555 (citations omitted).

Although the actions alleged by the plaintiffs might reasonably be construed to pertain to promotion, and thus to constitute an ultimate employment action, the undisputed material facts establish that the circumstances involved are significantly distinguishable from an ordinary promotion situation. As noted in the Title VII ruling:

> The move from janitor I to the new janitor position...was not a part of any...ordered scheme of promotion to which the plaintiffs were entitled, either from years of service, or job performance. Instead, the janitor position was a new job, for which the plaintiffs were given a right of first refusal before the position was offered to the public. Given this fact, and given the additional fact that the plaintiffs had the choice of staying where they were with no adverse consequences, this court finds that implementation of the new janitor position was not an ultimate employment decision. **Ruling on Motion for Summary Judgment** (doc. 97), p. 12.

Following a similar rationale, the court now finds that under the undisputed facts, the plaintiffs cannot establish an essential element of their claim of sex

discrimination under 42 U.S.C. §1983, i.e., that they were subjected to an adverse employment action.

The plaintiffs argue that the definition of "adverse employment action" may be different under §1983 than under title VII, citing **Sharp v. City of Houston**, 164 F.3d 923 (5th Cir. 1999).[1] The court recognizes that possibility. Nevertheless, promotion is the only category of potential adverse employment actions relevant to the facts alleged by the plaintiffs. Accordingly, the court concludes that the actions of the School Board do not constitute an adverse employment action despite their superficial similarity to "promotion."

A district court may grant summary judgment *sua sponte*, provided that the losing party is given adequate notice in order to allow it to marshal its arguments in opposition. **Scott v. Mississippi Department of Corrections**, 961 F.2d 77 (5th Cir. 1992); **Berkovitz v. Home Box Office, Inc.**, 89 F.3d 24 (1st Cir. 1996). Fair notice has been given here, and the plaintiffs have not come forward with evidence

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[1]The city urges that **Mattern v. Eastman Kodak Co.**..., a title VII case, precludes a finding of "adverse employment action" by limiting that phrase to "ultimate employment decisions," which would include, for example, reprimands. The definition of "adverse employment action," however, may be different under title VII from its definition under §1983. See **Messer v. Meno**, 130 F.3d 130, 140 (5th Cir. 1997) (stating that under title VII, ultimate employment decisions include hiring, discharging, promoting, compensating, or granting leaves, but not reprimands) **Mattern**, 104 F.3d at 707-08 (excluding disciplinary filings and reprimands from ultimate employment decisions). But this case does not implicate the potential differences between title VII's and 1983's definitions of "adverse employment action," because under both statutes demotions can be adverse employment actions. **Sharp**, 164 F.3d at 933, n. 21.

or authority sufficient to support their remaining claim. While summary judgment on the court's own motion is an extraordinary action which should be used sparingly, the resolution of the issue of the plaintiffs' claims under title VII leads inevitably to the conclusion that their action under 42 U.S.C. §1983 must also fail.

Accordingly, judgment is hereby entered, dismissing the plaintiffs' remaining claim of sex discrimination under 42 U.S.C. §1983and this action shall be dismissed.

Baton Rouge, Louisiana, December 12, 2001.

JOHN V. PARKER,
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA