IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

BEVERLY D. CRAWFORD Plaintiff, v. VIRGINIA EDUCATION ASSOCIATION, DAVID L. JOHNSON Defendants.	)	Civil Action No. 88-0154

FINAL ORDER

This matter is before the Court on the defendants' motion for dismissal or summary judgment pursuant to Rules 12(b)(1) and 56(b), Fed. R. Civ. P. Defendants also request that this Court dissolve the injunction issued by the Circuit Court of the City of Richmond on February 23, 1988, pursuant to 28 U.S.C. §1450 and 29 U.S.C. §185.

The plaintiff is currently grieving her claims under a collective bargaining agreement entered between the Virginia Educational Association and the Virginia Professional Staff Association. The collective bargaining agreement falls within the parameters of §301 of the Labor Management Relations Act, 29 U.S.C. §185. It is well established that where a collective bargaining agreement provides procedures for the resolution of disputes, an aggrieved employee may not bring suit unless the agreement's procedures have been exhausted. Vaca v. Sipes, 386 U.S. 171, 184-85 (1967); Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965). Consequently, the defendants' motion for

dismissal is GRANTED. The complaint is DISMISSED without prejudice for lack of subject matter jurisdiction.

Jurisdiction for removal of this matter from state court was premised on alleged violations of 29 U.S.C. §185, and the plaintiff sought equitable as well as other forms of relief. The Court has dismissed the substantive claim for lack of subject matter jurisdiction. The plaintiff's claim for an injunction remains. In circumstances such as this, "the appropriate test for issuance of [an] injunction ... is whether the conduct proposed must be enjoined because the available arbitral process could not possibly restore the status quo ante in an acceptable form were that conduct to be found violative of contract rights. This would render the arbitral process a hollow formality and necessitate [an] injunction maintaining the status quo pending arbitration." Columbia Local, American Postal Workers Union, AFL-CIO v. Bolger, 621 F.2d 615, 618 (4th Cir. 1980). In the instant case, the arbitrator has a variety of remedies available to restore the parties to a situation similar to the status quo ante. The arbitrator may award her back pay, forward pay or order that she be given the next Staff Attorney or similar position that opens up at the VEA. "That there might be some measure of difficulty in devising appropriate compensatory relief for any employees found in the arbitral process to have been [treated]... in violation of the bargaining agreement does not make of the process a hollow formality." Columbia Local, 621 F.2d at 618. Therefore, the injunction entered by the Circuit Court of Richmond on February 23, 1988 is DISSOLVED.

It is so ORDERED.

Let the Clerk send a copy of this final order to all counsel of record.

Richard L. Williams

DATE

UNITED STATES DISTRICT JUDGE

BENCHMEMO: BEVERLY D. CRAWFORD v. VIRGINIA EDUCATION ASSOCIAION, et al., 88-0154, Def. motion to dismiss/ sum. jud. & dissolve an injunction; Mar. 18 at 2:00

ATTORNEYS: Plaintiff: Reginold M. Barley
Defendants: James McElligott and Scott Cairns
(McGuire Woods)

Judge, this matter is before you on the defendants' motion for dismissal or summary judgment pursuant to Rules 12(b) and 56(b), Fed. R. Civ. P. Defendants also request, pursuant to 28 U.S.C. §1450, that this Court dissolve the injunction issued by the Circuit Court of Richmond which was entered before this case was removed. I believe you should grant the defendants' motion for dismissal for lack of subject matter jurisdiction, absent the plaintiff's abandonment of pursuing a grievance under the parties' collective bargaining agreement, and you should dissolve the injunction entered by the Circuit Court.

Background

Beverly Crawford, the plaintiff, is VEA's Assistant Director of Governmental Relations. She applied for a newly created Staff Attorney position at the Virginia Education Association (VEA). One of the qualifications was admission to the Virginia bar. Crawford, a black female, applied, was interviewed, and denied the position on February 8, 1988. On that same day, the VEA entered into a contract with Dena Rosenkrantz for the Staff Attorney position. Ms. Rosenkrantz is white and not a member of the Virginia bar.

David Johnson, the executive director for the VEA and the other defendant in this action, told Crawford she was not

selected because (1) Rosenkrantz had more arbitration experience; (2) he was not satisfied with Crawford's work at VEA-PAC; and (3) the interviewing committee of Mike Smith (VEA's general counsel from Christian, Barton) and Gene Truitt (Director of the Division of Legal Services) did not recommend her.

On February 19, 1988, Crawford filed a Bill of Complaint in the Richmond Circuit Court alleging that by offering the Staff Attorney position to an unqualified white female (Rosenkrantz is not a memeber of the Virginia bar) the VEA had violated Article 8 of its bargaining agreement with her, by violating "the Constitution and laws of the United States in that the plaintiff, who is black, was discriminated against because of her race or color." Bill of Complaint, ¶12. On February 23, the Circuit Court--unaware that Ms. Rosenkrantz had been offered and accepted the job--issued a 30 day injunction barring the defendants from hiring a Staff Attorney or from offering the position to anyone.

Also on February 23, Crawford filed a grievance under her collective bargaining agreement with the VEA alleging race discrimination.

Dismissal/Summary Judgment

The defendants claim three grounds of defense: (1) Crawford has not exhausted her administrative remedies under the grievance procedure and therefore the case should be dismissed; (2) Crawford has failed to demonstrate that the VEA's nondiscriminatory reasons for hiring someone else were a pretext for racial discrimination; and (3) the Virginia Code of

Professional Responsibility precludes her from compelling the VEA to employ her as counsel.

1. Exhaustion of Administrative Remedies

The VEA entered into a collective bargaining agreement with the Virginia Professional Staff Association (VPSA) which is the exclusive representative for all VEA employees excluding "supervisors, all managerial, executive, confidential employees, and support staff..." Article 1. Crawford filled a grievance under the provisions of the Agreement, and her grievance has progressed to the second stage-- an appeal to the Executive Director, the defendant. Article 14; Affidavit of David Johnson. The matter can eventually be appealed to arbitraton conducted by the American Arbitration Association.

The collective bargaining agreement falls within the parameters of §301 of the Labor Management Relations Act, 29 U.S.C. §185. The VEA and Johnson are both "employers" and VPSA is a "labor organization" [redacted] whose employees and members are in an industry affecting interstate commerce and whose activites affect interstate commerce within the meaning of 29 U.S.C. §152(2) and (7).

It is well established that where a collective bargaining agreement provides procedures for the resolution of disputes, an aggrieved employee may not bring suit unless the agreement's procedures have been exhausted. Vaca v. Sipes, 386 U.S. 171, 184-85 (1967); Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965). Crawford has pursued her cause under the collective

bargaining agreement, and has not yet exhausted her possible remedies.

The defendants take the position that Crawford cannot grieve the decision not to hire her because the Staff Attorney position qualifies as a "confidential employee" and therefore is not covered by the Agreement. As I understand their argument, they suggests that if Crawford had not filed a grievance she would have standing to maintain a court action. Once she filed a grievance, however, she divested the court of jurisdiction, and the issue of grievability/arbitrability should be resolved by an arbitrator.

You asked if you could regain jurisdiction by (1) deciding if the Staff Attorney position is covered by the Agreement, or (2) have the parties stipulate that the Agreement does not cover this dispute. The first question was presented in Ampthill Rayon Workers, Inc. v. E.I. Dupont de Nemours & Company , Inc., 87-390-R, argued Oct. 23, 1987 where you indicated that you were going to hold that it was a matter to be decided by the arbitrator. The parties eventually worked the matter out on their own. The Supreme Court outlined four rules a district court should abide by in assessing a matter such as this. First, "arbitraton is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. AT&T Technologies v. Communication Workers of America, ___ U.S. ___, 89 L. Ed.2d 648, 655 (1986). Second, "unless the parties clearly and unmistakenly provide otherwise, the question of whether the parties agreed to arbitrate is to be

decided by the court, not the arbitrator." Id. at 656. Article 14, Stage 3 entitled "Arbitration" clearly provides for arbitration as a remedy under the collective bargaining agreement. Third, "in deciding whether the parties have agreed to submit a particular grievence to arbitration, a court is not to rule on the potential merits of the underlying claims." Id. Finally, "where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that 'an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" Id. (citation omitted).

I believe that the fourth prong is not satisfied in this case. There are two arguments. First, arguably the Staff Attorney position is not a position of "confidentiality" as referred to in Article 1. A second and stronger argument is that Crawford is grieving her claim from her current position as Assistant Director of Governmental Relations. This position is explicitly covered by the Agreement under Article 8. The claim that the Staff Attorney position is not covered is a red herring. Only because Crawford is presently a VEA employee does she have standing to grieve VEA's failure to award her the promotion she sought. If Rosenkrantz had been denied the position, she would not have standing to use the VEA grievance procedure. Therefore, the answer to your first question--can you decide the applicability of the Agreement--is no.

The second option--have the parties agree that the Agreement is not applicable--is a viable option. As it stands now, the defendants would have Crawford run through the grievance procedure drill and return to court six months hence. The defendants apparently would not object if Crawford elected to pursue a judicial remedy and abandoned her grievance claim. Accordingly, if she refuses to forego her grievance claim, she cannot maintain two actions at once and you should dismiss this case for lack of subject matter jurisdiction.

2. Failure to allege that VEA's reasons are a pretext

The plaintiff has not indicated which laws or constitutional provisions she claims the defendants' actions violated. The defendants have assumed that her claim is under 42 U.S.C. §1981 and have geared their motion for summary judgment on this issue accordingly. (She cannot bring a claim under §1983 because VEA is a private organization nor can she bring a Title VII action because she has not pursued a claim through the EEOC.) I think the more appropriate approach is to order the plaintiff to amend her complaint to present a more definite claim before the Court summarily dismisses her case on this ground. Nonetheless, I have assessed the defendants' motion in response to a §1981 claim.

To state a claim under §1981, the plaintiff must show that she was a member of a protected class; that she was qualified for the job; and that she was denied the job because she was black. In other words, she must show intentional discrimination. General Building Assoc. v. Pennsylvania, 458 U.S. 375, 396-97 (1982); Personnel Administrator v. Feeney, 442 U.S. 256, 279

(1979). I believe the fact that the VEA selected a white female who by the terms of the job description was "unqualified" creates a sufficient inference of discriminatory intent to survive a motion to dismiss.

Assuming she states a prima facie case under §1981, the burden of proof shifts to the VEA to demonstrate legitimate, nondiscriminatory reasons for not awarding the plaintiff the job. The VEA has met that burden. Johnson claims that Crawford was not hired because Rosenkrantz had more arbitration experience; he was not satisfied with Crawford's work; and Crawford was not recommended for the job by the interview panel. Crawford has not offered any proof to rebut these reasons and to prove that they are pretextual. Consequently, VEA is entitled to summary judgment on the §1983 claim.

Such a ruling, however, I believe is premature. This case has been unusually expedited, albeit at the plaintiff's request. The defendant's motion was filed on Monday, and the plaintiff ~~has yet to~~ responded briefly this morning. You may want to give her an opportunity to submit what proof she can to rebut the defendants' rational for not promoting her before deciding the case on summary judgment.

3. Virginia Code of Professional Responsibility precludes Crawford from compelling the VEA to hire her.

Defendants argue that Crawford's suit against the VEA disqualifies her from serving as Staff Attorney because under Disciplinary Rule 5-101, "A lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own interests, except with the consent of

his client after full disclosure under the circumstances." Her suit creates a clear conflict of interest between herself and her would-be client because of her interpretation of the Agreement conflicts with VEA's interests--presumely for her not to give the VEA any trouble. Secondly, the Virginia Code prohibits attorneys from soliciting employment by coercive means. The defendants suggest that the remedy Crawford seeks would result in her being forced upon an unwilling client.

Even if this was a legitimate argument, and I do not think it is, it goes to the issue of an appropriate remedy, not the issue of liability. Hence, the defendants' argument is not probative for the purpose of promoting a dismissal or summary judgment motion. It may reflect, however, on whether an injunction was properly issued in this case.

Dissolving the injunction

The Court has the power to dissolve the state injunction pursuant to 28 U.S.C. §1450: "All injunctions, orders, and other proceedings had in such action prior to removal shall remain in full force and effect until dissolved or modified by the district court." After removal, the burden is on the plaintiff to demonstrate that a preliminary injunction is justified. Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 237, 441 (1974).

The defendants contend that the injunction should be dissolved on the three grounds: (1) it violates the anti-injunction provision of the Norris LaGuardia Act; (3) it did not perserve the status quo as intended; (3) the balance of the

hardship and the likelihood of success on the merits weigh in the defendants' favor.

The Norris LaGuardia Act provides:

> No court of the United States... shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute except in strict conformity with the provisions of this chapter...

29 U.S.C. §104. Section 13(c) of the Norris-LaGuardia Act defines "labor disputes" to encompass "any contraversy concerning terms or conditions of employment."

"In strict conformity with the provisions of this chapter" has been interpretted to mean that where a collective bargaining agreement provides for mandatory grievance-arbitration procedure, "the federal courts should not intrude at the behest of either management or labor into disputes over arbitrable issues unless intrusion by injunction is necessary to protect the arbitral process itself." Columbia Local, American Postal Workers Union, AFL CIO v. Bolger, 621 F.2d 615 (4th Cir. 1980). Here the defendants are either deceitful or talking out of both sides of their mouths. They state in their brief: "The defendants have always been willing to arbitrate this case." (p.10) However, on page 4, n.3 the defendants state "The VEA asserts that the plaintiff's complaints are not grievable or arbitrable because the Staff Attorney position is not part of the bargaining unit." It appears that the defendants are arguing that the matter is arbitrable to the extent that the arbitrator should decide if Crawford's complaint falls with the Agreement. In this way, the defendants get the best of all possible remedies. The case is

dismissed for failure to exhaust the Agreement's remedies, and the injunction could be dissolve because the anti-injunction prohibition applies. Nonetheless if the defendants are successful in their argument, the case will be back before the Court within a year, but without an injunction. In short, the defendants appear to be engaging in a game of procedural semantics to rid themselves of the injunction.

Whether the anti-injunction provision applies, however, appears to be unimportant. The plantiff must show irreparable harm regardless of whether the dispute is governed by the Agreement. Assuming the anti-injunction language applies, "the appropriate test for issuance of [an] injunction ... is whether the conduct proposed must be enjoined because the available arbitral process could not possibly restore the status quo ante in an acceptable form were that conduct to be found violative of contract rights. This would render the arbitral process a hollow formality and necessitate [an] injunction maintaining the status quo pending arbitration." Columbia Local, 621 F.2d at 618. Columbia Local involved reassigning postal workers to another station with a concomitant lost of reporting time, days off and vacation time. The Fourths noted:

> The district court found irreparable harm in those employees loss of seniority. However, there is no showing that their jobs were less secure as the result of loss of seniority involved... That there might be some measure of difficulty in devising appropriate compensatory relief for any employees found in the arbitral process to have been transferred in violation of the bargaining agreement does not make of the process a hollow formality.

Id. at 618. Conversely, the Fourths approved the enjoining of a company from moving its plant from Maryland to Indiana since an arbitration award--to give the Union the information it needed to convince the company not to move--would have been an "empty victory." Lever Brothers Company v. International Chemical Workers Union, Local 217, 554 F.2d 115, 122 (4th Cir. 1977).

In the instant case, the arbitrator would have a variety of remedies available to restore the parties to a situation similar to the status quo ante. For example, he could award her back pay and forward pay until she finds a comparable job to the VEA Staff Attorney position. He could order that she be given the next Staff Attorney or similar position that opens up at the VEA. In other words, Crawford will not suffer irreparable injury if the the injunction is dissolved and Rosenkrantz is allowed to assume the Staff Attorney's position.

Even if the anti-injunction provision of the Norris-LaGuardia Act is not applicable, the case would go forward presumedly as a §1981 case. The motion to continue or modify the injunction would be governed by Fed. R. Civ. P. 61(a). A district court should, in deciding whether to issue an injunction pursuant to Fed. R. Civ. P. 61(a), balance the likelihood of irreparable harm to the plaintiff against the likelihood of harm imposed upon the defendant by the injunction. Blackwelder Furniture Co. v. Seilig Manfacturing Co., 550 F.2d 189, 195 (1977). As noted above, I don't believe the plaintiff can establish irreparable harm. Ordinarily, the "importance of the probability of success increases as the probability of

irreparable injury decreases." Id. at 195. Here, the probability of success is not great. "The decision to grant preliminary relief cannot be intelligently made unless the trial court knows how much the precaution will cost the defendant. If it costs very little, the trial court should be more apt to decide that the threatened injury is 'irreparable'..." Id. The defendants claim that they will "suffer greatly" is they are denied the opportunity to employ the VEA attorney of their choice. Although the defendants' injuries are ill-defined, the plaintiff has not established that perserving the status quo is necessary to giving her an adequate remedy. Therefore, the balance weighs in favor of the defendants and the injunction should be dissolved.

Crawford argues that her right to an injunction is strenghten by the defendants' act of bad faith in not telling her that Rosenkrantz accepted the job the same day she was told that the VEA offered the job to someone else. The plaintiff's argument is misplaced. Bad faith is only relevant to show that the plantiff's attempt to exhaust the grievance-arbitration procedure was thwarted by the defendants' bad faith. See, Williams v. Wheeling Steel Corp., 266 F.Supp. 651, 654 (N.D. W. Va. 1967).

Summary

1. Dismissal/Summary judgment

If the plaintiff persists in maintaining her action under the collective bargain Agreement, you should dismiss the

complaint without prejudice. You do not have jurisdiction until all the contractual remedies have been exhausted.

If the plaintiff agrees to abandon her grievance and have the Court try the case, you should allow the plaintiff to amend her complaint to identify the Constitutional provisions and statutes she is suing under. You should take the summary judgment motion under advisement and advise the plaintiff she may want to submit affidavits that demonstrate the defendants' proffered reasons for not hiring her are pretextual.

2. Dissolving the injunction

You should grant the defendants' motion to dissolve the injunction. If the plaintiff proceeds with her grievance, the case falls within the reach of the Labor Management Relations Act and the Norris-LaGuardia anti-injunction provision. Courts are reluctant to grant injunctions in this area unless the arbitrator's decision will be of no use if the status quo is not maintained. Here the arbitrator would be able to devise other remedies.

If the plaintiff choses to proceed in this Court, the injunction should be dissolved because the balance of the hardships created by either granting or denying the injunction weighs in the defendants' favor.

JLW