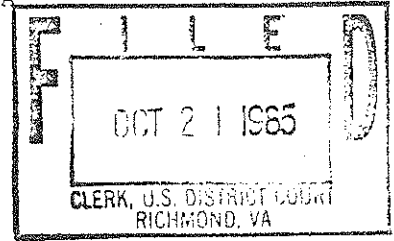


IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

JAMES E. CARTER, SR., et al.,)
)
Plaintiffs,)
)
)
)
v.)
)
CITY OF RICHMOND, et al.,)
)
)
)
)
Defendants.)



Civil Action No. 84-0890-R

MEMORANDUM OPINION

This matter comes before the Court on the individual defendants' motions for summary judgment and to dismiss the union plaintiffs. The issues having been fully briefed, the Court now decides as follows.

All three of the individual defendants are opposing the plaintiffs' §§ 1981 and 1983 claims on the grounds that Title VII preempts the §§ 1981 and 1983 counts in the complaint, that the plaintiffs fail to make out a case of intentional discrimination against them, and that the defense of good faith immunity shields them from liability under §§ 1981 and 1983. All of the defendants have joined in asking the Court to dismiss the union plaintiffs for lack of standing.

1. Preemption

The Supreme Court, in Johnson v. Railway Express Agency, 421 U.S. 454 (1975), held that § 1981 and Title VII are separate and

distinct remedies. In Great American Savings and Loan Association v. Novotony, 442 U.S. 366 (1979), the Court held that Title VII did indeed preempt 42 U.S.C. § 1985(3), stating that "deprivation of a right created by Title VII cannot be the basis for a cause of action under [42 U.S.C.] § 1985(3)." While the Supreme Court appears to have moved towards preempting § 1983 claims in the face of comprehensive federal statutes, Smith v. Robinson, --- U.S. ---, 104 S.Ct. 3457 (1984); Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981), its Railway Express opinion speaks to the duplicative remedies for employment discrimination and implicitly approved of them. There, the Court stated that "[d]espite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possessed and is not limited to Title VII in his search for relief." 421 U.S. at 459. Legislative history also discusses the overlapping nature of these federal remedies, and notes "that the two procedures augment each other and are not mutually exclusive." H.R. Rep. No. 238, 92 Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2154.

In the face of these somewhat contradictory trends -- preemption of § 1983 by comprehensive federal statutes, and the duplicative avenues for the relief from discrimination -- lower courts have split on whether § 1983 is preempted by Title VII. Compare Day v. Wayne County Board of Auditors, 749 F.2d 1199 (6th Cir. 1984); Torres v. Wisconsin Dept. of Health and Social

Services, 592 F.Supp. 922 (E.D. Wis. 1984) (Title VII preempts § 1983 claims if the two essentially arise out of the same events and no deprivation of Constitutional rights is alleged) with Trigg v. Fort Wayne Community Schools, 766 F.2d 299 (7th Cir. 1985); Storey v. Board of Regents, 600 F.Supp. 838 (W.D. Wis. 1985) (Title VII not preemptive).

Indeed, while the Fourth Circuit has not decided this issue, district courts within the Circuit have reached opposite conclusion. Judge Doumar, of this District, has decided that Title VII is not the exclusive remedy for public employment discrimination, and that a § 1983 claim is not preempted. Williams v. School Bd. of the City of Suffolk, Va., Civil Action No. 84-0720-N (E.D. Va., May 24, 1985). On the other hand, Judge Northrop, of the District of Maryland, concluded that Title VII preempted § 1983. Keller v. Prince George's County Dept. of Social Services, --- F.Supp. ---, No. N-85-793 (D. Md., August 19, 1985).

This Court is presently inclined to follow the guidance provided by Judge Doumar in Williams. Regardless of the disarray of opinion into which the courts have fallen over this issue, the Court is of the belief that at least the law of this District should be uniform. In Williams, the Court found itself "constrained" to hold that Title VII was not the exclusive remedy for public employment discrimination and that a decision to that effect would have to come from either the Supreme Court, Congress, or the Fourth Circuit. Nonetheless, this Court endorses Judge Doumar's conclusion that "pursuit of these

overlapping and duplicative § 1981, § 1983 and Title VII remedies creates a chaotic jumble which at some point must be reconciled and appropriately limited to allow a court, and conceivably a jury, to render a fair decision based on clear rights and remedies."

Furthermore, this Court cannot, in the face of Railway Express, hold that Title VII preempts § 1981. While later Supreme Court cases may be moving towards preemption of Civil Rights Act claims by Title VII, this Court declines to take such a bold step as ignoring clearly applicable precedent. The defendants urge that the Supreme Court distinguished Railway Express in Brown v. General Services Administration, 425 U.S. 820 (1976), which held that Title VII's § 717 provided the exclusive remedy for employment discrimination for federal employees. The Court there pointed to the context of private employment out of which the Railway Express case arose.

But Brown concerned federal employees, while the case here presents the instance of state and local employees. Congress, in the legislative history, seemed to think this distinction made a difference. The 1972 Amendments extending coverage of Title VII to state and local employees were intended to provide an additional source of relief from public employment discrimination: "[i]n establishing the applicability of Title VII to State and local employees, the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1870 and 1871, 42 U.S.C. §§ 1981 and 1983, is in no way affected... Title

VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination." H.R. Rep. No. 238, supra, at 1972 U.S. Code Cong. & Ad. News 2154. Thus, this Court concludes that the passage of Title VII did not work an implied repeal of § 1981, and likely of § 1983 as well.

Thus, whatever this Court decided as to the preemption of § 1983, plaintiffs' § 1981 claims would still have to be considered, including the elements of good faith immunity and intent. Indeed, were the Court to hold that Title VII preempts § 1983 claims, then plaintiffs could avoid the impact of the holding simply by amending their causes of action to add § 1981 claims to their present suit. The defenses of lack of intent or personal involvement and good faith immunity which confront the Court in the present case would still have to be resolved in the context of a § 1981 claim.

The Court also notes that the plaintiffs have basically complied with Title VII and EEOC administrative procedures and have not attempted to circumvent Title VII's intent by requesting a jury. They do seek, however, relief under the §§ 1981 and 1983 counts which would not be available under Title VII (general make-whole relief, including compensatory and punitive damages). This particular area gives the Court great concern, since all plaintiffs could avoid the special procedures and equitable remedies Congress decided were appropriate to remedy employment discrimination by turning to claims under the Civil Rights Acts. Nonetheless, the Court is not presently persuaded that Title VII

is the exclusive remedy for public employment discrimination, and the Court therefore DENIES the defendants' motion for summary judgment on this argument.

2. Intent and Personal Involvement under Sections 1981 and 1983

The individual defendants then argue that the plaintiffs have failed to make out certain vital elements of §§ 1981 and 1983 claims -- that of each defendant's personal involvement in the alleged discriminatory acts and that each had the intent to discriminate. To establish liability under § 1981, there must be a showing of intent or purpose to discriminate. General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982). A similar requirement exists for § 1983, if the claim is predicated on the alleged violation of the Equal Protection clause. Personnel Administrator v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976). Furthermore, liability cannot attach under § 1983 against a defendant who is not alleged to have acted personally in the deprivation of the plaintiffs' rights. Vinnedge v. Gibbs, 550 F.2d 926 (4th Cir. 1977). In the instant case, the thrust of plaintiffs' claims against the individual defendants is that they erred by omission in failing to take certain steps to investigate the claims of discrimination in the Sewer Maintenance Division. The Fourth Circuit requires, in this respect, that a plaintiff establish that a defendant acted unreasonably and was deliberately indifferent to the alleged claims of the plaintiffs. Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983).

As to Manual Deese, the Court holds that the plaintiffs have failed to make out any showing of personal involvement and intent to discriminate, and that there are no material facts at issue which would preclude granting summary judgment in his favor. During the relevant time period, Deese was the City Manager of Richmond and had no direct control over the work of the plaintiffs. He did not see them on a daily basis nor did he have any direct supervisory capacity over the Sewer Maintenance Division. Rather, this responsibility was delegated. It is of course reasonable for the City Manager of a large metropolitan area to rely on others within the City administration to address matters within the scope of their day-to-day authority. See Atcherson v. Siebenman, 605 F.2d 1050, 1066 (8th Cir. 1979). When Deese actually learned of the allegations concerning the Sewer Division, he acted appropriately to establish the exact circumstances and details surrounding these claims of discrimination. Deese did hear of the Sewer Division complaints to the City Human Relations Commission, but at the same time, found that the Task Force was working to resolve the situation. When the N.A.A.C.P. requested that Deese review the allegations, he appointed a special committee to investigate the claims.

The plaintiffs attempt to show that Deese knew of the claims prior to the spring of 1984. The Court, however, is satisfied that even if Deese knew of the events then, his subsequent actions and reasonable reliance on others within the City hierarchy preclude his liability. In short, the plaintiffs have not shown Deese to have been personally involved in the alleged

discrimination, or that he was deliberately indifferent to their constitutional rights.

The plaintiffs argue a similar theory as to the liability of Robert Sarver, who served as Director of the Department of Public Works from July, 1980 through this case's onset. They contend that Sarver was deliberately indifferent to the alleged violations in the Sewer Maintenance Division and that he acquiesced in existing discriminatory situations. Furthermore, the plaintiffs allege that Sarver made no effort to determine whether applicable public law was complied with in that Division. Sarver, on the other hand, maintains that he was not personally involved in any of the events leading to plaintiffs' claim and that the plaintiffs have failed to show on his behalf any intent or purpose to discriminate.

Defendant O. K. Priddy served as the Senior Labor and Trades Superintendent in the Sewer Division from 1974 to November, 1983 and was responsible for employment matters within the Sewer Maintenance Division. The plaintiffs argue, similarly as to Sarver, that Priddy was personally involved in the alleged existing discrimination and that he was deliberately indifferent to the constitutional rights of the black workers.

At this stage in the proceedings, the Court is still uncertain as to the exact course of events in the Sewer Maintenance Division and is reluctant to grant summary judgment in either Sarver's or Priddy's favor. There still exist issues of material fact concerning Sarver's state of mind with respect to the alleged discriminatory situation in the Sewer Division.

Although Sarver did initiate some changes in the workplace, the effects of these changes, and the motivations behind them, are still unclear and prevent summary judgment in his favor. Thus, each side should be permitted to go forward at trial with their evidence as to Sarver's personal involvement in the Sewer Maintenance Division's day-to-day operations, and whether his "sins of omission," as characterized by the plaintiffs, rise to the level of an unreasonable and deliberate indifference to the claims of the plaintiffs.

O. K. Priddy initially asserts that the statute of limitations precludes any §§ 1981 and 1983 claims against him. The applicable limitations period here is two years, and plaintiffs filed suit on December 7, 1984. Since Priddy no longer headed the Division after late 1983, the plaintiffs must show a discriminatory act between December of 1982 and December of 1983. Priddy argues that the plaintiffs have failed to show any specific discriminatory acts within the limitations period, while the plaintiffs proceed on a continuing violation theory, seeking to tie in events before December 1982 to those which occurred afterward if the acts are part of a continuing pattern of discrimination. The Court is satisfied that the plaintiffs have come forward with enough evidence to get past Priddy's summary judgment motion on this theory, since there exists a material issue of fact as to whether any specific act of discrimination occurred between December of 1982 and December of 1983. The Court therefore cannot grant Priddy's motion since it cannot unequivocally ascertain whether "any present violation

exist[ed]" within the two year period. United Air Lines v. Evans, 431 U.S. 533 (1977).

Additionally, the parties differ sharply concerning Priddy's role in job classifications, promotions, training, overtime, discipline, equipment, and sick leave. Crucial issues of fact still exist as the personal involvement, if any, of Priddy, as well as to his state of mind concerning the alleged existing discrimination within the Sewer Division.

3. Good Faith Immunity

All three of the individual defendants assert that the defense of qualified immunity precludes their liability under §§ 1981 and 1983. This affirmative defense shields officials from liability if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1980). The Supreme Court has recently indicated its approval for resolving the good faith immunity claim at the summary judgment stage. Mitchell v. Forsyth, --- U.S. ---, 105 S.Ct. 2806 (1985). The Fourth Circuit has interpreted Harlow to allow some inquiry into the defendant's subjective state of mind, McElveen v. County of Prince William, 725 F.2d 954 (1984), and this Court has stated that the relevant focus is on the defendants' conduct. Wilkinson v. School Board of the County of Henrico, 566 F.Supp. 766, 771 (E.D. Va. 1983). Applying this law, the Court holds that summary judgment on a good faith

immunity theory is proper for defendant Deese, but not for either Sarver or Priddy.

The uncontroverted evidence shows that Deese's actions fall well within the parameters of the Harlow standard. The same reasons which lead to summary judgment in his favor for lack of intent or personal involvement also lead to summary judgment in his favor on this ground, since the Court concludes that his conduct did not violate any clearly established law.

The Court cannot grant summary judgment on behalf of Sarver or Priddy on this ground, since genuine doubt exists in the Court's mind as to the exact conduct -- or lack of conduct -- engaged in by these two defendants. Since the Court cannot ascertain the precise actions of Sarver or Priddy, it cannot measure their conduct against then-existing law. Moreover, an inquiry into the defendants' state of mind, as allowed by McElveen, is even more difficult to make, since the two sides differ dramatically about the relevant states of mind each actor held.

The plaintiffs have produced enough evidence concerning Sarver's alleged omissions which, if true, would preclude any grant of summary judgment in his favor. These acts or omissions would have been violative of existing statutory or constitutional law, since the law will not countenance the willful acquiescence in continuing discriminatory situations. As to Priddy, the plaintiffs have come forth with evidence concerning racially separate work crews, dressing areas, and roll calls. It has been over forty years since the Supreme Court has abolished the

separate but equal doctrine, and this Court has absolutely no doubt that a City of Richmond supervisor should reasonably have know~~s~~ of the law's dictates on racial segregation. The Court thus refuses to grant summary judgment, on an immunity theory, for either Sarver or Priddy.

In sum, the Court GRANTS the motion of Maunal Deese for summary judgment, but DENIES the motions of Robert Sarver and O. K. Priddy.

4. Dismissal of the Union Plaintiffs

The defendants have urged the Court to dismiss two of the plaintiffs, the Virginia Public Employees and the American Federation of State, County, and Municipal Employees, on the grounds of lack of standing. Both unions meet the associational standing requirements of Warth v. Seldin, 422 U.S. 490 (1975) and Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977), at least insofar as they are suing only for prospective injunctive or declaratory relief. Nonetheless, while as a theoretical matter the unions have standing to sue, the Court is of the opinion that neither party is a real party in interest in the present lawsuit. As the Court has already noted in an earlier order denying class certification, "money is primarily what is sought," and the claims are "individualized and individualized relief, primarily money damages, will predominate."

Here, the focus of this action is on monetary damages. The unions have no standing to seek damages, as they have not alleged

any past harm to themselves. Rather, they come forth in a representational capacity as to prospective relief. But the real parties in interest in this suit are the original plaintiffs and the plaintiff-intervenors, not the unions. While the complaint requests declaratory and injunctive relief in a generalized prayer for relief, the individual plaintiffs and plaintiff-intervenors are also requesting the exact relief sought by the unions. Any prospective relief granted to the individual plaintiffs in this suit will inure to the benefit of all members of the Sewer Maintenance Division. The Court notes, also, that an employee of the Sewer Division is not required to be a member of either union. For this reason, the Court is wary of keeping the unions in the action, since any prospective relief granted in the union's favor may not redound to the benefit of a non-union employee. Therefore, the Court concludes that the unions are not the real parties in interest in the present case, and that pursuant to Fed. R. Civ. P. 17(a), dismissal of the unions as party plaintiffs is proper. The defendants' motion to dismiss the union plaintiffs is GRANTED.

An order has been entered in accordance with this opinion. Let the Clerk send a copy of this memorandum opinion to all counsel of record.

DATE



UNITED STATES DISTRICT JUDGE