

JJ-
race
discrim.

Benchmemo: Vergie M. Henderson v. Commonwealth of Va. Department of Corrections, Reception and Diagnostic Center for Children, Bon Air, Virginia; CA 86-0588-R; hearing scheduled for Wednesday, March 11, 1987, at 10:00 a.m.

Judge, this matter is before you on defendant's motion to dismiss or alternatively for summary judgment. (Because there are affidavits and exhibits attached, the motion should probably be considered to be a motion for summary judgment.)

FACTS

Plaintiff's lawsuit is based on her being rejected for a permanent half-time position at the Reception and Diagnostic Center for Children, Bon Air, Virginia. Plaintiff brings her suit under sections 1981 and 1983, as well as Title VII. The allegations at issue are in Count I of the complaint.

Plaintiff's counsel told defense counsel that Count II will be "non-suited." (I called Sa'ad and he confirmed this.)

Some of the applicants for the position, including plaintiff, were already employed as "authorization" supervisors A at Bon Air. This is an hourly position with no benefits outside the hourly wages. Authorization supervisors are called in to fill in for the permanent Supervisors A when needed.

Plaintiff and 7 other applicants applied for the permanent part-time supervisor A position. Each applicant was interviewed by George Wakefield, Corrections Facility Manager, (white male); Ella Chavis, Correctional Counselor (black female); and Andy Hubble, Learning Center Supervisor C (white male). The interviews took place in April, 1985. All applicants were rated on the following categories:

1. Experience, Education, and Training
2. Understanding of the position
3. Problem solving
4. Communication

The fifth standard category - Job Knowledge - was not used since this was a trainee level position.

All applicants were black females except for Stephanie Robertson. The combined scores of the top five candidates were:

1. Frye (black female) - 103
2. Robertson (white female) - 98
3. Dennis (black female) - 96
4. Jones (black female) - 95
5. Henderson (plaintiff) - 86

Ms. Frye, the top candidate, already held a position with the state and only wanted the position in question to supplement her income. Because state policy prohibited this, the offer letter was sent to the second highest rated candidate, Ms. Robertson. Although Ms. Robertson accepted, if she had not, the offer would have then gone to Debra Dennis, another black female. Ms. Henderson, who was rated fifth of the eight candidates, was notified of the decision by the panel in May, 1985.

Ms. Henderson was given a meeting with the panel members after the selection was made. The panel members advised plaintiff of her weaknesses during the interview, including that she had been nervous, had difficulty in expressing herself, that she needed to organize her thoughts before speaking, and that she needed to improve her problem solving skills. Both Ella Chavis and George Wakefield stated in their depositions that race played no role in their evaluation of any of the applicants. (Judge, it might be helpful to review the ratings received by Ms. Robertson and by the plaintiff, copy attached).

LEGAL ISSUES

Plaintiff seeks the following relief pursuant to Count I of her complaint. (Sa'ad confirmed that Count II will be dismissed by the plaintiff.)

1. Plaintiff be placed in the position and be given back-pay and front-pay until this is done;
2. Plaintiff wants the Court to DECLARE that she was not selected because of her race;
3. Plaintiff wants costs, reasonable attorneys fees, and other relief as the Court deems proper.

Defendant makes three arguments. First, defendant argues that the state is not a person under 42 U.S.C. section 1983. The cases support the rule that a state is not a proper defendant to

a section 1983 action, but there is an exception where prospective injunctive relief is sought. Ex Parte Young, 209 U.S. 123 (1908). Sa'ad claims that this case fits within the exception.

Judge, although there is an exception where prospective injunction relief is sought, it does not seem to me that plaintiff's requests for relief fit within "prospective injunctive relief," with the possible exception of her request to be placed in the job and her request for a declaration that she was discriminated against. Thus, this issue is a little unclear to me. However, if you decide that plaintiff cannot show "deprivation of a federal right," (one of the two elements of a section 1983 action, along with "under color of state law,") then she cannot recover under section 1983 anyway. Therefore, you probably can decide the case without reaching this issue specifically. There will be more discussion on this "deprivation of a federal right" - the substantive issue - below.

Defendant's second argument is that the Eleventh Amendment bars any monetary recovery against the defendant. Therefore, the argument goes, to the extent that plaintiff's claim for monetary relief is premised on sections 1981 and 1983, it is barred by the Eleventh Amendment.

It seems clear that the Eleventh Amendment bars any monetary recovery against a state. Therefore, the defendants are right on this argument and summary judgment could be GRANTED to the defendants to the extent that plaintiff's claims for monetary relief are premised on sections 1981 and 1983. However, again you can probably decide the case without reaching this issue specifically, by deciding instead that the plaintiff cannot prevail on the merits of the case.

Defendant's third argument is that the plaintiff cannot meet the burden of proof in a Title VII action (as well as section 1981 and 1983) sufficient to overcome a motion for summary judgment. This is an argument based on the facts, presented by affidavits and exhibits.

It seems clear that plaintiff cannot meet the burden of

proof sufficient to overcome a motion for summary judgment. (This would apply to all three bases for relief, sections 1981 and 1983, and Title VII.)

The elements of a 1981 cause of action are:

1. race discrimination
2. intention to discriminate
3. and in some activity enumerated in 1981 (probably "the full and equal benefit of all laws . . ." in this case, although Sa'ad does not specify.

The elements of a 1983 cause of action are:

1. that the defendant has deprived the plaintiff of a federal right; and
2. that the defendant acted under color of state law.

Title VII proscribes employment discrimination on the basis of race, color, sex, religion and national origin. Under McDonnell Douglas Corp. v. Green, the plaintiff has the burden of production initially to establish sufficient evidence to raise an inference that the actions about which she complains were taken because of her race. This establishes a prima facie case, creating a rebuttable presumption that the employer discriminated. The presumption is rebutted if the employer articulates some legitimate non-discriminatory reason for the action taken. The presumption is rebutted if the defendant's evidence "raises a genuine issue of fact as to whether it discriminated against the plaintiff." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). Once the presumption is met, the inquiry is whether there has been intentional discrimination by the defendant against the plaintiff. On this ultimate factual issue, the plaintiff bears the burden of persuasion which must be met by showing either that a discriminatory reason more likely motivated the defendant or that the articulated, non-discriminatory reasons were pretextual.

On a motion for summary judgment, the plaintiff need only create a genuine issue as to a material fact. Thus, where the defendant moves for summary judgment and produces, as here, evidence of legitimate, non-discriminatory reasons for the

actions taken with respect to plaintiff, the latter must come forward with evidence not only establishing a prima facie case, but also sufficient to create a genuine issue of material fact as to the defendant's claimed reasons. See International Woodworks of America v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1271 (4th Cir. 1981). Here, defendant claims, and I agree, that plaintiff can offer NO substantial proof to substantiate a prima facie case. There is really no direct or indirect evidence of race discrimination, but assuming plaintiff makes out a prima facie case, it seems clear that she fails to create a genuine issue of material fact in response to the defendant's articulated non-discriminatory reasons.

If plaintiff cannot establish this issue with regard to the framework of Title VII, plaintiff likewise cannot establish this within the framework of sections 1981 and 1983, since 1981 requires "race discrimination" and an "intention to discriminate" and 1983 requires "deprivation of a federal right."

Thus, the Court should grant summary judgment for the defendant as to Count I of the plaintiff's complaint and DISMISS the complaint with prejudice. It seems to me that if the Court GRANTS the motion for summary judgment on this basis, that the other two arguments need not be decided.

DAH

Judge,

*Δ also wants atty. fees and costs.
See p. 16 of item 13.*

Debbie

Stephanie Robertson
 60 hrs. Therapeutic Recreation
 BS. Public Affairs - concentration
 in Criminal Justice

Volunteer experience with
 soap and quest.

Verzie Hudson

12th grade

Has work authorization for
 3 yrs.

	SW	EC	AH	SW	EC	AH
science, statistics	5	5	6	9	10	8
to knowledge	—	Not	used	—	—	3
writing & speaking	9	10	9	9	10	7
in writing	8	10	9	5	5	7
memorization	8	10	9	6	4	6
	30	35	33	29	29	28

103 G. H. Lee
 96 Dennis
 95 Jones 86
 86 Hudson

98

