2nd Circuit: White Employees' Rights Implicated in Title VII Settlement Agreement

5/27/2011 By Patricia M. McFall

Reverse bias claims against the New York City Board of Education are revived by the 2nd U.S. Circuit Court of Appeals on behalf of white individuals seeking supervisory custodial positions in the city's schools system.

Consideration of this appeal rests upon a prior case, commenced 15 years ago, by the U.S. Justice Department against the city. That case challenged alleged Title VII race and gender disparate impact by the Board of Education in hiring custodians and custodian engineers (CEs) through the use of written exams and recruiting methods (e.g., advertising and word-of-mouth referrals).

In 1996, the Justice Department suspected race and gender bias in hiring. A 1993 demographic survey revealed that more than 99 percent of the permanent custodian and CE workforce was male, and 92 percent was white. However, black individuals constituted about 20 percent of the qualified labor pool for these positions. Hispanics made up about 19 percent and women about 8 percent of the pool. A 1996 demographic survey showed similar results. It also appeared (as was later confirmed by the investigation) that racial minorities and women were much more likely to be hired as provisional custodians or CEs than as permanent custodians or CEs, even though the qualifications for both were the same.

After several years of litigation, in 1999 the parties (including minority and women intervenors) approved a settlement agreement that conferred permanent appointments and retroactive competitive seniority to 63 black, Hispanic, Asian or female individuals. Seniority in custodian and CE jobs matter because it determines assignments, transfer opportunities and layoff priorities.

White incumbents then challenged the retroactive seniority grant as reverse discrimination in violation of Title VII and 42 U.S.C. §1983. After lengthy litigation, the district court in 2007 and 2008 entered three opinions and a judgment largely upholding the challenges, granting some relief to select white plaintiffs. While the case was on appeal, though, the Supreme Court handed down *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), which revised the Title VII standards for challenging the voluntary implementation of race-conscious policies.

On appeal, the panel held that the district court decision must be vacated and remanded, in substantial part, for the trial judge to apply the *Ricci* standard. The opinion spanned 139 pages, with a majority opinion (signed by Judge Calabresi, joined by visiting Judge Cudahy) and a special concurring opinion (by Judge Raggi). The opinion held that the settlement agreement is not properly classified as an "affirmative action" plan because it is principally made up of Title VII make-whole relief for select applicants. The court noted that there must be a "strong basis in evidence" that the race- or gender-conscious action taken is necessary to avoid disparate impact based on race or sex.

The court reached some additional decisions on the substance of Title VII law. First, recruiting practices may be challenged for Title VII disparate impact, and "potential applicants for employment are applicants for employment." Second, employees under a collective bargaining agreement challenging a breach of their contractual rights may not proceed under Title VII; they must grieve/arbitrate such claims.

United States v. New York City Board of Education, 2nd Cir., No. 08-5171 (May 5, 2011).

Professional Pointer: Affirmative action plans, which are meant to provide forward-looking relief to all members of a racial or gender minority to combat discrimination, are distinct from remedies for past discrimination, and remedial relief must be specifically tailored so as not to harm other groups.

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Editor's Note: This article should not be construed as legal advice.

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