Washington and Lee Journal of Civil Rights and Social Justice

Volume 9 | Issue 1 Article 13

Spring 4-1-2003

REYNOLDS V. CITY OF CHICAGO, 296 F.3d 524 (7th Cir. 2002)

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FACTS

Prior to 1960, black and white police officers in Chicago were segregated, with black officers assigned to predominantly black sections of the city.[1] During this period, the police department hired black officers in proportion to the number of black residents in the city.[2] Although the commissioner eventually desegregated the department, discrimination continued to occur, leading to a decline in the hiring of black officers.[3] Despite reforms instituted in the 1970s to rectify the effects of racial discrimination, few black officers held senior positions within the department by the 1980s.[4] Additionally, the police department refused to hire women for most positions until the 1970s.[5]

To remedy these discriminatory acts, the City enacted an affirmative action plan under which the police department promoted blacks, Hispanics, and women even if they scored lower than a white male on the promotion test.[6] In 1990 and 1991, the department promoted twenty officers in accordance with this plan.[7] Shortly afterward, plaintiffs, white Chicago police sergeants and lieutenants, challenged these promotions by filing suit against the City of Chicago, claiming a denial of their equal protection of the laws.[8] The United States District Court for the Northern District of Illinois found in favor of the City with respect to the promotions of the black and female officers. The court held for the plaintiffs regarding the promotion of the Hispanic officer.[9] Both parties appealed the decision.[10]

HOLDING

The United States Court of Appeals for the Seventh Circuit affirmed the judgment for the City with respect to the black and female officers.[11] The court reversed the judgment for the plaintiffs regarding the promotion of

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[1] Reynolds v. City of Chicago, 296 F.3d 524, 527 (7th Cir. 2002).
[2] *Id.*
[3] *Id.* at 527-28.
[4] *Id.* at 528.
[5] *Id.*
[6] *Id.* at 525-26.
[7] *Id.* at 525, 528. The department promoted 11 black sergeants and one Hispanic sergeant to lieutenant out of 182 promotions of sergeants, three black lieutenants to captain out of 50 promotions of lieutenants, and five women.
[8] *Id.* at 525.
[9] *Id.* at 526.
[10] *Id.*
[11] *Id.*

the Hispanic officer.[12] The court held that the evidence supported the jury's findings that discrimination within the police department in the 1960s led to a lack of black officers in senior positions in the 1980s[13] and that the City refused to hire women until the 1970s.[14] The court upheld the District Court's determination that the City did not violate the Equal Protection Clause by promoting black and female officers who had lower test scores.[15] The court stated that remedying past discrimination is a valid justification for affirmative action.[16] Additionally, the court found that the City did not violate the Equal Protection Clause by promoting the Hispanic officer because the City had a compelling need to increase the amount of Hispanic lieutenants.[17] The court remanded the case with instructions to enter judgment for the City of Chicago.[18]

ANALYSIS

The court first addressed the plaintiffs' argument that an appellate court must review a jury's finding of fact de novo in race discrimination cases.[19] The plaintiffs claimed that a justification for racial discrimination must be supported by "a strong basis in evidence."[20] The court explained that under equal protection analysis, racial discrimination must be based on proof, as opposed to argument or conjecture, of a compelling justification for discrimination.[21] The court also noted that the fact finding duties of both the trial and appellate court may differ.[22] Nevertheless, the court concluded that the jury's responsibility and the appellate standard of review remain the same as with any other case.[23] The court stated that a clearly-erroneous standard of review was appropriate for jury findings.[24] Further, a reviewing court in federal civil cases may owe more deference to a jury's finding than to a

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[12] *Id.* at 531.
[13] *Id.* at 528.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* at 529-30.
[18] *Id.* at 531.
[19] *Id.* at 526.
[20] *Id.*; *see, e.g.*, Miller v. Johnson, 515 U.S. 900, 922 (1995); Johnson v. Bd. of Regents, 263 F.3d 1234, 1244 (11th Cir. 2001).
[21] Reynolds v. City of Chicago, 296 F.3d 524, 526 (7th Cir. 2002).
[22] *Id.* at 526-27.
[23] *Id.* at 526.
[24] *Id.* (citing Worth v. Tyler, 276 F.3d 249, 266 (7th Cir. 2001); Susan Wakeen Doll Co. v. Ashton Drake Galleries, 272 F.3d 441, 451 (7th Cir. 2001); All Care Nursing Serv., Inc. v. High Tech Staffing Serv., Inc., 135 F.3d 740, 749 (11th Cir. 1998); Tamez v. City of San Marcos, 118 F.3d 1085, 1094 (5th Cir. 1997); United States v. Tolliver, 116 F.3d 120, 125 (5th Cir. 1997)).

judge's findings.[25] Ultimately, the court decided that the appropriate standard of review was a "general issue of judicial epistemology and was in no way special to cases involving racial discrimination."[26] The court noted that this issue did not need to be resolved in the case at hand.[27]

The court held that the jury's findings of fact concerning the promotions of the black and female officers were neither clearly erroneous nor unreasonable.[28] The evidence showed that white officers harassed black officers and that black officers failed the medical examination at a rate suspiciously higher than that of white officers.[29] The court noted that this supported a finding that discrimination in the department in the 1960s led to a lack of black people in senior positions in the 1980s.[30] The court reasoned that affirmative action is justified when it attempts to remedy past discrimination.[31] The court agreed with the District Court's conclusion that the City did not violate the Equal Protection Clause, noting that the City took only modest action.[32] Similarly, the court upheld the decision in favor of the City with respect to the promotions of the female officers, because the City barred women from most jobs in the police department until the 1970s.[33]

Next, the court dismissed the plaintiffs' contention that the City was barred by judicial estoppel from defending its affirmative action promotions.[34] Judicial estoppel bars a party that has obtained a judgment based on certain facts from obtaining a later judgment by proving contradicting facts.[35] The plaintiffs contended that the City could not argue in favor of intentional discrimination because it had obtained a judgment in an earlier case, *United States v. City of Chicago*,[36] based on a failure to find

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[25] *Id.* at 527; *see, e.g.*, District of Columbia v. Pace, 320 U.S. 698, 701 (1944); Artis v. Hitachi Zosen Clearing, Inc., 967 F.2d 1132, 1139 (7th Cir. 1992); Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1235 (Fed. Cir. 1989).

[26] Reynolds v. City of Chicago, 296 F.3d 524, 527 (7th Cir. 2002).

[27] *Id.*

[28] *Id.*

[29] *Id.* at 528.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 529.

[35] *Id.*

[36] United States v. City of Chicago, 549 F.2d 415, 435 (7th Cir. 1977) (reversing the District Court's finding of an equal protection violation by the City of Chicago). In *City of Chicago*, the City was charged with discriminating against blacks in hiring officers for the police department, *id.* at 420, and the District Court ruled that the City had violated equal protection. *Id.* at 435. While the case was on appeal, the Supreme Court ruled that discrimination had to be intentional to violate equal protection. Washington v. Davis, 426 U.S. 229, 239-41 (1976). The Court of Appeals then reversed the District Court's finding of an equal protection violation because the evidence did not support a finding of intentional discrimination. *City of Chicago*, 549 F.2d at 435.

intentional discrimination.[37] In response, the court stated that there had been no finding whatsoever regarding intentional discrimination in the earlier case,[38] and estoppel was therefore inappropriate.[39]

Finally, the court considered the City's alternative justification of the promotions as a means of increasing the police department's effectiveness in performing its duties.[40] Because the court had already approved the remedial grounds for the promotions of the black and female officers, it focused on the alternative ground only with respect to the promotion of the Hispanic officer.[41] Statistics from 1990 showed that Hispanics represented twenty percent of the City's population, but less than five percent of its police lieutenants were Hispanic.[42] The City justified the Hispanic officer's promotion on two grounds: a Hispanic lieutenant would be more sensitized to problems in Hispanic neighborhoods, thereby promoting a more sensitive police force, and an increase in the number of Hispanic lieutenants would improve the Hispanic community's trust of the police department.[43] The court pointed out that while non-remedial justifications of discrimination are usually suspect, some courts have upheld discrimination that is based on compelling public safety concerns.[44] The court further ruled that because effective police work is a national priority, especially in a time of international terrorism, the City proved that it had a compelling need to discriminate by promoting Hispanic lieutenants.[45]

CONCLUSION

When courts analyze race-based classifications for equal protection claims, they typically apply strict scrutiny, the highest standard of review. Strict scrutiny analysis in *Reynolds* required the City to show that the affirmative action policy was narrowly tailored to further a compelling state interest.[46] Without discussing it in much detail, the court applied the first part of the analysis by relying on precedent stating that an affirmative action

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[37] *Id.*
[38] Reynolds v. City of Chicago, 296 F.3d 524, 529 (7th Cir. 2002).
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* at 529-30.
[44] *Id.* at 530 (citing Wittmer v. Peters, 87 F.3d 916, 920-21 (7th Cir. 1996); Barhold v. Rodriguez, 863 F.2d 233, 238 (2d Cir. 1988); Talbert v. City of Richmond, 648 F.2d 925, 928-32 (4th Cir. 1981); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 695-96 (6th Cir. 1979)).
[45] *Id.* at 530-31.
[46] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

policy is justified if its purpose is to remedy past discrimination.[47] The policy was narrowly tailored because the action was "modest."[48] Specifically, the court noted that "a mere handful" of officers were promoted out of rank and no white officers lost their jobs because of the promotions; instead their promotions merely were delayed.[49]

The Hispanic officer's promotion could not survive strict scrutiny analysis on the same remedial basis, however, because the evidence did not reveal a history of past discrimination against Hispanics by the police department.[50] Recognizing this, the court stated that the Supreme Court had not spoken definitively on the issue of non-remedial justifications for affirmative action.[51] The court then found that the promotion served the compelling state interest of public safety by increasing the department's effectiveness in relating to the Hispanic community.[52] Because the department had promoted only one Hispanic sergeant on this basis, this promotion also was narrowly tailored.[53]

For gender classifications, courts apply an intermediate scrutiny standard that requires the policy in question to be substantially related to an important state interest.[54] Without discussing intermediate scrutiny at all, the court simply upheld the District Court's finding that there was no equal protection violation due to the policy's purpose of remedying past discrimination.[55]

For several decades, courts have dealt with cases of alleged "reverse discrimination" in which white or male plaintiffs challenge affirmative action programs, claiming a violation of their equal protection under the laws.[56] The backlash against affirmative action has grown steadily stronger over the years, with two current Justices of the Supreme Court going as far as finding race-based affirmative action of any sort unconstitutional.[57] By joining other circuits in expanding the non-remedial justifications for affirmative action,

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[47] *See* Reynolds v. City of Chicago, 296 F.3d 524, 528 (7th Cir. 2002).
[48] *See id.*
[49] *See id.*
[50] *See id.* at 529.
[51] *See id.* at 530.
[52] *See id.*
[53] *See id.*
[54] *See* Craig v. Boren, 429 U.S. 190, 197 (1976).
[55] *See* Reynolds v. City of Chicago, 296 F.3d 524, 528-29 (7th Cir. 2002).
[56] *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
[57] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (stating that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction"); *id.* at 241 (Thomas, J., concurring) (stating that "government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice" because "[i]n each instance, it is racial discrimination, plain and simple").

the Court of Appeals for the Seventh Circuit took a bold step and demonstrated its willingness to defer to the state legislature's expertise in assessing the benefits of diversity. The legitimization of all the challenged promotions in *Reynolds* is a positive sign that courts continue to recognize the need for affirmative action.

Summary and Analysis Prepared By:
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