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THIGPEN V. BIBB COUNTY, GEORGIA
223 F.3D 1231 (11TH CIR. 2000)

FACTS

In 1978, James Reeves, a black deputy sheriff, brought a class action racial discrimination suit against the Bibb County, Georgia, Sheriff's Department (the "Department") and the Sheriff, "on behalf of all past, present, and future black applicants for employment with or promotions within the Department."[1] The parties settled the dispute and entered into a consent decree ("*Reeves* Decree").[2] The *Reeves* Decree provided, in part, that "each year at least fifty percent (50%) of the promotions will be blacks who have met the requirements for promotion to their next highest position."[3] The Department has complied with the *Reeves* Decree since its ratification.[4]

Plaintiffs William Thigpen, Jr. and James Allen ("plaintiffs") were white male police officers in the Department.[5] Plaintiffs brought this action against the Department and Sheriff Johnson, under 42 U.S.C. § 1983,[6] to challenge the constitutionality of the Department's promotion policy under the *Reeves* Decree.[7] The Department's promotion policy was created after a prior accusation of racial discrimination.[8] Plaintiffs alleged that the *Reeves* Decree should be declared unconstitutional because it "apportions the Department's annual promotions on the basis of race, excluding them from competing for one-half of the promotions conferred annually and precipitating the promotion of less-qualified black applicants."[9] Plaintiffs named seven black officers who were promoted, and alleged that as Caucasians they could not be considered for those promotions because they were not black.[10] Specifically, Thigpen, a captain, challenged the promotions of three black officers to the rank of major, and Allen, a senior lieutenant, challenged the promotions of four black officers to the rank of captain.[11] The district court granted defendants' motion for summary judgment and denied plaintiffs' motion for partial summary

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1. Thigpen v. Bibb County Georgia, 223 F.3d 1214 (11th Cir. 2000).
2. *Thigpen*, 223 F.3d at 1235.
3. *Id.*
4. *Id.*
5. *Id.* at 1234.
6. 42 U.S.C. § 1983 (2000).
7. *Thigpen*, 223 F.3d at 1234.
8. *Id.*
9. *Id.*
10. *Id.* Plaintiff Thigpen alleged the promotions of Robert White in 1990, Leonard Thomas in 1992, and Charles Gantt in 1996 to the rank of major were all conferred based on those employees' races. In addition, Plaintiff Allen claimed that the promotions of James Reeves in 1986, Robert White in 1989, Leonard Thomas in 1990, and Stella Davis in 1992 to the rank of captain were also conferred based on the employees' races.
11. *Id.*

judgment on liability.[12] On appeal, the Plaintiffs presented four legal issues: (1) whether an equal protection claim based on the promotion of black employees is permitted; (2) whether an equal protection claim brought under 42 U.S.C. § 1983 must be pleaded with a companion claim brought under the Civil Rights Act of 1964 (Title VII); (3) whether employment discrimination claims and equal protection claims may employ the same burden-shifting analysis; and (4) whether the denial of promotions constitutes a single continuing violation under the statute of limitations.[13]

HOLDING

On appeal, the Eleventh Circuit reversed the grant of defendants' motion for summary judgment and remanded the case because plaintiffs' equal protection claim was properly pleaded.[14] The court held that plaintiffs' claims were not barred by the their failure to file an accompanying Title VII claim arising under the Civil Rights Act of 1964.[15] The court further held that the *McDonnell Douglas*[16] analysis was not the appropriate framework to evaluate the constitutionality of the Reeves Decre;, instead the *Croson*[17] standard was appropriate.[18] Lastly, the court held that the *Reeves* Decree created multiple discrete violations containing individual statute of limitation periods.

ANALYSIS

In reviewing the district court's grant of summary judgment, the Eleventh Circuit examined the district court's four reasons for granting defendants' motion for summary judgment.[19] The Eleventh Circuit reviewed the district court's decision de novo, in accordance with *Kirby v. Seigelman.*[20]

Property and Liberty Interests in Equal Protection Claims

The Eleventh Circuit began its analysis by addressing the district court's finding that in order to properly plead an equal protection claim, plaintiff

12. *Id.*
13. *Id.*
14. *Id.* at 1244.
15. *Id.*
16. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
17. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).
18. *Id.* at 1241.
19. *Id.* at 1236.
20. Kirby v. Siegelman, 195 F.3d 1285, 1289 (11th Cir. 1999) (stating petitions for summary judgment are reviewed de novo).

would have to demonstrate a property or liberty interest.[21] The court found that the district court had erroneously relied on *Wu v. Thomas*[22] when it concluded that plaintiffs' equal protection claims were not cognizable because they had not alleged a property or liberty interest in the promotions that were denied.[23] Although *Wu* stated that "a prospective promotion is not a property or liberty interest protected by the [F]ourteenth [A]mendment," the Eleventh Circuit pointed out that the quoted language was addressing only the plaintiff's due process claim and so the district court took the quote out of context when it applied it to an equal protection claim.[24] The Eleventh Circuit instead concluded that plaintiffs had properly pleaded an equal protection claim because the *Reeves* Decree requires that annual promotions be allocated in substantial part based on race.[25]

The Eleventh Circuit then looked at the text of the Fourteenth Amendment and again concluded that the district court's belief that a property or liberty interest should be required in an equal protection claim was improper.[26] The court noted that the Fourteenth Amendment is made up of three clauses, and only the due process clause addresses property and liberty interests.[27] The court cited *City of Cleburne v. Cleburne Living Center*[28] and *Plyler v. Doe*[29] to support its conclusion that plaintiffs pleading an equal protection claim "need only allege that through state action, similarly situated persons have been treated disparately."[30] Because the plaintiffs' complaint was based on the allegation that similarly situated officers of equal rank were treated differently as a result of the *Reeves* Decree's promotion policy based on race, the court concluded that plaintiffs had asserted proper equal protection claims.[31]

The Connection Between Section 1983 Equal Protection Claims and Title VII Employment Discrimination Claims

The Eleventh Circuit then evaluated the district court's holding that plaintiffs' § 1983 claims were procedurally barred because they had not

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21. *Thigpen*, 222 F.3d at 1236.
22. *Wu v. Thomas*, 847 F.2d 1480, 1485 (11th Cir. 1988) (deciding that "a prospective promotion is not a property or liberty interest protected by the Fourteenth Amendment").
23. *Thigpen*, 223 F.3d at 1236. *See Wu v. Thomas*.
24. *Id.* at 1236. *See* Wu v. Thomas, 847 F.2d at 1485 (11th Cir. 1988).
25. *Id.*
26. *Id.* at 1237.
27. *Id.*
28. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).
29. Plyler v. Doe, 457 U.S. 202 (1982).
30. *Thigpen*, 223 F.3d at 1237.
31. *Id.*

pleaded a companion Title VII claim.[32] The Court noted that this was an issue of first impression in the Circuit, and thus began its analysis by looking at the historical relationship between § 1983 equal protection claims and Title VII employment discrimination claims.[33] In holding that, "a section 1983 claim predicated on the violation of a right guaranteed by the Constitution...can be pleaded exclusive of a Title VII claim," the Eleventh Circuit found the case law cited by the district court to be inapplicable and instead based its decision on a Second Circuit case that directly dealt with the issue.[34] In *Annis v. County of Westchester,*[35] the Second Circuit examined whether a § 1983 equal protection claim must be accompanied by a Title VII claim.[36] The Second Circuit found that, "Title VII and § 1983 are equally cognizable causes of action available to remedy public sector employment discrimination, [and] reasoned that because section 1983 claims are not preempted by Title VII, they need not be accompanied by Title VII claims."[37]

The Eleventh Circuit agreed with the Second Circuit's disposition of the issue and held that a § 1983 claim based on the violation of a constitutionally protected right can be pleaded independently of a Title VII claim.[38] Therefore, the Court found that plaintiffs' § 1983 claims were not procedurally barred by plaintiffs' failure to plead a Title VII claim.[39]

The Proper Analytic Framework for Evaluating Plaintiffs' Equal Protection Claims

The Eleventh Circuit found that the district court's application of the analytic framework outlined in *McDonnell Douglas Corp. v. Green*[40] was inappropriately applied to plaintiffs' claims.[41] The Eleventh Circuit pointed out that the district court incorrectly characterized plaintiffs' claims as

32. *Id.*
33. *Id.*
34. *Id.* at 1239. *See* Annis v. County of Westchester, 36 F.3d 251 (2d Cir. 1994). The Eleventh Circuit held in *Johnson v. City of Fort Lauderdale*, 148 F.3d 1228, 1231 (11th Cir. 1998), that the Civil Rights Act of 1991 did not cause Title VII to be the only redress for public sector employment discrimination that would preempt a § 1983 cause of action. The district court erroneously interpreted the *Johnson* decision to require a § 1983 claim to be plead concurrently with a Title VII claim.
35. Annis v. County of Westchester, 36 F.3d 251 (2d Cir. 1994).
36. *Annis*, 36 F.3d at 254-255.
37. 36 F.3d at 254-55.
38. *Thigpen*, 223 F.3d at 1322.
39. *Id.*
40. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (stating that in order to present prima facie case of discrimination plaintiff would only have to demonstrate that he was qualified for the promotion and that white got it instead. After such showing, burden would shift to employer to put forth non-invidious reason to explain why white rather than black employee received the promotion).
41. *Thigpen*, 223 F.3d at 1322.

employment discrimination claims, instead of an equal protection claim, and therefore improperly applied the *McDonnell Douglas* standard.[42] Based on its previous determination that the *Reeves* Decree, "establishe[d] certain mandatory racial quotas for hiring and promotion within the Bibb County Sheriff's Department,"[43] the Eleventh Circuit therefore found it to be an affirmative action plan.[44] The court evaluated the constitutionality of the *Reeves* Decree under the framework set out in *City of Richmond v. J.A. Croson Co.*[45] because that standard is the proper standard under which an affirmative action plan is judged.[46]

In *Croson*, the Supreme Court evaluated a plan created by the city of Richmond that mandated that all prime contractors subcontract a percentage of their construction contracts to minority-owned businesses.[47] The Court found that this affirmative action plan restricted equal opportunity to compete based upon race.[48] The *Croson* court stated that for all affected citizens, "their personal rights to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking."[49] Based on the use of this "facial racial" classification plan the *Croson* court then analyzed Richmond's plan under the *Wygant v. Jackson Board of Education*[50] strict scrutiny standard.[51] In accordance with strict scrutiny, the reviewing court must decide whether the plan serves "a compelling governmental interest and [is] narrowly tailored to the achievement of the interest."[52]

To illustrate the use of the *Croson* standard in affirmative action plans, the Eleventh Circuit cited *In re Birmingham Reverse Discrimination Employment Litigation*[53] *(Birmingham II)*.[54] The *Birmingham II* plan, like the *Reeves* Decree, required that a fixed percentage of promotions be awarded to black applicants.[55] The Eleventh Circuit also quoted *Ensley Branch, N.A.A.C.P. v. Seibels*,[56] which found that the government's interest in remedying past discrimination "is widely accepted as compelling. As a result, the true test of

42. 223 F.3d at 1322.
43. *Reeves*, 754 F.2d at 967.
44. *Thigpen*, 223 F.3d at 1240.
45. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
46. *Thigpen*, 223 F.3d at 1240.
47. *Croson*, 488 U.S. at 477.
48. 488 U.S. at 477.
49. *Thigpen*, 233 F.3d at 1240, *quoting Croson*, 488 U.S. at 493).
50. Wygant v. Jackson Bd. Of Educ., 476 U.S. 267 (1986).
51. *Croson*, 488 U.S. at 520.
52. *Thigpen* 223 F.3d at 1240 (quoting *Wygant*, 476 U.S. at 273-74) (plurality).
53. *In re* Birmingham Reverse Discrimination Employment Litig., 20 F.3d 1525 (11th Cir. 1994).
54. *Thigpen*, 223 F. 3d at 1240.
55. 223 F.3d at 1240.
56. Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548 (11th Cir. 1994).

an affirmative action program is usually not the nature of the government's interest, but rather the adequacy of the evidence of discrimination offered to show that interest."[57] In *Birmingham II*, the court enumerated several factors that can be used to determine "whether race-based promotional relief is narrowly tailored to accomplish a compelling purpose."[58] The factors include:

> the necessity for the relief and the efficacy of alternative remedies, the flexibility and duration of the relief, including the availability of waiver provisions, the relationship of numerical goals to the relevant labor market, and the impact of the relief on the rights of [non-minority officers].[59]
> The Eleventh Circuit concluded that *Croson* and *Birmingham II* provide the proper framework for evaluating plaintiffs' equal protection claims, not *McDonnell Douglas*.[60] Consequently, the court found that summary judgment was inappropriate and remanded the case for further proceedings.[61]

The Eleventh Circuit rejected defendants' three arguments that they should be entitled to summary judgment because: "(1) the *Reeves* Decree does not require the sheriff to award individual promotions based on race; (2) even absent the *Reeves* Decree, the promotions would have been awarded to the same officers; and (3) judicial oversight of the *Reeves* Decree shields defendants from liability."[62] In dismissing defendants' first argument the court found that, "the pattern in which the promotions are conferred is irrelevant, because the result is the same: fifty percent of the annual promotions must be awarded to black officers, effectively excluding white officers from consideration for those promotions."[63] The court found that the racial allocation of promotions required by the *Reeves* Decree could create constitutional violations prohibited by *Croson*.[64]

Although the court acknowledged that it had permitted the so-called "same decision" defense in §1983 equal protection claims, it noted that this defense was "immaterial to a constitutional challenge to an affirmative action plan that imposes a racial classification."[65] The court cited *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*,[66] in which the Supreme Court found that:

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57. *Thigpen*, 223 F.3d at 1240 (quoting Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d at 1565).
58. 223 F.3d at 1240.
59. *Birmingham II*, 20 F.3d at 1545.
60. *Thigpen*, 223 F.3d at 1241.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 1242.
65. *Id.*
66. Northeastern Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656 (1993).

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier...The injury in fact in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.[67]

The *Thigpen* court reasoned that the plaintiffs' failure to be promoted could be the result of not being considered for half of the promotions conferred by the Department.[68] Thus, the Court rejected defendants' "same decision" defense as irrelevant.[69]

The court dismissed the defendants' final argument that judicial oversight of the *Reeves* Decree should shield them from liability. The court cited *In re Birmingham Reverse Discrimination Employment Litigation* (*Birmingham I*)[70] in which it "reject[ed] any notion that the memorialization of [a] voluntary undertaking in the form of a consent decree somehow provide[d] the employer with extra protection against charges of illegal discrimination."[71] The Eleventh Circuit concluded that the district court's grant of summary judgment was inappropriate and therefore remanded the issue.

Statute of Limitations and Plaintiffs' Equal Protection Claims

In evaluating the district court's treatment of the statute of limitations for plaintiffs' equal protection claims the Eleventh Circuit first determined that the statute of limitations for a §1983 claim in Georgia is two years.[72] Because this suit was filed in 1996, the district court held that all promotions that occurred between 1986 and 1992 were precluded from review.[73] Plaintiffs, however, contended that because the *Reeves* Decree had governed all promotions, it "constitute[d] a single continuing violation" under the equal protection clause. To determine the meaning of a "continuing violation" the court looked at its prior decision in *Calloway v. Partners National Health Plans*,[74] where it "distinguished between the present consequence of a one time violation, which

67. *Northeastern Fla. Chapter of the Assoc. Gen. Contractors of Am.*, 508 U.S. at 666.
68. *Thigpen*, 223 F.3d at 1243.
69. 223 F3d at 1243.
70. *In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492 (11th Cir. 1987).
71. *Thigpen*, 223 F.3d at 1243 (*quoting* Birmingham, 833 F.2d at 501).
72. *Id.*
73. *Id.*
74. *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 448 (11th Cir. 1993).

does not extend the limitations period, and the continuation of that violation into the present, which does."[75]

The Court rejected Plaintiffs' reliance on *Beavers v. American Cast Iron Pipe Company*[76] as distinguishable, and instead found *Knight v. Columbus Georgia*[77] to be more applicable to plaintiffs' case.[78] In *Knight*,[79] the city allegedly misclassified the status of the plaintiffs, thereby failing to properly pay the plaintiffs for overtime.[80] The court in *Knight* viewed the failure to pay overtime as a series of repeated violations and not "one on-going violation."[81] The Eleventh Circuit, relying on *Knight*, found that "although the *Reeves* Decree, like the classification scheme at issue in *Knight*, is a constant, it gives rise to discrete violations, each triggering its own statute of limitations period."[82] Therefore, the court found that plaintiffs could only rely on the promotion of Charles Gant to establish their constitutional challenge of the *Reeves* Decree, because only Gant's promotion in 1994 was within the two-year statute of limitations.[83]

Plaintiffs' Cross-Motion for Partial Summary Judgment

The Eleventh Circuit lastly examined plaintiffs' appeal of the district court's denial of their cross-motion for partial summary judgment on the issue of liability.[84] The court found that the district court's grant of summary judgment to defendants naturally led to the denial of plaintiffs' corresponding cross-motion. Though it reversed the district court's grant of defendants' motion, the appellate court affirmed its denial of plaintiffs' cross-motion.[85] The court explained, "the operation of the *Reeves* Decree does not necessarily offend the equal protection clause."[86] The court concluded that the issue of

75. *Thigpen*, 223 F.3d at 1243.

76. Beavers v. American Cast Iron Pipe Co., 975 F.2d 792 (holding that where employer's benefits policy only applied to children who lived full-time with their employee-parent, claim was timely despite being outside statute of limitations because injury resulted on-going policy).

77. Calloway v. Partners Nat'l Health Plans, 986 F.2d 446 (11th Cir. 1993).

78. Knight v. Columbus Georgia, 19 F.3d 579 (11th Cir. 1994).

79. *Thigpen*, 223 F.3d at 1243.

80. 223 F.3d at 1243.

81. *Knight*, 19 F.3d at 582.

82. *Thigpen*, 223 F.3d at 1243.

83. *Id.* Because the suit was filed in August of 1996, the statute of limitations dates back two years from that date, i.e., August of 1994. Within this time period only the promotion of Charles Gantt applies. All other promotions were conferred by Sheriff Wilkes between 1986 and 1992 and are therefore not cognizable.

84. *Thigpen*, 223 F.3d at 1244.

85. *Id.*

86. *Id.*

liability was not appropriate until the constitutionality of the *Reeves* Decree could be determined on remand.[87]

CONCLUSION

Upon remand the district court will have to evaluate plaintiffs' claim under *Croson*. Using the strict scrutiny standard, the district court will likely invalidate the *Reeves* Decree because it is not narrowly tailored to remedy past discrimination.

The effect of this decision could have significant implications. The debate over affirmative action plans usually focuses on their use in higher education admissions. However, *Thigpen* points out that the effects of affirmative action are far reaching. Affirmative action plans, though a source of debate, serve important governmental interests of curbing the effects of past discrimination. Unfortunately, ill-devised plans that merely choose an arbitrary number to remedy past discrimination miss the point. If plans could be devised that would be narrowly tailored, much of the confusion that surrounds the issue could be allayed.

Thigpen highlights the importance of understanding the nature of a claim in order to employ the necessary analytic framework. Much of the confusion in *Thigpen* surfaced because the district court viewed the dispute as several individual alleged occurrences of employment discrimination instead of a dispute concerning the constitutionality of the *Reeves* decree. Owing to this confusion the district court applied the *McDonnell Douglas* standard typically associated with employment discrimination. Instead the proper standard was *Croson*, which is employed in the cases of affirmative action plans and hence invokes Equal Protection concerns.

Summary and Analysis Prepared by:
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87. *Id.*