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STERLING V. TENET
416 F.3d 338 (4th Cir. 2005)

FACTS

In August 2001, Jeffrey Sterling, an African-American formerly employed with the Central Intelligence Agency (CIA), filed a *pro se* complaint against the agency in the Southern District of New York alleging violations of Title VII of the Civil Rights Act of 1964.¹ Sterling was an Operations Officer in the CIA's Near East and South Asia division from 1993 to 2001.² He alleged that he was the victim of unlawful discriminatory practices, accusing the agency of demanding expectations of him that far exceeded those of non African-American Operations Officers, withholding advantageous opportunities from him, subjecting him to disparate treatment, assigning him Advanced Work Plans that contained more demanding duties than those assigned to non African-Americans, retaliating against him for utilizing the agency's Equal Employment Opportunity (EEO) process, scheduling him to undergo security processing earlier than he should have been, and vandalizing his personal property.³

The complaint was served on the government in January 2002, but the trial court later redacted it after the CIA protested that the complaint contained classified information.⁴ The agency sought dismissal of the case on "state secrets" grounds,⁵ but the court refused.⁶ It did, however, grant the government's motion to transfer the case to the Eastern District of Virginia, where the CIA is located.⁷

Upon transfer, the government renewed its claim to the state secrets privilege.⁸ The Director of the CIA filed two declarations, one classified and the other unclassified, explaining why invocation of the privilege was necessary to prevent disclosure of classified information.⁹ The district court considered the declarations in an *ex parte, in camera* examination and granted the government's motion to dismiss, concluding that state secrets

¹ Sterling v. Tenet, 416 F.3d 338, 341 (2005); see Civil Rights Act, 42 U.S.C. § 2000e (1964) (prohibiting employment discrimination).

² *Id.*

³ *Id.*

⁴ *Id.* at 341-42.

⁵ *Id.* at 341. "The [state secrets] doctrine embodies an evidentiary privilege which protects military and state secrets from disclosure in judicial proceedings." (citing United States v. Reynolds, 345 U.S. 1, 7 (1953)) (holding that the government had a valid claim to the state secrets privilege because disclosure of the requested information could jeopardize classified information) (internal quotation marks omitted); see *infra* note 12 and accompanying text (discussing "state secrets" and the Court's holding in United States v. Reynolds, 345 U.S. 1 (1953)).

⁶ *Id.* at 342.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

"were critical to the resolution of core factual questions in the case," and that dismissal, therefore, was necessary.¹⁰

Sterling timely appealed the trial court's dismissal and the United States Court of Appeals for the Fourth Circuit conducted a *de novo* review of the ruling.¹¹

HOLDING

The United States Court of Appeals for the Fourth Circuit held that the CIA properly invoked the state secrets privilege, as articulated in *United States v. Reynolds*,¹² and that invocation of the privilege required dismissal of Sterling's Title VII claims.¹³

ANALYSIS

The Fourth Circuit began by articulating the decisive issues: (1) when the privilege may be invoked; and (2) when a properly invoked privilege justifies complete dismissal.¹⁴ Judge Wilkinson, writing for the court, explained that only the government may invoke the privilege; private parties have no right to claim or waive it.¹⁵ The government formally claims the privilege when the head of the agency conducts "actual personal consideration" and asserts the privilege based on that personal determination.¹⁶ It is then for the court to decide whether the circumstances support invocation of the privilege.¹⁷ Additionally, the Fourth Circuit noted that the trial court must make this determination without jeopardizing the secrecy of the contested materials or issues in the process.¹⁸

¹⁰ *Id.*

¹¹ *Id.*

¹² *United States v. Reynolds*, 345 U.S. 1 (1953). In *Reynolds*, the Court considered the applicability of the military secrets doctrine to suits brought against the United States Air Force under the Tort Claims Act. *Id.* at 2. On October 6, 1948, three civilians were killed in the crash of a government aircraft that was testing secret electronic equipment. *Id.* at 3. Following the incident, widows of the deceased civilians filed suit. *Id.* In preparation for trial, respondent widows sought disclosure of the official accident investigation report in preparation for their case, but the government denied their request. *Id.* The Supreme Court countenanced the government's refusal under the military secrets privilege, determining that disclosure of the sought-after materials would risk exposure of highly sensitive information. *Id.* at 10–11. It held that the government properly invoked the privilege, and thus, the materials were not subject to disclosure. *Id.* at 11.

¹³ *Sterling*, 416 F.3d at 342.

¹⁴ *Id.* at 343.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

If the trial court determines that any response to a question or discovery request would have a "deleterious effect on national security," it may cease its inquiry and accept the government's claim of privilege.¹⁹ The court explained that the circumstances of each case determine what a court will need to satisfy itself that the privilege was properly invoked.²⁰ The greater the plaintiff's showing of necessity, the further the court will inquire into the claim of privilege.²¹ However, the risk of exposing national secrets can trump even the worthiest of necessities.²²

The law does not require that the court review *in camera* all materials that allegedly contain state secrets.²³ If circumstances indicate that examination of classified materials, even in the privacy of a judge's chambers, would pose too great a risk, the court may deem such inquiry unwarranted.²⁴ According to the Fourth Circuit, "the party seeking *in camera* review must make some threshold showing that such review is appropriate."²⁵ "Courts are not required to play with fire and chance further disclosure—inadvertent, mistaken, or even intentional—that would defeat the very purpose for which the privilege exists."²⁶

Sterling's main contention on appeal was that the CIA improperly invoked the state secrets privilege and that the district court erroneously dismissed his claims.²⁷ He further argued that the district court dismissed his claims without adequately considering whether available protective measures could guard the secrecy of classified materials in the course of litigation.²⁸

The Fourth Circuit reviewed Sterling's case in light of Title VII case law, noting that he must prove adverse employment action in order to show unlawful discrimination.²⁹ Looking to past precedent, the court determined

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* "[N]ational security concerns are paramount, for even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Id.* (quoting *Totten v. United States*, 92 U.S. 105, 107 (1875)) (concluding that public policy precludes litigation of lawsuits that would inevitably result in the disclosure of matters that the law deems to be confidential, and respecting which the law prohibits violation of confidence) (internal quotation marks omitted).

²³ *Id.*

²⁴ *Id.* at 344.

²⁵ *Id.* (quoting *United States v. Zolin*, 491 U.S. 554, 570 (1989)) (holding that the party advocating *in camera* review in order to determine whether privileged attorney-client communications fall within the crime-fraud exception must make a threshold showing that such review is appropriate) (internal quotation marks omitted).

²⁶ *Id.*

²⁷ *Id.* at 345.

²⁸ *Id.*

²⁹ *Id.* (citing *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 375 (4th Cir. 2004)) (defining adverse employment action and positing that adverse employment action is essential to proving Title VII claims, regardless of the route plaintiff takes to proving his case).

that Sterling could accomplish this by proving either discriminatory intent³⁰ or disparate treatment.³¹ Assuming all elements are met, the burden would shift to the CIA to show a legitimate, non-discriminatory reason for its actions, and then return to Sterling to prove that the CIA's explanation was a "pretext for discrimination."³²

The court explained that the state secrets privilege could go forward only if the CIA had properly invoked it.³³ For this to happen, the one who has control over the matter, the CIA Director in this case, must personally consider the matter before lodging a formal claim of privilege.³⁴ After invoking the privilege, he must articulate his reasons for so doing.³⁵ According to the Director of the CIA, he had complied with proper protocol, having claimed the privilege after personally considering the situation and also having set forth reasons supporting it.³⁶ He explained that Sterling could not make a prima facie case of discrimination without "compromis[ing] CIA sources and methods, threaten[ing] the safety of intelligence sources, and adversely affect[ing] foreign relations."³⁷ Persuaded by the facts, the court found that this information was foundational to Sterling's case and concluded that disparate treatment could not be proved without disclosing the names, positions, and duties of other Operations Officers and supervisors.³⁸ Neither could Sterling make a case for discriminatory intent without bringing confidential information to light.³⁹

The Fourth Circuit postulated that even if Sterling could convince the court that he could make a case for employment discrimination without revealing state secrets, the government's rebuttal case inevitably must reference the protected material.⁴⁰ The CIA would have to furnish nondiscriminatory reasons for its treatment of Sterling and would be compelled to explain why Sterling received different tasks and operational tools than similarly situated peers.⁴¹ "The evidence required would *inescapably* reveal the criteria inherent in sensitive CIA decisionmaking."⁴² Furthermore, the court determined that the very methods employed for

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* (citing *Reynolds*, 345 U.S. at 7-8) (articulating the protocol for invoking the state secrets privilege).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 346.

³⁸ *Id.*

³⁹ *See id.* at 347 (describing Sterling's attempt to establish the elements of a Title VII claim without disclosing state secrets as an "impossible feat").

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* (emphasis added).

gathering evidence would jeopardize privacy.⁴³ Disclosure of information deemed inconsequential by uninformed minds could lead to disastrous results if leaked.⁴⁴

Sterling's final argument was that dismissal of all his claims was in error, even if the state secrets privilege applied.⁴⁵ The Fourth Circuit disagreed, reasoning that dismissal was inevitable because the "sum and substance" of the case concerned state secrets.⁴⁶ According to the court, "when the very subject of the litigation is itself a state secret, which provides no way [that] case could be tried without compromising sensitive military secrets, a district court may properly dismiss the plaintiff's case."⁴⁷ It added that dismissal is appropriate only when no efforts of the court or parties can produce adequate protection for the privileged material.⁴⁸ Nevertheless, it determined that all efforts to devise adequate protective measures in Sterling's case still would fall short of guaranteeing complete secrecy.⁴⁹

Although the court rejected Sterling's claim, it did note that other avenues of recourse were available to him.⁵⁰ For example, Sterling and those in similar circumstances, could utilize the CIA's EEO process to resolve his disputes.⁵¹ However, the court did caution that the availability of alternative internal or administrative processes had no bearing on the validity of the agency's invocation of the privilege.⁵²

Accordingly, the Fourth Circuit held that the state secrets privilege was properly invoked by the CIA Director and that Sterling's claims were rightly dismissed.⁵³ The court need not inquire further, having satisfied itself

⁴³ *Id.*

⁴⁴ *Id.* "[W]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." *Id.* (quoting *CIA v. Sims*, 471 U.S. 159, 170 (1985)) (finding that it was clear from the National Security Act of 1947 that "Congress intended to give the Director of the CIA broad power to protect the secrecy and integrity of the intelligence process") (internal quotation marks omitted).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 347–48 (quoting *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1243 (4th Cir. 1985)) (concluding that the district court did not err in dismissing petitioner's case because the substance of the litigation comprised state secrets and petitioner's case could not be tried without compromising those secrets) (internal quotation marks omitted).

⁴⁸ *Id.* at 348.

⁴⁹ *Id.* "Such procedures, whatever they might be, still entail considerable risk. Inadvertent disclosure during the course of a trial—or even in camera—is precisely the sort of risk that *Reynolds* attempts to avoid. At best, special accommodations give rise to *added opportunity* for leaked information. At worst, the information would become public, placing covert agents and intelligence sources alike at grave personal risk." *Id.* (emphasis added).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 348–49.

that resolution of petitioner's claims would lead to inadvertent disclosure of state secrets.⁵⁴

CONCLUSION

Although the Fourth Circuit did not expressly state that Title VII plaintiffs are without legal recourse should they bring an action against the CIA, the effect of its decision is to place relief beyond the grasp of most parties when the agency claims the state secrets privilege.

Certainly, there are important policy reasons behind the privilege. The government has a vital interest in preserving national security. In today's post-September 11 world, protection against terrorism is a high priority in the United States and abroad. Therefore, the government has a keen interest in preserving the confidentiality of its strategies, methods, informants, and operatives. However, these policy reasons, as important as they are, should not eclipse the government's duty to safeguard employee rights against discrimination. Any tendency to erode these rights must be checked.

Here, the Fourth Circuit dismissed Sterling's claim upon a cursory review of the case. It urged that "dismissal is appropriate [o]nly when no amount of effort and care on the part of the court and the parties will safeguard privileged material,"⁵⁵ but the careful consideration of available protective measures that would follow from such a statement was absent. The effect of the decision may be to minimize government accountability and leave vulnerable employee rights against discrimination. Once the government mounts the privilege, it may enjoy a near complete insulation from suit. The Title VII claimant may be denied his day in court.

The Fourth Circuit's opinion was also surprisingly abstract. Unlike most state secrets cases, which typically are ruled on specific discovery requests, the holding here was an outright, plenary dismissal. No concrete discovery requests or access to particularized information were at issue.⁵⁶ Instead, the court appeared to assume on an abstract basis that Sterling could not make his case without exposing state secrets.

It is important to note that there are varying degrees of classified material. One document may not be as sensitive as the next, and not everything that is classified is so sensitive that it cannot withstand *in camera*

⁵⁴ *Id.*

⁵⁵ *Id.* at 348 (quoting *Fitzgerald*, 776 F.2d at 1244); see *supra* note 47 and accompanying text (noting that a court may dismiss a case where it cannot be litigated without divulging state secrets).

⁵⁶ See *id.* (stating "Sterling's argument that the court could devise special procedures that would allow his suit to proceed must . . . fail. Such procedures, *whatever they might be*, still entail considerable risk.") (emphasis added).

review or safe-keeping by protective measures. However, this notion was strangely absent from the Fourth Circuit's analysis. The court should have inquired into the level of secrecy that various materials required and considered whether appropriate protective measures could be devised to allow at least partial admission. Materials that required the utmost secrecy would be omitted, while materials requiring less secrecy would be guarded through appropriate safeguards. It was not clear from the opinion, however, whether the court even knew the nature of the state secrets and whether the secrets were as sensitive as the court considered them to be.

Had the court found that certain of the classified information could have been protected from disclosure through appropriate means, it could have recommended a number of safeguards. Protective measures might have included *in camera* review or a bench trial rather than a jury trial. This would have required Sterling to forego his right to trial by jury, but such a choice should have been his to make. Other alternative options include holding depositions could be held at CIA headquarters, with transcripts taken and maintained by CIA personnel, or the use of pseudonyms in court documents and opinions to protect the identity of operatives and other personnel. Conceivably, several other options were available to the court had it made greater efforts to explore reasonable measures to protect the government's interests while allowing Sterling to litigate his claims.

The court noted that the CIA's EEO process was available to Sterling as an alternative for resolving his disputes.⁵⁷ This provides little consolation to Sterling, however, because his retaliation claim was based upon his prior use of the EEO process.⁵⁸ Specifically, Sterling claimed that CIA management had acted against him for utilizing this very avenue.⁵⁹ If the CIA had retaliated against Sterling for using its internal procedures, the likelihood that he would obtain a more favorable result on the second attempt is questionable.

The Fourth Circuit's decision poses grave implications beyond Title VII discrimination claims. Conceivably, CIA employees may suffer any number of injustices, including curtailment of constitutional rights such as freedom of speech and religion, yet be without legal recourse. Personal rights enshrined in the Constitution could be sacrificed to the state secrets privilege, and claimants deprived of their day in court. In light of the important personal liberty and national security interests at stake, there should be special efforts to develop provisions that will allow claimants to

⁵⁷*Id.*⁵⁸*See id.* (admitting that Sterling had already utilized the CIA's EEO process).⁵⁹*Id.* at 341.

litigate their cases against the nation's intelligence agencies, while guarding national security in the process.

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