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U.S. Court of Appeals

GOVERNMENT INFORMATION

SUMMARY JUDGMENT

Summary judgment was improperly granted in Freedom of Information Act case where inferring facts favorably to requestor shows issues of whether complete disclosure was make of Kennedy Assassination items.

WEISBERG v. U.S. DEPARTMENT OF JUSTICE, ET AL., U.S.App.D.C. No. 78-1107, April 28, 1980. *Reversed and remanded* per S. Robinson, J. (Bazelon, J. and Van Dusen, J. (3rd Cir.) concur). *James H. Lesar* for appellant. *John H. Korns* with *Earl J. Silbert, John A. Terry, Michael W. Farrell* and *Michael J. Ryan* for appellees. Trial Court— Pratt, J.

S. ROBINSON, J.: Harold Weisberg appears here for the third time in his decade-long crusade under the Freedom of Information Act (the Act) for documents bearing on the assassination of President Kennedy. The present appeal is from a summary judgment in the District Court holding that the Department of Justice had disclosed all available material within the scope of Weisberg's quest. Our review of the record constrains us to conclude that the Department's demonstration on that score was inadequate for purposes of summary judgment. Accordingly, we reverse the judgment and remand the case for further proceedings.

I

In 1970, Weisberg petitioned the Federal Bureau of Investigation (FBI) for release of spectrographic analyses of several items of Kennedy-assassination evidence. The FBI denied his request, claiming that the analyses were protected from disclosure by Exemption 7 of the Act, a provision shielding investigatory files compiled for law enforcement purposes. In 1973, this court, sitting *en banc*, upheld that determination. Following our decision, however, Congress amended the Act and narrowed the scope of Exemption 7.

Weisberg then renewed his demands for investigatory data, directing them to both the FBI and the Atomic Energy Commission. Although some documents were disclosed, Weisberg felt that the agencies had made an inadequate response, and attempted to establish through interrogatories that there were additional records not provided to him. On the agencies' motion, the District Court quashed the interrogatories as "oppressive," found that the agencies had "complied substantially" with Weisberg's requests, and dismissed his case as moot. We reversed, however, finding material disputed facts regarding the existence of relevant but unreleased records, and holding that Weisberg was entitled to further discovery.

In remanding for that purpose, we express-

(Cont'd. on p. 993 - Judgment)

U.S. Court of Appeals

CIVIL RIGHTS

EXHAUSTION DOCTRINE

District Court erred in ruling that federal employee had not put agency on notice of lack of promotion claim in discrimination grievance and thus had not exhausted administrative remedy.

PRESIDENT v. VANCE, ET AL., U.S.App. D.C. No. 78-1226, April 25, 1980. *Affirmed in part, reversed in part* per S. Robinson, J. (Bazelon, J. concurs) Leventhal, J. participated, but died before decision and judgment). *Roma J. Stewart* for appellant. *John H.E. Bayly, Jr.* with *Earl J. Silbert, John A. Terry, Peter E. George* and *Dennis A. Dutterer* for appellee. Trial Court— Hart, J.

S. ROBINSON, J.: This appeal is but the latest skirmish in Samuel R. President's five-year quest for complete relief from the effects of admitted racial employment discrimination at the Department of State. The question is the precision with which a federal employee must formulate his grievance in order to exhaust administrative remedies prior to suit under Title VII of the Civil Rights Act of 1964. The District Court granted the motion of the Secretary of State for summary judgment, holding that President had not exhausted sufficiently with regard to the particular relief he now seeks. We affirm in part, reverse in part, and remand for further proceedings.

* * *

President's primary contentions are that the District Court erred in holding that he had failed to exhaust his administrative remedies with respect to promotion, and in finding the rest of his case moot. In addition, President argues that a declaratory judgment should have been summarily granted in his favor.

A. *Exhaustion*

Section 717(c) of Title VII authorizes a civil action by a federal employee asserting proscribed discrimination, but only after redress has been sought at the hand of the employing agency. More particularly for this case, the employee may sue when more than 180 days have passed since the filing of an administrative complaint without final agency action thereon. Upon timely compliance with these requirements, the aggrieved employee is entitled to a trial *de novo* on the claims.

President had not obtained final agency action when, almost two years after filing his administrative complaint, he came into the District Court. Thus, it might appear at first blush that he had fully met Section 717(c)'s exhaustion requirements. The Secretary urges, however, that because President's administrative complaint did not expressly request promotion from GS-12 to GS-13 as part of its prayer for relief, he was precluded from seeking that type of redress in a civil action. The District Court accepted this

(Cont'd. on p. 992 - Doctrine)

U.S. Court of Appeals

OTHER ACTION

IN RE: SURFACE MINING REGULATION LITIGATION, U.S.App.D.C. No. 78-2190, 78-2191 and 78-2192, May 2, 1980. *Opinion* per Robb, J. (McGowan and Tamm, JJ. concur). *Robert N. Sayler* with *Theodore Voorhees, Jr.* and *Robert J. Gage* for appellants American Mining Congress and National Coal Association. *Warner W. Gardner* for appellant Peabody Coal Company. *Thomas G. Johnson* for appellant R & F Coal Company. *John L. Kilcullen* for appellant Utah International, Inc. *John A. MacLeod* and *Richard McMillan, Jr.* for appellants Consolidation Coal Company and The North American Coal Corporation. *Peter J. Nickles* and *Eugene D. Gulland* for appellant Sunoco Energy Development Company. *Michael A. McCord* with *Sanford Sagalkin* and *Carl Strass* for appellees. *Terence L. Thatcher, L. Thomas Galloway* and *Jonathan Lash* for appellees National Wildlife Federation, et al. Trial Court— Flannery, J.

ROBB, J.: In this case we are presented with challenges to interim regulations promulgated by the Secretary of the Interior pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1201 *et seq.* (Supp. II 1978) (Surface Mining Act or Act). Following publication of the interim regulations in final form on December 13 and 16, 1977, twenty-two complaints attacking the regulations were filed in the United States District Court for the District of Columbia by coal mine operators, mining trade associations, environmental groups, and three states. The District Court rejected the attacks, and these appeals followed.

* * *

* * * [W]e affirm, the District Court's rejection of the Surface Miners' three general challenges to the interim regulations as a whole and specific challenge to the enforcement regulations concerning surface mining on Indian lands. We reverse the District Court, however, as to the 1,000-foot distance limitation on blasting, the one inch per second maximum limitation on peak particle velocity produced by blasting, and the grandfather exemption for surface mining on prime farmlands; and we hold invalid those provisions of the interim regulatory program. Finally, we remand the issue of the interim effluent regulations to the District Court for proceedings, as detailed above, not inconsistent with this opinion.

TABLE OF CASES

United States Court of Appeals

and, if an anti-promotional policy affecting minority officers were proven, he obviously was among its potential victims. And it is impossible to conceive of an inferior performance evaluation as other than a detriment to promotion.

Even had it not been entirely clear from the face of the complaint that President sought promotion as part of his remedy, the Department certainly was told during the course of the administrative proceeding, and well before it issued its final decision, that President's claims were based in part upon a belief that he had been discriminated against in his chances for promotion. The administrative record includes a memorandum in which the EEO counselor who originally heard and investigated President's complaint stated that he had "assert[ed] that the effect of the [biased] performance rating would be to hamper the promotion opportunities of a qualified minority officer." And in President's letter rejecting the Department's proposed relief, he expressly referred to "the remedy that I requested for getting promoted above the GS 12 level."

In the face of these positive indications that the Department was on notice that promotion was an issue, the Secretary nevertheless insists, and the District Court held, that President had not adequately raised the question of promotion in the administrative proceeding. Simply put, the position seems to be that an aggrieved employee may not litigate promotional discrimination in court unless at the administrative level he sought promotion to a specific position or grade. We think so strict a requirement would impose far too heavy a burden upon a lay complainant, and far too little responsibility on the agency, particularly one that has admitted its own wrongdoing.

Pertinent legislative history teaches that when Congress amended Title VII in 1972 to cover federal as well as private-sector employees, it was mindful that ofttimes administrative complaints would be lodged by law persons without benefit of legal assistance. By insisting in Section 717(c) that a complaining employee seek relief within his agency in the first instance, Congress made certain that the agency would have the opportunity as well as the responsibility to right any wrong that it might have done. Congress did not, however, intend to erect a massive procedural roadblock to access to the courts. On the contrary, far from hampering resort to these potential forums for resolution of discrimination claims, Congress contemplated that the exhaustion doctrine would be held within limits consonant with the realities of the statutory scheme.

In the context of private-sector employment discrimination, the Supreme Court has held that Title VII's exhaustion requirement should not be read to create useless procedural technicalities; "[s]uch technicalities," the Court admonished, "are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." Similarly, this court had declared that administrative complaints by private-sector employees "are to be construed liberally since very commonly they are framed by persons unschooled in technical pleading." Other circuits have articulated similar conclusions respecting the specificity with which a private-sector employee must draft his administrative complaint. Federal employees face identical obstacles, and we perceive no reason whatsoever for subjecting them to disparate treatment.

We cannot agree, then, that the Department lacked adequate notice that President desired promotion. It cannot reasonably be expected that a lay complainant will always phrase his prayer for relief so narrowly as to leave no question about what he seeks; indeed, he may not even be aware of all of his legal rights or available remedies. Once discrimination has been demonstrated, a respectable part of the burden of fashioning suitable relief must shift to the discriminating agency lest the ultimate goal of Title VII be frustrated.

Properly understood, the exhaustion rule does not point to a different conclusion. It is not an end in itself; it is a practical and pragmatic doctrine that "must be tailored to fit the peculiarities of the administrative system Congress has created." Exhaustion under Title VII, like other procedural devices, should never be allowed to become so formidable a demand that it obscures the clear congressional purpose of "rooting out . . . every vestige of employment discrimination within the federal government." We think that wholesome objective would be disserved by requiring in the name of exhaustion more of President than he already has done.

C. *Mootness*

The District Court also held that any further claim envisioned by President was moot because all other relief sought had been granted. That ignores an issue on whether all relief awarded has actually been implemented. The question on that score is one of fact, and here the fact is in dispute.

In support of their cross-motions for summary judgment, both parties filed statements of the facts they deemed uncontested. The Secretary's filing asserted that "[a]ll duties for a validly classified Civil Service grade GS-12 position have been restored to plaintiff and he is presently performing those duties." The Secretary attempted to undergird this position by two affidavits, one rather conclusory and the other more detailed. President, however, presented two counter-affidavits of his own, each containing a point-by-point denial of the relevant facts alleged in the Secretary's affidavits. It is thus evident that the controversy over restoration of the grade GS-12 duties is not moot.

D. *Relief*

President is entitled to a trial *de novo* in the District Court on two issues: restoration of duties to his GS-12 position and promotion. As long as material facts remain in dispute, he is not, however, entitled to summary relief. Nor, contrary to President's position, until he has established by evidence a prima facie case of discrimination will the burden of proof shift to the Secretary. Should, however, he prevail at trial on one or both issues, the District Court will fashion appropriate relief.

To the extent that the District Court's order denied President's motion for summary judgment, it is affirmed. In all other respects the order is reversed and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUDGMENT

(Cont'd. from p. 989)

ed the opinion that success in locating the desired data might be promoted if Weisberg sought testimony from those who conducted the scientific tests and generated the records, instead of questioning present custodians of the files. Weisberg followed this suggestion and deposed four FBI agents who had personal knowledge of the tests performed. He also resubmitted interrogatories and requests for production of documents to the FBI and the Energy Research and Development Administration (ERDA), the successor to the Atomic Energy Commission. Weisberg then endeavored to depose FBI Special Agent John W. Kilty on the scope of the search that had been made of FBI files. Kilty had earlier executed two affidavits avowing that the files contained no information of interest to Weisberg other than that already furnished him.

The Department of Justice moved for a protective order to prevent the deposition, and to quash an accompanying subpoena, on the grounds that they would be unduly burdensome and would exceed the scope of our earlier remand, which the Department interpreted as confining discovery to testimony by those directly involved in creating the investigative records. The District Court, persuaded that the deposition would impose "an unnecessary burden," granted the motion, and, in a subsequent memorandum opinion, awarded the Department a summary judgment, holding that it had adequately demonstrated that all available documents within the purview of Weisberg's demands had been released, and thus had met its burden of showing that there remained no genuine issue of material fact.

Weisberg now appeals this disposition, contending that summary judgment was improper because the depositions and the responses to his interrogatories identified documents not given to him, and the Department had not substantiated a file search of a caliber sufficient to assure retrieval of all existing data. After carefully reviewing the record before us, we find that there remains a genuine issue of material fact as to whether all extant documents encompassed by Weisberg's request have been located.

* * *

The Department of Justice relies entirely on a claim of complete disclosure. Thus, to prevail, it must demonstrate that there was no genuine issue respecting its assertion that all requested documents in its possession had been both unearthed and unmasked. In an effort to do so, the Department first contends that Agent Kilty's affidavits made a prima facie showing that the file search was thorough enough to uncover any data meeting Weisberg's specifications. The Department further asserts that Weisberg failed to rebut this preliminary showing because the evidence adduced during discovery did not identify anything responsive to his request that has not now been disclosed. When, however, the evidence is viewed in the light most favorable to Weisberg— as indubitably it must be— we find that solicited but unproduced material may still be in FBI files. As the record presently stands, the FBI's affirmations on the quality of the search do not eliminate that possibility.

Among the items identified through discovery was a spectrographic plate made during testing of a lead smear from the Dealey Plaza curbstone to determine whether it was caused by a bullet involved in the assassination. The Department does not deny that this plate once existed; instead, in attempted explanation of the FBI's failure to produce the plate, the Department points to a statement by FBI Special Agent William R. Heilman that he believed the plate was discarded in one of the periodic housecleanings by the laboratory. True it is that this morsel of evidence could lead to the conclusion, reached by the District Court, that the spectrographic plate is no longer in the FBI's possession. But Heilman asserts no personal knowledge that the plate

really was discarded, so another permissible inference is that Heilman is incorrect in his belief and that the plate remains somewhere in the FBI's domain. A factual question thus persists, and it was inappropriate for the District Court to undertake to resolve it at the stage of summary judgment.

The deposition of FBI Special Agent John F. Gallagher indicated that neutron activation analysis (NAA) was conducted on specimen Q3, a bullet fragment found on the right front seat of the presidential limousine, and on specimen Q15, residues collected by scraping the vehicle's windshield. Weisberg claimed that the computer printouts containing the raw data from the NAA testings have been withheld. Agent Gallagher testified responsively that these data sheets may not have been kept because they were duplicative of information recorded on worksheets at the time of the testing, copies of which have been provided to Weisberg. Again, although the District Court took this evidence as sufficient to demonstrate that the printouts were no longer available, that result was not compelled. Viewing the evidence in the light most favorable to Weisberg, one might easily infer that the printouts were not discarded and are still in the FBI's possession.

FBI Special Agent Robert A. Frazier stated that he had asked another agent, possibly Paul Stombaugh, to conduct an examination of the shirt worn by the President to determine whether two holes in the collar overlapped—a question bearing on whether both holes were made by a single bullet. After comparing this with Frazier's contradictory testimony before the Warren Commission, the District Court concluded that Frazier examined the shirt himself, and therefore that Stombaugh had not made any such examination at all. The court's deduction was hardly illogical but, more to the point, was not inexorably required; while Frazier's Warren Commission testimony may have been the correct version, from aught that appeared his deposition statements could have been more accurate. Weisberg, we repeat, should have been the beneficiary of the inference more favorable to him—that Stombaugh did make the examination and his report is somewhere in FBI files.

Thus, accepting the indications most favorable to Weisberg, at least these three documents should have turned up during the search of FBI files. Since the Department did not show positively that the primary facts are not susceptible to this interpretation, it was not entitled to summary judgment. The Department asserts, however, that even if the record did not establish that all once-existing records had either been produced or discarded, the affidavit of Agent Kilty adequately demonstrated the thoroughness of the FBI file search and negated any inference that other requested documents still remained in the files.

We have heretofore taken pains to define the role of affidavits in situations of this sort:

> [O]f course, in adjudicating the adequacy of the agency's identification and retrieval efforts, the trial court may be warranted in relying upon agency affidavits, for these "are equally trustworthy when they aver that all documents have been produced or are unidentifiable as when they aver that identified documents are exempt." To justify that degree of confidence, however, supporting affidavits must be " 'relatively detailed' and nonconclusory and must be submitted in good faith." Even if these conditions are met the requester may nonetheless produce countervailing evidence, and if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order.

Kilty's affidavit states only that:

> I have conducted a review of FBI files which would contain information that Mr. Weisberg has requested. . . .The FBI files to the best of my knowledge do not include any information requested by Mr. Weisberg other than the information made available to him.

Even if, as the Department argues, this is to be read as an indication of a review of *all* FBI files potentially containing information Weisberg demanded, the affidavit gives no detail as to the scope of the examination and thus is insufficient as a matter of law to establish its completeness. This is particularly so in view of the inferences, arising from the other evidence, that some documents once existing may not have been discarded and thus remain in the files.

Unlike earlier cases in which summary judgment was predicated in part on a finding that the document search was complete, the agency affidavits now before us do not denote which files were searched or by whom, do not reflect any systematic approach to document location, and do not provide information specific enough to enable Weisberg to challenge the procedures utilized. Under these circumstances, issues genuinely existed as to the thoroughness of the FBI search, and consequently summary judgment was improper. Moreover, since resolution of these disputes was essential to disposition of Weisberg's several claims, the District Court should have permitted him to depose at least Agent Kilty and perhaps others who examined the files. Courts have ample authority to protect agencies from oppressive discovery— for example, by limiting the scope of permissible questioning— and surely they need not sanction depositions down to the level of each individual participating in the search. But the court becomes unduly restrictive when it bans further investigation while the adequacy of the search remains in doubt.

The judgment appealed from is reversed, and the case is remanded to the District Court to enable further proceedings consistent with this opinion.

Reversed and remanded.

LEGAL NOTICES

U.S. COAST GUARD

Notice is hereby given that an order dated 15 May 1980, has been issued by the undersigned authorizing the name of the Ol. s. L'CHAYIM, official number 554418, owned by Rodney Todd Reinhardt & Nancy M. Long, of which Washington, D.C. is the home port, to be changed to NICE ONE. M. HERRERA, Documentation Officer. By direction of the Officer-in-Charge, U.S. Coast Guard, Marine Safety Office, Baltimore, Maryland.

May 27, 28, 29, 30.

FIRST INSERTION

AJIBADE, Raphael

R. K. Millstien, *Attorney*
821 15th St., N.W., Washington, D.C.

[Filed May 16, 1980. Joseph M. Burton, Clerk, Superior Court of the District of Columbia.] Superior Court of the District of Columbia. Family Division. Domestic Relations Branch. Raphael Ajibade, Plaintiff vs. Brenda E. Ajibade, Defendant. Civil Action No. D-257-80. ORDER PUBLICATION— ABSENT DEFENDANT. The object of this suit is to obtain an absolute divorce (voluntary separation for more than one year without cohabitation). On motion of the plaintiff, it is this 15th day of May, 1980, ordered that the defendant, Brenda E. Ajibade, cause her appearance to be entered herein on or before the fortieth day, exclusive of Sundays and legal holidays, occurring after the day of the first publication of this order; otherwise the cause will be proceeded with as in case of default. Provided, a copy of this order be published once a week for three successive weeks in the Washington Law Reporter, and the Afro American Newspaper, before said day. /s/ E. HAMILTON, *Judge*. [Seal.] Attest: *Clerk of the Superior Court of the District of Columbia*. By Harold Keye, *Deputy Clerk*.

May 29, June 5, 12.