Civil Rights -- Racial Discrimination in Teacher Hiring and Assignment Forbidden

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NOTES AND COMMENTS

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In two recent cases involving teacher discrimination in the Durham and in the Hendersonville, North Carolina public school systems the United States Court of Appeals for the Fourth Circuit ordered that decisions as to employment and retention of teachers be made without regard to race.

Wheeler v. Durham City Bd. of Educ.[1] is another step in the continuing litigation by which Negro parents and pupils in Durham have sought "rights and privileges assertedly accorded them by Brown v. Board of Education . . . ."[2]

In 1965 the court of appeals disapproved a pupil assignment plan tendered by the school board and remanded in order that a constitutional plan might be adopted.[3] On remand the plaintiffs opposed a new "Permanent Plan for Desegregation of the Durham City Schools"[4] solely because no provision was made in the school board plan to eliminate race as a factor in teacher employment; and they applied to the court for an order effectuating such a provision. After a full evidentiary hearing the district court denied their application.[5] Denial was grounded on lack of jurisdiction to adjudicate teachers' rights—since none were parties to the action—and on the plaintiffs' failure to prove any substantial relation between teacher employment and assignment on the basis of race and the constitutionality of the proposed pupil plan.[6]

On appeal, the court of appeals held that it was error to refuse the order sought by plaintiffs and reversed. Judge Bryan, speaking for a unanimous court said:

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[1] 363 F.2d 738 (4th Cir. 1966).

[2] *Id.* at 739. This litigation was begun in 1960 and the principal case is the fourth appeal in the series. For a complete recount up to, but not including, the principal case see Wheeler v. Durham City Bd. of Educ., 346 F.2d 768, 768-72 (4th Cir. 1965). It is significant that plaintiffs' contentions have been unanimously sustained in all four appeals.

[3] Wheeler v. Durham City Bd. of Educ., 346 F.2d 768 (4th Cir. 1965).

[4] 363 F.2d at 740.

[5] Wheeler v. Durham City Bd. of Educ., 249 F. Supp. 145 (M.D.N.C. 1966).

[6] *Id.* at 153-54.

> We read . . . [*Bradley v. School Board*] as authority for the proposition that removal of race considerations from faculty selection and allocation is, as a matter of law, an inseparable and indispensable command within the abolition of pupil segregation in public schools as pronounced in *Brown v. Board of Education* . . . . Hence no proof of the relationship between faculty allocation and pupil assignment was required here.[7]

Noting that the district court's findings of fact clearly established that race was a factor in teacher assignment and employment, the court vacated the trial court's judgment in that respect and ordered that all future teacher assignment and employment be conducted without regard to race.[8]

Plaintiffs in *Chambers v. Hendersonville City Bd. of Educ.*,[9] sixteen Negro teachers, sought an injunction against "racially discriminatory practices and policies"[10] of the school board that had allegedly resulted in their failure to be re-employed. The teachers' dispute stemmed from a reduction in the enrollment of Negro pupils in the school system[11] and from the subsequent integration of the remaining Negro pupils into the formerly white schools. As a result, the number of teacher jobs in the system was reduced by five. Although twenty-four Negro teachers had been employed up to that time, only eight were retained for the year 1965-1966. The trial court rejected plaintiffs' argument that this—the reduction from twenty-four to eight—in itself raised an inference of discrimination, and proceeded to examine the school superintendent's reasons for not re-employing each one. He found that they were all valid nondiscriminatory reasons[12] and dismissed their complaint, the plaintiffs having failed to carry the burden of proof.

The court of appeals, in a 3-2 decision, reversed that dismissal. In an opinion by Judge Bell, the majority found that since "the

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[7] 363 F.2d at 740.

[8] *Id.* at 741.

[9] 364 F.2d 189 (4th Cir. 1966).

[10] *Id.* at 190.

[11] 217 Negro students from neighboring counties who had previously attended the consolidated "Negro" school in Hendersonville were by court order integrated into their home county schools. *Id.* at 190.

[12] There was no "objective" reason for the failure to retain one of the teachers. Although the judge indicated that her qualifications appeared to him to be excellent, he declined to substitute his judgment for that of the superintendent, since he felt the decision had been made in good faith. Chambers v. Hendersonville City Bd. of Educ., 245 F. Supp. 759, 764-65 (W.D.N.C. 1965).

mandate of Brown v. Board of Education . . . forbids the consideration of race in faculty selection"[13] the Board's apparent policy of giving Negro pupils "adequate representation at the teacher level"[14] implied a racial "quota" and was unlawful. The court held that this policy coupled with a community history of racial discrimination formed a backdrop against which the "sudden disproportionate decimation in the ranks of the Negro teachers"[15] raised an inference of discrimination. The burden thus placed on the school board of justifying its conduct was not met. Accordingly, the court ordered the board to set up "definite objective standards for the employment and retention of teachers and to apply them to all teachers alike . . . ."[16]

Racial discrimination in faculty selection and allocation was not specifically condemned as unconstitutional in *Brown v. Board of Educ.*[17] Subsequent lower court decisions have frequently been sidetracked by problems of standing[18] and of burden of proof.[19] These threshold problems and the broad discretion allowed trial courts have prevented courts from meeting the constitutional question squarely.[20]

[13] 364 F.2d at 192.

[14] *Id.* at 190.

[15] *Id.* at 192.

[16] *Id.* at 193.

[17] 347 U.S. 483 (1954); 349 U.S. 294 (1955). The second case is frequently referred to as the "implementing" decision. The original decision was grounded on the conclusion that "segregation . . . deprived [plaintiff pupils] of the equal protection of the laws guaranteed by the Fourteenth Amendment" and not on violation of the amendment's due process clause. 347 U.S. at 495.

[18] *E.g.*, Bell v. School City, 324 F.2d 209 (7th Cir. 1963) where it was held that no affirmative constitutional duty was imposed on school boards to change innocently arrived at racial "imbalance," either in student bodies or in faculties; Brooks v. School District, 267 F.2d 733 (8th Cir. 1959) where Negro teachers were held to have the burden of proving that they were not retained because of race. The latter case was distinguished by the court of appeals in *Hendersonville* on the grounds that Hendersonville's history of racial discrimination was not duplicated there.

[19] Augustus v. Board of Pub. Instruction, 306 F.2d 862 (5th Cir. 1962) where it was held error for a trial court to allow a motion to strike plaintiff's allegation relating to racial teacher assignments. See cases cited note 21 *infra.*

[20] For an example of the broad trial court discretion allowed in dealing with the question see Board of Pub. Instruction v. Braxton, 326 F.2d 616, 620-21 (5th Cir. 1964) (within trial court authority to enjoin teacher assignment on the basis of race); Calhoun v. Latimer, 321 F.2d 302, 311 (5th Cir. 1963) (no error for trial court to postpone consideration of racial teacher assignment). The *Calhoun* decision, however, has been severely undermined by Bradley v. School Bd., 382 U.S. 103 (1965). See notes 31-32 *infra* and accompanying text. See generally Knowles, *School Desegregation* 42 N.C.L.

Parents and pupils have had standing to raise the question of teacher assignment and employment based on race "to the extent it involves an asserted denial of constitutionally protected rights of the pupils."[21] But in order to make out a cause of action they were required to prove that racially motivated teacher assignments caused a deprivation of the pupils' constitutional rights; that the denial thus caused made the desegregation plans under attack inadequate under *Brown v. Board of Educ.* The question of the nature of proof required seems to have been contemplated by the courts as one of fact, or law, or both.[22] Whatever it was, it has almost uniformly eluded plaintiffs' grasp.[23] Thus pupils' "standing" has been a rather hollow right.

A long standing statutory remedy exists for deprivations of constitutional rights by persons acting under color of law.[24] A pub-

REV. 67, 83-84 (1963); Note, *Desegregation of Public School Faculties,* 51 IOWA L. REV. 681 (1966); Note, *Discrimination in the Hiring and Assignment of Teachers in Public School Systems,* 64 MICH. L. REV. 692 (1966).

[21] Bradley v. School Bd., 345 F.2d 310, 320 (4th Cir. 1965). See also Northcross v. Board of Educ., 333 F.2d 661 (6th Cir. 1964); Mapp v. Board of Educ., 319 F.2d 571 (6th Cir. 1963); Augustus v. Board of Pub. Instruction, 306 F.2d 862 (5th Cir. 1962); Christmas v. Board of Educ., 231 F. Supp. 331 (D. Md. 1964).

[22] *E.g.,* "[I]n a particular case it may be regarded as a question of law or of fact. . . ." Bradley v. School Bd., 345 F.2d 310, 320 (4th Cir. 1965). See Augustus v. Board of Pub. Instruction, 306 F.2d 862, 868 (5th Cir. 1962) where court discusses the propriety of allowing defendant's motion to strike plaintiffs' allegation that racial teacher assignment constituted a deprivation to pupils which was prohibited by *Brown v. Board of Educ.* The court dealt with both "questions of fact" and "questions of law" implying unwillingness to categorize the issue precisely.

Whether racially discriminatory teacher assignments exist would seem to be a question of fact; whether admittedly discriminatory practices are forbidden by *Brown v. Board of Educ.,* a question of law. But whether racially motivated teacher assignments impose a denial of the "equal protection" contemplated by *Brown v. Board of Educ.* is apparently a mixed bag.

[23] See the trial court's opinion in one of the principal cases, Wheeler v. Bd. of Educ., 249 F. Supp. 145 (M.D.N.C. 1966). Plaintiff pupils introduced the testimony of several educators and sociologists directed toward proving that faculty segregation had an inhibitory effect on pupils. In denying the relief requested the court noted:

> Actually, the testimony of . . . [a sociologist] the most impressive witness offered by the plaintiffs, tends to disprove the plaintiffs' charge. While recognizing the desirability of assigning teachers without regard to race, . . . [he] felt that school children received the greatest benefit by coming into contact with the people of other races and cultures. This benefit would be denied Negro children attending a predominantly white school if they were not also taught by white teachers.

Id. at 154.

[24] REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1964). Plaintiff teachers

lic school teacher's standing to assert his own rights, therefore, has not been a problem.

The court of appeals, in both the principal cases, reaches the conclusion that "the mandate of Brown v. Board of Education . . . forbids the consideration of race in faculty selection just as it forbids it in pupil placement."[25] The *Hendersonville* opinion, published one month before the *Durham* opinion, contains no citation to supporting authority.[26] The *Durham* case on the other hand, reaches the conclusion after drawing what Judge Bryan seems to indicate is none too strong support from *Bradley v. School Bd.*[27]

Plaintiffs' contention in *Bradley* was that discrimination in faculty assignment made the proposed pupil assignment plans unconstitutional as to the pupils. The Supreme Court held that the district court erred in approving the plans without also holding a "full evidentiary hearing"[28] on that issue and remanded the case. The court of appeals construed the case as authority that factually discriminatory teacher assignment is, as a matter of law, unconstitutional under *Brown v. Board of Educ.* If that was the implication intended by the Supreme Court in *Bradley,* it is difficult to see why the Court remanded the case for an evidentiary hearing. For the hearing contemplated was to determine the "impact on . . . [the desegration plans] of faculty allocation on an alleged racial basis,"[29] not to determine whether the alleged racial faculty allocation in fact existed. A remand on the issue would seem to indicate that the outcome of the hearing itself would determine whether the relationship was such that it gave rise to a cause of action on behalf of the plaintiff pupils.

Nevertheless, the court of appeals unanimously concluded that factual discrimination in teacher assignment, as a matter of law, violates the command of *Brown v. Board of Educ.* and that no relationship between racial teacher assignment and pupils' rights must be shown. Since plaintiffs had proved at the trial that teacher

in the *Hendersonville* case based jurisdiction in their suit on this provision. 364 F.2d at 190 n.1.

[25] 364 F.2d at 192; 363 F.2d at 740.

[26] 364 F.2d at 192.

[27] 382 U.S. 103 (1965).

[28] *Id.* at 103.

[29] *Id.* at 103. In specific response to the court of appeals' implication in the opinion below that any relation between faculty assignment and pupils' rights was speculative the Court said simply: "There is no merit to the suggestion. . . ." *Id.* at 105.

assignments had been made on the basis of race, the court granted the relief sought.[30]

Removal of the troublesome proof requirement, even if somewhat lacking in precedential support, provides long needed relief to Negro plaintiffs.[31] Additionally, there can be little question that faculty segregation violates the spirit and the rationale of *Brown v. Bd. of Educ.*[32] These factors, combined with the clear congressional policy forbidding race considerations in employment decisions,[33] compel the conclusion that technical objections to the rule announced have been validly overridden.

In the *Hendersonville* case, Judge Bell, speaking for the majority, summarily concluded that *Brown v. Board of Educ.* commanded an end to teacher assignments based on race. But, unlike the *Durham* case, plaintiffs had not satisfactorily proved that racially discriminatory practices had been used. The majority drew an analogy to cases involving racial discrimination in jury selection where a community's history of discrimination has been held to raise an inference of discrimination which the party in possession of the facts must meet.[34] Thus, the court held that the board's apparent racially oriented retention policy and the sudden release of sixteen out of twenty-four Negro teachers, when superimposed on the com-

[30] 363 F.2d at 740-41.

[31] See note 23 *supra* and case cited there. Teachers have been hesitant, for a variety of reasons such as time, expense and fear of a hostile atmosphere, to become involved in litigation in order to assert their own rights. See Note, *Desegration of Public School Faculties,* 51 IOWA L. REV. 681, 682-83 (1966). In 1963, one writer characterized pupil integration as having moved at "glacial speed" and that teacher integration had not moved at all, Knowles, *School Desegregation,* 42 N.C.L. REV. 67, 83-84 (1963). No authoritative figures on teacher integration are available. However, for general estimates, both for the South as a whole and for each state individually, see SOUTHERN EDUCATION REPORTING SERVICE, STATISTICAL SUMMARY OF SCHOOL SEGREGATION-DESEGREGATION IN THE SOUTHERN AND BORDER STATES (1965).

[32] See the opinion of the trial court in the *Durham* case where, although dismissing the suit for lack of jurisdiction, it construes Colorado Anti-Discrimination Comm'n v.Continental Air Lines, Inc., 372 U.S. 714 (1963) as condemning "any policy that requires, or even permits, any racial consideration whatever in the employment and placement of teacher personnel. . . ." 249 F. Supp. at 154.

[33] The Equal Employment Opportunity provisions of the Civil Rights Act of 1964 clearly make racial discrimination by "employers"—both in hiring and in assignment—unlawful. 78 Stat. 255 (1964), 42 U.S.C. § 2000e-2(a) (1964). However, states and their political subdivisions are specifically excluded from the coverage of the Act. *Id.* at § 2000e(b). Hence, the school board employers in the principal cases were exempt.

[34] 364 F.2d at 192-93 and cases cited there.

munity's history of racial discrimination raised an inference of discrimination. It placed a burden on the board which was not met.

This conclusion seems to have been premised on the existence of several facts: (1) that the school board viewed the reduction in Negro students as authority for a pro-rata reduction in Negro faculty members;[35] (2) that the Negro teachers were treated as "applicants" for the new jobs created by the merger, rather than being retained if they met "minimum standards" as were white teachers;[36] (3) that the subjective test used by the school board resulted in racially motivated retention decisions.[37]

Conceding that (1) and (2) existed, the essential element of a cause of action must be (3), racial judgment in these plaintiffs' cases. And this, even after painstaking scrutiny, the district judge could not find. At the trial the court dismissed the complaint because plaintiffs had not met the burden of proof. Yet in arriving at that decision the judge examined, individually, the cases of each of the teachers who were not retained[38] in light of the qualifications of the teachers with whom they competed. In all but one case there was objective evidence supporting the board's decision.[39]

Judge Bryan, in a dissenting opinion, argues that this thorough examination demonstrated the district judge's complete awareness of the constitutional principles announced by the majority. But he felt that the application of these general principles to all plaintiffs resulted in an unwarranted conclusion that "they were all denied their Constitutional rights."[40] He said further:

> Whatever Constitutional guidelines are recognized, the bald facts here plainly reveal that at least 15 of the 16 unretained teachers were not kept because of [objective reasons]. . . . This is hardly a record of a racial judgment. General principles do not sup-

[35] The court felt the superintendent's testimony that Negro pupils should have "adequate representation at the teacher level," indicated such a view. *Id.* at 190.

[36] In short the Negro principal's report clearly reflected the knowledge that the number of Negro teachers was to be drastically reduced; consequently his teachers were graded comparatively while those of the white principals were used only to eliminate those teachers who, in the opinion of the principal or the superintendent, fell below a minimum standard.

Id. at 191.

[37] *Id.* at 192 n.2.

[38] Chambers v. Hendersonville City Bd. of Educ., 245 F. Supp. 759, 763-64 (W.D.N.C. 1965).

[39] *Id.* at 764. See note 12 *supra.*

[40] 364 F.2d at 193.

plant realities; the Constitutional fundamentals stressed by the majority here are abstract and academic.[41]

Still, in one instance there was a fairly clear discriminatory decision on the guise of the board's discretion. When this is considered with the aggregate of the indicia of discrimination[42] cited by Judge Bell and with the trial judge's repeated reliance on plaintiffs' failure to sustain their burden of proof, the result is warranted. Racially motivated decisions are often subtly disguised and present difficult problems of proof, especially where, as here, the discretion of an administrative body is involved. The majority's analogy to cases involving racial discrimination in jury selection is apt. In *Eubanks v. Louisiana*,[43] cited by Judge Bell, a Negro defendant alleged that judges administered a jury selection system in a discriminatory manner by exercise of their "discretion." The Supreme Court concluded, in the face of mere general denials, that race had been a factor in violation of the equal protection clause of the fourteenth amendment. Whether this is termed raising an "inference" or not the result is the same, to replace the trial court's conclusion that there was no discrimination with the appellate court's conclusion that there was. A showing that discrimination was likely in the particular circumstances becomes sufficient.

Taken together, the principal cases have significantly eased what previously were two formidable obstacles to Negro plaintiffs who seek teacher integration. First, pupils no longer need "prove" that racial teacher assignment is a constitutional deprivation to them, but only that teachers are in fact assigned on the basis of race. Second, Negro teachers released en masse, who must prove that they were denied retention because of race, will have the assistance of an inference of discrimination thrusting the burden of justification on

[41] *Id.* at 194.

[42] They were: (1) superintendent's decision as to which Negro teachers would be retained was made before he knew how many vacancies would exist; (2) the apparent "pro-rata" policy to retain Negro teachers in proportion to the racial makeup of the student body; (3) superintendent's testimony that while he was guided by the principals' recommendations, he made the decisions on the basis of "personal preference"; (4) Negro principal's report was detailed and submitted in writing while white principals made oral reports (reflecting Negro principal's knowledge that the number of Negro teachers was to be reduced); (5) white teachers were graded competitively only if below minimum standards, whereas all Negro teachers were so graded; (6) no white teachers' qualifications were compared with those of new applicants, whereas Negro teachers frequently were. *Id.* at 190-92.

[43] 356 U.S. 584 (1958).

school boards. Simultaneously, the decisions have increased the pressure on school boards to eliminate racially motivated faculty assignment, and to base employment decisions on objective nondiscriminatory standards. Most important though, the court of appeals has again moved closer to making the mandate of *Brown v. Board of Educ.*—now more than twelve years in existence—a reality.

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Constitutional Law—Compulsory Blood Tests—Self-Incrimination

Recent decisions of the Supreme Court of the United States involving the rights of the accused in state criminal proceedings have attracted the attention of state law enforcement officials who, undoubtedly, are concerned with the present Court's concept of the scope of the fourth, fifth and sixth amendments. *Schmerber v. California,*[1] unlike most recent decisions, restricts the scope of the fifth amendment and affords state police with a clear guideline.

Petitioner was convicted in Los Angeles municipal court of the criminal offense of driving an automobile while under the influence of alcohol. He was arrested at a hospital where he was receiving treatment for injuries received in an accident involving the automobile that he had been driving. At the direction of a police officer, a blood sample was taken from petitioner at the hospital and an analysis of this sample indicated by weight of alcohol in his blood that the petitioner was intoxicated at the time of the accident.[2] Petitioner objected to use of this test as evidence on the grounds that the blood was withdrawn dispite his refusal on advice of counsel to consent to it.

He contended that the admission of the test as evidence denied him due process of law under the fourteenth amendment of the Constitution as well as his specific rights under the fourth, fifth and sixth amendments as incorporated in the fourteenth amendment. The California court rejected these contentions and affirmed the conviction. The Supreme Court, in an opinion by Mr. Justice Brennan, held that the blood test, even though compulsary, did not vio-

[1] 384 U.S. 757 (1966).

[2] Concerning the reliability of blood tests as evidence of intoxication see Ladd & Gibson, *The Medico-Legal Aspects of the Blood Test to Determine Intoxication,* 24 IOWA L. REV. 191 (1939) [hereinafter cited as Ladd & Gibson].