

No. 02-2143

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

VETERANS LEGAL DEFENSE FUND,)	Appeal from the United States District
an Illinois not-for-profit corporation, TOM)	Court for the Central District of Illinois,
FOSTER, and STEVEN C. TERRY,)	Springfield Division.
)	
Plaintiffs-Appellants,)	
)	
v.)	No. 97 C 3380
)	
MICHAEL S. SCHWARTZ, in his official)	
capacity as Director of the Illinois)	
Department of Central Management)	
Services, individually and on behalf of all)	
State agencies and political subdivisions of)	
the State of Illinois; and JESSE WHITE, in)	
his official capacity as Secretary of State)	
of the State of Illinois, individually and on)	
behalf of all state agencies and all political)	
subdivisions of the State of Illinois,)	The Honorable
)	RICHARD MILLS,
Defendants-Appellees.)	Judge Presiding.

BRIEF OF THE DEFENDANTS-APPELLEES

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JURISDICTIONAL STATEMENT

The appellants' jurisdictional statement is complete and correct.

ISSUES PRESENTED FOR REVIEW

1. Whether the veteran's preference created by section 8b.7 of the Personnel Code, 20 ILCS 415/8b.7 (2000), and similar Illinois statutes gives veterans a "property interest" entitled to protection under the Fourteenth Amendment's Due Process Clause.

2. If the veteran's preference does create an enforceable property interest, whether that interest may be vindicated under the substantive component of the Due Process Clause, where the plaintiffs did not allege the violation of any other constitutional provision, and Illinois law provides remedies for veterans who should have been hired pursuant to the veteran's preference but were not.

3. If the veteran's preference does create an enforceable property interest, whether the plaintiffs could establish a procedural due process violation, where state law provides avenues of post-deprivation relief for veterans who should have been hired pursuant to the veteran's preference but were not.

STATEMENT OF THE CASE

Tom Foster and Steven Terry, both veterans of the armed services, and the Veterans Legal Defense Fund (VLDF), an organization that promotes veterans' interests, brought this action under 42 U.S.C. § 1983 against the Illinois Secretary of State and the Director of the Illinois Department of Central Management Services, alleging that both officers (in their official capacities) violated and were continuing to violate veterans' due process rights by hiring non-veterans for civil service positions in contravention of state statutes that give veterans an absolute hiring preference.¹ The plaintiffs sought to represent a class of veterans who have applied for civil service jobs but were passed over in favor of non-veterans. The plaintiffs sought declaratory and injunctive relief to compel the defendants to hire civil servants in accordance with the veterans' preference laws.

After denying the plaintiffs' motion for class certification, the district court granted summary judgment to the defendants on April 3, 2002. The district court concluded that the plaintiffs were essentially asking for an injunction compelling state officials to comply with state law, and that such a request was barred under the Eleventh Amendment. The plaintiffs have appealed.

¹ Other plaintiffs and defendants were involved in this suit, but their claims and defenses were disposed of before final judgment and are not at issue here. In addition, although Martin Wild was a plaintiff throughout the litigation, and although the plaintiffs listed him in the caption of their notice of appeal (R. Doc. 127), it appears from the body of the notice of appeal and the appellants' brief that he has not joined Foster, Terry, and the VLDF as appellants. In this brief, the defendants-appellees will use "plaintiffs" to refer to Foster, Terry, and the VLDF.

STATEMENT OF FACTS

A. Illinois Law Gives Veterans an Absolute Hiring Preference with Respect to Civil Service Jobs.

This case involves a challenge to the manner in which Illinois state officials apply veteran's preference statutes when filling state-level civil service positions. To understand the case, it is first necessary to understand the statutory and administrative scheme through which the State hires its civil servants.

A number of civil service statutes govern the employment relationship between various state offices and agencies and their employees. Thus, for example, some constitutional offices have their own civil service codes. *See, e.g.*, 15 ILCS 310/1 *et seq.* (2000) (Secretary of State Merit Employment Code); 15 ILCS 410/1 *et seq.* (2000) (Comptroller Merit Employment Code). And most employees of executive agencies are covered by the Personnel Code, 20 ILCS 415/1 *et seq.* (2000).

These civil service statutes include provisions that favor veterans in the hiring process. Section 8b.7 of the Personnel Code, 20 ILCS 415/8b.7 (2000), is typical of these. Although the plaintiffs have challenged the manner in which numerous veteran's preference statutes are being applied (R. Doc. 85, exh. A at 4-7), their focus in this action has been on section 8b.7. Therefore, in the remainder of this brief the defendants will likewise focus on section 8b.7, with the understanding that its veteran's preference is representative of those in other civil service statutes.

Civil service hiring under the Personnel Code is accomplished in the following manner. First, persons interested in civil service positions submit applications to the

Illinois Department of Central Management Services (“CMS”), indicating the “general type of position they are interested in.” (R. Doc. 85, exh. A at 5); *Denton v. Civil Serv. Comm’n*, 277 Ill. App. 3d 770, 772-73, 661 N.E.2d 520, 523 (4th Dist. 1996), *aff’d*, 176 Ill.2d 144, 679 N.E.2d 1234 (1997). CMS grades the applicants based on their resumes, test scores, and other criteria, and places the applicants in categories (such as “A,” “B,” and “C,” with “A” being the highest). (R. Doc. 85, exh. A at 6); *Denton*, 277 Ill. App. 3d at 773, 661 N.E.2d at 523.² CMS then compiles an eligibility list in which applicants are ranked according to their grade category. (R. Doc. 85, exh. A at 6); *Denton*, 277 Ill. App. 3d at 773, 661 N.E.2d at 523.

An agency that wants to fill a position requests the eligibility list and chooses candidates from the highest grade category to interview. *Denton*, 277 Ill. App. 3d at 773, 661 N.E.2d at 523. The agency “may dip into the next-highest category if there are fewer than three applicants in the highest,” *id.* at 773, 661 N.E.2d at 523, but applicants are usually selected from the highest category. Final hiring decisions under this scheme must be approved by CMS. (R. Doc. 88, exh. D at 12-13).

In hiring, CMS and state agencies must take account of section 8b.7 of the Personnel Code, which provides in part: “When the Director [of CMS] establishes eligible lists on the basis of category ratings such as ‘superior’, ‘excellent’, ‘well-

² In some instances candidates may be given numerical rankings and placed on an eligibility list based upon numerical rank. *See* 20 ILCS 415/8b.3 (2000); 80 Ill. Adm. Code § 302.80 (2002). In this case the plaintiffs only challenge the manner in which the defendants have applied the veteran’s preference to positions filled according to category rankings. (R. Doc. 85, exh. A at 6).

qualified’, and ‘qualified’, the veteran eligibles in each such category shall be preferred for appointment before the non-veteran eligibles in the same category.” 20 ILCS 415/8b.7(f) (2000). Prior to the Illinois Supreme Court’s decision in *Denton v. Civil Serv. Comm’n* 176 Ill.2d 144, 679 N.E.2d 1234 (1997), CMS construed section 8b.7 as requiring that veterans be given only favorable consideration for civil service jobs, rather than an absolute preference. *Denton*, 176 Ill.2d at 149, 679 N.E.2d at 1236. In *Denton*, however, the supreme court held that section 8b.7 conferred an absolute preference, so that “when the Director of CMS chooses to organize eligibility lists on the basis of category rankings, a veteran must receive an offer for the job before nonveterans of the same grade category.” *Denton*, 176 Ill. 2d at 150, 679 N.E.2d at 1237.

In April 1997, after *Denton* was decided, the Governor’s Office issued a memorandum to the directors and chief counsels of state agencies, indicating that, “[e]ffective immediately, all agencies, departments, bureaus, boards and commissions subject to the control or direction of the Governor shall conform their personnel practices to the ruling of the Illinois Supreme Court” in *Denton*. (R. Doc. 93, exh. B).

B. Plaintiffs Foster and Terry are Denied Civil Service Positions in Alleged Violation of Section 8b.7’s Veteran’s Preference.

Plaintiffs Foster and Terry are both veterans of the armed services. (R. Doc. 85, exh. A at 7-8). Both had “A” category ratings for a number of civil service jobs, and both applied to CMS for such positions at various times in 1995 and 1996. (R. Doc. 85, exh. A at 7-10). However, neither Foster nor Terry was hired for any of the

positions he applied for, and non-veterans were hired for at least some of these jobs. (R. Doc. 85, exh. A at 7-10).

The record is silent on whether other veterans with “A” category ratings applied for the jobs that Foster applied for. But the record does show that, for each of the positions that Terry applied for, numerous other veterans who rated in the “A” category also applied. (R. Doc. 68, exh. B at 1-2; exh. C at 41-50).³ In addition, during the proceedings in this case, the plaintiffs informed the district court that they “admittedly cannot at this time prove ‘that they alone were entitled to one of the jobs for which they applied, more so than any other veteran or non-veteran applicant.’” (R. Doc. 124 at 5).

C. The Plaintiffs Bring This Action to Challenge the Defendants’ Alleged Failure to Implement Section 8b.7’s Absolute Hiring Preference.

Having been denied civil service positions, the plaintiffs brought this purported class action in October 1997 against the Illinois Secretary of State and the Director of CMS in their official capacities. (R. Doc. 1 at 2-3, 10). The third amended complaint alleged that the plaintiffs had a property interest in section 8b.7’s veteran’s preference; that the defendants deprived the plaintiffs of that interest by hiring non-veterans for positions the plaintiffs had applied for; and that this deprivation was without due process of law in violation of the Fourteenth

³ Thus, for example, Terry had an “A” rating for an administrative assistant position with CMS, but 44 other veterans had an “A” rating for the position as well. (R. Doc. 68, exh. B).

Amendment and 42 U.S.C. § 1983. (R. Doc. 85, exh. A at 14-15). In later submissions, the plaintiffs made clear that they were alleging both procedural and substantive due process violations. (R. Doc. 118 at 20-22).

In bringing this action, the plaintiffs sought to represent a class of veterans who were entitled to the absolute veteran's preference in state hiring but were denied it. (R. Doc. 85, exh. A at 11). As relief, the plaintiffs asked the district court to enter an order "directing [the defendants] to afford an absolute veterans' preference" to the plaintiffs, and "directing [the defendants] . . . to allow Plaintiffs . . . to re-apply for appointments previously denied them because Defendants . . . had not afforded them an absolute veterans' preference." (R. Doc. 85, exh. A at 16).

D. The District Court Denies the Plaintiffs' Motion for Class Certification.

The plaintiffs moved for class certification in May 2001 (R. Doc. 99), but the district court denied the motion by order entered December 18, 2001 (R. Doc. 120). The court did not address each of the factors that Federal Rule of Civil Procedure 23 requires courts to consider when determining whether class certification is appropriate. Instead, the court determined that the fourth factor – whether the representative can adequately represent the class – was not met here because there was an "inherent conflict" among the purported class members. (R. Doc. 120 at 8-11).

According to the district court, the only way in which any veteran applicant can establish an "ongoing violation" of his veteran's preference – and thereby

overcome the bar of Eleventh Amendment immunity under the doctrine of *Ex parte Young* – is to show that he would have been hired for a civil service job but for the denial of his veteran’s preference. (R. Doc. 120 at 7-8). Any veteran who could make this showing, however, would necessarily do so at the expense of other veterans who had applied for the same job but would not have been hired even with the preference’s application. (R. Doc. 120 at 7-9). Accordingly, the district court concluded, the interests of veteran applicants in this case were conflicting, not identical, and thus class certification was inappropriate. (R. Doc. 120 at 9).

E. The District Court Grants Summary Judgment to the Defendants.

Both sides moved for summary judgment following discovery. (R. Docs. 88, 114). On April 3, 2002, the district court entered an order granting the defendants’ motion for summary judgment and dismissing the plaintiffs’ action. (R. Doc. 125). In seeking to vindicate their rights under the veteran’s preference statute, the district court reasoned, the plaintiffs “are merely asking the Court to enforce the law of Illinois as declared by *Denton*[.]” (R. Doc. 125 at 6). According to the district court, the Eleventh Amendment (as construed in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984)) bars a federal tribunal from entertaining such a request. (R. Doc. 125 at 6-7). The plaintiffs’ grievance was thus a matter for Illinois state courts, and summary judgment for the defendants was therefore warranted. (R. Doc. 125 at 6-7). A Rule 58 judgment was entered on the civil docket on April 3, 2002 (R. Doc. 126), and the plaintiffs filed a notice of appeal on May 2, 2002. (R. Doc. 127).

SUMMARY OF THE ARGUMENT

The district court's judgment should be affirmed, but on the ground that the plaintiffs have no due process claim regarding the alleged denial of their veteran's preferences.

The veteran's preference created by section 8b.7 of the Personnel Code is not a "property interest" entitled to protection under the Due Process Clause. Persons who are hired into the civil service must serve probationary periods during which they do not have property interests in their positions and may be terminated without the benefit of due process hearings. Because the jobs themselves are not constitutionally-protected property interests, the statutory preference that helps veterans acquire those jobs cannot be a property interest either.

In addition, the veteran's preference is too contingent and meager to be a property interest. It does not guarantee any veteran a job, but rather gives *all* veteran applicants a right to insist that *some* veteran be hired for the position before any equally-qualified non-veteran is hired. As between equally-qualified veterans, the preference is no help in determining who gets hired. Therefore, the preference does not give any *individual* veteran a legitimate expectation that he will be hired for a civil service position.

The plaintiffs' claims fail even if the preference is a property interest. They have no substantive due process claim because state procedures are adequate to remedy erroneous denials of the veteran's preference. Indeed, *Denton* itself was an

instance where an Illinois veteran used the state courts' administrative review mechanism to vindicate his right to the preference. The plaintiffs' procedural due process claim fails, too, because the defendants' alleged conduct in this case was "random and unauthorized," and the State's post-deprivation procedures were sufficient under the Due Process Clause to remedy the effects of such conduct.

For these reasons, the district court's judgment should be affirmed.

ARGUMENT

The judgment below should be affirmed, but for reasons different from those the district court relied upon. *See Capocy v. Kirtadze*, 183 F.3d 629, 632 (7th Cir. 1999) (stating that this court “may affirm a district court’s grant of summary judgment for any reason supported by the record”). According to the district court, the plaintiffs were essentially asking a federal court to enforce a state law against state officials in violation of *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (Eleventh Amendment bars federal courts from forcing state officials to comply with state law). (R. Doc. 125 at 5-6). This characterization of the plaintiffs’ claim is ultimately correct: the plaintiffs were indeed attempting to “transmute a violation of state law into a constitutional violation.” *Colon v. Schneider*, 899 F.2d 660, 672 (7th Cir. 1990). But the plaintiffs have alleged and attempted to prove that Illinois’ veteran’s preference statutes give them enforceable property interests under the Fourteenth Amendment’s Due Process Clause, and that the defendants deprived them of such interests by hiring non-veterans for various civil service jobs. (R. Doc. 85, exh. A). A claim of this sort is not barred by *Pennhurst*. *See Piecknick v. Pennsylvania*, 36 F.3d 1250, 1255 n.7 (3d Cir. 1994); *Williams v. Kentucky*, 24 F.3d 1526, 1543-44 (6th Cir. 1994).

This court’s focus should therefore be on the plaintiffs’ erroneous contention that a deprivation of the veteran’s preference is cognizable under the Due Process Clause. The veteran’s preference is not a property interest for due process purposes.

And even if it is, state law provides post-deprivation remedies which give veterans all the process they are entitled to under the Fourteenth Amendment. The record accordingly discloses no violation of the plaintiffs' due process rights, and the defendants were entitled to summary judgment.

A. This Court Should Decide this Case on the Merits of the Plaintiffs' Due Process Claim.

In the district court, a number of issues arose besides the question whether the plaintiffs can establish a due process violation. This court need not and should not resolve any of these issues. The due process question is easily resolved in the defendants' favor, and the case should be decided solely on that basis.

First, it is far from clear that plaintiff Veterans Legal Defense Fund has associational standing necessary to maintain the action. However, plaintiffs Foster and Terry clearly do have standing, so this court need not address whether the VLDF does so as well. *See Price v. Pierce*, 823 F.2d 1114, 1118 (7th Cir. 1987) (noting that "it is enough to give us jurisdiction over the case if one of the plaintiffs has standing").

Second, because the plaintiffs sought only prospective relief against the defendants in their official capacities, the parties disputed whether the action was permissible under the *Ex parte Young* doctrine. The defendants argued that the plaintiffs failed to establish an "ongoing violation" of federal law as required under *Young*. (R. Doc. 115 at 5-7). The plaintiffs countered with affidavits purporting to show that the defendants hired non-veterans over veterans even after *Denton* was

decided. (R. Docs. 110, 111). It is questionable whether these affidavits establish an “ongoing violation” of the plaintiffs’ due process rights, *cf. Sonnleitner v. York*, 304 F.3d 704, 717-18 (7th Cir. 2002) (state employee who was demoted without a predeprivation hearing did not allege “ongoing” violation of his due process rights for purposes of the *Young* doctrine), and the district court did not conclusively resolve whether the conditions for an *Ex parte Young* action were satisfied. But because the defendants are clearly entitled to summary judgment on the merits, this court can and should avoid the *Ex parte Young* issue. *See Floyd v. Thompson*, 227 F.3d 1029, 1034-35 (7th Cir. 2000) (court bypassed difficult *Ex Parte Young* issues and decided case on merits); *McClendon v. Georgia Dep’t of Community Health*, 261 F.3d 1252, 1259 (11th Cir. 2001) (same).

Third, because the defendants plainly win on the merits, this court may also avoid deciding whether the district court abused its discretion by refusing to certify the plaintiffs’ purported class. *See Wilson v. Quadramed Corp.*, 225 F.3d 350, 351-52 (3d Cir. 2000) (court declined to reach class certification issues after affirming dismissal of claims on merits); *Durning v. Citibank, N.A.*, 990 F.2d 1133, 1135 (9th Cir. 1993) (same); *cf. Chavez v. Illinois State Police*, 251 F.3d 612, 630 (7th Cir. 2001) (district court did not abuse its discretion in denying motion for class certification where plaintiffs would not have prevailed on the merits).

B. The Standard of Review Is *De Novo*.

This court reviews *de novo* the district court’s grant of summary judgment.

Moore v. Muncie Police and Fire Merit Comm'n, 312 F.3d 322, 2002 WL 31722178, at *4 (7th Cir. Dec. 5, 2002). Summary judgment is appropriate when the pleadings and evidentiary materials, construed in the non-movant's favor, show that no genuine issue of material fact exists, and that the movant is entitled to judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

C. The Hiring Preference Contained in Section 8b.7 of the Personnel Code Does Not Give Veterans a Constitutionally-Protected Property Interest.

The plaintiffs could not prevail in this action because the veteran's preference created by section 8b.7 and similar statutes is not a property interest that warrants protection under the Due Process Clause. This is so for two reasons. First, the preference only ensures veterans special consideration with respect to positions that are not themselves property in a constitutional sense. Second, the preference is "too contingent to count as property[.]" *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412, 417 (7th Cir. 1988). Because the veteran's preference is not "property" for purposes of the Fourteenth Amendment, the plaintiffs had no due process claim.

The starting point in any due process inquiry is to determine whether the plaintiff has been deprived of a constitutionally protected interest in liberty or property. *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972); *Moore*, 2002 WL 31722178, at *4; *Webster v. Redmond*, 599 F.2d 793, 796-97 (7th Cir. 1979). Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or

understandings that secure certain benefits and that support claims of entitlement to those benefits.’” *Moore*, 2002 WL 31722178, at *4 (quoting *Roth*, 408 U.S. at 577). Benefits that are so conditional as to be “meager, transitory, or uncertain” do not qualify as constitutionally-protected property interests. *Yatvin*, 840 F.2d at 417 (quoting *Reed v. Village of Shorewood*, 704 F.2d 943, 948 (7th Cir. 1983)). A plaintiff who cannot carry his burden of establishing a property interest cannot prevail on a due process claim. See *Petru v. City of Berwyn*, 872 F.2d 1359, 1362 (7th Cir. 1989).

1. The Veteran’s Preference Cannot Qualify as a Property Interest Because Probationary Civil Service Jobs are Not Property.

The veteran’s preference is not a property interest because it only entitles veterans to special consideration for jobs that are not themselves “property” in a constitutional sense. For this reason alone, the plaintiffs could not establish a due process violation.

“The case law holds loudly and clearly that when the position sought is not one which confers a property interest, one cannot retain a property interest in the steps taken toward achievement of that position.” *Ratajack v. Board of Police and Fire Comm’rs*, 729 F. Supp. 603, 607 (N.D. Ill. 1990) (Rovner, J.). In *Yatvin*, for example, this court held that a school principal had no property right in an affirmative action plan under which she was entitled to special consideration for a promotion. *Yatvin*, 840 F.2d at 416-17. One ground for this holding was that the job the plaintiff sought was not itself a constitutionally protected property interest:

Had [Yatvin] gotten the appointment and been fired the next day, she could not have complained of a deprivation of property; no more should she be allowed to complain that the failure to appoint her deprived her of property, even if the failure was due to a breach of contract. She claims entitlement to consideration for a job that is itself not property in the constitutional sense; and the interest in being considered for a job is even more attenuated than the interest in the job.

Id. at 417; *see also Webster*, 599 F.2d at 800 (teacher had no property interest in promotion to principal, where state law required principals to serve probationary period during which time they could be fired without a hearing).

The same reasoning applies here. Persons who are appointed to civil service positions in Illinois state government must serve a probationary period, *see Powell v. Jones*, 56 Ill. 2d 70, 78, 305 N.E.2d 166, 170 (1973); 80 Ill. Adm. Code § 302.300(a)(1) (2002), during which time they may be discharged for any reason (except for invidious reasons like race discrimination) without the benefit of a hearing, *Johnson v. Ogilvie*, 47 Ill. 2d 506, 508, 266 N.E.2d 338, 339 (1970); *People ex rel. Sterba v. Blaser*, 33 Ill. App. 3d 1, 6, 337 N.E.2d 410, 414 (1st Dist. 1975); *cf. Fox v. Civil Serv. Comm'n*, 66 Ill. App.3d 381, 389, 383 N.E.2d 1201, 1207 (1st Dist. 1978) (“Once a state employee has completed his probationary term, he may not be discharged except for cause and subject to due process hearing protections.”).⁴ Thus, persons who hold probationary positions within the civil service do not have a legitimate claim of

⁴ Section 8b.6 of the Personnel Code provides that probationary employees may be discharged “with the consent of the Director of [CMS],” 20 ILCS 415/8b.6 (2000), whereas section 8b.16, which covers employees who have successfully completed their probationary periods, provides that such employees may only be discharged for cause after a hearing, 20 ILCS 415/8b.16 (2000).

entitlement to continued employment, and consequently they do not have a constitutionally-protected property interest in keeping such positions. *See Farmer v. Lane*, 864 F.2d 473, 478-80 (7th Cir. 1988) (probationary employee of Illinois state agency had no property interest in position); *see also Webster*, 599 F.2d at 799-801.

Had the plaintiffs in this case received civil service jobs with the help of section 8b.7's veteran's preference, they could have been discharged immediately after appointment without the benefit of due process protections. Like the affirmative action plan in *Yatvin*, then, the entitlement to special consideration in civil service hiring created by section 8b.7 is not a property interest for due process purposes.

2. The Veteran's Preference is Too Contingent to be a Property Interest.

Section 8b.7's veteran's preference is also "too contingent to count as property[.]" *Yatvin*, 840 F.2d at 417. It does not guarantee any veteran a job; rather, it requires that veterans be hired over non-veterans of the same grade category. *Denton*, 176 Ill. 2d at 150-51, 679 N.E.2d at 1237. Thus, if several veterans of the same grade category apply for the same job, the preference is of no help to any one of them. In such cases the hiring authority may select the veteran who, upon consideration of merit-based factors, is mostly likely to excel in the job. Thus, for each civil service job opening, there is "inherent uncertainty" about whether any particular veteran will turn out to be the best qualified candidate. *Yatvin*, 840 F.2d at 417. The expectation of favorable consideration created by the veteran's preference is simply "too exiguous to count as property under the due process

clause[.]” *Id.*; *cf. Moore*, 2002 WL 31722178, at *4-5 (persons do not have property interests in prospective employment).

As far as the record shows, for each position the plaintiffs applied for, numerous other veterans of the same grade category also applied. (R. Doc. 68, exh. B at 1-2; exh. C at 41-50). The plaintiffs were thus compelled to admit that they “cannot at this time prove that they alone were entitled to one of the jobs for which they applied, more so than any other veteran or non-veteran applicant.” (R. Doc. 125 at 5 (internal quotations and citation omitted)). Therefore, the most the plaintiffs had a right to complain about was that non-veterans were hired for positions that veterans (but not necessarily the plaintiffs) should have received. But the right to insist that someone else *not* be hired is too *de minimis* to “implicate the great objects of the Fourteenth Amendment.” *Brown v. Brienen*, 722 F.2d 360, 365 (7th Cir. 1983).

Carter v. City of Philadelphia, 989 F.2d 117 (3d Cir. 1993), on which the plaintiffs rely, compels no finding to the contrary. The court there determined that Pennsylvania’s veteran’s preference statute, which by its plain terms granted veterans an absolute preference in promotion, qualified as a property interest entitled to protection under the Due Process Clause. 989 F.2d at 122. In reaching this conclusion, the court did not inquire whether the job to which the plaintiff sought promotion was itself a property interest. Nor did it consider how the preference was supposed to confer anything tangible in the event equally qualified veterans

competed for promotion. Therefore, the Third Circuit in *Carter* did not employ the same analysis this court has used in determining whether a property interest may be derived from rules that create special consideration for public jobs. So *Carter* is of little value here.

In sum, the plaintiffs could not meet their burden of showing that the veteran's preference created by section 8b.7 is a property interest entitled to protection under the Due Process Clause. Accordingly, the Constitution did not guarantee the plaintiffs any process surrounding the alleged deprivation of their veteran's preferences. They should have looked to remedies provided under state law. The district court's judgment should therefore be affirmed.

D. Substantive Due Process Does Not Protect Against Erroneous Deprivations of Veteran's Preferences.

The plaintiffs' substantive due process claim would fail even if the veteran's preference were a constitutionally-protected property interest. Much confusion surrounds the doctrine of substantive due process, and it is doubtful that the doctrine *ever* protects state-created rights to public employment. Indeed, as far as the defendants' research has revealed, this court has never sustained a substantive due process challenge to a public official's decision regarding public employment. This case is not the exception.

The Supreme Court has yet to decide whether state-created property interests deserve protection under the substantive component of the Due Process Clause. *See Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 223 (1985). Lacking guidance

from the Court, most circuits have held or intimated that state-created property interests in public employment do not warrant such protection. *See Nicholas v. Pennsylvania State Univ.*, 227 F.3d 133, 142 (3d Cir. 2000); *McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir. 1994) (*en banc*); *Sutton v. Cleveland Bd. of Educ.*, 958 F.2d 1339, 1350-51 (6th Cir. 1992); *Huang v. Board of Governors of Univ. of N. Carolina*, 902 F.2d 1134, 1142 n.10 (4th Cir. 1990) (*dictum*); *cf. Singleton v. Cecil*, 176 F.3d 419, 427-28 (8th Cir. 1999) (*en banc*) (public employees have no “occupational liberty” interests protectable under substantive due process); *but see Newman v. Massachusetts*, 884 F.2d 19, 25 (1st Cir. 1989) (tenured teacher enjoyed substantive due process protection); *Schaper v. City of Huntsville*, 813 F.2d 709, 717 (5th Cir. 1987) (city police captain had “substantive due process right in continued employment”). The majority view is undoubtedly correct, because substantive due process protects only “fundamental” rights, *Wozniak v. Conry*, 236 F.3d 888, 891 (7th Cir. 2001), and rights to public employment are not fundamental, *Dehainaut v. Pena*, 32 F.3d 1066, 1075 (7th Cir. 1994).

At one point this court seemingly adhered to the majority view. *See Kauth v. Hartford Ins. Co.*, 852 F.2d 951, 957 (7th Cir. 1988) (“We have indicated in previous opinions that we do not believe that substantive due process protects state-created property rights.”); *cf. Zorzi v. County of Putnam*, 30 F.3d 885, 895 (7th Cir. 1994) (substantive due process does not protect “occupational liberty” interests). Under its current jurisprudence, however, the court will at least entertain a substantive due

process claim with respect to public employment if the plaintiff can show “(1) that the [challenged] decision was arbitrary and irrational, and (2) that the decision-makers either committed another substantive constitutional violation or that state remedies are inadequate.” *Strasburger v. Board of Educ.*, 143 F.3d 351, 357 (7th Cir. 1998); *see also Wudtke v. Davel*, 128 F.3d 1057, 1062 (7th Cir. 1997).⁵

The plaintiffs here could not prevail under this court’s framework for resolving substantive due process claims.⁶ They alleged only violations of the Due Process Clause, and therefore did not establish that the defendants “committed another substantive constitutional violation,” *Strasburger*, 143 F.3d at 357. *See Gable*, 296 F.3d at 541 (no substantive due process violation where plaintiffs alleged only procedural and substantive due process violations). Indeed, the plaintiffs’ brief on

⁵ In *Draghi v. County of Cook*, 184 F.3d 689, 694 (7th Cir. 1999), the court erroneously suggested that the inadequate state remedies element need not be met in section 1983 cases. Substantive due process claims against state officials are *always* brought under section 1983, and every case in which this court has applied the inadequate state remedies element has been a section 1983 action. *See, e.g., Gable v. City of Chicago*, 296 F.3d 531, 541 (7th Cir. 2002) (rejecting substantive due process claim in section 1983 action in part because plaintiff failed to allege that state law remedies were inadequate); *Contreras v. City of Chicago*, 119 F.3d 1286, 1295 (7th Cir. 1997) (same); *Kauth*, 852 F.2d at 958 (same).

⁶ In *Schacht v. Wisconsin Dep’t of Corrections*, 175 F.3d 497, 501-02 (7th Cir. 1999), this court analyzed a substantive due process claim in the employment context under the “shocks the conscience” standard articulated in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). A few months later, in *Draghi v. County of Cook*, 184 F.3d 689, 694 (7th Cir. 1999), the court reverted to the two-part analysis it employed in previous decisions, and made no reference to *Schacht*. If this court is inclined to address plaintiffs’ substantive due process claim under *Schacht*, it is enough to say that the conduct alleged to have occurred here is no more conscience-shocking than the conduct at issue in that decision. *See Schacht*, 175 F.3d at 502 (allegedly “sham” pre-deprivation procedures were not so outrageous as to shock the conscience).

appeal contains no argument regarding the violation of any other substantive constitutional provision. Rather, the plaintiffs insist that state law remedies were inadequate because any action to enforce their right to a veteran's preference would have to be pursued in the Illinois Court of Claims. (Appellants' brief at 20-21).

Given their heavy reliance on *Denton* – a case in which an applicant used the state courts' administrative review process to vindicate his right to a veteran's preference, 176 Ill. 2d at 147, 679 N.E.2d at 1236 – it is difficult to see how the plaintiffs can make this argument. Their appellate brief contains no explanation why the plaintiffs were unable to employ the same administrative procedures used by the plaintiff in *Denton*.

Even where administrative remedies are not available, moreover, Illinois law is clear that state courts have jurisdiction to issue writs of *mandamus* to compel public officials to comply with state laws. *See Healy v. Vaupel*, 133 Ill. 2d 295, 308, 549 N.E.2d 1240, 1247 (1990) (“Sovereign immunity affords no protection . . . when it is alleged that the State's agent acted in violation of statutory or constitutional law or in excess of his authority, and in those instances an action may be brought in circuit court.”); *see also Noyola v. Board of Educ.*, 179 Ill. 2d 121, 134-35, 688 N.E.2d 81-87 (1997); *Nelson v. Murphy*, 44 F.3d 497, 505 (7th Cir. 1995) (applying Illinois law). Therefore, if the plaintiffs had a right under state law to a veteran's preference, and if the defendants had a non-discretionary duty to give them that preference, then the plaintiffs could have enforced their rights in an Illinois state court through an

administrative review or *mandamus* proceeding. *Cf. Hitt v. Ryan*, 307 Ill. App. 3d 344, 346-48, 718 N.E.2d 695, 697-98 (4th Dist. 1999) (court dismissed state employees' *mandamus* action to enforce veteran's preference where they failed to exhaust administrative remedies available under state law). The available state remedies were adequate. Consequently the plaintiffs had no substantive due process claim.⁷

E. The Plaintiffs' Procedural Due Process Claim Failed Because Adequate Post-Deprivation Remedies were Available Under State Law.

The plaintiffs also contend that their procedural due process rights were violated when the defendants allegedly deprived them of their veteran's preferences without giving them pre-deprivation hearings. (Appellants' brief at 21-22). To the contrary, the plaintiffs' claim amounted to a contention that the defendants engaged in "random and unauthorized conduct," and in such cases due process only mandates post-deprivation procedures. The plaintiffs had access to such procedures but failed to take advantage of them. Therefore, their procedural due process claim failed as well.

⁷ In arguing that no adequate state remedies exist, the plaintiffs note that they brought this action under 42 U.S.C. § 1983, and they claim that section 1983 actions cannot be brought in state court. (Appellant's brief at 20-21). This is both wrong and irrelevant. State courts have concurrent jurisdiction over section 1983 actions. *Felder v. Casey*, 487 U.S. 131, 139 (1988). And the question whether state remedies are adequate in no way turns upon where section 1983 actions may be brought. The remedies available under section 1983 are *federal* remedies, and the plaintiffs have no cause of action under section 1983 for a substantive due process violation unless *state* remedies are inadequate. *See generally Easter House v. Felder*, 910 F.2d 1387, 1405-06 (7th Cir. 1990) (*en banc*).

The plaintiffs selectively quote *Zinermon v. Burch*, 494 U.S. 113, 127 (1990), for the proposition that “the Constitution requires some kind of hearing *before* the State deprives a person of liberty or property.” (Appellants’ brief at 22). The Court in *Zinermon* actually observed that due process *usually* requires a pre-deprivation hearing, *id.* at 127, but went on to acknowledge that “[i]n some instances . . . the Court has held that a statutory provision for a postdeprivation remedy, or a common-law tort remedy for erroneous deprivation, satisfies due process,” *id.* at 128. Thus, “[t]his Court has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause.” *Gilbert v. Homar*, 520 U.S. 924, 930 (1997).

One circumstance under which postdeprivation remedies may be adequate for due process purposes is where the alleged deprivation was “random and unauthorized.” See *Hudson v. Palmer*, 468 U.S. 517, 533 (1984); *Easter House*, 910 F.2d at 1396. Often a State will not be able to predict that its officials will wrongfully deprive persons of property, and in such cases the State cannot be expected to supply adequate pre-deprivation procedures. *Parratt v. Taylor*, 451 U.S. 527, 540-41 (1981).

In determining whether official action is “predictable,” this court considers whether the official exercises discretion in the performance of his duties, and if so, the extent to which that discretion is circumscribed by “statutory or other predeprivation procedural safeguards.” *Easter House*, 910 F.2d at 1400-01. If a state

official abuses his discretion in a way that violates state law, his conduct will be deemed “random and unauthorized” from the standpoint of the State. *See id.* at 1401-02 (where state official’s actions were “patently inconsistent with Illinois law and constituted an outright departure from the authority which [he] was granted under the governing statutes and regulations,” such action was “random” under *Parratt* and its progeny).

In this case, if the defendants have in fact continued to deny veterans an absolute preference in hiring even after the Illinois Supreme Court’s decision in *Denton*, then that conduct must be characterized as “random and unauthorized” under the *Parratt* doctrine. The state supreme court has the final say on what Illinois law means, and where that court has spoken the State expects its administrative officials to adjust their conduct accordingly.⁸ Therefore, once *Denton* was decided, state officials were duty-bound to give veterans an absolute hiring preference under section 8b.7 of the Personnel Code. They had no discretion to deviate from the statute’s requirements. There was accordingly no reason for the State to anticipate non-compliance with *Denton*’s directives and to create predeprivation procedures to guard against such non-compliance.

Under *Parratt* and its progeny, then, the Due Process Clause did not give the plaintiffs the right to a predeprivation remedy. *Cf. Strasburger*, 143 F.3d at 358 (predeprivation process not required where plaintiff alleged “conspiracy by state

⁸ Indeed, the record shows that the Governor’s Office specifically directed state agencies to follow *Denton*. (R. Doc. 93, exh. B).

officials to deprive him of a state-created interest” in public employment); *see also* *McMenemy v. City of Rochester*, 241 F.3d 279, 288-89 (2d Cir. 2001) (no predeprivation process required where plaintiff alleged that denial of promotion in public employment deprived him of a property interest); *Shirokey v. Marth*, 63 Ohio St.3d 113, 120-21, 585 N.E.2d 407, 413 (1992) (same).

The question thus remains whether Illinois law provides adequate post-deprivation remedies for a state official’s failure to apply the veteran’s preference statute. As explained in the previous discussion on substantive due process, state law provides ample post-deprivation remedies for veterans who are allegedly denied their veterans’ preferences. *See Denton*, 176 Ill. 2d at 147, 679 N.E.2d at 1236. It follows that the plaintiffs were not denied their procedural due process rights. Therefore, the district court’s judgment should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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APPENDIX

Moore v. Muncie Police and Fire Merit Comm'n,
312 F.3d 322, 2002 WL 31722178 (7th Cir. Dec. 5, 2002) A1-A11

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

PROOF OF SERVICE

The undersigned, being first duly sworn upon oath, deposes and states that two copies of the foregoing brief and one disk containing the brief were served upon the below-named person on December 24, 2002, by depositing such copies in the United States mail at 100 West Randolph Street, Chicago, Illinois, in an envelope bearing sufficient postage and addressed as follows:

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SUBSCRIBED and SWORN to before me
this 24th day of December, 2002.

NOTARY PUBLIC