No. 02-2143

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Veterans Legal Defense Fund, an Illinois not-for-profit corporation, Tom Foster and Steven C. Terry,

Plaintiffs - Appellants,

v.

Michael S. Schwartz, in his official capacity as Director, Department of Central Management Services of the State of Illinois, 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,

Defendants - Appellees.

Appeal From The United State District Court
For the Central District of Illinois, Springfield Division
Case No. 97-3380

The Honorable Judge Richard Mills

ORAL ARGUMENT REQUESTED

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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ARGUMENT

The Defendants have now completely abandoned the argument they so vociferously presented, and won, in the lower court, for the even flimsier position that the veterans' preference– which both parties, the Illinois Supreme Court and the lower court acknowledge as an absolute hiring preference– is now not a property interest protected by the Fourteenth Amendment of the United States Constitution. In doing so, they deceptively seek to shift the focus from the preference guaranteed to the future employment in civil service.

The Defendants diversions continue, asserting that Plaintiffs need first exhaust their state remedies– an argument repeatedly rejected by the United States Supreme Court and the Seventh Circuit. Once past these two meritless arguments, the Defendants have nothing left, offering no arguments to justify their unreasonable and arbitrary denial of the benefits or lack of pre- or post-denial procedure.

In amazed disbelief, Plaintiffs' respectfully respond.[1]

III. DEFENDANTS DECEPTIVELY DIVERT THE FOCUS OF THE PROPERTY INTEREST FROM THE PREFERENCE TO THE JOB– HOWEVER, IT IS THE VETERANS' PREFERENCE, AND NOT THE RESULTING JOB, THAT IS THE PROPERTY INTEREST.

The Defendants attempt to muddle the issue before this Court by mischaracterizing the property interest Plaintiffs seek to protect. As alleged by the Plaintiffs, and held by the lower court, the property interest is in the preference, not the job. Illinois statutes explicitly grant veterans an absolute hiring preference over nonveterans. *See, e.g.*, 20 ILCS 415/8b (West 2002); *Denton v. Civil Service Commission of the State of Illinois*, 176 Ill. 2d 144, 679 N.E.2d 1234 (1997). This preference is entitled to Constitutional protection. *Carter v. City of Philadelphia*, 989 F.2d 117 (3rd Cir. 1993), *cert. denied*, 12 L. Ed. 2d 868, 114 S. Ct. 2139 (1994). Whether Plaintiffs might get

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[1] This Court should ignore any arguments asserted in the Defendants' brief that are unsupported by the record. *Perry v. Sullivan*, 207 F. 3d 379, 383 (7th Cir. 2000).

the job and whether that job constitutes a protectable property interest is irrelevant.

Thus, Section C. 2 of Defendants' argument (entitled "The Veterans' Preference is Too Contingent to be a Property Interest") is a misnomer. The contingency that Defendants refer to is the actual acquisition of a job, not the right at issue here– the preference guaranteed veterans' by Illinois statute. Even if the right at issue were the actual job, and not the preference, the blanket statement that "probationary civil service jobs are not property" is untrue.

To determine whether a probationary job is a property interest, a Court must look to whether additional rules or provisions create a property interest in the job. *Lewis v. Hayes*, 152 Ill. App. 3d 1020, 1024, 505 N.E.2d 408, 106 Ill. Dec. 102 (1987). In *Lewis*, the court directly addressed whether a probationary employee could have a property right in his employment, and concluded that he could. *Id.* ("[w]e hold that a protectable property interest existed in employment as a probationary police officer in the Village of Bradley.") Further, to make a determination at this point would be to go beyond the materials found in the record, and thus to exceed this Court's authority. *See, e.g., Joseph P. Caulfield & Associates v. Litho Productions, Inc.*, 155 F. 3d 883, 888 (7th Cir. 1998)("[O]ur review of a grant of summary judgment is limited to the record presented to the district court at that time…")

Defendants' reliance on *Yatvin v. Madison Metro. School Dist.*, 840 F.2d 412, 417 (7th Cir. 1988)

is equally disturbing. The court in *Yatvin* was presented with a non-mandatory, permissive, contractual right to affirmative action. Conversely, the right at issue here is a mandatory, statutory right. Any such comparison of the two factual situations would be like comparing apples and zucchinis.

Moreover, the statutorily mandated preference is not merely a "step taken" towards the

achievement of employment, as in *Ratajack v. Board of Police and Fire Commissioners*, 729 F. Supp. 603, 607 (N.D. Ill. 1990). In the present case, unlike *Ratajack* and the similar cases relied upon by that court (which were properly distinguished by the court in *Carter*), the property interest in the preference is created by state statute, and is, therefore, not merely a procedure, but a guaranteed right.

Simply, the right at issue here is a statutorily provided mandatory hiring preference that was denied veterans. Even if the probationary status of the job one would receive if they had received their preference was a factor, it is one that this Court cannot consider without stepping outside the bounds of the record. The Third Circuit case of *Carter v. City of Philadelphia*, 989 F.2d 117 (3rd Cir. 1993), is not only compelling, it provides the guideposts for the nearly-mirrored facts in the present case.

II. DEFENDANTS' DUE PROCESS ARGUMENTS ARE ALSO MERITLESS– PLAINTIFFS DO NOT HAVE TO EXHAUST STATE REMEDIES, THE FAILURE TO GIVE PREFERENCES IS BOTH ARBITRARY AND IRRATIONAL, AND NO PROCEDURE EXISTED TO RIGHT THE DEPRIVATION.

A. Defendants' ignore the explicit ruling of *Patsy v. Board of Regents*– Plaintiffs need not exhaust their state remedies before pursuing federal ones.

Defendants continued referral to "adequate state law remedies" in their response to both the substantive and procedural due process claims completely ignores the holding of *Patsy v. Board of Regents*, 457 U.S. 496, 516, 73 L. Ed. 2d 172, 102 S. Ct. 2557(1982), and its offspring, including *Zinermon v. Burch*, 494 U.S. 113, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990). As the Court stated in *Zinermon*:

> [T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions "regardless of the fairness of the procedures used to implement them." Daniels v. Williams, 474 U.S. at 331. . . A plaintiff, under *Monroe* v.*Pape*, may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights.

Zinermon, 494 U.S. at 125.

This Court recently had the opportunity to revisit this long standing principle in its' unpublished decision of *Harker v. University Professionals*, 1999 U.S. App. LEXIS 922, No. 98-1318 and 97-1147 (7th Cir. Jan. 21, 1999). In *Harker*, the plaintiff filed a Section 1983 action against Western Illinois University for due process violations in his termination from the university. *Id.* at * 3. The defendants argued, like the Defendants here, that Harker needed to first exhaust his state administrative remedies. *Id.* at * 9. This Court found the position "untenable" in light of the Supreme Court's decision in *Parker*, and held that "a plaintiff may bring a collateral attack on a state administrative procedure in federal court for violation of due process." *Id.* at * 10 (citing *Van Harken v. City of Chicago*, 104 F.3d 1346, 1349 (7th Cir. 1997)).

As clearly established by the litany of Supreme Court and Seventh Circuit cases, there is no need for the Plaintiffs to exhaust their state remedies before pursuing their Section 1983 action in federal court.

B. Defendants denial of the Veterans' Preference was arbitrary and unreasonable.

To establish a substantive due process violation, a plaintiff must show that the defendant's actions were "arbitrary and unreasonable bearing no relationship to the public health, safety and welfare." *Estate of Himelstein v. Ft. Wayne*, 898 F.2d 573, 577 (7th Cir. 1990). Defendants have offered no argument, legal justification, or evidence disputing the irrational denial of the Veterans' Preference, instead putting all of their eggs in the bottomless "adequate state remedies" basket. Because a guaranteed, mandatory preference is the only "logical" and "commonly understood meaning" of the statute, it is easy to understand Defendants' failure to conjure up any rationale to their arbitrary denial of a preference to veterans. *Denton v. Civil Service Commission of the State of Illinois*, 277 Ill. App. 3d 770, 661 N.E.2d 520, 524 (Ill. App. 4th Dist. 1996). What is hard to understand is the continued denial of these benefits.

Without any relation to the public health, safety or welfare, no explanation for their actions, and no fathomable rationale for the denial, Defendants' failure to implement the mandatory preference is clearly both arbitrary and unreasonable.

C. Defendants disingenuous suggestion that post-deprivation procedure would suffice ignores precisely the situation Plaintiff is in, namely, seeking pre-deprivation declaratory relief for other class members. Additionally, Defendants determination to disregard the preference mandates pre-deprivation procedure as the only meaningful protection.

The post-deprivation argument is a trap, constituting nothing more than a shell game intended to force all claims into an action foreclosed by the Eleventh Amendment. The damage here, however, is the ongoing refusal to honor the statutorily mandated preference. While questioning the Plaintiffs "selectivity" in their citation, the Defendants place the cart well before the horse with their reliance on the doctrine espoused in *Parratt v. Taylor*, 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981).[2] Although few occasions do allow for post-deprivation remedy, these situations arise when post-deprivation remedies are the only remedy the State can provide, producing an unusual result of the test composed in *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The rule announced in *Parratt*, and utilized by the Defendants, is a rare example where one of the factors– the value of predeprivation safeguards– is negligible. *Zinermon*, 494 U.S. at 129. This

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[2] Even if the Court determines that post-deprivation state remedies would suffice, any determination that the remedies available were sufficient would be primarily a question of fact (one not determined by the court below) and, therefore, outside of this Court's scope of review. *See, e.g., Pavelich v. Natural Gas Pipeline Co.*, 2002 U.S. Dist. LEXIS 23946, No. 02 C 3374 (N.D. Ill. December 12, 2002)

lessened value results either from the necessity for quick action by the state (clearly not at issue here) or because of the unpredictability of the defendants' actions– *e.g.*, the "random and unauthorized" actions of *Parratt* where a prison guard who lost materials in a prisoners mail, or the destruction of legal papers by a prison guard in *Hudson v. Palmer*, 468 U.S. 517, 82 l. Ed. 2d 393, 104 S. Ct. 3194 (1984). These cases, however are a far cry from the case *sub judice*.

In *Easter House II*, there was no evidence that the state could know that one of its employees would disregard procedure. *Easter House v. Felder*, 910 F.2d 1387, 1401 (7th Cir. 1990). Here, the State of Illinois has been thwarting the intent of the Veterans preference statute before the decision in *Denton*, and continued to so after the decision. There is nothing "unpredictable" or "random" about the State and its employees continued trend in denial of a mandatory preference. This is not like *Parratt*, where the State could potentially anticipate lost mail, but could not predict when it would be lost. 451 U.S. at 541. It closer resembles the situation in *Zinermon*, where it was "hardly unforeseeable" that an erroneous deprivation might occur at a specific part in the admission process of a mentally ill patient. 494 U.S. at 136. Likewise, any deprivation here will occur at exactly the same part of the state's hiring process– at the moment when an official reviews the roster for potential veterans, and assigns them their proper position based upon the statutorily mandated preference.

Further, Defendants behavior does not become "unauthorized" simply because they exceeded the scope of their authority, as suggested in Defendants Brief. In fact, this Court has held that state official could not "escape liability under section 1983 simply by exceeding the scope of their authority." *Tavarez v. O'Malley*, 826 F.2d 671, 677 (7th Cir. 1987). The Supreme Court narrowed the definition of "unauthorized" to those employees who had no state-delegated power, and thus no duty to provide victims with procedural safeguards. *See,* generally, *Zinermon*,

494 U.S. 113; *Easter House II*, 910 F.2d at 1412 (Cudahy, J., dissenting). Clearly that is not the case here. Indeed, as stated by the Supreme Court:

> It would be strange to allow state officials to escape § 1983 liability for failure to provide constitutionally required procedural protections by assuming those procedures would be futile because the same state officials would find a way to subvert them.

Id. at 137-38.[3]

CONCLUSION

Plaintiffs respectfully request the Court to reverse the decision of the lower court regarding the bar of Plaintiffs federal claim by the Eleventh Amendment, and remand this case to the District Court to proceed ahead, certify the classes as requested under Fed. R. Civ. P. 23(b)(2) and order the enforcement of class members' absolute veterans preference.

Respectfully submitted,

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[3] Plaintiffs respectfully disagree with this Court's recent expansion of the *Parratt* "rule". As eloquently stated by Judge Easterbrook, the line of cases following the Supreme Court's decision in *Parratt* resembles "the path of a drunken sailor" that has been drawn by a clearly divided (as true now as it was then) Supreme Court. *Easter House II*, 910 F. 2d at 1409. Regardless of one's feelings as to the Due Process clause, it is integral to our system of justice that one be given a hearing before the deprivation of a right guaranteed by the Fourteenth Amendment. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 84 L. Ed. 2d. 494, 105 S. Ct. 1487 (1985). It should be the extremely rare occurrence when post-deprivation procedures suffice, and only then when the state had no way of providing procedural safeguards before the deprivation. *Zinermon*, 494 U.S. at 136.

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Certificate of Service and of Digital Media

I, Clinton A. Krislov, an attorney, on oath state that on January 28, 2003, I caused two paper copies and a diskette (digital media) of this attached pleading to be served via FEDERAL EXPRESS on the party listed below.

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Certificate of Compliance with Circuit Rule 31 (e)

I, Clinton A. Krislov, an attorney for Appellant, certifies that a digital version of the foregoing Brief is being furnished to the Court and served upon counsel in Portable Document Format as required by Circuit Rule 31.

____
Clinton A. Krislov

Dated: January 28, 2003