University of Richmond Law Review

Volume 10 | Issue 2 Article 8

1976

Administrative Law-Incompleted Title VII Administrative Proceedings Not-Terminated By Judicial Review- Federal Employee May Present New Evidence In Court

RECENT DECISIONS

Administrative Law—INCOMPLETED TITLE VII ADMINISTRATIVE PROCEEDINGS NOT TERMINATED BY JUDICIAL REVIEW—FEDERAL EMPLOYEE MAY PRESENT NEW EVIDENCE IN COURT—*Grubbs v. Butz*, 514 F.2d 1323 (D.C. Cir. 1975).

The Equal Employment Opportunity Act of 1972[1] (EEOA) extended certain provisions of Title VII of the Civil Rights Act of 1964[2] to federal employees. One such provision extended is contained in § 717(c).[3] Under this section a federal employee alleging employment discrimination is granted access to a United States district court in two situations: when administrative relief is not provided within 180 days after the filing of the original complaint; or, upon final action being taken by either the agency involved or the Civil Service Commission.[4] Where final administrative

1. 42 U.S.C.A. § 2000e *et seq.* (1974). For a discussion of this Act see Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

2. 42 U.S.C.A. § 2000e *et seq.* (1974). Title VII of the Civil Rights Act prohibits employment discrimination based on "race, color, religion, sex, or national origin."

3. Section 717(c) of the Equal Employment Opportunity Act (EEOA) (42 U.S.C.A. § 2000e-16(c) (1974)) provides:

> Within thirty days of receipt of notice of final action taken by a department, agency, . . . or by the Civil Service Commission . . . or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit . . . an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

4. Traditionally the courts have been reluctant to interfere with federal employment standards. Hackley v. Johnson, 360 F. Supp. 1247, 1250 (D.D.C. 1973). This was because the government could always claim sovereign immunity. In recent decades the review of adverse actions taken by the Civil Service Commission has broadened from a review insuring statutory compliance, *see, e.g.* Boylan v. Quarles, 235 F.2d 834 (D.C. Cir. 1956), to a review based on finding substantial support for the administrative findings, *see, e.g.*, Halsey v. Nitze, 390 F.2d 142, 144 (4th Cir. 1968). The scope of review has broadened but it has still remained a review of the administrative record rather than a trial de novo.

Since the enactment of the EEOA, federal employees have generally been denied independent jurisdiction on grounds other than Title VII. The federal employee has been denied the right to file an independent civil action pursuant to the Civil Rights Act of 1866 (§ 1981) because the government has retained the right of sovereign immunity in that area. *See, e.g.*, McLaughlin v. Callaway, 382 F. Supp. 885, 892 (S.D. Ala. 1974). The fifth amendment has not been seen as a ground for independent action since the employee can gain relief for any fifth amendment violation through a Title VII action. *Id.* at 892-93. The mandamus provided under 28 U.S.C. § 1361 has generally been denied as an independent basis for jurisdiction. This statute compels public officials to perform their ministerial duties, *e.g.*, the duty not to

action has been taken, decisions differ as to whether new evidence should be allowed in the district court (trial de novo), or whether the civil action should be limited to a review of the administrative record. The Supreme Court has determined that private employees have a right to a trial de novo,[5] but this right has infrequently been granted to public employees.[6]

---

discriminate. However, mandamus is an extraordinary remedy which is normally not utilized when another remedy is available, such as a Title VII action. *Id.* at 893. Although federal employees have frequently sought a trial de novo by an independent cause of action, this has generally been denied.

This denial of a trial de novo has put the federal employee at a disadvantage when compared to the private employee. The private employee has the initial option of filing a complaint with the Equal Employment Opportunity Commission (EEOC) or filing a civil action pursuant to the Civil Rights Act of 1866, which is a de novo trial because there is obviously no record to review at that point. *See, e.g.*, Johnson v. City of Cincinnati, 450 F.2d 796 (6th Cir. 1971); *cf.*, Sullivan v. Little Hunting Park Inc., 396 U.S. 229 (1969). If he chooses to proceed through the EEOC route, the EEOC may file a civil action on his behalf or, if the employee is not satisfied with the EEOC resolution, he may file a civil action himself and receive a trial de novo. 42 U.S.C.A. § 2000e-5(f)(1) (1974). This gives the private employee three opportunities for a full trial whereas the federal employee may not receive a full trial at any stage but only a review of the administrative proceedings. The line of cases following *Hackley* denies that any inequality is created because the public employee has the benefit of a hearing before the Civil Service Commission. *See* note 6 *infra*.

5. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court stated that the EEOA does not restrict a private employee's right to sue to those charges for which the EEOC has found reasonable cause. The employee also must be allowed to introduce new evidence. *Id.* at 798-804. In reaching this decision the Court cited a Fourth Circuit case that noted: "The Courts of Appeals which have considered the issue have held that court actions under Title VII are de novo proceedings . . . ." Robinson v. Lorillard Corp., 444 F.2d 791, 800 (4th Cir. 1971). The Fourth Circuit then upheld de novo proceedings for employees in the private sector.

6. The statute itself does not mention the scope of review. It incorporates the sections of the Code giving private sector employees the right to a trial de novo (see note 5 *supra*) into the section pertaining to federal employees, but only "as applicable." 42 U.S.C.A. § 2000e-16(d) (1974). What is meant by the term "as applicable" is not explained in either the statute or the legislative history. Baca v. Butz, 376 F. Supp. 1005 (D.N.M. 1974), stated that there is no automatic right to a trial de novo, partly because it read "as applicable" to mean that sections referring to the EEOC would not be incorporated since federal employees have available to them the Civil Service Commission. *Id.* at 1009. On the other hand, the phrase could mean to substitute the Civil Service Commission as applicable in place of the EEOC. Courts favoring a new trial generally just ignore subsection 16(d) and stress subsection 16(c) (see note 3 *supra*) which gives federal employees the right to file a civil action as provided in the section for private employees. *See, e.g.*, Jackson v. United States Civil Serv. Comm'n, 379 F. Supp. 589 (S.D. Tex. 1973).

Due to the ambiguity in the statute, the legislative history also must be examined. This is a matter of dispute. Senator Williams and Senator Cranston were sponsors of the Senate version of the EEOA, yet they disagreed in their interpretations of whether federal employees are entitled to a trial de novo. Senator Williams interpreted the Act as providing a simple review of the agency or Civil Service Commission proceedings. 118 CONG. REC. 2280 (daily ed. Feb. 22, 1972). Due to an error, Senator Cranston originally appeared to agree with

This different treatment can be attributed in part to the added protection granted federal employees by the existence of the Civil Service Commission.[7]

A recent case, *Grubbs v. Butz*,[8] involved judicial review of an administrative process which was begun but not completed. Ms. Grubbs, an employee of the Food and Nutrition Service (FNS) of the Department of Agriculture, filed a formal complaint with FNS alleging sex discrimination. After a six month investigation, FNS held that no evidence of sex discrimination was established, whereupon Ms. Grubbs indicated her intention to seek a hearing within the Department of Agriculture. After a delay of over two years, no final action had been taken by the Department.[9] Ms. Grubbs filed a civil action seeking relief under the anti-discrimination provisions of the EEOA[10] and an injunction prohibiting the Department of Agriculture from continuing separate administrative proceedings. The lower court denied the injunction and, at the same time, the trial judge held that Ms. Grubbs would have to exhaust her administrative remedies within the Department.[11]

Senator Williams. However, he later corrected himself, stating that the Act provides federal employees with the right to a trial de novo. His original remarks in 118 CONG. REC. 2287 (daily ed. Feb. 22, 1972) were corrected in 118 CONG. REC. 4929 (1972) (remarks of Senator Cranston).

As stressed by Reynolds v. Wise, 375 F. Supp. 145 (N.D. Tex. 1973), it was the House version and not the Senate version of the Act that was adopted. *Id.* at 148. The House report strongly suggested that a trial de novo is required where it encourages "a vigorous effort to afford Federal employees the same rights and impartial treatment which the law seeks to afford employees in the private sector." 2 U.S. CODE CONG. & AD. NEWS 2137, 2158 (1972). Yet this quote cannot be taken too literally since private and public employees were definitely not given the same rights. The federal employees have the benefit of an employee oriented Civil Service Commission whereas the private employees have the EEOC which as a conciliatory body is much weaker than the Civil Service Commission. Since Congress did not clearly require nor clearly deny a trial de novo, the best solution would be to make the determination on a case by case basis. *See* 123 U. PA. L. REV. 206 (1974); Comment, *Federal Employment Discrimination and The Equal Employment Opportunity Act of 1972: Review on the Administrative Record or Trial De Novo*, 20 S.D.L. REV. 181 (1975).

7. *See, e.g.*, Hackley v. Johnson, 360 F. Supp. 1247, 1251 (D.D.C. 1973).

8. 514 F.2d 1323 (D.C. Cir. 1975).

9. While a hearing before the Department of Agriculture was pending, Ms. Grubbs brought an action before the Civil Service Commission (CSC) alleging that she had received a reduction in rank from the FNS while her complaint was pending. The CSC found against Ms. Grubbs and on May 4, 1973, she filed an action in the district court. Over two years had passed since she initiated proceedings with FNS, and it was not until a month later, June of 1973, that she was informed that the Department of Agriculture would conduct a hearing. *Id.*

10. *See* notes 2 & 3 *supra*.

11. 514 F.2d at 1327.

Upon appeal, Chief Judge Bazelon held that under § 717(c) there was no requirement of remedy exhaustion.[12] He stated further that to graft such a requirement would frustrate the congressional intent of prompt access to courts in discrimination disputes.[13] However, the denial by the trial court of the injunction prohibiting the Department of Agriculture from proceeding concurrently with the plaintiff's civil action was affirmed. Judge Bazelon noted that nothing in the Act supported the position that concurrent proceedings were prohibited; in fact, the regulations adopted to implement the EEOA clearly state the contrary.[14] The court also ruled that in deciding federal employees' Title VII claims, the district court may not rely upon the record of incomplete administrative proceedings without giving the employee a full and fair opportunity to present his own evidence in court.[15]

In cases dealing with the scope of review of federal employment discrimination administrative proceedings, *Hackley v. Johnson*[16] has been the most frequently cited decision. In that case the district court held that the EEOA does not require an automatic trial de novo for federal employees where the administrative record is complete. However, the court must examine the record with great care, and if the absence of discrimination is not affirmatively established by the clear weight of the evidence, new evidence may be allowed at the discretion of the court.[17] *Hackley* further stated that courts are free to act on a case by case basis, deciding whatever is appropriate and consistent with experience and precedent.[18] A majority of courts have followed *Hackley* and have denied a new trial[19] while a few

12. Even before § 717(c) was enacted, the exhaustion of remedies doctrine was not always enforced strictly. In McKart v. United States, 395 U.S. 185, 193 (1969), the Court stated that the exhaustion of remedies doctrine is subject to many exceptions and an application to a particular case requires an understanding of the particular administrative scheme involved. Since the passage of § 717(c), as stated in *Grubbs:* "[N]o appellate court has yet superimposed an exhaustion requirement on the statutory prerequisites to suit as set out in § 717(c)." 514 F.2d at 1328. In the Fourth Circuit the exhaustion of administrative remedies may be excused where there is not available a "reasonably expeditious . . . administrative remedy." Farley v. Turner, 281 F.2d 131, 132 (4th Cir. 1960).

13. 514 F.2d at 1328.

14. 5 C.F.R. § 713.283 (1975) provides: "The filing of a civil action [for employment discrimination] by an employee or applicant does not terminate agency processing of a complaint. . . ."

15. 514 F.2d at 1330-31.

16. 360 F. Supp. 1247 (D.D.C. 1973).

17. *Id.* at 1252.

18. *Id.*

19. *See, e.g.*, Salone v. United States, 511 F.2d 902 (10th Cir. 1975) (no circuit court other than the District of Columbia has mandated an automatic trial de novo); Thompson v. United States Dep't of Justice, 372 F. Supp. 762 (N.D. Cal. 1974); Spencer v. Schlesinger, 374 F. Supp. 840 (D.D.C. 1974); Handy v. Gayler, 364 F. Supp. 676 (D. Md. 1973).

cases have mandated an automatic trial de novo.[20]

The line of cases following *Hackley* has raised three basic policy considerations against granting a new trial: first, because matter already established in the record will have to be reestablished, an evidentiary trial will overburden the courts with unnecessary duplication;[21] second, the time required to gather new information will needlessly delay the termination of the case;[22] and third, a new trial will undermine the expertise of administrative bodies because it may be difficult for courts "to differentiate between pure discrimination claims and the underlying intricacies of civil

20. *See* Henderson v. Defense Contract Admin. Serv. Region, 370 F. Supp. 180 (S.D.N.Y. 1973); Jackson v. United States Civil Serv. Comm'n, 379 F. Supp. 589 (S.D. Tex. 1973); Reynolds v. Wise, 375 F. Supp. 145 (N.D. Tex. 1973); Griffin v. United States Postal Serv., 7 F.E.P. Cases 303 (1973); Williams v. Mumford, 6 F.E.P. Cases 483 (1973) (mandated trial de novo but only for matters in original complaint). These cases rely on the ambiguous statutory and legislative history, and do not deal with the policy considerations against an automatic trial de novo.

Various courts which have denied a trial de novo have stated in dictum that full trials would naturally be allowed when there is no administrative record to review. *See* Spencer v. Schlesinger, 374 F. Supp. 840, 845 (D.D.C. 1974); Baca v. Butz, 376 F. Supp. 1005, 1009-10 (D.N.M. 1974); Pointer v. Sampson, 62 F.R.D. 689, 694 n.30 (D.D.C. 1974). For a case allowing a trial de novo only because the record was unclear see McLaughlin v. Callaway, 382 F. Supp. 885 (S.D. Ala. 1974).

21. Courts, already overburdened, wish to avoid unnecessary evidentiary hearings. On the other hand, the EEOA has strengthened the Civil Service Commission. 42 U.S.C.A. § 2000e-16(b) (1974). If courts ignored the findings and evidence obtained by the agencies, it would render the Commission's work almost useless.

However, there are arguments that can be made against a simple review. 5 C.F.R. § 713.218(c)(2) (1975) provides that rules of evidence will not be strictly applied in administrative hearings. The problem then exists that improper evidence may be included, and proper evidence may be excluded. Section 713.218(e) enables the agencies to request the testimony of federal employees but no provisions are made for obtaining the testimony of former employees. Thus a former employee's testimony, no matter how important, could not be obtained, while in a civil action the testimony of such a witness could be obtained. *See* FED. R. CIV. P. 26-37. The complaints examiner in an administrative hearing is not required to have legal experience. 5 C.F.R. § 771.116(c) (1975). In a civil action the employee controls his own factfinding process whereas in the agency hearing the complaints officer conducts the investigation. *Id.* § 713.216(a). Requiring a trial de novo in every case could burden the courts unnecessarily, but the possible inadequacies of the administrative process may make a trial de novo necessary in certain situations. A discretionary right of review would provide a remedy for such a situation. *See generally* 123 U. PA. L. REV. 206 (1974); Comment, *Federal Employment Discrimination and The Equal Employment Opportunity Act of 1972: Review on the Administrative Record or Trial De Novo,* 20 S.D.L. REV. 181 (1975).

22. *See* Hackley v. Johnson, 360 F. Supp. 1247, 1252 (D.D.C. 1973). This is a valid argument against a full trial following a completed administrative record, but there may be circumstances in which the administrative hearing is inadequate and a trial de novo should be allowed. *See* note 21 *supra.* Congress did not intend a speedy process at the expense of justice.

service regulations governing job qualification selection for promotion, training and the like."[23] According to the authority expounding these considerations, a trial de novo, when dealing with federal employees, is impractical. According to those decisions, the solution is to leave the complainant to his remedy with the Civil Service Commission and for the courts merely to provide a simple review. The Commission, it is argued, has been greatly strengthened by Congress and is better equipped to decide these matters.[24]

The above policy considerations, however, do not apply to the situation presented in *Grubbs* where no final administrative action has been taken. The consideration of unnecessary duplication does not apply because any evidence obtained in a new trial will be a necessary supplement to the incomplete administrative record. Also, the time required for an evidentiary trial will not needlessly delay the final termination of the case since there is an obvious need to gather new information which outweighs the effect of any possible delay. In fact, the result of the decision could be to speed up administrative proceedings.[25] The last consideration, that a new trial would undermine the expertise of administrative bodies, also does not apply because the holding only requires a trial de novo when the agencies themselves have not acted within the statutory time limit. Any possible undermining can be avoided by completing the administrative process within 180 days.

All considerations point to the wisdom of the decision to allow a full trial. However, the court in *Grubbs* went further than merely permitting a trial de novo. The court mandated that new evidence must always be allowed when the record is incomplete.[26] The court reasoned that this is necessary for two reasons. One reason is that a claimant, forced to proceed in two fora at the same time, might feel it necessary to refrain from filing until the administrative proceeding is advantageously terminated in case the judge should decide not to allow new evidence. This would negate the EEOA's provision for judicial relief after 180 days.[27] The second reason is that if the trial judge is allowed to rely heavily on the administrative record, he may be tempted to delay until the administrative proceedings are completed, thereby violating the clear intent of the EEOA that judicial proceedings "be in every way expedited".[28]

---

23. Hackley v. Johnson, 360 F. Supp. 1247, 1252 (D.D.C. 1973).

24. *Id.*

25. The administrative bodies will want to complete the proceedings in 180 days to provide the court with a complete record.

26. 514 F.2d at 1330-31.

27. *See* note 3 *supra*.

28. 42 U.S.C.A. § 2000e-5(f)(5) (1974).

These are valid arguments, but they ignore the possibility that federal employees might delay their administrative proceedings until the 180 day period is over in order to ensure themselves a trial de novo. This would result in needless delay and a mockery of the administrative process established by the EEOA. An employee might file a complaint and then completely ignore the administrative body. This is not what Congress intended when § 717(c) was enacted. A possible alternative would be to give the federal employee the right to an evidentiary trial after administrative proceedings over 180 days but make granting this trial discretionary with the court. This would be in accord with the numerous decisions following *Hackley* that neither automatically deny nor require a trial de novo.[29] If the court feels the employee has delayed obtaining a trial de novo, the court may deny such a trial and base its decision on the record rendered after the 180 days. To prevent judges from arbitrarily abusing their discretion, substantial evidence that the federal employee intentionally delayed the administrative hearings should be required. This would assure the employee, if he did not purposely delay, a plenary review allowing him to concentrate on the judicial process.

The increasing number of federal agencies and employees and the likelihood that employee Title VII claims will become more frequent will impose a greater burden on administrative bodies. This will create delays in which the 180 day limit will increasingly be surpassed and the employee will increasingly be faced with litigation in two fora. To help remedy such a situation, a trial de novo should be allowed at the discretion of the court. This procedural device not only fulfills the congressional purpose that the EEOA provide for an expeditious hearing while protecting the rights of federal employees but also avoids the duplication criticized by the *Hackley* line of cases.

M.J.W.

29. Although the cases following *Hackley* generally deny a trial de novo, they do admit that exceptions may exist. *See* note 20 *supra*. Hackley v. Johnson, 360 F. Supp. 1247, 1252 (D.D.C. 1973).