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IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DIVISION OF THE WESTERN DISTRICT OF MISSOURI

Lucile Bluford,)
)
Plaintiff,)
)
vs : CivilAction No. 42
)
S.W. Canada,)
)
Defendant.)

MEMORANDUM IN OPPOSITION to Defendant's Motion to Dismiss

Jurisdiction

Jurisdiction is based on the 14th Amendment to the United States Constitution, section 1; and the United States Code, title 8, sections 41 and 43. Suit is brought in this District Court under United States Code, title 28, section 41 (1) and (14).

State of the Pleadings

The case is before the Court on defendant's motion to dismiss the complaint. The motion to dismiss is essentially the common law demurrer.

McConville vs. District of Columbia, 26 F.Supp. 295 (1938)
Every allegation in the complaint well pleaded is taken for true, and all reasonable intendments therefrom are to be construed against the movant.

Facts

January, 1939, plaintiff Lucile Bluford, a Negro citizen of Missouri resident in Kansas City, twenty-eight years of age, duly made application to defendant Canada, Registrar of the University of Missouri, for admission to the University of Missouri for graduate work in journalism for the second semester of the academic year 1938-1939. She was an A.B., with major in journalism, from the University of Kansas, 1932. Since her graduation she had been

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actively engaged in newspaper work, being managing editor of the Kansas City (Mo.) Call, a weekly newspaper when she applied for admission to the University of Missouri. In all lawful respects she was eligible for admission to the University of Missouri for graduate work in journalism, and defendant Canada accepted her qualifications and told her to come to his office

on the university campus in Columbia to obtain her permit to register. Nothing remained to be done except the mechanics of registration and admission. Nevertheless when she appeared on the campus January 30, 1939, during the regular registration period for said second semester defendant Canada refused to issue her the permit to register, or to register or admit her to the University solely because of her race.

The University of Missouri is a public educational institution maintained by the state for the higher education of all Missouri citizens and foreigners except persons of African descent. A permit to register is a condition precedent to registration and admission. Under Missouri law the University is governed by a board of curators. Under regulations of the board of curators defendant Canada is in complete charge of all details of the registration arid admission of students to the University of Missouri, including students desiring graduate work in journalism.

The University of Missouri is the only institution in Missouri offering graduate work in journalism, and the only place in Missouri where plaintiff can study graduate work in journalism. It stands admitted of record that Lincoln University, the educational institution of higher learning maintained by the state of Missouri for Negro citizens has never, does not now, and cannot offer graduate work in journalism. Defendant Canada knew all these facts January 30,1939 when he refused plaintiff registration and admission to the University of Missouri for graduate work in journalism solely because of her color.

In May, 1939 the Missouri legislature passed a law known as the Taylor Act (Laws 1939, p.685) in an effort to keep Negroes out of

the University of Missouri and at the same time satisfy the standards of equal protection of the law laid down by the United States Supreme Court in State ex rel. Gaines vs Canada et al., 305 U.S. 337 (December 12,1938). The Taylor Act placed a mandatory duty on the board of curators of Lincoln University to reorganize it so that it afford Negro citizens of Missouri education up to the standard available at the University of Missouri. The state legislature implemented the Act by an appropriation of $200,000 to the board of curators of Lincoln University for expansion and new departments (Laws 1939, p.62, sec.3). Nevertheless under said Act the board of curators of Lincoln University had never at any time hereinafter mentioned offered graduate work in journalism, and it stands admitted that it neither had nor has "the faculty, plant, money in hand or appropriated, nor other resources or facilities to offer graduate work in journalism; and does not and cannot offer said work.

In this state of affairs plaintiff in August,1939, being still eligible in all lawful respects for admission to the University of Missouri for graduate work in journalism, renewed her application to defendant for registration and admission, for the first semester of the academic year 1939-1940. Nevertheless when plaintiff appeared on the campus September 14,1939, during the regular registration period for said first semester, defendant well knowing that the University of Missouri was the only Institution in Missouri offering graduate work in journalism, and that it was the only place in the state where plaintiff could study graduate work In journalism, again denied plaintiff her permit to register, and registration and admission solely on account of her race.

Defendant Canada in so refusing plaintiff both times purported to act under color of state law restricting admission to the University of Missouri to students not of the Negro race. In so doing, under the circumstances of this case, he violated the Fourteenth Amendment to the Constitution of the United States, section 1, and the United States Code title 8, section 41; and made

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himself liable to an action for damages by plaintiff under United States Code title 8, section 43.

Alleging substantial damages by reason of loss of time and earning power and efficiency in her work, and great humiliation and mental anguish, plaintiff sued defendant, claiming $10,000 for each of the two illegal refusals, charging that she was lawfully entitled to admission to the University of Missouri for graduate work in journalism, that defendant was under a plain, legal and ministerial duty to admit her, and breach of that duty.

Defendant moved to dismiss on the ground the complaint failed to state a cause of action.

Issue

Is defendant Canada, Registrar of the University of Missouri, personally liable under Federal law supra for damages sustained by a qualified Missouri Negro citizen because defendant acting under color of state law segregating the races in Missouri for purposes of education, denied her registration and admission solely because of her race, when the University of Missouri was the only place in the state where she could study graduate work in journalism?

Argument
I
The Federal right involved

The Federal constitution does not dictate to the states what education it shall offer its citizens; it merely guarantees that when the state offers a particular educational opportunity to its white citizens it cannot withhold the same educational opportunity from its Negro citizens solely because of their race or color.

State ex rel. Gaines vs. Canada, 305 U.S. 337 (1938) supra; same case on second hearing in the Missouri Supreme Court:
131 S.W. (2d) 217 (1939)

The state can segregate the races for purposes of education, but this segregation must be based on the actual present existence of comparable educational opportunities for Negroes within the state

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Lehew vs. Brummell, 103 Mo. 546 (1890)
Gong Lum vs. Rice, 275 U.S. 78 (1927: Chinese)

University vs. Murray, 169 Md. 478 (1936)
State ex rel. Gaines vs. Canada, citations supra

"Separation of the races must nevertheless furnish equal treatment. The constitutional requirement cannot be dispensed with in order to maintain a school or schools for whites exclusively. That requirement comes first." Bond, C.J. in University vs. Murray, supra, at 485.

Granted the Taylor Act of 1939 (Laws 1939, p.685) places a mandatory duty on the curators of Lincoln University to expand it until it furnishes Negro citizens educational opportunities up to the standard available at the University of Missouri, and that the Appropriation Act made available $200,000 for this purpose, nevertheless the facts are that Lincoln University has never, before or after the Taylor Act, offered graduate work in journalism, and cannot do so. Defendant asks the Court to take judicial notice of the appropriations. But it takes more than appropriations to offer an educational course: it takes faculty, physical plant, library and money. At the trial or on motion for summary judgment we shall show the Court that this question of graduate work in journalism was specifically considered by the curators of Lincoln University, that after the Taylor Act the board decided it had neither the plant, library nor faculty available for such work and decided it could not offer such work before February 1,1941; and merely hoped to then.

Under these circumstances the state, and its delegate the defendant Registrar of the University of Missouri, cannot upon the strength of a mere legislative fiat compel the plaintiff to surrender her Federal right to share in the existing educational opportunities for graduate work in journalism now actually offered to the citizens of Missouri by the state in the University of Missouri for a lawsuit against the curators of Lincoln University. This point has been ruled on by the Missouri Supreme Court in the second decision in the Gaines case (131 S.W. 2d 217 - 1939, supra) in language so plain that it defies the efforts of defendant to misread and misinterpret it.

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Counsel for defendant argue that the second hearing of the Gaines case in the Missouri Supreme Court came up under the old 1921 Lincoln University Act (R.S. 1929, sec.9618). That is not true. The second hearing came up under the Taylor Act of 1939 supra. It had to, because the United States Supreme Court had ruled on the inadequacy of the 1921 Act, and there was nothing for the Missouri Supreme Court to consider on second hearing so far as the 1921 Act was concerned. The whole point of the second hearing was as to the effect of the Taylor Act, passed subsequent to the United States Supreme Court hearing, on the issues involved.
If the contention of counsel for defendant were sound, the Missouri Supreme Court would merely have pointed out to Gaines the mandatory duty resting on the curators of Lincoln University un- the Taylor Act and the $200,000 appropriation, and directed him to bring mandamus against the curators of Lincoln University for his legal education. Instead the Missouri Supreme Court ordered that the writ of mandamus issue, in spite of the Taylor Act and the appropriation, unless prior to the beginning of the next school term the facilities available

at Lincoln University in fact were substantially equivalent for the study of law as the facilities in the School of Law of the University of Missouri.

The point is that segregation being a denial of rights, an exception to the general rule that every qualified citizen is entitled to rights in common in every public facility, segregation is a matter of defense on the part of the state in denying Negroes or other persons discriminated against the right to share in every public facility. The burden is not on Negroes primarily to prove that the segregated facilities are unequal. The balance of convenience, facility of proof, and rudimentary justice require that the state justify the segregation by showing that the segregated facility is substantially equal. That is the inescapable meaning of the second decision by the Missouri Supreme Court in the Gaines case, and the only basis on which the decision can be explained.

Finally, it should be noted that this Federal right to equal

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equal educational opportunity is a personal, individual right not dependent upon volume of demand.

> "Nor can we regard the fact that there is but a limited demand in Missouri for the legal education of Negroes as excusing the discrimination in favor of whites. We had occasion to consider a cognate question in the case of McCabe vs Atchison, T. & S.F. R. Co., 235 U.S. 151, 59 L.edl69, 35 S.Ct. 69, supra. There the argument was advanced, in relation to the provision by a carrier of sleeping cars, dining and chair cars, that the limited demand by Negroes justified the State in permitting the furnishing of such accommodations exclusively for white persons. We found that argument to be without merit. It made, we said, the constitutional right "depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.' Id., pp.161,162." Hughes, C.J., in State ex rel. Gaines vs Canada, supra, 350-351.

The Fourteenth Amendment is self-operating. It needs no action of Congress, but Congress has acted in the Civil Rights Act and defendant violated both the Amendment and the Civil Rights Act (U.S.C., title 8, sec. 41) in refusing to issue plaintiff a permit to register, or to register or admit her to the University of Missouri for graduate work in journalism, solely because of race.

II

Personal liability of the officer under Federal law

Defendant Canada justifies his action refusing plaintiff a permit to register, registration and admission to the University of Missouri on the ground of the Missouri law segregating the races for purposes of education, and the orders of his board of curators. It is significant on the good faith of this claim that the Gaines case had been decided by the United States Supreme Court, December 12,1938, before plaintiff Bluford even applied for admission to the University of Missouri. When he denied her a permit to register January 30,1939, the United States Supreme Court had already held that the Missouri law and the orders of the curators of the Univer-

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sity of Missouri excluding qualified Negroes from the University of Missouri were no justification as to those courses offered by the state exclusively in the University of Missouri and not available to Negro citizens of Missouri elsewhere within the state. When Canada refused plaintiff September 14,1939 a permit to register the second time, the Missouri Supreme Court had already handed down its second decision in the Gaines case (August 1,1939), holding that the Taylor Act furnished no justification for the exclusion of Negroes from the University of Missouri unless there was actually in existence substantially equal educational facilities for Negroes elsewhere within the state. The Missouri laws attempting to exclude qualified Negroes from the University of Missouri under circumstances such as exist in this case conflict with the Fourteenth Amendment and the Civil Rights Act, and are not merely voidable but void.

Ex carte Siebold. 100 U.S. 371, 397 (1879)

The vice in defendant's position is that he ignores the fact the Constitution of the United States and laws of Congress passed pursuant thereto are just as much a part of the law of Missouri as any local statute.

Hauenstein vs. Lynham, 100 U.S. 483, 490 (1880)

A local statute enacted under the police power of the state (such as race segregation) must yield where it conflicts with the equal protection of the laws as guaranteed by the Fourteenth Amendment and the Civil Rights Act (U.S.C., title 8, sec. 41).

See Connolly vs. Union Sewer Pipe Co., 184 U.S.540, 558 (1902)

Defendant Canada is a ministerial officer, and his duty to issue plaintiff under the circumstances of this case her permit to register, and to register and admit her to the University of Missouri at the regular registration period upon plaintiff meeting all the lawful uniform requirements and paying the lawful uniform fees, is a ministerial duty which can be enforced by mandamus.

State ex rel. Gaines vs. Canada, 131 S.W. (2d) 217 (1939) supra

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It is settled law both in the Federal courts and in Missouri that a public officer is liable civilly in damages for failure to perform a ministerial duty.

Amy vs. Supervisors, 11 Wall. 136 (1870)

Knox County vs. Hunolt, 110 Mo.67 (1892: county judge)

Burton Machinery Co. vs. Ruth, 194 Mo.A. 194 (1916)

Mistake as to duty or honest intention is no defense.

Amy vs. Supervisors, supra, at 138

Knox County vs. Hunolt, supra

The case of Adams vs Home Owners' Loan Corporation. 107 F (2d) 139 (1939: Eighth Circuit) does not contravene the general rule but rests on its own special circumstances and a narrow principle based on the administration of the criminal law. The Adams case was an action for malicious prosecution by Adams against the Home Owners' Loan Corporation. The complaint charged that the Corporation maliciously and without probable cause had procured plaintiff to be indicted by the federal grand jury for procuring false affidavits in support of applications for loans from the Corporation. The Court found that the Home Owners' Loan Corporation is an agency of the Federal government charged by the Home Owners' Loan Act of 1933 (12 U.S.C.A., secs. 1461-1468) and the Regulation made pursuant to the Act ("Manual of Rules and Regulations", Ch.VI, sec.17) with an official duty to forward information concerning violations of law affecting the Corporation; and that the same principle of public policy applicable to accusations by district attorneys protected the Corporation from suit for malicious prosecution.

> "The gist of an action for malicious prosecution is the animus and motive---the malice of the accuser. Where, however, the accusation is made by public officers in the course of their official duties, as when an information is filed by a district attorney, or an indictment by the foreman of a grand jury or a bind-over order by a committing magistrate, it is against public policy to allow an action for malicious prosecution to be maintained on account of such official acts. The policy doubtless results from the inherent public necessity of having justice administered through the process of accusation and trial which justifies immunity to those who are required by the laws to perform the indispensable official acts to that end." P.141.

No such inherent public necessity is present in the instant case, except the public necessity of respecting the constitutional guaranties of equal protection of the laws.

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The specific statutory authority giving plaintiff this right of action is section 43, title 8, United States Code. This section is grounded on the Thirteenth and Fourteenth Amendments. Citation is superfluous to show that the Thirteenth and Fourteenth Amendments were designed to free the newly emancipated Negroes from the "stigma" of slavery and raise them before the law to the same favored position theretofore enjoyed only by whites.

Section 43 stems from the Act of April 9,1866, c.31 (14 St. 27): an Act to Protect all Persons in the United States in their Civil Rights, and Furnish the Means of their Vindication. It was re-enacted with some changes in the Act of April 20,1871, c.22, sec.l (17 Stat.13), and in the Revised Statutes, sec.1979, from which it comes into the United States Code.

The particular evils which forced the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, and the Civil Rights legislation during the decade following the Civil War were the efforts of the states of the South to perpetuate the inferior status of the Negro before the law by hostile legislation, and by a stubborn resistance on the part of state officers against recognizing Negroes as full-fledged citizens.

E.g., Ex parte Virginia, 100 U.S. 100 U.S.339 (1879)

Strauder vs. West Virginia, 100 U.S. 303 (1879)

The Act of 1866 struck at the root of the evil by making it personally hazardous to the individual who discriminated against Negroes under color of state law, statute, ordinance, regulation, or custom, and refused to recognize the Federal rights and immunities granted Negroes under the Thirteenth Amendment as the supreme law of the land. The Act of April 20,1871, supra, was designed to "enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes".

The Constitution of the United States and the laws of Congress enacted pursuant thereto cannot operate in a vacuum or against the abstractions known as states,

Ex parte Virginia, supra, at 346-347

If the Federal law and Federal courts cannot reach all persons who violate the provisions of the Federal constitution and laws enacted by Congress pursuant thereto, under authority of state constitutions and state laws, the paramount authority of the Constitution and laws of the United States is gone. All state officers are subordinate to the United States Constitution, including the governor

Sterling vs. Constantin, 287 U.S. 378 (1932)

The state constitution and state laws in conflict with the Constitution and laws of the United States are void; and state officers and persons acting under color of state laws in conflict with the United States Constitution have been repeatedly held in damages under sections 41 and 43 of title 8, United States Code, for denial to Negroes of their Federal rights.

E.g., Myers vs. Anderson, 238 U.S. 368 (1915)

Nixon vs. Condon, 286 U.S. 73 (1932)

Lane vs. Wilson, 307 U.S. 268 (1939)

In the present case the specific type of discrimination appears which the Fourteenth Amendment and the Civil Rights Act came into being to strike down. Defendant has denied plaintiff her Federal right to equality of educational opportunity at the sole state agency, the University of Missouri, offering the educational facilities which she desires to avail herself of. He has acted in a ministerial capacity under color of state law. If the state law is to be an immunity to him, then the state has cloaked one of its agents with power to violate the United States Constitution with impunity.

III

The suit is not prematurely filed

As a last defense, defendant claims that plaintiff's suit is prematurely filed. He states that

she has never made application to the board of curators of Lincoln University for graduate work in journalism, and that prior to such application this Court can not presume that the board of curators of Lincoln University will not perform their mandatory duty under the Taylor Act to afford

the Negro citizens of Missouri educational facilities equal to those available at the University of Missouri. As it now stands the record shows that the board of curators of Lincoln University could not, if it would, offer graduate work in journalism. When the case reaches the stage for introduction of documents, plaintiff will prove that she did inquire of Lincoln University as to graduate work in journalism, and that the board of curators of Lincoln University considered her inquiry and officially and specifically decided it could not offer graduate work in journalism but would work toward inaugurating such work by February 1, 1941.
The law does not require a vain thing.

Defendant maintains plaintiff has not exhausted her administrative remedies. Exactly what he means is not clear. He cites Trudeau vs. Barnes, 65 F. (2d) 563 (1933: a registration case where judicial review of the refusal of registration was provided in the same article of the state constitution which established the right of registration. No such legislative or constitutional remedy is here provided as part of the university registration procedure. The ordinary judicial proceedings are the only remedies available. In such circumstances plaintiff is entitled to come into the Federal court as soon as her Federal rights have been violated, to seek damages against the violator.

Lane vs. Wilson, supra
The argument of defendant is frivolous and merely a play for time.

Conclusion

Plaintiff respectfully submits that the motion to dismiss should be overruled.

29 February 1940

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FILED
MAR 1 1940
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