Ltr dent 8/26/93

(34)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

KENNETH PAPINEAU, VERONICA PAPINEAU, OLIVER HILL AND SUMMER ROCKWELL,

Plaintiffs,

v.

JOHN DILLON, Individually and as the Sheriff of Onondaga County and THE COUNTY of ONONDAGA,

Defendants.

93-CV-491
[FJS] [GJD]

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FREDERICK J. SCULLIN, Jr., J.

MEMORANDUM-DECISION AND ORDER

I. Background

Plaintiffs Kenneth Papineau, Veronica Papineau, Oliver Hill and Summer Rockwell have owned and operated small businesses within the Onondaga Nation until April 1993, when the Onondaga Indian Nation ("Onondaga Nation") cited plaintiffs with violating certain tribal civil tax laws and environmental regulations. The Onondaga Nation, appearing amicus curiæ, contends that the plaintiffs resisted numerous efforts to bring them in compliance with tribal laws. When such efforts proved to be unavailing, entrances to plaintiffs' businesses on Onondaga Nation were blocked by members of the Onondaga Nation, thereby preventing the plaintiffs from effectively operating their businesses.

Plaintiffs allege that during this blockade they sought police intervention from the Onondaga County Sheriff, defendant John Dillon. However, pursuant to a long-standing policy developed between Sheriff Dillon, Onondaga County (the "County") and the Onondaga Nation, discussed in more detail infra, the Onondaga County Sheriff's Department (the "Sheriff's Department") requests permission from one of several tribal chiefs prior to

entering into Onondaga Nation territory in situations not involving a threat to life or serious injury. Since such permission was not forthcoming regarding the blockade of plaintiffs' businesses, Sheriff Dillon did not enter the territory.

On April 16, 1993, as a consequence of Sheriff Dillon's refusal to dismantle the blockade, the plaintiffs commenced the present lawsuit to enjoin Sheriff Dillon and the County from withholding police protection on the Onondaga Nation. In their complaint, plaintiffs allege that such policy violates 42 U.S.C. § 1983, as it is unlawful, illegal and violative of the Fifth and Fourteenth Amendments to the United States Constitution. This court therefore has jurisdiction of this action under 28 U.S.C. § 1331.

On April 22, 1993, this court conducted a hearing on plaintiffs' application for a temporary restraining order. At that time, the Court requested additional briefing from the parties and requested that the defendants specify the exact terms of the policy at issue herein. The court also granted the request of the Onondaga Nation to appear as an amicus in this action. On May 14, 1993, the court received the amicus brief of the Onondaga Nation as well as supplemental briefing from the plaintiffs and Sheriff Dillon. This court requested the United States Department of Justice to submit an amicus brief expressing

its views concerning the policy at issue, and that Department filed such brief with the court on June 11, 1993. Additional briefs concerning the instant application were filed by the plaintiffs, the Department of Justice and the Onondaga Nation on June 22, July 23 and July 26, 1993 respectively.

II. Discussion

(A) Standing.

Prior to addressing the issue of whether the plaintiffs are entitled to a preliminary injunction in this matter, this court must first decide whether the plaintiffs have standing to bring the present action.

The defendants contend that the plaintiffs lack standing to bring this civil rights suit because the "only affidavit submitted in support of plaintiffs' claim [by plaintiff Kenneth Papineau] ... does not allege any injury in fact to himself." County Memorandum of Law in opposition to plaintiffs' motion (4/14/93) at 2. Defendants claim that the plaintiffs are relying upon alleged violations of the constitutional rights of other persons in bringing the present lawsuit, id., and that the injury complained of herein is not fairly traceable to the challenged action because even if this court were to issue an injunction the plaintiffs "would not thereby achieve their ultimate goal, the reopening of their businesses." Id.

However, a fair reading of plaintiffs' complaint reveals that they have standing to bring the present action. The plaintiffs are all Native Americans and members of the Onondaga Nation. Complaint at ¶ 4. The complaint alleges that Sheriff Dillon and the County have failed to provide residents of the Onondaga Nation with police protection because the policy under which the Sheriff's Department operates does not allow them to respond to incidents on the territory without prior approval of a tribal chief. This failure to provide police protection without such prior approval is unique to the Onondaga Nation, and therefore allegedly discriminates against the plaintiffs on the basis of their race. Id. at ¶¶ 1, 11-16. Specifically, the plaintiffs claim that on April 1, 1993, Sheriff Dillon was requested to respond to certain crimes alleged to have been committed on Onondaga Nation territory near Route 11 in Onondaga County that were adversely affecting plaintiffs' businesses, and that "John Dillon did refuse and continued to refuse police protection, police response [and] police patrol solely on the basis of plaintiffs' race." Id. at ¶ 16. Plaintiffs allege that such conduct, inter alia, caused the plaintiffs to suffer a loss of business and therefore an economic injury. Id. at ¶ 18.

Since the plaintiffs have alleged an injury which appears to have a nexus to the challenged action -- failure to provide police protection on the basis of their race -- the plaintiffs have standing to bring the present action. See Board of

Education of Seneca Falls Cent. School Dist. v. Board of Education of Liverpool Cent. School Dist., 728 F.Supp. 910, 912 (W.D.N.Y. 1990) (citing Valley Forge Christian College v. Americans United For Separation of Church and State, Inc., 454 U.S. 464, 472 (1982)); Katsigianis et al. v. Merzig et al., 1993 U.S.Dist. LEXIS 9806, *8 (N.D.N.Y. July 17, 1993) (McCurn, S.J.). Accordingly, this court must determine whether the plaintiffs are entitled to the preliminary injunction sought by them in the present case.

(B) Plaintiffs' preliminary injunction application.

In order to be entitled to a preliminary injunction, a party must demonstrate that (1) irreparable harm would ensue should the injunction not be granted, and (2) that there is either (a) a likelihood of success on the merits, or (b) sufficiently serious questions involved going to the merits and a balancing of the hardships between the parties clearly favors the party making the application. King v. Innovation Books etc., 976 F.2d 824, 828 (2d Cir. 1992); Servidone Construction Corp. v. St. Paul Fire & Marine Ins. Co., 1993 U.S.Dist. LEXIS 6695, *15 (N.D.N.Y. May 17, 1993) (McCurn, S.J.). These factors will be addressed seriatim.

(1) Irreparable Harm.

The irreparable harm which plaintiffs claim to have sustained relates to their contention that they have been deprived of their alleged constitutional right to police

protection because of their race. Complaint at ¶¶ 1, 11 and 16. However, contrary to plaintiffs' contentions, there is no general constitutional right to police protection. See generally DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189, 195-197 (1989); Westbrook v. City of Jackson, Miss., 772 F.Supp. 932, 935 (S.D.Miss. 1991) ("[i]t has long been recognized that there generally exists no constitutional right to basic governmental services such as ... police protection") (citations omitted). Nevertheless, a state may not discriminate in providing such protection to certain of its citizens on account of their race without violating the equal protection clause of the United States Constitution. Watson v. Kansas City, 857 F.2d 690, 694 (10th Cir. 1988) (citations omitted); Bohen v. City of East Chicago, 799 F.2d 1180, 1190 (7th Cir. 1986). The plaintiffs herein have claimed that they are being deprived of their constitutional rights under the equal protection clauses of the Fifth and Fourteenth Amendments[1] in that the policy of "policing" with respect to the Onondaga Nation is unique -- it is not applicable anywhere else in the County and is therefore discriminatory. This court finds that such allegations of fact would, if proven, result in irreparable harm. See Disabled

[1] The Fourteenth Amendment of the United States Constitution provides, inter alia, that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." Moreover, it is well established that the due process clause of the Fifth Amendment embodies equal protection principles. Disabled American Veterans v. United States Dep't of Veterans Affairs, 962 F.2d 136, 141 (2d Cir. 1992).

American Veterans v. United States Dep't of Veterans Affairs, 783 F.Supp. 187, 196 (S.D.N.Y.) ("[i]f plaintiffs are being deprived of their right to equal protection of the laws ... it follows inexorably that they are being harmed irreparably" (citations omitted), vacated on other grounds, 962 F.2d 136 (2d Cir. 1992).[2]

(B) Likelihood of success on the merits.

With respect to the second factor to be considered by this court in ruling on plaintiffs' application, however, this court finds that the plaintiffs have failed to demonstrate either a likelihood that they will prevail on the merits of this action or sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the plaintiffs.

Based upon the oral arguments heard, and submissions reviewed by the court, this court has determined that the Onondaga County Sheriff's Department (the "Sheriff's Department") has developed and implemented a specific "policy" concerning its response to incidents which occur on Onondaga Nation territory. Under such policy, whenever the Sheriff's Department receives a call for service on Onondaga Nation territory that does not

[2] The defendants argue that this policy does not deprive the plaintiffs of police protection, but rather merely represents the procedure by which police services are provided to residents of Onondaga County. However, if such procedure, as implemented by the defendants, impermissibly discriminates against certain of the County's citizens on the basis of their race, the procedure would be violative of the equal protection clause.

involve a threat to life or serious injury, prior to entering such territory it requests permission to enter this land from a Chief of the Onondaga Nation. However, under this policy, whenever there is any in-progress incident that involves a threat to life or serious injury to an individual, permission from an Onondaga Nation Chief is not required prior to entering onto the territory, and such Department responds to the incident immediately.[3]

Plaintiffs' complaint alleges that this policy of requesting permission from a tribal chief of the Onondaga Nation prior to entering into Onondaga Nation territory "is unlawful in that it discriminates against a certain group of persons based upon race," i.e., Indian. Complaint at ¶ 11. In making such allegation, the plaintiffs challenge the constitutionality of the subject policy, thereby requiring this court to analyze this policy and determine whether it comports with the requirements of the United States Constitution.

Where a classification in a statute or, in this case, a policy implemented by the Sheriff's Department of the County of Onondaga, is drawn that operates to the peculiar disadvantage of

[3] In his affidavit of May 6, 1993, Sheriff Dillon noted that this policy, some of which had not previously been reduced to writing, is delineated in the most recent General Order issued by the Onondaga County Sheriff's Department regarding this issue, General Order number G-D-1009-93, dated May 5, 1993. Affidavit of John C. Dillon (5/6/93) ("Dillon Aff.") at ¶¶ 8-11.

a suspect class, or impermissibly interferes with the exercise of a fundamental right, courts must view the categorization with "strict scrutiny" in ascertaining whether such classification is constitutionally permissible.[4] Disabled American Veterans v. United States Dep't of Veterans Affairs, 962 F.2d at 141. "Suspect classifications" are those drawn on the basis of race, alienage or national origin. Id.; Cleburne v. Cleburne Living Center Inc., 473 U.S. 432, 440 (1985). Thus, if this court were to view the policy at issue as one based upon race, it could only pass constitutional muster if this court found that such policy was substantially related to a compelling state interest. See, e.g., St. German of Alaska E. Orthodox Cath. Ch. v. United States, 840 F.2d 1087, 1094 (2d Cir. 1988) (applying strict scrutiny test to claim alleging infringement of rights protected by First Amendment).

However, as noted in Felix Cohen's Handbook of Federal Indian Law (1982):

> [T]he unique status of Indian tribes under the Constitution

[4] The court notes that the tests courts utilize in determining the constitutionality of *statutes* are similarly utilized in ascertaining the validity of *policies* that categorize groups of people. See Russo v. White, 775 F.Supp. 639, 646 n.5 (S.D.N.Y. 1991) (noting that policy of police department that screens individuals to ascertain whether they can serve minimum of one year as lieutenant with police force subject to rational basis, rather than strict scrutiny, test); see generally Regents of University of California v. Bakke, 438 U.S. 265, 287-310 (1978) (applying strict scrutiny test to admissions program implemented by University to assure admission of certain number of minority students).

> and treaties establishes a legitimate legislative purpose for singling out Indians as a class. Legislation rationally related to this purpose is not proscribed by the equal protection principle.

Id. at 657 (emphasis added). This is because Indians are more correctly viewed as *political*, rather than *racial*, groups. See Morton v. Mancari, 417 U.S. 535, 554-54 & n.24 (1974) (employment preference for Indians "political rather than racial in nature"); Duro v. Reina, 851 F.2d 1136, 1144-45 (9th Cir.) (federally recognized Indian tribes are political, rather than racial groups), rev'd on other grounds 495 U.S. 676 (1990); LaPier v. McCormick, 986 F.2d 303, 305 (9th Cir. 1993) (in dealing with Indians, federal government deals not with a particular race but with members of social-political groups) (citations omitted); Livingston v. Ewing, 455 F.Supp. 825, 830-31 (D.N.M.) (policy permitting only Indians to sell hand-made goods in museum not violative of equal protection clause; Indians are viewed as a political and cultural, rather than racial, group), aff'd in mem. 601 F.2d 1110 (10th Cir.), cert. denied, 444 U.S. 870 (1979); cf. Oklahoma Tax Comm'n v. Sac and Fox Nation, __ U.S. __, 113 S.Ct. 1985, 1991 (1993) ("Indian nations have long been distinct political communities, having territorial boundaries, within which their authority is exclusive") (internal quotation marks and citations omitted).

In the present case, it is clear to this court that the policy at issue was developed because of the unique political nature of the Onondaga Nation. See Dillon Aff. at ¶ 4; Affidavit

of Lawrence R. Williams (4/21/93) ("Williams Aff.") at ¶ 17; Affidavit of Chief Irving Powless, Jr. (4/21/93) ("Powless Aff.") at ¶¶ 6-10, 25. As such, it would be inappropriate for this court to view this policy as one which is based upon race. Rather, this understanding was developed between the defendants and the chiefs of the Onondaga Nation because of political considerations unique to Indians in general and the Onondaga Nation in particular. Therefore, this court may not apply the strict scrutiny test in determining whether this policy is valid. E.g., Disabled American Veterans v. United States Dep't of Veterans Affairs, 962 F.2d at 141. Nor may this court employ an "intermediate" level of scrutiny in determining the validity of this policy, as such level of scrutiny may only be utilized where the classification at issue is based upon sex or illegitimacy. Id. at 142 (citations omitted). Therefore, to analyze the classification of one group of people differently than others based upon their political makeup, this court must use the "rational basis" test. See, e.g., Planned Parenthood v. Casey, ___ U.S. ___, 112 S.Ct. 2791, 2848 (courts evaluate equal protection claims under either strict scrutiny, heightened scrutiny or rational basis test); Oklahoma Ed. Ass'n v. Alcoholic Bev. Laws Enf. Comm'n, 889 F.2d 929, 932 (10th Cir. 1989) (same).

In order for legislation or, in this case, a policy, to pass this rational basis test, the policy must bear a rational relationship to a legitimate governmental purpose. A legislative

enactment fails this test if "the varying treatment of different groups is so unrelated to the achievement of any combination of legitimate purposes that one can only conclude that the legislature's actions were irrational." Id.; Vance v. Bradley, 440 U.S. 93, 97 (1979). The policy of the defendants to seek permission of a tribal chief prior to entering into Onondaga Nation territory in situations not involving a threat to life or serious injury was developed and first implemented in 1979 to enable the defendants to discharge their responsibility of protecting all of their citizens -- Indian and non-Indian -- without unduly interfering with the political and cultural heritage of the Onondaga Nation. Since the inception of this policy, the County, Sheriff Dillon and members of the Onondaga Nation all agree that its goal of keeping the peace within and around the Onondaga Nation has been achieved. See Williams Aff. at ¶ 17; Dillon Aff. at ¶¶ 4-8; Powless Aff. at ¶ 4; Affidavit of Joseph J. Heath (4/21/93) at ¶ 25. This policy allows for an immediate response to calls for police assistance -- as with anywhere else in the County -- where an incident involves a threat of serious injury to a person and/or loss of life. At the same time, it provides that incidents involving property crimes or more minor infractions of the law, be coordinated with the authorized representative of the Onondaga Nation so as to preserve their unique political and cultural status. This court finds that such a policy bears a rational relationship to the legitimate government interest of maintaining peace on the

Onondaga Nation and its surrounding areas. As such, this policy does not violate plaintiffs' right to equal protection of the laws. Cf. Disabled American Veterans v. United States Dep't of Veterans Affairs, 962 F.2d at 141-145; Cohen, Handbook of Federal Indian Law, supra, at 657, 659.

III. Conclusion

Since this court finds that the plaintiffs have failed to establish that there is a likelihood that they will prevail on the merits of this action or that there are sufficiently serious questions going to the merits of this action and a balance of hardships tipping decidedly toward them, plaintiffs' application for a preliminary injunction enjoining the defendants from continuing to implement the aforementioned policy (General Order G-D-1009-93) is denied.

It Is So Ordered.

Dated: August 26, 1993
Syracuse, New York.

FREDERICK J. SCULLIN, Jr.
U.S. DISTRICT COURT JUDGE