March 8, 2016

MEMO TO: S-CG-1(1)

F R O M: Anthony Takitani, Chair
Special Committee on County Governance

SUBJECT: **TRANSMITTAL OF INFORMATIONAL DOCUMENTS RELATING TO STATE LAW REGARDING CITIZENSHIP REQUIREMENTS FOR ELECTED AND APPOINTED OFFICERS OF THE STATE AND COUNTIES** (S-CG-1(1))

The attached informational documents pertain to Item 1(1) on the Committee's agenda.

cg:ltr:001(1)amc06:kcw

Attachments

PART I. GENERAL PROVISIONS--REPEALED

Note

Part I heading was added by L 1989, c 63, §4 and repealed by L 2000, c 253, §79.

§78-1 Citizenship and residence; exceptions. (a) All elective officers in the service of the government of the State or any county shall be citizens of the United States and residents of the State for at least three years immediately preceding assumption of office.

(b) All appointive officers in the service of the government of the State or any county who are employed as department heads and deputies or assistants to a department head shall be citizens of the United States and residents of the State for at least one year immediately preceding their appointment; provided that the foregoing one year residency requirement may be waived by the appointing authority when the appointive officer is required to have highly specialized or scientific knowledge and training and a qualified applicant who is a resident for at least one year is not available to fill the position. All others appointed in the service of the government of the State or in the service of any county or municipal subdivision of the State shall be citizens, nationals, or permanent resident aliens of the United States and residents of the State at the time of their appointment. A national or permanent resident alien appointee shall not be eligible for continued employment unless such person diligently seeks citizenship upon becoming eligible to apply for United States citizenship.

(c) All persons seeking employment with the government of the State or in the service of any county shall be citizens, nationals, or permanent resident aliens of the United States, or eligible under federal law for unrestricted employment in the United States, and shall become residents of the State within thirty days after beginning their employment and as a condition of eligibility for continued employment.

"Resident" means a person who is physically present in the State at the time the person claims to have established the person's domicile in the State and shows the person's intent is to make Hawaii the person's primary residence.

(d) The appointing authority may approve the appointment of persons without consideration of the requirements under subsection (c) when services essential to the public interest require highly specialized technical and scientific skills or knowledge for critical-to-fill and labor shortage positions.

(e) For the positions involved in the performance of services in planning and executing measures for the security of Hawaii and the United States, the employees shall be citizens of the United

States in addition to meeting the requirement of residency in subsection (c).

(f) This section shall not apply to persons recruited by the University of Hawaii under the authority of section [304A-1001]. [L 1909, c 32, §1; am L 1923, c 19, §1; RL 1935, §86; am L 1935, c 211, §1; am L 1939, c 216, §§1, 2; RL 1945, §451; am L 1949, c 190, §§1, 2; am L 1951, c 319, §3; RL 1955, §5-1; am L 1961, c 82, §1; am L 1965, c 170, §1 and c 175, §1; am L 1967, c 5, §1 and c 220, §1; HRS §78-1; am L 1969, c 206, §1; am L 1970, c 36, §1; am L 1976, c 162, §1; am L 1977, c 211, §1; am L 1978, c 101, §1; am L 1980, c 250, §1; gen ch 1985; am L 1987, c 295, §2; am L 1994, c 56, §21; am L 1998, c 2, §25 and c 115, §11; am L 2000, c 253, §75; am L 2002, c 90, §2; am L 2006, c 75, §5; am L 2007, c 52, §1; am L 2012, c 115, §1]

Cross References

Constitutional provisions on residency, see Const. Art. V, §6.

Attorney General Opinions

Residency of president of University of Hawaii. Att. Gen. Op. 61-84.

A noncitizen may be given a probationary appointment to a state civil service position provided that all prescribed conditions are met. Att. Gen. Op. 66-21.

Promotion of a nonresident appointee following completion of probationary period. Att. Gen. Op. 66-22.

The superintendent of education's position is exempt from the three-year residency law. Att. Gen. Op. 66-27.

Law Journals and Reviews

The New Resident: Hawaii's Second-Class Citizen. 5 HBJ 77.

Case Notes

Durational residency requirement for public employment violated equal protection clause of 14th Amendment. 443 F. Supp. 228.

Where plaintiffs challenged the constitutionality of the pre-employment residency requirement for public employment set forth in subsection (c), plaintiffs had standing to challenge the constitutionality of this section, and the court granted plaintiffs' motion for preliminary injunction to bar defendants from enforcing the pre-employment residency requirement of subsection (c). 423 F. Supp. 2d 1094.

Plaintiffs had standing to challenge the constitutionality of this section; subsection (c) violated plaintiffs' fundamental constitutional right to interstate migration. 460 F. Supp. 2d 1207.

As to alien employment under former laws. See 5 H. 167.

Durational residence requirement, set forth in prior law, did not have a rational relation to public employment and violated the equal protection clause of the U.S. Constitution. 53 H. 557, 498 P.2d 644.

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53 Haw. 557
Supreme Court of Hawai'i.

Carleen YORK, on behalf of herself and all others similarly situated, Plaintiffs-Appelles,
v.
STATE of Hawaii et al., Defendants-Appellants.

No. 5159.
|
June 9, 1972.

Action for declaratory judgment. The Third Circuit Court, Hawaii County, Nelson K. Doi, J., held that durational residence requirement for public employment violated equal protection clause of the United States Constitution, and appeal was taken. The Supreme Court, Kobayashi, J., held that statute containing three-year residency requirement for public employment created an arbitrary classification without rational relation to public employee applicant's capabilities of performing satisfactorily for the State and operated irrationally without reference to any legitimate state interest and was unconstitutional.

Affirmed.

***557** Syllabus by the Court

****645** 1. In reviewing statutes under the Equal Protection Clause, the character of the classification in question, the individual interests affected by the classification, and the governmental interests asserted in support of the classification should be examined.

2. The State, in the classification of a particular group as a subject for regulation, must proceed upon a rational basis and may not resort to an arbitrary classification.

3. The State may not arbitrarily foreclose to certain of its residents, based on a statute that is without a rational basis, the right to pursue public employment.

Attorneys and Law Firms

***562** Nobuki Kamida, Deputy Atty. Gen., Honolulu, State of Hawaii (George Pai, Atty. Gen., and Sonia Faust, Deputy Atty. Gen., on the brief), for appellants.

Andrew Levin, Associate Counsel (Hawaii Legal Services Project, Legal Aid Society of Hawaii, of counsel, Hilo), for appellees.

Before RICHARDSON, C. J., and MARUMOTO, ABE, LEVINSON and KOBAYASHI, JJ.

Opinion

KOBAYASHI, Justice.

The State of Hawaii and various Hawaii public officials (hereinafter the State) appeal from a decision of the circuit court holding that Hawaii's durational residence requirement for public employment violates the Equal Protection Clause of the United States Constitution.

Appellee, Carleen York, was hired by the State Department of Education as a general aide at Keaau Elementary and Intermediate School. She was dismissed therefrom when it was learned that she failed to meet the three-year residency requirment for public employment contained in Section 78-1(a), Hawaii Revised Statutes. The trial court, in an action ***558** for declaratory judgment, found the statute constitutionally invalid and the contract between the State and appellee binding. A prohibitory injunction was granted, enjoining the State from enforcing the three-year residency requirement. Damages were awarded in the sum of $895.77, based on the contract provisions less an amount made by appellee in mitigation of her damages during the contract period. The injunction and judgment of the trial court were suspended and stayed during the pendency of this appeal.

Hawaii Revised Statutes, s 78-1(a), provides in pertinent part that:

> All officers, whether elective or appointive, and all employees in the service of the government of the State or in the service of any county or municipal subdivision of the State . . . shall be . . . residents of the State for at least three years immediately preceding their appointment.

The above statute clearly creates two classes of residents applying for public employment. One class is composed of applicants who have resided for three years or more in the State, and the other of applicants who have resided in the State for less than three years. The question is whether this type of discrimination against the class with less than three years of residence is legally justifiable.

[1] Whether HRS s 78-1(a) stands in violation of the Equal Protection Clause, involves essentially an examination of three criteria: 'the character of the classification in question; the individual interests affected ****646** by the classification; and the governmental interests asserted in support of the classification.' Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 999, 31 L.Ed.2d 274 (1972).

Appellant adamantly asserts that the less burdensome traditional rational basis test, as opposed to the compelling State interest test utilized by the trial court, be applied in determining the constitutionality of the statute in question. Apparently, it is appellant's belief that the rational basis test is easily met by the State in this case. We cannot agree.

[2] We set forth the rational basis test in Hasegawa v. Maui Pine-apple Co., 52 Haw. 327, 329, 475 P.2d 679, 681 (1970), ***559** (I)n exercising this right to classify in order to achieve social goals the legislature may not act arbitrarily; that is, the classification of a particular group as a subject for regulation must be reasonable in relation to the purpose of the legislation. As the Supreme Court stated in Allied Stores of Ohio (Inc.) v. Bowers, 358 U.S. 522, 527, 79 S.Ct. 437, 441 3 L.Ed.2d 480 (1959):

(T)here is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' [1]

The State in its brief stresses that 'it can readily be seen that Section 78-1(a) is constitutional. It rests upon rational basis concerning the right of the State, as an employer, to employ as officers and employees, persons with Hawaiian residency of three years or more.' It is beyond question that the State of Hawaii, as an employer, can in its discretion require high standards of qualification from those of its residents it selects to employ. However, such discretion is not absolute. The argument that the State possesses the rights of a private employer and may freely regulate the terms and conditions of public employment has been rejected by the Supreme Court of California stating that 'the state may not arbitrarily foreclose to any person the right to pursue an otherwise lawful occupation. Any limitation on the opportunity for employment impedes the achievement of

economic security, which is essential for the pursuant (sic) of life, liberty and happiness; courts sustain such limitations only after careful scrutiny. . . . (W)e may no longer question that state regulation of public employment must accord with the Fourteenth Amendment.' ***560** Purdy & Fitzpatrick v. State, 71 Cal.2d 566, 79 Cal.Rptr. 77, 86-89, 456 P.2d 645, 654-657 (1969).

[3] **[4]** As suggested in Dunn v. Blumstein, supra, the 'individual interests affected by the classification' are of primary significance in the application of the doctrine of equal protection. Such a fundamental interest as the right to work [2] and thereby sustain one's self and family cannot be impinged absent a showing of a rational relationship to a countervailing legitimate interests on the part of the State. A three-year durational residency requirement does not provide a rational connection for determining whether an applicant has the capacity and fitness to adequately serve as a public employee. A rational relationship to a legitimate State interest that justifies imposing three years' residency as a prerequisite to qualifying for employment with the State has not been demonstrated in this case. [3] The statute ***647** creates an arbitrary classification without rational relation to a public employee applicant's capabilities of performing satisfactorily for the State [4] and operates irrationally without reference ***561** to any legitimate State interest. The discrimination imposed by HRS s 78-1(a) denies arbitrarily to certain persons, merely because of their status as residents of less than three years' duration, [5] the right to pursue otherwise lawful occupations. It is therefore unconstitutional.

We have held that HRS s 78-1(a) exists without a rational basis. It was not necessary for the trial, court to judge the statute under the more burdensome and stricter compelling State interest test in conjunction with the right to travel. We recognize, however, that the compelling State interest test has been held applicable in cases involving suspect classifications, Korematsu v. United States, 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944) (racial classifications), and fundamental rights, Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (right to travel). In Dunn v. Blumstein, supra, 92 S.Ct. at 1003, the Supreme Court, citing Shapiro, stated that 'durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are 'necessary to promote a compelling governmental interest.''

[5] Appellant aruges that appellee should not be allowed to recover damages. In support of its position appellant cites Brown v. Provisional Government, 9 Haw. 311 (1893). We find the Brown decision to be clearly distinguishable and inapposite to the situation before In Brown the court held that a politically appointed State officer, claiming color of title to the office but ousted from his job and replaced by another appointee, could not recover his salary from the government after he was reinstated. In the instant case an individual employee contract is involved. The better rule provides that the State is liable where it is found to be in breach of contract and a question of governmental immunity is not involved. See Souza & McCue Construction Co. v. Superior Court of San Benito, 57 Cal.2d 508, 20 Cal.Rptr. 634, 370 P.2d 338 (1962). As such the trial court's award as to damages is upheld.

Judgment affirmed.

All Citations

53 Haw. 557, 498 P.2d 644

Footnotes

1 For a post Shapiro v. Thompson utilization of the traditional rational basis test see Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

2 For an expansion of this rationale see Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv.L.Rev. 1439, 1461-64 (1968).

3 In relation to this particular issue, we adopt the language of the trial court in refuting what appears to be appellant's strongest argument for justifying such a lengthy period.

The defendants, it appears contend that the three year residency requirement would lead to better government service because 'in many positions knowledge of local linguistic expressions and customs is a desirable, if not a necessary qualification,' . . .. I think it fails to support the premise that it makes for better government service. . . . Examine the jobs of the janitor, carpenter, mechanic, truck

driver, engineer, draftsman, clerk, stenographer. Is there a significant need for them to have such knowledge? Is there a significant difference in the performance of such a job whether it is in California or in Hawaii? The answer is no. To require all to reside three years so that they may hopefully acquire such capacities is arbitrary. If there are jobs that make such demands a special test should be given to qualify the applicant. A three year residence requirement does not in any way guarantee that it will give one those special capacities to serve better in a job that requires such special knowledge. In fact, a three year residence requirement will detract from government service for there are many who are eminently qualified and cannot be employed because of the handicap imposed by Section 78-1(a).

4 See Schware v. Board of Bar Examiners, 353 U.S. 232, 239, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957).

5 The trial court stated that '(t)he reason for the residency requirement is more correctly set out in the following language:
"This bill, if enacted, will assure better opportunity for local persons to secure public offices and positions.' 'Taken from the 1935 Senate Journal at page 228, it was in regard to a bill that later became a part of Section 78-1, HRS. The language will also necessarily mean that the intent of the bill was to prohibit those with less than the required residence period to secure government jobs.'

460 F.Supp.2d 1207
United States District Court,
D. Hawai'i.

Kevin R. WALSH and Blane M. Wilson, Steven M. Annarelli, and Lydia R. Hill, as individuals and on behalf of all others similarly situated, Plaintiffs,

v.

CITY AND COUNTY OF HONOLULU, a Hawaii municipal corporation; Mark J. Bennett, Attorney General of the State of Hawaii, in his official capacity; and Marie Laderta, Interim Director, State of Hawaii Department of Human Resources Development, in her official capacity, Defendants.

No. CV 05–00378 DAE LEK.
|
July 3, 2006.

Synopsis

Background: Individuals whose applications for employment with municipality had been rejected brought action against municipality and county, as well as attorney general for state and interim director of state agency, to challenge constitutionality of Hawai'i's statutory pre-employment residency requirement for public employment. Court granted plaintiffs' motion for preliminary injunction, 423 F.Supp.2d 1094. Plaintiffs brought motions for summary judgment and for permanent injunction to enjoin enforcement of pre-employment residency requirement.

Holdings: The District Court, David Alan Ezra, J., held that:

[1] out-of-state prospective applicant for employment with municipality, who never actually applied for employment with municipality, nevertheless suffered injury from statutory pre-employment residency requirement for public employment, on basis that she was deterred from applying for open jobs, and

[2] state pre-employment residence requirement, which limited applications for public employment to current legal residents of state at time of application, was not rationally related to any legitimate interest or goal of state.

Motions granted.

Superseding 2006 WL 1663370.

West Codenotes

Held Unconstitutional
HRS § 78–1(c).

Attorneys and Law Firms

***1208** Charleen M. Aina, Office of the Attorney General–Hawaii, Honolulu, HI, for Mark J. Bennett, Kathleen N.A. Watanabe, Marie Laderta, Defendants.

Mark J. Bennett, Office of the Attorney General–Hawaii, Honolulu, HI, for City and County of Honolulu, Marie Laderta, Mark J. Bennett, Defendants.

James Earl Halvorson, Office of the Attorney General–Hawaii, Honolulu, HI, for Mark J. Bennett, Kathleen N.A. Watanabe, Marie Laderta, Defendants.

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***1209** Gordon D. Nelson, Office of Corporation Counsel–Honolulu, Honolulu, HI, for City and County of Honolulu, Defendant.

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Anne L. Williams, Davis Levin Livingston Grande, Honolulu, HI, for Kevin R. Walsh, Blane M. Wilson, Lydia R. Hill, Steven M. Annarelli, Plaintiffs.

Donna M. Woo, Office of Corporation Counsel–Honolulu, Honolulu, HI, for City and County of Honolulu, Defendant.

AMENDED ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' COUNTER MOTION FOR SUMMARY JUDGMENT

DAVID ALAN EZRA, District Judge.

Pursuant to Local Rule 7.2(d), the Court finds this matter suitable for disposition without a hearing. After reviewing Plaintiffs' Motion and the supporting and opposing memoranda, the Court GRANTS Plaintiffs' Motion for Summary Judgment and Permanent Injunction.

BACKGROUND

On February 1, 2006, this Court granted Plaintiffs' Motion for Preliminary Injunction of Hawaii Revised Statute Section 78–1(c). In reaching its decision, this Court found that Defendants did not establish that the pre-employment residency requirement was not enacted for an improper purpose and that it is rationally related to a legitimate interest. Plaintiffs now seek summary judgment and a permanent injunction enjoining enforcement of the pre-employment residency requirement of Hawaii Revised Statute Section 78–1(c).

Plaintiffs challenge the constitutionality of the pre-employment residency requirement for public employment set forth in Hawaii Revised Statute Section 78–1(c). That section provides as follows:

> All persons seeking employment with the government of the State or in the service of any county shall be citizens, nationals, or permanent resident aliens of the United States, or eligible under federal law for unrestricted employment in the United

States, and residents of the State at the time of their application for employment and as a condition of eligibility for continued employment.

"Resident" means a person who is physically present in the State at the time the person claims to have established the person's domicile in the State and shows the person's intent is to make Hawaii the person's permanent residence. In determining this intent, the following factors shall be considered:

(1) Maintenance of a domicile or permanent place of residence in the State;

(2) Absence of residency in another state; and

(3) Former residency in the State.

Haw.Rev.Stat. § 78–1(c).

The Hawaii Administrative Rules provide that "[a]pplicants shall be residents or former residents of the State and citizens, nationals, permanent resident aliens of the United States ... at the time of application." Haw. Admin. R. § 14–3.01–4. At the hearing, State Defendants represented that this rule has been repealed.

In addition, the City has implemented the residency requirement through its Civil Service Rules. Initially, Section 3–4 provided that at the time of application, applicants shall be residents or former residents of the State. However, prompted ***1210** by the instant lawsuit, effective November 19, 2005, the City amended the rule to eliminate the reference to "former residents."

On March 15, 2005, prior to the amendment to the Civil Service Rule and prior to any action taken to repeal the administrative regulation, Kevin Walsh ("Walsh") applied for three positions with the City. On May 20, 2005, Blane Wilson ("Wilson") applied for one position with the City. On October 2, 2005, Steven Annarelli ("Annarelli") applied for one position with the City. Question 4 of the City's electronic application for employment that Plaintiffs filled out provided as follows: "RESIDENCY REQUIREMENT: The Hawaii public employment law requires that applicants be current or former legal residents of Hawaii at the time of application." (Walsh Decl. ¶ 6; Wilson Decl. ¶ 17, attached to Pls.' Mot.) Each Plaintiff responded that they were not a legal resident of Hawaii. Walsh received three rejection letters, one for each position, Wilson received one rejection letter, and Annarelli also received one rejection letter. Each rejection letter stated that "your application cannot be accepted because you are not a resident of the State of Hawaii, which is required for this position. Hawaii State law requires that applicants be current or former residents of Hawaii at the time of application." (Walsh Decl. Exs. 1–3; Wilson Decl. Ex. 3.) Wilson and Annarelli also applied for jobs with the State. Wilson applied for one position with the State. Annarelli applied for two positions with the State. Wilson received a letter dated March 15, 2005, informing him that he was ineligible for the position because he did not meet the minimum experience required and he was not a legal resident of the State of Hawaii. (Wilson Decl. Ex. 2.) Annarelli was rejected from both positions, the first because another candidate had been selected and the second solely because he was not a resident at the time of application. (Annarelli Decl. ¶ 13, attached to Pls' Mot.) Annarelli received a letter dated October 10, 2005, that stated "Current State Law, Chapter 78 of the Hawaii Revised Statutes, requires applicants be residents of the State of Hawaii at the time of their application for employment. As you do not appear to be a resident of the State of Hawaii at this time, we are unable to consider you for this position." (Annarelli Decl. Ex. 3.)

Lydia Hill ("Hill"), a Plaintiff in this action, is currently living on the mainland and is a resident of Massachusetts. She is not nor has she ever been a resident of Hawaii. Hill alleges that she has not completed an employment application because it was apparent that her application would be rejected because of her past and present residency status. Hill argues that she cannot bear the financial burden of relocating to Hawaii without any assurance of being employed upon arrival. Hill further alleges that she has been and will continue to be discouraged from applying for any job with the City and County and/or the State of Hawaii because of the pre-employment residency requirement.

LEGAL STANDARD

Summary judgment shall be granted when

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed.R.Civ.P. 56(c); *see also Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 891 (9th Cir.2005); *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir.2000). One of the principal purposes of summary judgment is to identify and dispose of factually unsupported claims and defenses. *Celotex* ***1211** *Corp. v. Catrett*, 477 U.S. 317, 323–24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. *See id.* at 323, 106 S.Ct. 2548. A moving party without the ultimate burden of persuasion at trial—usually, but not always, the defendant—has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir.2000). The moving party must identify for the court "those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987) (citing *Celotex Corp.*, 477 U.S. at 323, 106 S.Ct. 2548). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (footnote omitted). The nonmoving party may not rely on the mere allegations in the pleadings and instead "must set forth specific facts showing that there is a genuine issue for trial." *Porter*, 419 F.3d at 891 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). "A genuine dispute arises if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *California v. Campbell*, 319 F.3d 1161, 1166 (9th Cir.2003); *Addisu*, 198 F.3d at 1134 ("There must be enough doubt for a 'reasonable trier of fact' to find for plaintiffs in order to defeat the summary judgment motion.").

When "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *T.W. Elec. Serv.*, 809 F.2d at 631. In other words, evidence and inferences must be construed in the light most favorable to the nonmoving party. *Porter*, 419 F.3d at 891. The court does not make credibility determinations or weigh conflicting evidence at the summary judgment stage. *Id.* However, inferences may be drawn from underlying facts not in dispute, as well as from disputed facts that the judge is required to resolve in favor of the nonmoving party. *T.W. Elec. Serv.*, 809 F.2d at 631.

The standard for granting a permanent injunction is essentially the same as a preliminary injunction with the exception that the plaintiff must show a actual success, instead of probable success on the merits. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n. 12, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987). When actual success on the merits is shown, however, the inquiry is over. A party is entitled to relief as a matter of law irrespective of the amount of irreparable injury that may be shown. *Sierra Club v. Penfold*, 857 F.2d 1307, 1318 n. 16 (9th Cir.1988).

DISCUSSION

Plaintiffs argue that the pre-employment residence requirement is unconstitutional because it has the impermissible purpose of deterring migration into the State and fails all levels of scrutiny. Plaintiffs further argue that the law unduly burdens the fundamental right to travel and cannot withstand strict scrutiny or even rational basis analysis. In addition, Plaintiffs argue that the residency requirement violates the Privileges and Immunities Clause of Article VI since it discriminates against non-

residents seeking to practice their trade. Finally, Plaintiffs argue that the former resident exception violates ***1212** the Equal Protection Clause and that the claim is not mooted by Defendants' voluntary acts.

Defendants argue that Plaintiffs lack standing and that Plaintiffs' challenge to the "former residency" factor is moot. Defendants also argue that Plaintiffs' Privileges and Immunities claim fails because public employment is not a fundamental right. Defendants further argue that Plaintiffs present no viable right to travel claim. Finally, Defendants argue that even if Plaintiffs present a right to travel claim, the State's non-durational residency requirement satisfies the applicable rational basis test.

I. *Standing*

[1] At the time of the preliminary injunction, Defendants argued that Plaintiffs Walsh and Wilson did not have standing to challenge the constitutionality of Hawaii Revised Statute section 78–1. *Walsh v. City and County of Honolulu,* 423 F.Supp.2d 1094 (D.Haw.2006). This Court held that Plaintiffs Walsh and Wilson both have standing to challenge the constitutionality of Hawaii Revised Statute 78–1. *Id.* In reaching its earlier decision, this Court cited *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), where the Supreme Court held that a large class of people who did not apply for the specific job at issue had nonetheless suffered an injury in fact that could be redressed. 431 U.S. at 324, 97 S.Ct. 1843. This injury existed since the class of people were deterred from even applying for the job because the practices of the Union convinced them that it would be futile to do so. This Court affirms its preliminary findings that Walsh and Wilson both have injuries in fact that can be redressed as they are both deterred applicants.

[2] Defendants now argue that Plaintiff Hill does not have standing because she did not apply for a position with the State, and therefore, suffered no injury in fact. To have standing, a plaintiff must demonstrate: 1) an injury in fact—an invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent, not conjectural or hypothetical; 2) a causal relationship between the injury and the challenged conduct—an injury that is fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and 3) a likelihood, not mere speculation, that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *San Diego County Gun Rights Committee v. Reno,* 98 F.3d 1121, 1126 (9th Cir.1996).

As stated above, the Supreme Court has held that a class of applicants suffers an injury if they are deterred from applying for a job because the State convinced them it would be futile to do so. *Int'l Bhd. of Teamsters,* at 324, 97 S.Ct. 1843. In the instant matter, Hill stated "I have perused the job listings posted by the City and County of Honolulu and the State of Hawaii in the hope of finding a suitable public employment position... The requirement that I be a current resident at the time of application was prominently stated on the internet as well as in several job postings. I did not complete the employment applications because it was apparent that my application would be rejected because I was not and never have been a Hawaii resident." (Hill Decl. ¶ 8–9). Based on this Court's reasoning in the preliminary injunction, Plaintiff Hill was deterred from applying for a public position and under the rationale of *Int'l Bhd. of Teamsters,* has standing to challenge the constitutionality of Hawaii Revised Statute 78–1. *Walsh,* at 1100.

***1213** Accordingly, this Court finds that Plaintiffs Walsh, Wilson and Hill have standing to challenge the Constitutionality of Hawaii Revised Statute section 78–1.

II. *Right to Interstate Migration*

[3] The parties agree that there are no genuine issues of material fact and only the questions of law remain. In the preliminary injunction this Court held that Defendants did not establish that the pre-employment residency requirement was not enacted for an improper purpose and that it is rationally related to a legitimate interest. Thus, this Court found that the Hawaii residency requirement very likely violates Plaintiffs' fundamental Constitutional right to interstate migration. *Walsh,* at 1108.

Here, Defendants restate the argument that they have a legitimate policy goal of assuring that persons considered for governmental jobs have a commitment to the State, are loyal, and have knowledge of local problems. Defendants again argue that

these interests are rationally related to the pre-employment residency requirement because hiring newly arrived persons results in quick turnover before the significant investment in training time of those persons has begun to yield a return. Defendants claim that this quick turnover is due to the non-residents' underestimation of the effect of Hawaii's geographic isolation or cultural differences. Defendants do not support their argument, however, with new information to persuade this Court that the pre-employment residency requirement was not enacted for improper purpose and that it is rationally related to a legitimate interest. Instead, Defendants assert the exact argument that resulted in this Court issuing the preliminary injunction.

This Court affirms its findings at the Preliminary Injunction stage. [1] The history of this statute, among others, establishes that the State has continued to deter in-migration through statutory law. In response, the Courts have continuously struck down such legislation as constitutionally impermissible.

In 1972, the Hawaii Supreme Court struck down the three-year residency requirement of this statute, holding that "the residency requirement created an arbitrary classification without rational relation to a public employee applicant's capabilities of performing satisfactorily for the State and operated irrationally without reference to any legitimate state interest." *York v. State*, 53 Haw. 557, 560–61, 498 P.2d 644, 647 (Haw.1972). Following the *York* decision, the State legislature amended the statute to include a one-year residency requirement providing that all employees in public employment had to residents of the State for at least one year immediately preceding their application for employment. In 1977, this Court struck down the one-year requirement as unconstitutional. *Nehring v. Ariyoshi*, 443 F.Supp. 228 (D.Haw.1977). This Court found that the purpose of Hawaii Revised Statute 78–1 was to control growth by "keeping people out of Hawaii." *Id.* at 238. Again, the State introduced a bill to amend the one-year residency requirement with the pre-employment residency requirement. The admitted purpose of the pre-employment residency requirement was to encourage the hiring of local residents, control ***1214** growth of the population, and protect limited resources by not encouraging in-migration. Here, Defendants do not contest the original impermissible purpose of the statute nor do they explain how the replacement of the one-year requirement with a pre-employment residency requirement removes the taint of the original impermissible purpose.

Additionally, the Courts have consistently held unconstitutional other Hawaii statutes that impose residency requirements. For example, in 1971 Hawaii established a one-year durational residency requirement as a condition of eligibility for state welfare benefits. Relying on *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), (Supreme Court ruled unconstitutional a state statute denying welfare benefits to residents who had not resided in state for at least one year preceding their application for assistance), plaintiff filed suit against the Director of Hawaii's Department of Social Services challenging the constitutionality of the Hawaii statute. Prior to trial, the defendant abandoned his position and stipulated to judgment in favor of plaintiff. *Brandenburger v. Thompson*, 494 F.2d 885 (1974). Also in 1971, this Court struck down a Hawaii statute which mandated a preexamination residency requirement on persons applying to take the Hawaii State Bar Examination. *Potts v. Honorable Justices of the Supreme Court of Hawaii*, 332 F.Supp. 1392 (D.Haw.1971). The law at issue required an applicant be a qualified registered voter in the State of Hawaii and that they have physically resided in Hawaii continuously for a period of six months after attaining the age of 15 years. Defendant argued that the law was enacted to ensure that "a person with some degree of maturity will be able to absorb, appreciate and understand the unique government structure, linguistics, and customs of Hawaii ..." *Id.* at 1397. This Court rejected defendant's argument holding that an "understanding" of Hawaii's "uniqueness" has no relevance to an applicant's legal education or ability to be a sound lawyer. Thus, this Court held that the preexamination residential requirements imposed under the statute contravened the Equal Protection Clause of the Fourteenth Amendment and struck down the statute.

Even if the storied legislative history of Hawaii statutes did not exist, "Defendants' argument that persons who were non-residents at the time of application are more likely to leave a position soon after their hire than those persons who were residents at the time of their application is contradicted by their argument that obtaining residency is easy and instantaneous upon arrival in the State." *Walsh*, at 1107. If Defendants' earlier argument is correct that persons can likely become residents within one day of their arrival in the State and immediately apply for public employment, "those persons are equally as likely to be unfamiliar with day-to-day life in Hawaii as the person who had not yet established residency, as they likewise have yet to actually experience living in Hawaii." *Id.*

Additionally, the law as currently written has the anomalous effect of prohibiting former Hawaii residents living on the mainland, even those born and raised in Hawaii, who wish to return home from applying for Hawaii government jobs since they are not Hawaii residents "at the time of application." [2] This flies in the face of ***1215** the argument that the law is designed to ensure that applicants are "familiar with Hawaii" and have a commitment to the state.

The fact of the matter is that the residency requirement imposes a significant hardship upon both non-residents and former residents of Hawaii who are seeking to either relocate or return to Hawaii. Many people do not have the financial resources or ability to weather the uncertainty and risk of moving to a new place without the assurance of a job waiting for them. By targeting the natural aversion of people to relocate in the absence of a firm job offer, the current statute is but one in a long series of thinly veiled measures by the legislature to improperly discourage migration to Hawaii.

The Court also affirms its finding that Hawaii Revised Statute section 78–1 is discriminatory on its face. The text of the statute grants exceptions to the residency requirement for those persons applying for positions as police officers or with the University of Hawaii. Haw.Rev.Stat. § 78–1(c) and (f). This Court found that "Defendants' argument that section 78–1 is rationally related to its legitimate interest in preventing turnover is severely undermined by the State's exception to the pre-employment residency requirement for those seeking public positions with the University of Hawaii or as police officers." *Id.*

As there are no genuine issues of material fact and Defendants have presented no new information to show that the pre-employment residency requirement is rationally related to a legitimate interest, this Court finds that Hawaii Revised Statute 78–1(c) violates Plaintiffs' fundamental Constitutional right to interstate migration. Accordingly, this Court GRANTS Plaintiffs' Motion for Summary Judgment and permanently enjoins Defendants from enforcing the requirement that an applicant for public employment be a current legal resident of Hawaii at the time of application as set forth in Hawaii Revised Statute 78–1(c). [3]

CONCLUSION

For the reasons stated above, the Court GRANTS Plaintiffs' Motion for Summary Judgment and Entry of Permanent Injunction and DENIES Defendants' Counter Motion for Summary Judgment.

IT IS SO ORDERED.

All Citations

460 F.Supp.2d 1207

Footnotes

1 At the Preliminary Injunction stage, this Court found that strict scrutiny analysis did not apply. In the instant matter, Plaintiffs again argue that strict scrutiny is warranted, however, it is unnecessary for the Court to re-examine the appropriate level of scrutiny to apply because the pre-employment residence requirement is not rationally related to any legitimate goal.

2 Prior to the commencement of the lawsuit, Section 78–1(c) of the Hawaii Revised Statutes contained a former resident exception, which permitted former Hawaii residents to apply for state government positions even though they currently resided on the mainland. However, following the inception of the lawsuit, the Hawaii legislature repealed this exception in the statute.

3 Plaintiffs urge the Court to issue an opinion on the constitutionality of the former residence exception. While the Court does not see how the existence of an exemption for former residents would change its calculus, the Hawaii legislature repealed this exception at the inception of this lawsuit, and therefore, the Court finds no occasion to address this issue.

423 F.Supp.2d 1094
United States District Court,
D. Hawai'i.

Kevin R. WALSH and Blane M. Wilson, as individuals and on behalf of all others similarly situated, Plaintiffs,

v.

CITY AND COUNTY OF HONOLULU, a Hawaii municipal corporation; Mark J. Bennett, Attorney General of the State of Hawaii, in his official capacity; and Marie Laderta, Interim Director, State of Hawaii Department of Human Resources Development, in her official capacity, Defendants.

No. CV 05–00378 DAE LEK.
|
Feb. 1, 2006.

Synopsis

Background: Individuals whose applications for employment with City of Honolulu had been rejected sued City and County of Honolulu as well as Hawaii Attorney General and Interim Director of Hawaii Department of Human Resources Development, challenging constitutionality of Hawaii's statutory preemployment residency requirement for public employment. Individuals moved for preliminary injunction.

Holdings: The District Court, Ezra, J., held that:

[1] individuals had standing under "deterred applicant" doctrine;

[2] individuals had strong likelihood of success on the merits of their constitutional claims; and

[3] individuals established at least the possibility of irreparable harm.

Motion granted.

West Codenotes

Validity Called into Doubt
H.R.S. § 78–1(c).

Attorneys and Law Firms

***1096** Anne L. Williams, Davis Levin Livingston Grande, Lois K. Perrin, American Civil Liberties Union of Hawaii, Michael K. Livingston, Davis Levin Livingston Grande, Honolulu, HI, for Kevin R. Walsh as an individual and on behalf of all others similarly situated, Blane M. Wilson as individuals and on behalf of all others similarly situated, Plaintiffs.

Donna M. Woo, Office of Corporation Counsel–Honolulu, Gordon D. Nelson, Office of Corporation Counsel–Honolulu, Charleen M. Aina, Office of the Attorney General–Hawaii, Deirdre Marie–Iha, Office of the Attorney General–Hawaii, ***1097** James Earl Halvorson, Office of the Attorney General–Hawaii, Richard H. Thomason, Office of the Attorney General–Hawaii, Honolulu, HI, for Kenneth Y. Nakamatsu Director, City and County of Honolulu Department of Human Resources, in his individual and official capacities, City and County of Honolulu a Hawaii municipal corporation, Mark J. Bennett in his official

capacity as the Attorney General of the State of Hawaii, Kathleen N.A. Watanabe Director, State of Hawaii Department of Human Resources Development, in her individual and official capacities, Marie Laderta Interim Director, State of Hawaii Department of Human Resources Development, in her official capacity, Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

EZRA, District Judge.

The Court heard Plaintiffs' Motion on January 30, 2006. Lois Perrin, Esq., and Anne Williams, Esq., appeared at the hearing on behalf of Plaintiffs; Gordon Nelson and Donna Woo, Deputies Corporation Counsel, appeared at the hearing on behalf of Defendant City and County of Honolulu ("the City"); and Mark Bennett, Attorney General, Deirdre Marie–Iha, and Charleen Aina, Deputies Attorney General, appeared at the hearing on behalf of Defendants Mark Bennett and Marie Laderta ("State Defendants"). After reviewing the motion and the supporting and opposing memoranda, the Court GRANTS Plaintiffs' Motion for Preliminary Injunction.

BACKGROUND

Plaintiffs challenge the constitutionality of the pre-employment residency requirement for public employment set forth in Hawaii Revised Statute Section 78–1(c). That section provides as follows:

> All persons seeking employment with the government of the State or in the service of any county shall be citizens, nationals, or permanent resident aliens of the United States, or eligible under federal law for unrestricted employment in the United States, and residents of the State at the time of their application for employment and as a condition of eligibility for continued employment.
>
> "Resident" means a person who is physically present in the State at the time the person claims to have established the person's domicile in the State and shows the person's intent is to make Hawaii the person's permanent residence. In determining this intent, the following factors shall be considered:
>
> (1) Maintenance of a domicile or permanent place of residence in the State;
>
> (2) Absence of residency in another state; and
>
> (3) Former residency in the State.

Haw.Rev.Stat. § 78–1(c).

The Hawaii Administrative Rules provide that "[a]pplicants shall be residents or former residents of the State and citizens, nationals, permanent resident aliens of the United States ... at the time of application." Haw. Admin. R. § 14–3.01–4. At the hearing, State Defendants represented that this rule has been repealed.

In addition, the City has implemented the residency requirement through its Civil Service Rules. Initially, Section 3–4 provided that at the time of application, applicants shall be residents or former residents of the State. However, prompted by the instant lawsuit, effective November 19, 2005, the City amended the rule to eliminate the reference to "former residents."

On March 15, 2005, prior to the amendment to the Civil Service Rule and prior to any action taken to repeal the administrative ***1098** regulation, Kevin Walsh ("Walsh") applied for three positions with the City. On May 20, 2005, Blane Wilson ("Wilson") applied for one position with the City. Question 4 of the City's electronic application for employment that Plaintiffs filled out provided as follows: "RESIDENCY REQUIREMENT: The Hawaii public employment law requires that applicants

be current or former legal residents of Hawaii at the time of application." (Walsh Decl. ¶ 6; Wilson Decl. ¶ 17, attached to Pls.' Mot.) Both Plaintiffs responded that they were not a legal resident of Hawaii. Walsh received three rejection letters, one for each position, and Wilson received one rejection letter. Each rejection letter stated that "your application cannot be accepted because you are not a resident of the State of Hawaii, which is required for this position. Hawaii State law requires that applicants be current or former residents of Hawaii at the time of application." (Walsh Decl. Exs. 1–3; Wilson Decl. Ex. 3.) Wilson also applied for a job with the State. He received a letter dated March 15, 2005, informing him that he was ineligible for the position because he did not meet the minimum experience required and he was not a legal resident of the State of Hawaii. (Wilson Decl. Ex. 2.)

Plaintiffs seek a preliminary injunction barring Defendants from enforcing the pre-employment residency requirement of Hawaii Revised Statute Section 78–1(c).

STANDARD OF REVIEW

[1] In order to obtain a preliminary injunction, the moving party must demonstrate either "(1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in [the plaintiff's] favor." *Am. Tunaboat Ass'n v. Brown,* 67 F.3d 1404, 1411 (9th Cir.1995) (brackets in original); *Warsoldier v. Woodford,* 418 F.3d 989, 993–94 (9th Cir.2005). These two formulas are not different tests but represent two points on a sliding scale in which the degree of irreparable harm increases as the probability of success on the merits decreases. *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.,* 762 F.2d 1374, 1376 (9th Cir.1985) (citations omitted). "Under any formulation of the test, [however,] the plaintiff must demonstrate that there exists a significant threat of irreparable injury." *Id.* It is within the court's discretion to grant or deny a motion for preliminary injunction. *Id.*

DISCUSSION

Plaintiffs argue that the pre-employment residency requirement is unconstitutional because it has the impermissible purpose of deterring migration into the State. Plaintiffs further argue that the law violates the Equal Protection Clause because it violates the fundamental right to travel by imposing a de facto durational requirement, and because it treats former residents different from non-residents. Finally, Plaintiffs argue that the residency requirement violates the Privileges and Immunities Clause of Article VI since it discriminates against non-residents seeking to practice their trade.

Defendants argue that Plaintiffs lack standing and that Plaintiffs' challenge to the "former residency" factor is moot. Defendants also argue that Plaintiffs' Privileges and Immunities claim fails because public employment is not a fundamental right. Defendants further argue that Plaintiffs' Equal Protection claim fails because the residency requirement is non-durational and meets the rational basis test.

I. *Standing*

[2] Defendants initially argue that Plaintiffs do not have standing to challenge the constitutionality of ***1099** Hawaii Revised Statute section 78–1. To have standing, a plaintiff must demonstrate: 1) an injury in fact—an invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent, not conjectural or hypothetical; 2) a causal relationship between the injury and the challenged conduct—an injury that is fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and 3) a likelihood, not mere speculation, that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *San Diego County Gun Rights Committee v. Reno,* 98 F.3d 1121, 1126 (9th Cir.1996).

Defendants argue that Plaintiff Wilson lacks standing because he fails to meet the first and third requirements of the *Lujan* standing test. First, Defendants argue that Wilson was not qualified for the State position that he applied for, and therefore, would have been rejected for that position regardless of his residency status. Consequently, he suffered no injury in fact from his rejection and his injury cannot be redressed by a favorable decision. Second, Defendants argue that Wilson cannot challenge the former residency requirement because it has not caused him any injury in fact. Finally, Defendants argue that Wilson does not have standing to raise a right to travel claim, because he has subsequently moved to Hawaii, and therefore has received no injury in fact to his right to travel.

Defendants argue that Plaintiff Walsh lacks standing with respect to the State because, he did not actually apply for a position with the State and thus suffered no injury in fact. Additionally, Defendants assert that any claim by Walsh that he was deterred from applying to positions with the State is too generalized and conjectural to meet the requirement of injury in fact. Finally, Defendants argue that the standing arguments that apply to Plaintiff Wilson also apply to Walsh.

Plaintiffs Walsh and Wilson argue that they both have standing to challenge the statute pursuant to the "deterred applicant" doctrine espoused by the Supreme Court in *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). They argue that the prohibition on non-residents applying for public employment in Hawaii has convinced them that submitting an application for State or City positions is futile. Plaintiffs argue that they were both rejected by the City based purely on their non-residency status, and that Wilson was rejected by the State, at least in part, for lack of Hawaii residency. Therefore, Walsh and Wilson both allege they have an injury in fact that can be redressed stemming from their outright rejection by the City. Both Plaintiffs also argue that they have an injury in fact that can be redressed in relation to the State. This injury stems from the effect that the City rejections, coupled with the widespread posting of the statutory requirement of residency (and in Wilson's case his actual rejection by the State), have had in deterring them from seeking other available public positions in Hawaii.

In *Int'l Bhd. of Teamsters*, the Supreme Court held that a large class of people who did not apply for the specific job at issue had nonetheless suffered an injury in fact that could be redressed. 431 U.S. at 324, 97 S.Ct. 1843. This injury existed since the class of people were deterred from even applying for the job because the practices of the Union convinced them that it would be futile to do so.

> If an employer should announce his policy of discrimination by a sign ... on the hiring-office door, his victims would not be limited to the few who ignored the ***1100** sign and subjected themselves to personal rebuffs ... [w]hen a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes though the motions of submitting an application.

Id. at 365–66, 97 S.Ct. 1843.

[3] Here, the City's application for employment specifically informed Plaintiffs that they need not apply for the job since Hawaii law requires that applicants be current or former residents of the State. This application is analogous to a sign on the hiring office door explicitly stating an employer's policy of discrimination. In both cases, the applicant is informed explicitly and unequivocally that because he falls into a disfavored group it is impossible for him to obtain employment.

In addition, the rejection letters from the City state that Plaintiffs' applications were not even accepted or reviewed because of their lack of Hawaii residency. This in turn deterred Plaintiffs from applying for other public positions because doing so would be futile. Indeed, Wilson stated that "[b]ased on my rejections to date due to my non-resident status, I have been discouraged from applying for any other government jobs with the City and County and the State of Hawaii." (Wilson Decl. ¶ 26.) Walsh stated that "because of the conspicuously displayed residency requirement and because I am not nor have I ever been a Hawaii resident, I was and remain deterred from applying for any position with the State of Hawaii or any further jobs with the City and County of Honolulu." (Walsh Decl. ¶ 11.) Thus, Wilson and Walsh both have injuries in fact that can be redressed as they are both deterred applicants who still wish to apply for available City and State open positions in the future.

Further, Defendants' standing argument that Wilson was not qualified for the specific State position to which he applied is misplaced. The statute and its effects have clearly deterred Wilson from applying for other public positions, for which he may have been qualified. Thus, even if Wilson was not qualified for the specific job at issue here, the injury is the deterrence itself. This is a recognizable injury in fact under the rationale of *Int'l Bhd. of Teamsters.* 431 U.S. at 365–66, 97 S.Ct. 1843.

Moreover, Defendants' argument that neither Wilson nor Walsh can challenge the provision of the statute that differentiates between non-residents and former Hawaii residents because they have suffered no injury in fact from this provision also fails. Plaintiffs argue that this provision distinguishes between two types of non-residents and then impermissibly favors one over the other. Because both Plaintiffs fall into the disfavored category of non-residents they both have standing to challenge such a provision.

[4] Finally, Defendants' argument that Wilson does not have standing to assert a right to travel claim because Wilson did in fact travel to Hawaii fails as well. The right to travel finds its roots in multiple sections of the Constitution, including Article IV Section 2, Article I Section 8, the Fourteenth Amendment, and inherently from our federal structure of government. *Attorney Gen. of N.Y. v. Soto–Lopez,* 476 U.S. 898, 901–02, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986). This concept encompasses more than simply the right to enter and leave the borders of a state. Wilson has standing to challenge this statute for infringing on his right to travel because the injury he is claiming to have suffered is encompassed by an expansive understanding of the right to travel. Wilson is alleging that although he now lives in Hawaii, he is not being given all of the benefits ***1101** of State citizenship to which he is due under the Privileges and Immunities Clause of Article IV and the various other sections of the Constitution from which the right to travel flows. In addition, as he is not a Hawaii resident, there is no reason to treat him differently from Walsh with respect to standing based solely on his physical presence in the State.

Accordingly, this Court finds that both Plaintiffs have standing to challenge the Constitutionality of Hawaii Revised Statute section 78–1.

II. *Likelihood of Success on the Merits*

The right to travel from one state to another has long been held to be a fundamental right, even though it is not enumerated as such in the text of the United States Constitution. *United States v. Guest,* 383 U.S. 745, 757–58, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966). This right has been considered to spring from various clauses of the Constitution, including the Privileges and Immunities Clause of Article IV, and the Equal Protection Clause, the two clauses pursuant to which Plaintiffs bring this lawsuit. *Soto–Lopez,* 476 U.S. at 902, 106 S.Ct. 2317.

[5] The right to travel includes the right of a citizen of one state to enter and leave another state, to be treated as a welcome visitor while temporarily present in the second state, and "for those travelers who elect to become permanent residents, the right to be treated like citizens of" the second state. *Saenz v. Roe,* 526 U.S. 489, 500, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999). "State law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." *Soto–Lopez,* 476 U.S. at 903, 106 S.Ct. 2317 (citations and internal quotation marks omitted).

Courts have held that all residency requirements implicate the right to interstate travel and thus must be justified by the state imposing the requirement. *Perez v. Personnel Bd. of the City of Chic.,* 690 F.Supp. 670, 674 (N.D.Ill.1988); *Andre v. Bd. of Trs. of Village of Maywood,* 561 F.2d 48, 52 (7th Cir.1977). In order to determine what level of scrutiny to employ to determine whether a residency requirement is constitutionally justified, the court must determine the extent to which the requirement impinges upon the right to travel. *Nehring v. Ariyoshi,* 443 F.Supp. 228, 236 (D.Haw.1977) ("in order to determine whether the compelling state interest test should be invoked, a court must analyze the extent of a law's impact on interstate travel ...") (citing *Mem'l Hosp. v. Maricopa County,* 415 U.S. 250, 256–62, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974)).

[6] **[7]** Where a state law sufficiently burdens the right to travel, the court applies a strict scrutiny analysis, requiring the law to be necessary to further a compelling state interest. *Id.; Soto–Lopez,* 476 U.S. at 904–06, 106 S.Ct. 2317 (a heightened scrutiny is triggered where a state law operates to penalize those persons who exercise their right to migration). Although not all durational residency requirements require application of the strict scrutiny test, the Supreme Court and this Court have applied the strict scrutiny test to laws that impose a durational residency requirement and infringe on the right to travel. *See Soto–Lopez,* 476 U.S. at 904–06, 106 S.Ct. 2317; *Nehring,* 443 F.Supp. at 236; *Grace v. City of Detroit,* 760 F.Supp. 646 (E.D.Mich.1991). [1] This is because ***1102** the durational requirement classifies residents of the same state based solely upon their time of migration and results in a penalty of "unequal distribution of rights and benefits among otherwise qualified bona fide residents." *Soto–Lopez,* 476 U.S. at 903, 106 S.Ct. 2317; *Perez,* 690 F.Supp. at 674; *Nehring,* 443 F.Supp. at 237 (applying strict scrutiny analysis since the durational residency requirement for public employment operated as penalty for newly arrived residents).

[8] Where the law at issue is merely a bona fide residence requirement, the court need only apply the rational relation test to determine whether the law is justified. *Perez,* 690 F.Supp. at 674. This is because the fact of residency itself is distinct from a durational residency requirement. *McCarthy v. Phila. Civil Serv. Comm'n,* 424 U.S. 645, 647, 96 S.Ct. 1154, 47 L.Ed.2d 366 (1976) (upholding a continuing residency requirement in order to remain a municipal employee since a residence requirement and a waiting period requirement are distinct prerequisites); *Andre,* 561 F.2d at 52–53 (citing cases noting that there is a difference between bona fide residence requirements and durational requirements and upholding a requirement that municipal employees establish residency within a certain period of time after becoming employed).

This Court previously addressed the issue of the level of scrutiny to apply in order to determine whether a prior version of Hawaii Revised Statute section 78–1 was unconstitutional. *Nehring,* 443 F.Supp. at 237. At that time, Hawaii Revised Statute section 78–1 had a durational provision in its text, providing that all employees in public employment had to be residents of the State for at least one year immediately preceding their application for employment. *Id.* at 229. This Court found that the denial of the opportunity to new residents to apply for public employment for a one-year period had a sufficient enough impact upon the right to travel to require that strict scrutiny analysis be applied. *Id.* at 237. This is because, at the time, approximately 12% of the jobs available in Hawaii were public employment jobs and the forced inability of a new resident to apply for those jobs acted as a penalty, particularly for those people who were trained for work primarily performed by the government. *Id.* Applying the strict scrutiny analysis, the Court found that the State failed to establish a compelling interest for the statute and therefore the durational residency aspect of Hawaii Revised Statute 78–1 violated the Equal Protection Clause. *Id.* at 239. The Court also noted that the original version of the statute, which had included a three-year residency requirement to be eligible for public employment, had previously been struck down by the Hawaii Supreme Court as violating the Equal Protection Clause. *Id.* at 229 (citing *York v. State,* 53 Haw. 557, 558, 498 P.2d 644, 645 (Haw.1972)).

Here, although Hawaii Revised Statute 78–1 previously had durational residency requirements in its text, those requirements were removed in response to the Hawaii Supreme Court and this Court's rulings finding them unconstitutional. Plaintiffs argue that although the statute on its face does not have a durational requirement, its effect is a de facto durational requirement that places a burden on the right to travel, thus requiring a strict scrutiny analysis. Residency can be established by documentary evidence of filing State income tax returns, registering to vote in Hawaii, obtaining a Hawaii driver's ***1103** license or other license, registering a motor vehicle in Hawaii, by a deed or lease, etc. Plaintiffs claim that establishing legal residency as required by the statute entails an onerous and time-consuming process since it would take weeks or months to fulfill the State's requirement. For example, Plaintiffs state that depending upon when the non-resident arrived, it could take 11 months to file a State tax return. Additionally, Plaintiffs assert it could take weeks for a motor vehicle to be shipped or purchased, or for voter registration to be verified and effective.

Plaintiffs cite *Grace v. City of Detroit,* 760 F.Supp. 646 (E.D.Mich.1991), as support for their argument that a de facto durational requirement is unconstitutional. In *Grace,* the City of Detroit had a requirement that all applicants for city service positions be residents of the city at the time of their application. *Id.* at 648. Various rules required that applicants have Detroit residency "not only at the time of application but also throughout the formulation of the eligibility list and until the time of certification and hire." *Id.* The court noted that the period of time between application and the formulation of the eligibility list ranged from two

months to one year, and the time period between application and certification could be as long as three years. *Id.* at 649. Thus, the court found that "[t]he practical effect of these requirements is to impose a residency requirement of substantial duration, for the mere opportunity to compete [for a public position] and without any certainty of ultimate success." *Id.* Applying the strict scrutiny analysis, the court found the residency requirement resulted in an impermissible burden on the right to travel and enjoined the city from enforcing the requirements. *Id.* at 653; *see also Perez* 690 F.Supp. at 676 (finding that the Chicago residency requirement was an unconstitutional de facto durational requirement since in its application it resulted in a 23–month waiting period of uncertainty).

Defendants argue that satisfying the Hawaii residency requirement is much easier and takes far less time to satisfy than the requirements set forth in the *Grace* case. Defendants state that any one of the documentary proof of residency could be sufficient to establish residency, and that establishing residency could happen almost instantaneously upon arrival in the State. Defendants use Plaintiff Wilson as an example of how easy it is to claim residency. Wilson filed an affidavit of Hawaii voter registration, and his Certificate of Voter Registration was issued within one week of his submission. Approximately sixteen days after Wilson provided the City with a copy of this Certificate, the City emailed Wilson informing him that they received his proof of residency document and re-activated his application. (DeCosta Decl. Exs. 1–2; Zukeran–Lyman Decl. Ex. 2, attached to the City's Opp'n.) Based upon Wilson's own experience, Defendants argue that the instant case is distinguishable from *Grace* since *Grace* involved various waiting periods, including one of 60–days to one year, and another period of almost three years. Thus, Defendants argue, that the statute at issue here does not impose a de facto durational requirement. The Court agrees.

Here, unlike in *Grace* or *Perez*, there has been no showing by Plaintiffs that obtaining any of the proof of residency documents takes much time at all, let alone a duration of 60–days or more. Indeed, it took only one week for Plaintiff Wilson to receive his Certification of Voter Registration and Defendants considered this one document sufficient to establish residency and therefore accept and process his application for employment. Furthermore, with the advent of the internet and email, there is nothing preventing a potential applicant ***1104** from starting the residency process to establish their intent to be a Hawaii resident before he or she is physically present in Hawaii. For example, certain websites make it easy to find places to rent and enter into leases without being physically present in the State at that time. In addition, many state forms are available on the web and the applicant can at least begin to fill them out before physically moving to Hawaii. Moreover, there is nothing preventing an applicant from shipping his or her vehicle prior to being physically present in the State and then registering it upon their arrival. As any one or combination of these documents would be sufficient to meet the residency requirement, and as obtaining some the above documents can be done either prior to being physically present in Hawaii or soon after arrival, the residency requirement does not impose a de facto durational requirement.

[9] As this Court finds that Hawaii Revised Statute 78–1(c) does not impose a de facto durational residency requirement, the strict scrutiny analysis does not apply. However, because the residency requirement still implicates the right to interstate travel, Defendants must prove that the requirement is rationally related to a legitimate policy goal. *Perez,* 690 F.Supp. at 674; *Martinez v. Bynum* 461 U.S. 321, 329 n. 7, 103 S.Ct. 1838, 75 L.Ed.2d 879 (1983) ("[a] bona fide residence requirement simply requires that the person does establish residence before demanding the services that are restricted to residents." "A bona fide residence requirement implicates no 'suspect' classification, and therefore is not subject to strict scrutiny.... the question is simply whether there is a rational basis for it.").

A. *Rational Relation Test*

Under the rational relation test, Defendants must show that the residency requirement is rationally related to a legitimate policy goal. *Perez,* 690 F.Supp. at 674.

> [T]here is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.

Allied Stores of Ohio (Inc.) v. Bowers, 358 U.S. 522, 527, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959) (citation and quotation omitted).

Defendants argue for the first time [2] that they have a legitimate policy goal of assuring that persons considered for governmental jobs have a commitment to the State, are loyal, and have knowledge of local problems. Defendants state that these interests are rationally related to the pre-employment residency requirement because hiring newly arrived persons results in quick turnover before the significant investment in training time of those persons has begun to yield a return. Defendants claim that this quick turnover is due to the non-residents' underestimation of the effect of Hawaii's geographic isolation or cultural differences.

Plaintiffs argue that the there is no legitimate policy for the statute because the legislative history indicates that it was adopted to deter in-migration, which is an impermissible purpose. Plaintiffs also argue that Defendants newly articulated interests of loyalty and commitment are irrational ***1105** as the likelihood of job turnover could be attributed to any particular group, such as those under 40 years of age, yet only non-residents are barred from applying for public employment.

"The Supreme Court has repeatedly stated that 'to the extent the purpose of (such a law) is to inhibit the immigration of (people) generally, that goal is constitutionally impermissible.' " *Nehring*, 443 F.Supp. at 238 (quoting *Memorial Hosp.*, 415 U.S. at 263–64, 94 S.Ct. 1076); *Saenz*, 526 U.S. at 506, 119 S.Ct. 1518 (classifications between residents based upon length of residency may not be justified by a purpose to deter applicants from migrating to a state because "such purpose would be unequivocally impermissible.").

With respect to the instant case, this Court previously found that the State admitted that the purpose of Hawaii Revised Statute 78–1 was to achieve its goal of controlling growth by "keeping people out of Hawaii." *Nehring*, 443 F.Supp. at 238. This Court noted in *Nehring* that the statute was originally enacted "[i]n order to dissuade people from continuing to settle in Hawaii." *Id.* at 229. After the Hawaii Supreme Court struck down the statute's three-year residency requirement as unconstitutional, then Governor Ariyoshi "expressed his willingness to put this State in direct confrontation with ... the Constitution of the United States. He called for bold ideas and action to combat the problem of potential overpopulation in Hawaii." *Id.* at 229. In response, the State enacted the one-year durational residency requirement. *Id.*

After the *Nehring* case struck down the one-year residency requirement for public employment as unconstitutional, Governor Ariyoshi requested that the pre-employment residency requirement be introduced as part of his "Legislative Package for Growth Management." (Perrin Decl. Ex. 6, attached to Pls.' Mot.) The standing committee reports on the pre-employment residency requirement bill followed the objectives of the "Legislative Package for Growth Management" and noted that the purposes of the pre-employment residency requirement was to encourage the hiring of local residents, control growth of the population, and protect limited resources by not encouraging in-migration. (*Id.* at Exs. 7–9.) This bill was enacted and it replaced the unconstitutional one-year durational requirement with the pre-employment residency requirement.

In addition, after *Nehring*, the State defended its pre-employment residency requirement in an amicus brief it filed in the *Hicklin v. Orbeck*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978) case. The State argued that

> migrant job-seekers pose problems for local residents in Alaska and Hawaii ... Over-population may ultimately mean the demise of Hawaii's visitor industry ... Consequently, the Legislature of the State of Hawaii, like Alaska's legislature, has also enacted restrictions on public employment requiring Hawaii residency for the vast majority of public jobs.

Briefing for State of Hawaii as Amicus Curiae, *Hicklin v. Orbeck*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978) (No. 77–324), 1978 WL 206744, at *3 (Jan. 31, 1978).

Plaintiffs assert that the legislative history and arguments by the State demonstrate that Hawaii Revised Statute section 78–1(c) has the impermissible purpose of deterring in-migration. The State would have this Court believe that because it removed the one-year durational requirement, the current incarnation of Hawaii Revised Statute section 78–1 is a complete transformation

from the previous version of the statute. However, Defendants do not contest the original impermissible purpose of the statute, nor do they explain ***1106** how the replacement of the one-year requirement with a pre-employment residency requirement removes the taint of the original impermissible purpose. [3]

[10] The history of this statute makes it clear that the State has continued to perpetuate the original improper purpose. Although the State removed the one-year durational requirement from the statute, this Court cannot ignore the original and continuing impermissible purpose of the statute—- to deter in-migration by controlling growth first through a three-year durational residency requirement, then through a one-year durational requirement, and finally through a pre-employment residency requirement for public employment. *Cf. Martinez,* 461 U.S. at 333, 103 S.Ct. 1838 (upholding a residency requirement since there was no indication that the statute had any impermissible basis). This is especially true since the impermissible purpose results in the denial of the opportunity to apply for public employment, which affects the opportunity to pursue a necessity of life, especially for those who are trained for work performed primarily by the government. *Nehring,* 443 F.Supp. at 237; *Soto–Lopez,* 476 U.S. at 908, 106 S.Ct. 2317 (finding that the awarding of bonus points to veterans who were New York residents at a past fixed point was unquestionably a substantial benefit since it could "mean the difference between winning or losing civil service employment, with its attendant job security, decent pay and good benefits."); *Grace,* 760 F.Supp. at 650 (noting that "the right to compete for government employment with city residents .. is a vital benefit and privilege. Employment ... is the means of providing one's family with the necessities of life."). As stated previously by this Court, the State "can constitutionally seek to control growth through the use of zoning and other more enlightened tools of economic planning." *Nehring,* 443 F.Supp. at 238.

Furthermore, even if this legislative history demonstrating an impermissible purpose did not exist, Defendants' newly alleged legitimate interests of finding loyal, committed employees to prevent quick turnover is not rationally related to a pre-employment residency requirement. First, Defendants' argument that persons who were non-residents at the time of application are more likely to leave a position soon after their hire than those persons who were residents at the time of their application is contradicted by their argument that obtaining residency is easy and instantaneous upon arrival in the State. Indeed, other than the purchasing ***1107** of a plane ticket and filling out a voter registration affidavit or vehicle registration form, there is no significant difference between persons who are non-residents at the time of their application and persons who obtained residency immediately upon arrival in the State. If the State's earlier argument is correct that persons can likely become residents within one day of their arrival in the State (e.g. by having already entered into a lease for rental of a home) and immediately apply for public employment, those persons are equally as likely to be unfamiliar with day-to-day life in Hawaii as the person who had not yet established residency, as they likewise have yet to actually experience living in Hawaii. Defendants' argument that residents are less likely to leave their job implies that Defendants are surreptitiously imposing a durational residency requirement by selecting long-time residents for hire over recently arrived residents, an action which is clearly unconstitutional.

Additionally, Hawaii Revised Statute section 78–1 is discriminatory on its face. Indeed, the text of statute grants exceptions to the pre-employment residency requirement for those persons applying for positions as police officers or with the University of Hawaii. Haw.Rev.Stat. § 78–1(c) and (f). Defendants do not even address this inconsistency or offer any justification for why those applying for jobs with the University of Hawaii should be treated differently from those persons applying for any other public position. Thus, Defendants' argument that section 78–1 is rationally related to its legitimate interest in preventing turnover is severely undermined by the State's exception to the pre-employment residency requirement for those seeking public positions with the University of Hawaii or as police officers. Moreover, this Court sees no reason why Defendants could not accept and review applications from non-residents and make a conditional offer of employment subject to proof of residency within a reasonable period of time of their start date. *See Andre,* 561 F.2d at 52–53 (upholding a requirement that municipal employees establish residency within a certain period of time *after* becoming employed).

Finally, the Hawaii Supreme Court has previously found that the rationale that residents better understand local issues was insufficient to support the former durational requirement of Hawaii Revised Statute 78–1 under the rational relation test, since the residency requirement had no rational connection to whether the applicant had the capacity and fitness to serve as a public employee. *York,* 53 Haw. at 561 n. 3, 498 P.2d at 647 n. 3. Also, in *Nehring,* this Court found that the State's enumerated

purpose for the statute of protecting the environment was not rationally related to the classification of new and old residents. 443 F.Supp. at 238.

Accordingly, as Defendants have not established that the pre-employment residency requirement was not enacted for an improper purpose and that it is rationally related to a legitimate interest, this Court finds that Plaintiffs have a strong likelihood of success on the merits of their claim that the pre-employment residency requirement of Hawaii Revised Statute section 78–1 is unconstitutional.

This Court is deeply concerned with the law in its current form as a residency requirement that bars non-residents from applying for employment with the State or County acts as a prohibition on the fundamental right to travel and is therefore constitutionally suspect and virtually indefensible. On the other hand, a requirement that a new hire obtain state residency within a reasonable period of time after hire appears to be a responsible requirement that would meet constitutional requirements, as dictated in prior decisions.

***1108** III. *Irreparable Harm*

Defendants first assert that Plaintiffs have not proven irreparable harm because they have not established a likelihood of success on their Constitutional claims. Defendants also argue that regardless of Plaintiffs' success on their Constitutional claims, a deprivation of Constitutional rights is insufficient to establish irreparable harm for purposes of a preliminary injunction.

Plaintiffs argue that a Constitutional violation is a *per se* basis for this Court to find irreparable injury. Additionally, Plaintiffs argue that they have a strong likelihood of success on the merits of their case, and therefore must only show a possibility of irreparable injury. Plaintiffs assert that either taken together or separately, these two propositions of law entitle them to a finding of irreparable harm sufficient to justify a preliminary injunction.

[11] **[12]** "When a plaintiffs fundamental constitutional rights are being infringed upon, one can assume that irreparable injury exists." *Nehring,* 443 F.Supp. at 228; *see also Mitchell v. Cuomo,* 748 F.2d 804, 806 (2nd Cir.1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."); *Huston v. Burpo,* C94–20771, 1995 WL 73097, at *5 (N.D.Cal. Feb. 13, 1995) ("a violation of a constitutional right would constitute an irreparable injury."); *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (in the context of free speech, the Supreme Court held that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). In addition, where a plaintiff has established a likelihood of success on the merits, he or she need only establish the possibility of irreparable injury. *Warsoldier,* 418 F.3d at 993–94.

Here, as set forth above, this Court found that the Hawaii residency requirement very likely violates Plaintiffs' fundamental constitutional right to interstate migration. Thus, it can be presumed that irreparable injury is extremely likely.

[13] Even if this Court does not follow *Mitchell* in assuming that a constitutional violation automatically creates irreparable injury, as this Court found that Plaintiffs have a strong likelihood of success on the merits of their constitutional claims, they need only establish the possibility of irreparable harm. Plaintiffs have met this burden. Plaintiffs, especially Wilson, have demonstrated that they have been and continue to be deterred from completely migrating to the State since they continue to be precluded from applying for public employment. As such, Plaintiffs are being prevented from plying their trade, and receiving all the attendant benefits. Accordingly, as Plaintiffs have established the possibility of irreparable harm, this Court GRANTS Plaintiffs' motion for a preliminary injunction.

CONCLUSION

For the reasons stated above, the Court GRANTS Plaintiffs' Motion for Preliminary Injunction.

IT IS SO ORDERED.

All Citations

423 F.Supp.2d 1094

Footnotes

1 *See also Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (requiring the state to show a compelling interest to support a one-year durational residency requirement for the receipt of welfare benefits and striking down the requirement as unconstitutional); *Dunn v. Blumstein*, 405 U.S. 330, 339–42, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (applying strict scrutiny analysis and invalidating one-year residency requirement for voting).

2 In *Nehring*, when the same statute was at issue, the State argued that the purpose of Hawaii Revised Statute section 78–1 was to control growth, protect the environment, and apportion employment opportunities. 443 F.Supp. at 237, 238.

3 Defendants rely heavily on dicta in the three page, per curiam decision in *McCarthy*, in which the Supreme Court stated that it has not "questioned the validity of a condition placed upon municipal employment that a person be a resident [a]t the time of his application." 424 U.S. at 646, 96 S.Ct. 1154. The quoted phrase is interpreted by Defendants as meaning that a State's imposition of a residency requirement at the time of application for municipal employment is literally beyond question, presumably, due to its obvious constitutionality. However, read in conjunction with the immediately succeeding footnote, the phrase we have not "questioned the validity of ..." is better interpreted simply as the Supreme Court explaining that it has not yet addressed this particular question. Indeed, in discussing previous rulings, the Court stated as follows: "Neither in those cases, nor in any others, have we questioned the validity of a condition placed upon municipal employment that a person be a resident [a]t the time of his application. Nor did any of those cases involve a public agency's relationship with its own employees ...." *Id.* at 646 n. 6, 96 S.Ct. 1154. The Supreme Court is differentiating specifically between the legal questions it is ruling on, and those that it is leaving open. In the *McCarthy* case, the Supreme Court ruled on the validity of a continuing residency requirement. A pre-employment residency requirement was not at issue.

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443 F.Supp. 228
United States District Court, D. Hawai'i.

Reverend David L. NEHRING, Margo M. Brower, Dennis Donavon and Margaret Pitts, Individually and on behalf of all other persons similarly situated, Plaintiffs,

v.

George R. ARIYOSHI, Individually and in his capacity as the Governor, State of Hawaii, Defendant.

Civ. No. 77-0276.
|
Dec. 16, 1977.

A class action was instituted against the Governor of Hawaii for a declaration that Hawaii's one-year durational residency requirement for public employment was unconstitutional as denying equal protection. The District Court, Samuel P. King, Chief Judge, held that the statute was unconstitutional.

Judgment for plaintiffs, preliminary injunction issued.

Attorneys and Law Firms

***228** Robert Gilbert Johnston, Clayton C. Ikei, Honolulu, Hawaii, for plaintiffs.

Lawrence D. Kumabe, Glenn S. Hara, Deputy Attys. Gen., Ronald Y. Amemiya, Atty. Gen., State of Hawaii, Honolulu, Hawaii, for defendant.

DECISION ON MOTIONS TO ABSTAIN AND FOR PRELIMINARY INJUNCTION

SAMUEL P. KING, Chief Judge.

I.

FACTUAL BACKGROUND

A. History of the Residency Requirement.

Mark Twain once described the Hawaiian islands as "the loveliest fleet of islands that lies anchored in any ocean. . . ." [1] This feeling has certainly been shared by large numbers of people from every racial, ethnic, and cultural background. For over a thousand years people have been travelling to Hawaii, and they have stayed here in ever-increasing numbers. As with almost all good things which are not in limitless supply in this world, many of the "haves" do not particularly wish to share their good fortune with the "have-nots."

***229** In order to dissuade people from continuing to settle in Hawaii, several years ago the legislature enacted a durational residency requirement for public employment. [2] This law provided that with certain exceptions no one could be employed by the State or any county or municipal subdivision of the State without having been a resident of Hawaii for three years immediately preceding his or her appointment. In 1972, the Hawaii Supreme Court declared that this statute created a classification which was not supported by any rational basis. [3] It therefore held that the statute violated the Equal Protection Clause of the Constitution.

York v. State, 53 Haw. 557, 498 P.2d 644 (1972). The enforcement of the statute was enjoined and there matters rested until early this year.

In January of 1977, defendant Ariyoshi, the Governor of Hawaii, expressed his willingness to "put this State in direct confrontation with the present laws of this land and possibly even the Constitution of the United States." [4] He called for "bold . . . ideas and action" to combat the problem of potential overpopulation in Hawaii. In response, the Legislature enacted a new, one-year durational residency requirement for public employment. Although no survey was ever made to ascertain the number of public employees who were residents of the state for less than a year, the Governor signed the law and it became effective on June 21, 1977.

The new version of Hawaii Revised Statutes section 78-1 provides in part:
(b) All employees in the service of the government of the State or in the service of any county or municipal subdivision of the State shall be citizens, nationals or permanent resident aliens of the United States and residents of the State for at least one year immediately preceding their application for employment. . . .

(f) The requirement of residency, as defined under subsection (b) . . . shall not apply to persons recruited by the University of Hawaii under the authority of Chapter 304-11; provided, however, that all persons recruited as Administrative/Professional/Technical personnel of the University of Hawaii shall be subject to the requirement of residency; provided further that appointment of persons to positions requiring highly specialized technical and scientific skills and knowledge may be made without consideration of residency.

Act 211, 1977 Haw.Sess.Laws. The state immediately began to enforce this new statute.

B. The Named Plaintiffs.

This action was brought by four individual plaintiffs. In December, 1976, plaintiff David L. Nehring moved from Connecticut to Hawaii because his wife accepted employment heading up the nursing program at the University of Hawaii, Hilo. Reverend Nehring had never been to Hawaii before this time. In July, 1977, he applied for a job as a resident dorm manager at the Hilo campus of the University of Hawaii. Although before the residency law had been enacted, university authorities had encouraged Reverend Nehring to apply for this job, he was told that no interview would be forthcoming because he had not been a resident of Hawaii for more than a year.

Plaintiff Margo M. Brower arrived in Hawaii on June 2, 1977, after travelling from New York with her husband. Ms. Brower is trained as a teacher of English as a ***230** second language. She applied for jobs at all of the community colleges on Oahu. David Luke, the Assistant Personnel Director at the University of Hawaii, informed her that she could not qualify for an interview because of her residency status.

Plaintiff Dennis Donavon came to Hawaii for the first time in early 1977. He sought employment and was eventually hired as a vending facility specialist by Hoopono, the State agency for the blind. He began work on April 26, 1977, but was terminated on July 15, 1977. His supervisor informed him that his termination was due to the recent enactment of the durational residency statute. Hoopono has continued to accept Mr. Donavon's services as an unpaid volunteer.

Plaintiff Margaret Pitts came to Hawaii with her two children on August 1, 1976. Ms. Pitts is trained as a social worker and eventually obtained a job with the Child Protective Services Unit of the State Department of Social Services. She worked from May 26, 1977, until June 24, 1977, when her employment was terminated. As with Mr. Donavon, Ms. Pitts was informed by her supervisor that she was fired because of her residency status. Immediately upon her becoming a resident for a year (August 2, 1977), she was rehired for the same job. [5]

On August 1, 1977, these four individual plaintiffs filed a complaint under 42 U.S.C. s 1983 naming the Governor of Hawaii as the sole defendant. Representing the class of all residents of Hawaii who had not resided in the State for more than one year

prior to the enactment of the residency requirement,[6] the plaintiffs challenged the statute as violative of the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments.[7] They simultaneously moved for a preliminary injunction restraining the defendant from enforcing the durational residency requirement for public employment. The defendant filed a counter-motion requesting that this Court abstain from decision so that the plaintiffs could pursue their claims in state court. Both motions were heard by the Court on August 25, 1977. For the reasons set forth below, I am of the opinion that the motion to abstain should be denied and that the preliminary injunction should issue.

II.

THE MOTION TO ABSTAIN

[1] The defendant asks that this Court defer to the state courts of Hawaii so that they will have the first opportunity to hear and decide the constitutional validity of the durational residency requirement. The defendant suggests that either of two forms of abstention would be appropriate in this case. These two types of abstention are commonly denominated as Pullman abstention and Burford abstention.

A. Pullman Abstention.

The Pullman doctrine requires a federal court to consider abstaining from decision in order to avoid unnecessary conflict with state policies whenever a federal constitutional issue may be avoided or presented in a different posture by a state court determination of an issue of relevant state law. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); ***231** Harrison v. N.A.A.C.P., 360 U.S. 167, 176-77, 79 S.Ct. 1025, 3 L.Ed.2d 1152 (1959). See generally P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 988-94 (2d ed. 1973) (hereinafter cited as Hart & Wechsler); C. Wright, Law of Federal Courts s 52, at 218-21 (3d ed. 1976). The Court has made it clear that Pullman abstention should only be invoked in "special circumstances." Harris County Comm'rs v. Moore, 420 U.S. 77, 83, 95 S.Ct. 870, 43 L.Ed.2d 32 (1975). Abstention is the exception to the general rule that a court must decide any case or controversy properly presented to it. Only if the state statute is "fairly susceptible" to a construction which avoids or limits the constitutional question is abstention appropriate. Kusper v. Pontikes, 414 U.S. 51, 55, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973); Zwickler v. Koota, 389 U.S. 241, 251 n. 14, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967) (obviously susceptible). See also Carey v. Sugar, 425 U.S. 73, 96 S.Ct. 1208, 47 L.Ed.2d 587 (1976); Boehning v. Indiana Employees Ass'n, 423 U.S. 6, 96 S.Ct. 168, 46 L.Ed.2d 148 (1975); Steffel v. Thompson, 415 U.S. 452, 475 n. 22, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974).

In this case, it is helpful to consider two different factual situations which may call for abstention. First, a state statute may be ambiguous, with one possible construction of the statute avoiding or substantially limiting the federal constitutional question. Alternatively, a clear statute may possibly violate an unconstrued state constitutional provision. If the state constitutional provision nullifies the statute, there is no need to reach the federal question.

Turning to the first problem, the defendant argues that three things are unclear in the challenged statute: the term "residents," the phrase "all employees," and the exception in subsection (f) of the statute for certain persons recruited by the University of Hawaii. The defendant reasons that the term "residents" is ambiguous since it is not actually defined within the statute. The term is not ambiguous, however, just because someone says it is so. The defendant has never offered any reasonable definition of the word which would include the plaintiffs within the group of state residents entitled to seek public employment. For example, plaintiff Donavon came to Hawaii from Wisconsin six months prior to the hearing on the Motion to Abstain. He had never before been to Hawaii. I can think of no conceivable definition of residency which would make him a "resident" of the state for at least a year. Furthermore, another state durational residency requirement uses the words "domiciled or has been physically present in the State for a continuous period of at least one year . . . ." Haw.Rev.Stat. s 580-1 (Supp.1975) (residency requirement for divorce decree). That is certainly the traditional meaning of the term. I conclude that the term "residents" is

not fairly susceptible to any construction which would avoid excluding the plaintiffs from state employment on the basis of their recent interstate travel.

Similarly, although the defendant alleges that the term "employees" is unclear, he offers no interpretation of that term which would exclude the plaintiffs here. He refers to two of the named plaintiffs who were hired on an emergency 30-day basis, and raises questions as to whether they had a protected "expectation" of continued employment. But these questions refer to procedural due process and the right to notice and a hearing before termination of employment, see, e. g., Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); Bd. of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), not to a violation of equal protection such as the one alleged here. Cf. Nelson v. Southeastern Pa. Transp. Auth., 420 F.Supp. 1374 (E.D.Pa.1976) (abstention ordered in a Due Process case since the existence of a protectable "property" interest in employment is determined by state law). Again, I think of no reasonable definition of "employees" which would exclude the salaried workers who are plaintiffs here.

The defendant's argument concerning the ambiguity of the university exception does have some merit. Perhaps the state courts will be required to delineate just which jobs fall in the category of "Administrative/Professional ***232** /Technical" employment or are those "requiring highly specialized technical and scientific skills and knowledge . . .."[8] Nevertheless, no matter how broadly or narrowly those terms are defined, there will still be persons such as plaintiff Donavon who have no connection whatsoever with the university. Those people seek to vindicate the same constitutional claim as do the university applicants: the right to apply for a job regardless of their recent exercise of the right to travel interstate. This claim is wholly unrelated to the kind of job which each person seeks.

The defendant also raises the possibility that the durational residency statute may violate a number of state constitutional provisions, including Article I, section 2 (all persons are free and equal),[9] Article I, section 4 (a state due process and equal protection clause),[10] and Article I, section 6 (no one should be deprived of rights secured for others, unless by law)[11] of the Hawaii State Constitution. The defendant argues that the state courts might interpret these provisions so as to nullify the challenged statute. Relying on Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970), he suggests that this Court abstain while the state courts resolve those issues.

In Reetz, the Supreme Court faced a federal equal protection challenge by non-residents to an Alaskan statute limiting the issuance of commercial licenses for net salmon fishing to those who had previously held such a license or to those who had engaged in commercial fishing for the past three years. The plaintiffs also attacked the statute as invalid under the Alaskan Constitution which provided that:

> Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Alas.Const. art. VIII, section 3 (1973). The state constitution further provided that:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.

Alas.Const. art. VIII, section 15 (1959) (amended 1972). A three-judge court had held that the statute violated both the federal and state constitutions. The Supreme Court vacated this judgment, holding that the federal court should have abstained so that the Alaskan courts could consider the statute in the first instance in the light of these specific state constitutional provisions. The Court ordered abstention because "the nub of the whole controversy may be the state constitution." 397 U.S. 87, 90 S.Ct. 790. In the instant case, the defendant argues that Reetz compels this court to abstain so that the state judiciary may have the opportunity to consider the effect of the state constitution on the new durational residency statute.

The Reetz decision, however, is not the Court's last word on the subject of deference to state constitutional construction. The Court has continued to struggle with the question of when abstention is or is not appropriate and Reetz, where the Court deferred

to a very specific state constitutional provision which had no federal counterpart, merely represents the best example of a case where abstention is desirable. On the other hand, in Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), the Court faced a statute allowing a state official to post a person's name on public lists forbidding the sale of alcohol to ***233** listed persons without previous notice or a hearing. The Court held that this practice violated the Due Process Clause of the Fourteenth Amendment, and it specifically ruled that abstention was not necessary, despite the dissent's claim that the federal courts should require the parties to obtain a state court ruling on the effect of the statute in the light of the state constitution's due process clause. Compare Wisconsin v. Constantineau, supra at 437-39, 91 S.Ct. 507, with id. at 439-43, 91 S.Ct. 507 (Burger, C. J., dissenting). The Court later explained the difference between the Reetz and the Constantineau cases:

> In (Constantineau), we declined to order abstention where the federal due process claim was not complicated by an unresolved state-law question, even though the plaintiffs might have sought relief under a similar provision of the state constitution. But where the challenged statute is part of an integrated scheme of related constitutional provisions, statutes, and regulations, and where the scheme as a whole calls for clarifying interpretation by the state courts, we have regularly required the district court to abstain. (citing Reetz) . . . .

Harris County Comm'rs Court v. Moore, 420 U.S. 77, 84-85 n. 8, 95 S.Ct. 870, 876, 43 L.Ed.2d 32 (1975).

The next case in which the Court faced state constitutional construction arose within months of the Constantineau decision. Askew v. Hargrave, 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 (1971), involved an injunction issued by a three-judge court on federal equal protection grounds against Florida's public school financing program. Subsequent to the filing of the federal suit, a similar challenge was launched in state court. This latter suit primarily attacked the school financing program on state constitutional grounds. The Hargrave opinion is unclear as to whether the state constitutional issues asserted in the state case were the equivalent of the federal equal protection question (a "mirror" issue) or whether there were more unique state claims raised. In any case, the Court remanded the case for reconsideration of the abstention question in the light of Reetz. As Judge Choy noted in Stephens v. Tielisch, 502 F.2d 1360, 1361 (9th Cir. 1974), "it does seem likely that there were non-mirror state issues in the case, for otherwise it certainly would have been appropriate for the Court to have discussed Constantineau, decided earlier in the term." [12]

The Court seems to have set up a dichotomy, albeit an unarticulated one, based upon the nature of the state constitutional issue which could be raised. If the state claim is merely the local equivalent of an important federal right then abstention is unnecessary. On the other hand, if the state claim extends to an interest primarily protected by the individual state's authority, particularly in a case involving a complex statutory and constitutional scheme, a federal court should allow the state courts to resolve the case in the first instance. See generally Hart & Wechsler 992-94.

The Court followed this pattern in the latest case dealing with abstention and state constitutional claims. In Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976), the plaintiffs had challenged a Puerto Rican statute prohibiting the licensing of aliens as private civil engineers. The Court refused to order abstention so that the Puerto Rican courts could consider the statute in the light of the Commonwealth's equal protection clause and constitutional provision forbidding discrimination on the basis of "race, color, sex, birth, social origin or condition, or political or religious ideas." The Court explained that requiring abstention "because (the statute) might conflict with the cited broad ***234** and sweeping constitutional provisions, would convert abstention from an exception into a general rule." 426 U.S. 598, 96 S.Ct. 2279. No interest unique to the Puerto Rican constitution was raised in Flores de Otero and, hence, there was no special reason to give the commonwealth's courts the first opportunity to construe the statute in the light of an important interest which is normally protected by the federal government.

The defendant's request for Pullman -type abstention in favor of state court constitutional construction must be considered against this background. The state constitutional questions raised are sweeping and broad, and they do not implicate interests which have been traditionally left to the states in our federal system. Indeed, ever since the Civil War and the enactment of the Fourteenth Amendment, issues such as non-discrimination and equal opportunity have been a major federal concern.

The facts in the instant case are most closely related to the situation in Flores de Otero, and on the authority of that case I will deny the motion to abstain for reasons based upon Pullman doctrine.

B. Burford Abstention.

The defendant also asserts that the durational residency requirement is part of a large, complex regulatory scheme designed to enhance Hawaii's unique environment and to protect its economy. He suggests that abstention is thus appropriate under the line of cases which began with Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). In Burford, the plaintiff brought an action in federal court based upon both diversity and federal question jurisdiction. The plaintiff attacked the validity of a proration order issued by a state commission which regulated drilling in a Texas oil field. The Court noted that the order was part of a complex regulatory scheme under state law. The state had provided a comprehensive judicial appeals system which focused all appeals in the courts of a single county in order to prevent the confusion which would result from collateral appeals of the single commission's decisions. 319 U.S. 326, 63 S.Ct. 1098. The Court felt that this issue of collateral appeals was so important that a federal court should refuse to entertain any action involving an appeal from the commission's decision. Therefore, the complaint was dismissed.

Similarly, in Alabama Public Service Comm'n v. Southern Ry. Co., 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1951), a railroad sought to challenge a state administrative order denying a permit to discontinue a particular intrastate train service. Again, as "an integral part of the regulatory process," the state provided for appeals concentrated in one particular court. 341 U.S. 348, 71 S.Ct. 767. To avoid friction with the state, the federal court was required to abstain.

The Burford line of cases is not apposite here. Burford -type cases involve actions where for any number of reasons [13] the exercise of federal review itself transcends the importance of the decision from which an appeal is taken. Colorado River Water Conservation District v. United States, 424 U.S. 800, 814-15, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). In the instant case, the intervention of the federal courts does not transcend the issue to be decided in this action. Assuming that the durational residency statute is a part of the State's environmental and economic growth plan, [14] it is not so interrelated with those goals as to preclude federal review. The case does not involve an individual claim which will disrupt an appeals system by creating confusion through inconsistent collateral attacks. Rather, in this class action the validity of the durational residency statute will be determined once and for all. I do not find ***235** that Burford -type abstention would be at all appropriate in this case.

III.

THE EFFECT OF THE EQUAL PROTECTION CLAUSE

The plaintiffs argue that the durational residency statute violates the Equal Protection Clause because it creates two separate classes of bona fide residents of the state and unjustifiably treats these two classes differently. By denying public employment to those who have moved to Hawaii within the previous year, the statute serves to penalize those residents who have recently exercised their constitutional right to travel interstate. The plaintiffs maintain that this treatment is supported by neither a compelling state interest nor a rational basis. Furthermore, they argue that the stated legislative purpose of the law is constitutionally impermissible.

A. The Scope of Judicial Review.

[2] Without a doubt, the durational residency statute does implicate interests protected by the right to travel. Although this right has never been ascribed to a particular section of the Constitution, its existence has long been recognized. In United States v. Guest, 383 U.S. 745, 757-58, 86 S.Ct. 1170, 1178, 16 L.Ed.2d 239 (1966), the Supreme Court explained that:

. . . (t)he constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. . . .

. . . (This) right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. . . .

All statutes which set forth qualifications for public employment have the effect of creating two classes of people: those who qualify and those who do not. Nevertheless, given the importance of the constitutional right to travel, the question for this Court is whether to sustain the classification at issue here on the basis of a rational relationship between the statute and a valid legislative goal or whether to require the classification to undergo strict judicial scrutiny, i. e., establish that the statute is necessary to promote a compelling state interest before it can pass constitutional muster.

The Supreme Court has never had the opportunity to decide whether or not a durational residency requirement for public employment must pass the "strict scrutiny" test. [15] It has, however, analyzed durational residency statutes in the context of other governmental benefits and services. In Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), the Court struck down a one-year durational residency requirement for the receipt of welfare benefits. The Court held that in moving from state to state the welfare applicants "were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling state interest, is unconstitutional." 394 U.S. 634, 89 S.Ct. 1331 (emphasis in original). It then found that all of the interests proffered in support of the rule, including fiscal integrity, planning, and the prevention of fraud, were not "compelling."

In the next relevant case, Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), the Court invalidated a one-year ***236** state durational residency requirement for voting. The compelling state interest test was invoked on alternative grounds: the statute both affected a fundamental right (voting) and penalized the recent exercise of the right to travel. The fact that there was no evidence that the statute actually did deter anyone from travelling from state to state was considered irrelevant. 405 U.S. 339-42, 92 S.Ct. 995. The challenged law still prevented those who had recently travelled from exercising their right to vote. That was held sufficient to require strict judicial scrutiny. The Court then found that the State's interests in preventing voting fraud and determining bona fide residence were not compelling given alternative means at the State's disposal to achieve these goals.

In 1974, the Court refined the principles expressed in Shapiro and Dunn when it invalidated a statute which provided that resident indigents could not receive free non-emergency medical care unless they had been residents for over a year. Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974). In Maricopa, the Court recognized that not all durational residency requirements should be evaluated through strict scrutiny. [16] Rather, in order to determine whether the compelling state interest test should be invoked, a court must analyze the extent of a law's impact on interstate travel by considering (1) whether the waiting period would deter migration and (2) the extent to which it penalizes those who nevertheless choose to travel. 415 U.S. 256-62, 94 S.Ct. 1076. The Court found that a potential migrant might well consider the lack of free medical care and decide not to move into the state. More importantly, it held that non-emergency medical care was as much a "necessity of life" as welfare assistance. Id. at 259, 94 S.Ct. 1076. Hence, the withholding of this necessity from people solely because they had recently exercised their right to travel was a sufficient penalty to justify the strict scrutiny test. The Court found that the interests promoted by the statute were either impermissible or not compelling.

Finally, in Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), the Court sustained a one-year state residency requirement for the filing of a petition for divorce. The decision simply does not say whether the Court rejected the equal protection attack because it found a compelling state interest or whether it decided that the traditional rationality test would govern the result. Despite the dissent's objection, 419 U.S. 393, 418-19, 95 S.Ct. 553 (Marshall, J., dissenting), the Court did not explicitly determine whether it should use strict scrutiny by considering the statute's impact on interstate travel either through deterrence or as a penalty, as it had suggested in Maricopa. It merely stated that the divorce statute was "of a different stripe" since the statute promoted more than budgetary and recordkeeping goals and since the plaintiff was not irretrievably foreclosed from getting what she wanted (a divorce). She would qualify for one within a year. Apparently, the Court meant to distinguish the denial of welfare, voting, or medical care for one year as irretrievable. See 419 U.S. 406, 95 S.Ct. 553. Regardless of which

Equal Protection test was used, the Court accepted two justifications for the statute: (1) the importance of regulating divorce for all parties concerned, not merely the state and the newly resident petitioner, and (2) the prevention of collateral attack of the state's divorce decrees in the courts of other states. Id. at 406-09, 95 S.Ct. 553.

It is against the background of Shapiro, Dunn, Maricopa, and Sosna that I must decide whether to apply strict scrutiny to Hawaii's public employment statute. After Sosna, the use of strict scrutiny cannot be ***237** viewed as automatic. Since the State maintains that the purpose of the statute is to control growth, protect the environment, and apportion employment opportunities, more than budgetary and recordkeeping goals are at issue.

A number of state and lower federal courts have struggled with the question of strict scrutiny and durational residency requirements or similar practices in the context of public employment. In Eggert v. City of Seattle, 81 Wash.2d 840, 505 P.2d 801 (1973), the Washington Supreme Court held that strict judicial scrutiny was required in order to test a one-year durational residency requirement for municipal employment. Similarly, in State v. Wylie, 516 P.2d 142 (Alaska 1973), the Alaska Supreme Court faced not a "requirement" but an absolute preference in public hiring for one-year residents over more recently arriving residents. The court chose to apply the strict scrutiny test. The Alaska Supreme Court has basically reaffirmed this decision, despite the intervention of Sosna. See Hicklin v. Orbeck, 565 P.2d 159, 162-66 (Alaska 1977), appeal granted, —- U.S. ——, 98 S.Ct. 391, 54 L.Ed.2d 275 (filed Oct. 31, 1977) (state law imposing durational hiring preference in oil and gas industries if the employer has a contract with the state, held failed to pass strict scrutiny test). [17] Cf. Carter v. Gallagher, 337 F.Supp. 626 (D.Minn.1971) (durational residency requirement to obtain veteran's preference in state employment must withstand strict scrutiny); but cf. Town of Milton v. Civil Service Comm'n, 365 Mass. 368, 312 N.E.2d 188 (1974) (durational residency preference for police hiring not a penalty on interstate travel and, hence, no strict scrutiny applied). The majority view appears to be that the strict scrutiny test should be employed.

In my opinion, the denial of the opportunity to apply for public employment does have a sufficient enough impact upon the right to travel to require that the statute be justified by a compelling state interest. At the hearing on the motion for a preliminary injunction, Robert Schmitt, a state statistician called by the defendant, testified that approximately 12% Of the jobs available in Hawaii are with the State and local government. [18] There is no question in my mind that the forced inability of a new resident to apply for 12% Of the available jobs is a penalty, particularly for those people who are generally trained for work performed primarily by government. Even though private jobs are still available, the universe of potential jobs is smaller. See Maricopa, supra, 415 U.S. at 264-65, 94 S.Ct. 1076, where the Court applied strict scrutiny even though it recognized that newly arrived indigent might still receive private medical care. With the exception of those with inherited wealth or those who are on the public dole, employment is the only way for people to provide themselves with the "necessities of life." Thus, this case is governed by Shapiro and Maricopa. Sosna, whatever the ultimate scope of its holding, is distinguishable in the sense that it dealt with non-economic matters which were not directly related to keeping people at or above the subsistence level. Thus, I find that Hawaii's durational residency statute classifies new residents in such a way as to operate as a penalty for the recent exercise of a fundamental constitutional right. In order to validate the statute, the defendant must prove that it is necessary to achieve a purpose which is both compelling and permissible.

***238** B. The State's Justifications.

The defendant offers two justifications for the durational residency statute. First, the State seeks to control growth and protect Hawaii's unique island environment by restricting the number of people migrating to the state. It also seeks to apportion employment opportunities and other resources so that long-term residents of the state will obtain jobs in preference to "outsiders." [19]

In support of the assertion that the statute is part of a complex program which is necessary to protect Hawaii's unique environment, the defendant called a number of witnesses. Robert Schmitt, a state statistician, detailed the trends in population growth and the cost of living in Hawaii. Interestingly, he stated that the number of persons born in Hawaii but living elsewhere in the United States was almost equal to the number of persons born elsewhere but living in Hawaii. George Ikeda, Executive Secretary to the State Commissioner on Manpower and Equal Employment, testified as to the potential for job growth in the

labor force in the future. However, Mr. Ikeda stated that no survey had yet been made as to the number of one-year-or-less residents employed by the state and local governments. [20] Harry Akagi, an environmental planning coordinator for the State, testified as to the capacity of Oahu's water supply. He predicted that given current trends the traditional water supplies on Oahu would begin to be consumed faster than they were replaced by 1995. Mr. Akagi further testified that his department never made any study of the effect that the durational residency statute would have on water consumption. [21] Frank Skrivanek, Deputy Director of the Department of Planning and Economic Development, testified that although population trends were an important factor in planning for the future, his department had not studied the effect of the residency statute on population growth. [22]

[3] I accept the proposition that Hawaii in general and the island of Oahu in particular will face substantial problems in coping with growth in the future. Nevertheless, while certain governmental solutions may be an " effective" answer to a problem in the narrowest sense of the term, they are not necessarily permissible in a federal system. The central Constitutional objection to the approach proposed by the defendant is that the state seeks to achieve its goal by keeping people out of Hawaii. Indeed, the defendant admits that this is the purpose of the statute. If people migrate to Hawaii despite the residency requirement then they will continue to use more water and take up space. In other words, the durational residency statute is an attempt to establish an interstate immigration policy. The Supreme Court has repeatedly stated that "to the extent the purpose of (such a law) is to inhibit the immigration of (people) generally, that goal is constitutionally impermissible." Maricopa, supra at 263-64, 94 S.Ct. at 1085; Shapiro, supra, 394 U.S. at 629, 89 S.Ct. 1322. This is not to say that the State is powerless to attack the problems it faces. It can constitutionally seek to control growth through the use of zoning and other, more enlightened tools of economic planning. Cf. Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974) (restriction of land use to one-family dwellings upheld).

Furthermore, even if the anti-migratory purpose of the statute was permissible, the defendant did not show that the classification of new and old residents of the state was even rationally related to protection of the environment. None of the witnesses called by the state could testify as to any significant connection between the number of people moving into Hawaii who were planning to or would take public jobs and the environmental problems faced by the state. Indeed, they had not even studied this problem. No one could even inform ***239** the court as to the present number of public employees who had been residents of Hawaii for less than a year! Thus, as far as environmental protection goes, this statute does not even meet the traditional rational basis test of equal protection analysis. [23]

The defendant also briefly argued a second justification for the residency statute. The state seeks to provide its limited employment opportunities to its long-term residents in preference to better qualified outsiders who may be more able to go elsewhere and look for jobs. [24] Even assuming that this is a permissible legislative objective, the statute at issue here is clearly not tailored to perform this function. Furthermore, as noted above, the defendant could not even introduce evidence as to the number of present public employees who had been residents for less than a year. As the record stands now, this justification cannot even withstand the more limited scrutiny of the rational basis test.

C. Conclusion.

[4] I therefore hold that the durational residency aspect of Haw.Rev.Stat. section 78-1(b) violates the Equal Protection Clause of the Fourteenth Amendment. The defendant has failed to establish a compelling state interest, or indeed, even a rational basis for this statute.

I further find that the plaintiff has met the requirements for a preliminary injunction. See Aguirre v. Chula Vista Sanitary Service and Sani-tainer, Inc., 542 F.2d 779 (9th Cir. 1976). When a plaintiff's fundamental constitutional rights are being infringed upon, one can assume that irreparable injury exists.

The order denying the Motion to Abstain and granting appropriate declaratory and injunctive relief was issued for the reasons set forth above.

All Citations

443 F.Supp. 228, 15 Empl. Prac. Dec. P 8081

Footnotes

1 Letter from Samuel Clemens to H. P. Wood (Nov. 30, 1908), reprinted in W. F. Frear, Mark Twain and Hawaii 242-43 (1947).

2 Haw.Rev.Stat. s 78-1(a) (1968) (current version s 78-1, Act 211, 1977 Haw.Sess.Laws).

3 The State sought to justify the statute on the grounds that it insured that all employees would possess the requisite qualifications for their job. York v. State, 53 Haw. 557, 559-60 & n. 3, 498 P.2d 644, 646-47 & n. 3 (1972). See also note 24, infra. In the instant case, the State has offered new and different justifications for the statute. Therefore, York v. State is not exactly on point with the case before me.

4 State-of-the-State Address by Governor George R. Ariyoshi, Ninth State Legislature Meeting in Joint Session (Jan. 25, 1977) (defendant's Exhibit No. 3).

5 Thus, between the time the complaint was filed and the time of this hearing, Ms. Pitts' claim for injunctive relief had become moot. She will therefore be dropped from the class. She may, of course, still have a damages action against the State or certain individuals. Due to the Eleventh Amendment, any monetary claim against the State must be brought in state court. See Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). In any event, the complaint in this case did not contain a prayer for damages.

6 The class was later certified to include:
those persons who have been denied State public employment, continued employment, or reemployment as a result of the one-year durational aspect of the residency requirement contained in paragraph b, Section 78-1, Hawaii Revised Statutes, as amended by Act 211, Session Laws of Hawaii 1977.
Order of September 20, 1977.

7 Inasmuch as this case involved actions solely performed by the State or its officials, only the Fourteenth Amendment need be considered.

8 Haw.Rev.Stat. s 78-1(f), Act 211, 1977 Haw.Sess.Laws, quoted in Part I, supra.

9 Haw.Const., art. I, s 2 (1968) provides:
All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property. These rights cannot endure unless the people recognize their corresponding obligations and responsibilities.

10 Haw.Const., art. I, s 4 (1968) provides:
No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

11 Haw.Const., art. I, s 6 (1968) provides:
No citizen shall be disfranchised or deprived of any of the rights or privileges secured to other citizens, unless by the law of the land.

12 If there were no non-mirror issues in Hargrave, then perhaps the case can be distinguished from Constantineau on the basis of the existence of a contemporaneous state suit raising identical state issues. In the interest of federal-state comity, a federal court might abstain in order to give a state court the first chance to resolve the problem. In the case at bar, no state suit has been filed and, thus, I cannot consider abstention on this basis.

13 For example, in Burford and Alabama Public Service Comm'n, the disruption caused by collateral appeals is more important than the decision to permit certain oil drilling or provide train service on one particular line.

14 See Part IIIB, infra.

15 The defendant argues that Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976), is controlling on this issue. Murgia held that there was no fundamental constitutional right to public employment. But that fact standing alone is irrelevant. There is no fundamental right to receive welfare, either. See Jefferson v. Hackney, 406 U.S. 535, 546-49, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972); Dandridge v. Williams, 397 U.S. 471, 483-87, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). Strict scrutiny was used in Shapiro v. Thompson, infra, because the welfare statute impacted upon the fundamental right to travel interstate. Dandridge v. Williams, supra at 484 n. 16, 90 S.Ct. 1153. The question here is whether or not Hawaii's statute also affects the right to travel in a significant way.

16 Although the Court has never squarely held so, it has hinted through dicta and summary affirmances that a one-year durational residency requirement to qualify for in-state tuition at a state college or university does not have to meet the compelling state interest test. See, e. g., Sosna v. Iowa, infra, 419 U.S. at 409, 95 S.Ct. 553; Vlandis v. Kline, 412 U.S. 441, 452-53 n. 9, 93 S.Ct. 2230, 37

L.Ed.2d 63 (1973); Starns v. Malkerson, 326 F.Supp. 234 (D.Minn.1970) (three-judge court), aff'd mem., 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed.2d 527 (1971).

17 The Supreme Court may decide this issue in Hicklin v. Orbeck, supra. Although the Alaska Supreme Court struck down the durational residency aspect of the hiring preference law for the oil and gas industry, it upheld the aspect of the law requiring the hiring of residents against an attack under the Privileges and Immunities Clause. The United States Supreme Court has agreed to hear an appeal directed to this latter issue. —- U.S. ——, 98 S.Ct. 391, 54 L.Ed.2d 275 (1977). If the state in turn questions the ruling on the durational aspect of the case, and if the Court agrees to hear that issue, one could expect a fairly definitive expression of the Court's view concerning equal protection and durational residency requirements for employment, private or otherwise.

18 Transcript of Proceedings, August 25, 26, and 29, 1977, at 86 (hereinafter cited as Transcript).

19 See note 24, infra.

20 Transcript at 99.

21 Transcript at 114.

22 Transcript at 134.

23 Counsel for defendant stated that a study was being instituted immediately to determine the dimensions of the supposed “problem” which the statute “corrects”.

24 The defendant took this position at oral argument. Transcript at 155-56. In York v. State, supra, the State argued that a three-year residency requirement for public employment guaranteed that only “qualified” people would be hired. The Hawaii Supreme Court found this irrational and struck down the statute under the traditional equal protection test. See note 3, supra. Now the State argues that the statute seeks to protect the less-qualified person!