

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Michael L. Shakman, Paul M. Lurie
and the Independent Voters of
Illinois,

Plaintiffs,

v.

Democratic Organization of
Cook County, et al.,

Defendants.

69 C 2145

The Honorable
Wayne R. Andersen

**COOK COUNTY'S RESPONSE TO PLAINTIFFS' APPLICATION
TO HOLD COOK COUNTY AND CERTAIN NAMED INDIVIDUALS
IN CIVIL CONTEMPT FOR VIOLATION OF COURT ORDERS**

Defendant Cook County (the "County"), by and through its attorney, RICHARD A. DEVINE, State's Attorney of Cook County, and his Assistant State's Attorneys, PATRICK T. DRISCOLL, JR., PAUL A. CASTIGLIONE, PATRICK M. BLANCHARD and SEAN P. CONNOLLY, respectfully submits the following response to *Plaintiffs' Application to Hold Cook County and Certain Named Individuals in Civil Contempt for Violation of Court Orders* ("plaintiffs' application") brought by Michael L. Shakman ("Shakman"), Paul M. Lurie ("Lurie") and Independent Voters of Illinois-Independent Precinct Organization. ("IVP") In response to this pleading, the County states as follows:

RESPONSE

On January 7, 1994, the County and plaintiffs Michael Shakman ("Shakman"), Paul M. Lurie ("Lurie") and Independent Voters of Illinois-Independent Precinct Organization ("IVI") entered into a consent decree (the "1994 consent decree") that resolved plaintiffs' claim that the County's hiring practices violated their First Amendment rights as a voter, a candidate for office and a political organization. As discussed in the County's memorandum of law in support of its

Rule 60(b)(5) motion to vacate the 1994 consent decree, plaintiffs do not have Article III standing to continue seeking enforcement of the 1994 consent decree.

Plaintiffs have filed a motion asking this Court to hold the County in civil contempt for an alleged violation of the consent decree. This Court should deny this motion for several reasons. First, this Court should address the County's Rule 60(b)(5) motion to vacate the 1994 consent decree before addressing plaintiffs' application. Second, plaintiffs lack Article III standing and cannot establish that an alleged violation of the 1994 consent decree caused them a concrete injury that was fairly traceable to the County's conduct. Third, an order of civil contempt is not warranted against the County for conduct that allegedly took place in the previous administration because the County's policy under the current Steele administration is to prohibit hiring, promotion or discharge decisions based upon political considerations and not to consider political sponsorship when determining whether to hire an applicant or promote or terminate an employee. Fourth, the plaintiffs seek remedies that are impermissible. Finally, long-standing principles of federalism should stand to bar the plaintiffs' application.

Accordingly, and for the reasons set forth below, this court should deny plaintiffs' motion to hold the County in civil contempt.

I. The Court Must Resolve The County's Motion To Vacate Before Addressing Plaintiffs' Application To Hold The County In Civil Contempt.

Plaintiffs request that the County be held in contempt. Plaintiffs also seek to expand the scope of the 1994 consent decree with the appointment of an un-elected monitor to review and monitor County hiring practices and implementation of ongoing reporting and disclosure procedures. (Plaintiffs' Motion, ¶¶A and B.) Plaintiffs ask for the implementation of a "remedial program," including the payment of "damages" for alleged job applicants and job holders allegedly injured in violation of the 1994 consent decree (Plaintiffs' Motion, ¶C.) and ask for substantial financial assessments (*i.e.*, fines) against the County and various County

employees for alleged violations of the 1994 consent decree. (Plaintiffs' Motion, ¶D.)¹ As discussed below in Sections II, III, IV and V, plaintiffs are not entitled to the relief that they now seek from the County. However, before reaching plaintiffs' civil contempt motion, this Court should first decide the County's pending motion to vacate the 1994 consent decree.

In *Ferrell v. United States Dep't of Housing and Urban Development*, 186 F.3d 805 (7th Cir. 1999), the Seventh Circuit recognized that a court should address a motion to modify or vacate a consent decree before adjudicating a motion for a finding of civil contempt. In *Ferrell*, the Court stated:

The purposes of a civil contempt order are to "coerce compliance with the underlying order and/or to compensate the complainant for loss sustained by disobedience." *Blocksom & Co. v. Marshall*, 582 F.2d 1122, 1124 (7th Cir. 1978). When the underlying order is erroneously issued or is no longer valid, a civil contempt order would serve neither of those purposes.

Ferrell, 186 F.3d at 814. See also *Komyatti v. Bayh*, 96 F.3d 955, 963 (7th Cir. 1996) (remanding a case to the district court prior to ordering compliance with a consent decree so that state officials could file a motion to vacate a portion of a consent decree on the grounds that enforcement of the decree would be inequitable.)

Here, the County has filed a motion to vacate the 1994 consent decree on the grounds that plaintiffs do not have injuries fairly traceable to the County's conduct and that under Article III of the United States Constitution, this Court lacks jurisdiction to hear plaintiffs' claim. (The County's Memorandum in Support of its Motion to Vacate at 6-10.) In light of *Shakman v. Democratic Organization of Cook County*, 481 F. Supp. 1315, 1320, 1346 n. 36 (N.D. Ill. 1979), vacated, *Shakman v. Dunne*, 829 F.2d 1387 (7th Cir. 1987), cert. denied, 484 U.S. 1065 (1988) ("*Shakman II*") and *Plotkin v. Ryan*, 239 F.3d 882 (7th Cir. 2001), plaintiffs do not satisfy the

¹ As discussed below in Section II, plaintiffs fail to satisfy the standing requirements of Article III of the Constitution. In addition, as discussed in Section IV below, even if plaintiffs were entitled to relief under the 1994 consent decree (which they are not), the relief that plaintiffs request is beyond the scope of the 1994 consent decree.

standing requirements of Article III. This Court, therefore, should address the threshold standing issues set forth in the County's motion to vacate the 1994 consent decree before addressing plaintiffs' civil contempt motion.

II. Plaintiffs Fail To Satisfy Article III Standing Requirements.

Since the Seventh Circuit's 1987 decision in *Shakman II*, it has been clear that Shakman, an unsuccessful candidate for election to the 1970 Illinois Constitutional Convention, and Lurie, a voter who supported Shakman, lack standing to challenge state and local government hiring practices. *Shakman II*, 829 F.2d at 1397. Furthermore, plaintiff IVI has not identified any concrete and specific injury to any of its members, and, thus, lacks Article III standing to bring a First Amendment claim on behalf of any such members. IVI also lacks Article III standing as an organization to bring a First Amendment claim against the County. In order to avoid repetition, the County incorporates its arguments regarding the lack of standing of plaintiffs Shakman, Lurie and IVI in its Memorandum in Support of its Motion to Vacate at pp. 6-10.

It is uncontested that plaintiffs Shakman and Lurie did not seek employment with the County. Even if they could assert such an injury, they filed their lawsuit as a candidate and a voter. When it joined the instant lawsuit in 1991, IVI did not identify a single member who sought employment with the County. Shakman, Lurie and IVI have not suffered any injury, let alone an injury to any First Amendment interest.

Consent decrees are not exempt from the requirements of Article III. The Seventh Circuit has expressly held that normal rules of justiciability apply to applications under consent decrees. *United States v. Accra Pac, Inc.*, 173 F.3d 630, 633 (7th Cir. 1999). Speaking for the Court, Judge Easterbrook noted that the plaintiff:

United States believes that normal rules of justiciability do not apply to applications under consent decrees. Its supplemental memorandum states that a court's authority to superintend the implementation of a consent decree dissolves all obstacles to judicial review. The judge himself was of this view, writing:

"There is no requirement that Accra Pac articulate a new injury to have standing; it is sufficient for jurisdictional purposes to identify a dispute related to the consent decree." That can't be right. Suppose the consent decree had a clause dispensing with the need for an Article III case or controversy and appointing the district judge ombudsman for all quarrels related to Accra Pac's site. That clause would be ineffectual: district judges can't suspend the application of Article III or grant themselves the power to issue advisory opinions one case at a time, and litigants can't stipulate to the enlargement of federal jurisdiction. A case or controversy must be present at every moment of the litigation. That's the point of the mootness doctrine, which is as applicable to consent decrees as to other judgments.

Id. Moreover, parties cannot consent to subject matter jurisdiction.² *In re Brand Name Prescription Drugs Antitrust Litigation*, 248 F.3d 668, 671 (7th Cir. 2001)(stating that "[j]urisdiction cannot be conferred by stipulation or silence.")

Shakman and Lurie have lacked standing since the Seventh Circuit's decision in *Shakman II* in 1987. IVI has lacked standing since it entered this lawsuit as a plaintiff in 1991. The 1994 consent decree does not create subject matter jurisdiction and the parties cannot consent to jurisdiction. On this basis, this Court should grant the County's motion to vacate and deny plaintiffs' application.

III. Civil Contempt Against the County Is Not Warranted.

Putting aside the standing and Article III problems with plaintiffs' lawsuit against the County, plaintiffs' civil contempt motion faces another insurmountable obstacle: in light of the recent policy directive of the new Steele administration, a finding of civil contempt is not warranted against the County.

The Seventh Circuit has recognized that:

² Allowing parties to do so would not only violate Article III but would demean the federal court system. If an activist and a local government official could agree to a consent decree without the existence of concrete, Article III injury, the official might very well do so simply to advance his parochial political interests. The federal courts, however, are intended to adjudicate cases or controversies. In light of Article III, federal courts are not a platform for the operation of essentially political agreements between activists and public officials who wish to advance a particular agenda.

there is no such thing as an independent cause of action for civil contempt. *Blalock v. United States*, 844 F.2d 1546, 1550 (11th Cir. 1988) (*per curiam*). Instead, "civil contempt proceedings are considered to be a part of the action from which they stem." (4 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure*, § 1017 at 71 (1987)),

D. Patrick, Inc. v. Ford Motor Co., 8 F.3d 455, 459 (7th Cir. 1993).

The only admissible evidence regarding the employment policies of the new Steele administration is Executive Order 06-2. New County Board President Bobbie L. Steele issued Executive Order 06-2 on August 29, 2006. Executive Order 06-2 strictly prohibits all employees:

(1) from directly or indirectly influencing the hiring, promotion or discharge of an employee or employment applicant on the basis of political considerations whether based on political affiliation, political campaign contributions and/or political support and (2) considering any form of political sponsorship in determining to hire an applicant for employment or to promote or terminate employment.

See Cook County Executive Order 06-2, a copy of which is attached as Exhibit A. Nothing in plaintiffs' civil contempt motion even suggests that the actions of the Steele administration are contrary to the stated policy in Executive Order 06-2. Indeed, plaintiffs ask for a finding of civil contempt based upon the alleged actions of officials from the previous administration.

Indeed, plaintiffs have asked this Court to hold the County in civil contempt because of an August 21, 2006 newspaper article from the Chicago Sun-Times in which an employee in the County's Highway Department alleged that the County hired certain unqualified employees in its highway department. Plaintiffs also cite a July 31, 2005 article from the Chicago Sun-Times about the alleged actions of a County Commissioner regarding positions within the County. As an initial matter, a newspaper article is "hearsay: an out-of-court statement offered to prove the truth of its contents." *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997). *See also Chicago Firefighters Local 2 v. City of Chicago*, 249 F.3d 649, 654 (7th Cir. 2001) (holding that

a newspaper article was inadmissible hearsay that could not be used in support of a Title VII action.) Importantly, hearsay is inadmissible in support of a petition seeking an order of civil contempt for violation of a consent decree. *Harcourt Brace Jovanovich Legal & Professional Publications v. Multistate Legal Studies, Inc.*, 26 F.3d 948, 953 (9th Cir. 1994). Consequently, plaintiffs' civil contempt motion does not set forth an adequate factual basis for a finding of contempt against the County.

Furthermore, the two newspaper articles were written prior to President Steele's execution of Executive Order 06-2 on August 29, 2006 and concerned actions that allegedly took place before President Steele was sworn in as President of the Cook County Board of Commissioners. It is well established that:

A "civil contempt sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative command such as an order . . . Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies. (citation omitted) In these circumstances, the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus 'carries the keys of his prison in his own pocket.'"

Int'l Union v. Bagwell, 512 U.S. 821, 828, 114 S. Ct. 2552, 2557-2558 (1994); *see also Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911) (noting that a person held in civil contempt "carries the keys of his prison in his own pocket.") A complaining party seeking a finding of civil contempt "must prove that the order was violated by 'clear and convincing' evidence." *Stotler & Co. v. Able*, 870 F.2d 1158, 1163 (7th Cir. 1989). Here, plaintiffs ask this Court to hold the County in civil contempt and to issue fines and other sanctions even though plaintiffs do not allege that the current Steele administration is violating the 1994 consent decree. (Plaintiffs' Motion, ¶¶A-E.) Instead, plaintiffs rely on inadmissible hearsay about some alleged actions that took place in the previous administration.

President Steele has already issued an executive order mandating that the County not base employment decisions on political considerations. Plaintiffs have not offered any evidence that the current Steele administration is not following this policy.

Because the current administration prohibits employees from basing employment decisions based upon political considerations, plaintiffs cannot ask the Court to impose fines and other relief to force the County to adopt an employment policy that the Steele administration has already adopted. Accordingly, the plaintiffs' application should be denied.

IV. Plaintiffs' Proposed Relief Against The County Is Beyond The Scope Of The 1994 Consent Decree

A consent decree is a contract between the parties. *O'Sullivan v. City of Chicago*, 396 F.3d 843, 859 (7th Cir. 2005) (observing that "a federal court is more than 'a recorder of contracts' from whom parties can purchase injunctions.") In order for a consent decree to satisfy the requirements of Article III and remain viable, a case or controversy must be present at every moment of the litigation. *Id.*; accord *United States v. Accra Pac, Inc.*, 173 F.3d 630, 633 (7th Cir. 1999).

The 1994 consent decree between the County and plaintiffs Shakman, Lurie and IVI did not contain a provision for liquidated damages, did not include a provision for fines and did not include a provision for an un-elected monitor to oversee the actions of the Cook County Board of Commissioners or the President of the Cook County Board of Commissioners. Plaintiffs should not ask this Court to add terms to the 1994 consent decree to which the parties did not assent.

Under the terms of the 1994 consent decree, plaintiffs are not entitled to liquidated damages and because plaintiffs lack Article III standing and have no "injury in fact," plaintiffs are not entitled to damages for any alleged breach of the decree.

Moreover, and cardinally, the Illinois Constitution provides that "the President of the Cook County Board shall be elected from the County at large and shall be the chief executive

officer of the County.” Ill. Const. Art. VII, §4(b) (1970). Bobbie L. Steele is the President of the Cook County Board of Commissioners. The monitor that plaintiffs request would oversee the operation of the County and, thus, would necessarily infringe on the President’s discharge of her constitutional obligations. Significantly, the 1994 consent decree does not authorize such a monitor. Without any legitimate basis or authority, plaintiffs invite this Court to appoint such a monitor. This Court should decline plaintiffs’ invitation to do so.

V. Plaintiffs’ Proposed Relief Violates Principles of Federalism.

The Seventh Circuit has consistently held that principles of federalism prohibit federal courts from issuing regulatory injunctions to perpetually oversee the activities of local government. *See, e.g., Palmer v. City of Chicago*, 755 F.2d 560, 575 (7th Cir. 1985) (stating that federal courts should not open the “Pandora’s Box” of overseeing the introduction of evidence in state court criminal trials and, thus, “subject[ing] every felony trial prosecuted in the Cook County Circuit Court system to the time-consuming scrutiny of the Federal district court.”); *First Defense Legal Aid v. City of Chicago*, 319 F.3d 967 (7th Cir. 2003) (reversing an injunction that regulated the questioning of witnesses to a crime and stating that issues regarding the introduction of a statement against a party in a state court felony trial should be raised by the party and not by the party’s counsel in a federal lawsuit.)

In *Palmer*, for example, the Seventh Circuit held that abstention principles set forth in *Younger v. Harris*, 401 U.S. 37 (1971) should have precluded the district court from enjoining policemen in the City of Chicago from engaging in the practice of keeping “street files” when conducting criminal investigations. In *First Defense Legal Aid*, the plaintiff lawyers filed a complaint to enjoin the police from not allowing them to converse with witnesses that the police are interviewing. The district court issued the injunction. The Seventh Circuit reversed and stated:

Any violations of suspects' rights to be free of trickery, wrongful imprisonment, and compulsory self-incrimination must be redressed after the fact (by damages or exclusion of evidence) rather than by a regulatory injunction issued in a case to which no witness is a party.

First Defense Legal Aid, 319 F.3d at 973. The same principle of federalism prohibits the relief that plaintiffs now seek in their civil contempt motion.

First Defense Legal Aid demonstrates that the federal courts should not issue regulatory injunctions to monitor the conduct of local government, particularly where individuals who are allegedly aggrieved may bring Section 1983 claims for compensatory damages caused by conduct that violates the United States Constitution. *Id.* If individuals (other than the named plaintiffs) believe that the County engages in employment practices in violation of the First Amendment as construed in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), then such individuals are, of course, free to file their own civil actions. Because Shakman, Lurie and IVI have no Article III standing to litigate the instant case, they cannot properly ask this Court to continue to monitor the employment practices of the County through a consent decree. *Accra Pac, Inc.*, 173 F.3d at 633.

In sum, plaintiffs' proposed prosecution of the 1994 consent decree without requisite Article III standing violates cherished principles of federalism. On this alternative basis, this Court should deny plaintiffs' civil contempt motion.

CONCLUSION

For the reasons stated above, the County requests that this Court: (a) deny plaintiffs' application to hold Cook county in civil contempt, (b) enter an order vacating the January 7, 1994 consent decree with respect to Cook County and (c) enter such other and further relief that this Court deems just and appropriate.

Respectfully submitted,

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BOBBIE L. STEELE
PRESIDENT

Clerk of the Cook County Board)
) SS
County of Cook)

EXECUTIVE ORDER 06-2

WHEREAS, it is essential to the proper operation of representative government that public officials and employees be independent and impartial; that public office and employment not be used for personal gain, and that the public have full confidence in the fair and honest administration of government; and

WHEREAS, it is the best interests of Cook County employees as well as the citizens of Cook County to promote fair and lawful employment and to enforce a policy that prohibits political consideration, affiliation and contribution in the hiring of non-exempt government employees; and

WHEREAS, political patronage should not be used as a basis to hire, promote or fire Cook County employees or employment applicants.

THEREFORE, by virtue of the authority vested in me by the Constitution of the State of Illinois, the laws of the State of Illinois, and the Ordinances of Cook County, I hereby order, effective August 29, 2006 that the Office of the President of the Board of Commissioners of Cook County, including all departments and bureaus under the authority and direction of the President, prohibit employment actions for non-exempt positions to be taken that are based, in whole or in part, on political consideration, political affiliation or political contribution. Accordingly, with respect to all non-exempt Cook County positions that fall under the control of the President, Cook County Employees shall be strictly prohibited from:

- 1. Directly or indirectly influencing the hiring, promotion, or discharge of an employee or employment applicant on the basis of political considerations whether based on political affiliation, political campaign contributions and/or political support.
- 2. Considering any form of political sponsorship in determining to hire an applicant for employment or to promote or terminate employment.

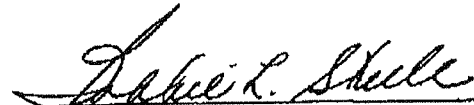
Hiring, promotion and discharge shall be based solely on a lawful merit based system recognized by the Cook County Department of Human Resources and in accordance with all other applicable laws.

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For purposes of this Executive Order, "non-exempt" positions shall have the meaning as defined under applicable state and federal law, and shall include all Cook County jobs except those jobs that involve policy making or require confidentiality to an extent that political affiliation is an appropriate consideration for the effective performance of the job.

Any Cook County employee who violates the above listed prohibited activities may be subject to discipline up to and including discharge.

Dated this 29th day of August, 2006



Bobbie L. Steele

Bobbie L. Steele
President
Board of Commissioners
Cook County, Illinois