

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION**

JOHN P. MIALL, JR., ROBYN HITE,
DAVID SHAW, DANIE JOHNSON, and
WILLA GRANT,

Plaintiffs,

v.

CITY OF ASHEVILLE,
DEBRA CAMPBELL, in her official
capacity as City Manager of the City of
Asheville, and
ESTHER MANHEIMER, in her official
capacity as Mayor of the City of Asheville,

Defendants.

Civil Action No. 1:23-cv-00259-MR-WCM

**FIRST AMENDED CLASS ACTION
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF AND
NOMINAL DAMAGES**

INTRODUCTION

1. For many residents of Asheville, North Carolina, civic duty goes beyond the ballot box. Residents offer their voices to local leaders and provide guidance on important policies shaping Asheville's future by serving on a city board or commission. But the opportunity to serve the public is not provided equally. For Asheville's Human Relations Commission, Asheville prefers individuals from certain races and ethnicities.

2. John Miall, Jr., sought appointment to the Human Relations Commission of Asheville. His experience and commitment to his community ought to make him a valuable member on the Commission. For nearly thirty years, Mr. Miall worked for the City of Asheville, including as the Director of Risk Management for several of those years. He worked closely with other City staff, citizens, and community groups. Mr. Miall was also the cocreator of the Asheville Project, an innovative disease management initiative. Despite his background of service to the

City, an Asheville ordinance mandates that the City Council disfavor Mr. Miall's inclusion on the Commission because of his race.

3. Like Mr. Miall, Robyn Hite, David Shaw, Danie Johnson, and Willa Grant are all citizen servants qualified to serve on the Human Relations Commission but are disadvantaged because of their race under the City's ordinance. The City's discriminatory treatment violates the U.S. Constitution and the long-held principles of equality that are vital to civic participation. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids the government from discriminating against individuals on the basis of their membership in a racial group. Plaintiffs bring this lawsuit to ensure the equal protection of the laws and restore equality to public service in the city.

JURISDICTION AND VENUE

4. This action arises under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1981 and 1983. This Court has jurisdiction over these federal claims under 28 U.S.C. §§ 1331 (federal question) and 1343(a) (redress for deprivation of civil rights). Declaratory relief is authorized by the Declaratory Judgment Act, 28 U.S.C. §§ 2201 & 2202.

5. Venue is proper in this Court under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claim occurred or will occur in this District.

PARTIES

6. Plaintiff John P. Miall, Jr., is a citizen and resident of Buncombe County, North Carolina, and resides within the city limits of Asheville, North Carolina. He applied for an appointment from the Asheville City Council to the Human Relations Commission of Asheville. Mr. Miall is white.

7. Plaintiff Robyn Hite is a citizen and resident of Buncombe County, North Carolina. She applied for an appointment from the Asheville City Council to the Human Relations Commission of Asheville. Ms. Hite is white.

8. Plaintiff David Shaw is a citizen and resident of Buncombe County, North Carolina, and resides within the city limits of Asheville, North Carolina. He applied for an appointment from the Asheville City Council to the Human Relations Commission of Asheville. Mr. Shaw is white.

9. Plaintiff Danie Johnson is a citizen and resident of Buncombe County, North Carolina, and resides within the city limits of Asheville, North Carolina. He applied for an appointment from the Asheville City Council to the Human Relations Commission of Asheville. Mr. Johnson is white.

10. Plaintiff Willa Grant is a citizen and resident of Buncombe County, North Carolina, and resides within the city limits of Asheville, North Carolina. She applied for an appointment from the Asheville City Council to the Human Relations Commission of Asheville. Ms. Grant is white.

11. Defendant City of Asheville is a North Carolina municipal corporation organized and existing under the laws of the State of North Carolina. It has all the powers given to a municipal corporation by general law in the State of North Carolina and all such other powers, rights, and privileges as may be useful and/or necessary to carry on the government of the City of Asheville. It maintains and administers the Human Relations Commission of Asheville, to which its City Council appoints members.

12. Defendant Debra Campbell is sued in her official capacity as the City Manager of the City of Asheville. As City Manager, Ms. Campbell's duties include supervising the administration of the affairs of the City and seeing that the ordinances of the City are enforced

therein, including the ordinance establishing the membership and appointment of the Human Relations Commission of Asheville.

13. Defendant Esther Manheimer is sued in her official capacity as the Mayor of the City of Asheville. As Mayor, Ms. Manheimer presides over City Council meetings and serves as the head of city government. In addition to the City Council and City Manager, the corporate powers of the City of Asheville are vested in and exercised by the Mayor.

14. Defendants City of Asheville, Campbell, and Manheimer are collectively referred to as “Defendants.”

FACTUAL ALLEGATIONS

Creation of the Human Rights Commission of Asheville

15. The City of Asheville has a variety of boards and commissions that give residents a voice in their local government and a means of influencing decisions that shape their community. The City Council appoints members to these boards and commissions following the recommendations of the Boards & Commissions Committee, a group composed of several members of the City Council that is responsible for reviewing citizens’ applications for appointment. Appointees typically serve on these boards and commissions for a set term without compensation and meet regularly throughout the year.

16. On May 23, 2017, the Boards & Commissions Committee recommended that the City create the Human Relations Commission of Asheville (HRCA). To that end, the City Council formed a Blue Ribbon Committee to determine and recommend the mission, scope, and duties of the HRCA.

17. The Blue Ribbon Committee presented its recommendations to the City Council on February 13, 2018. Among those recommendations was the implementation of racial quotas for

the membership of the HRCA. Specifically, the HRCA would have at least 6 African Americans and at least 2 “Latinx” members, along with 2 LGBTQ members, 3 “professionals with influence,” at least 2 to 3 youth members, a representative from each of the City’s geographical areas, 2 to 3 citizens living in public housing, and 2 individuals with a disability.

18. On April 10, 2018, pursuant to the Blue Ribbon Committee’s recommendations, the City Council unanimously passed Ordinance No. 4663, codified in the Asheville Code of Ordinances, Chapter II, Article III, Division 14, Sec. 2-185.23 *et seq.*, establishing the HRCA. The Commission’s purpose would be to “promote and improve human relations and achieve equity among all citizens in the city by carrying out the city’s human relations program.” The HRCA would further “prioritize racial equity” and “encourage and ensure diversity, fairness, equity and inclusion throughout the city.”

19. Section 2-185.25(b) set forth the criteria for membership and appointment to the Commission, providing for a 15-member commission appointed by the City Council to serve staggered two-year terms. The section further implemented a membership quota for various categories, including race. Specifically, the section provided that “In appointing members to the HRCA, the Council should endeavor to use the following criteria:

...

b. Membership should reflect the groups of individuals that the human relations program is intended to assist and protect, including but not limited to individuals from different races, ethnicities, sexual orientation and socioeconomic backgrounds. With the recognition that there will have to be members who meet more than one of the following, the City Council should endeavor to appoint individuals meeting the following criteria:

- 6 African Americans;
- 2 Latinx individuals;
- 2 members of the LGBTQ+ community;
- 2 Youth members between the ages of 18 and 25;
- 2 to 3 individuals who live in public housing;

- 2 individuals with a disability;
- 3 individuals who are recognized as community leaders.”

20. The City Council appointed the HRCA’s first members on May 22, 2018, largely adhering to the quotas set forth in the ordinance. The City Council strived to adhere to these quotas in its subsequent appointments to vacant positions on the HRCA, including confirming with the Boards & Commissions Committee that newly appointed members satisfied the requisite numbers.

Amendment of the Quotas and Preservation of Racial Preferences

21. In a June 16, 2022, HRCA meeting, Alayna Schmidt, the City Equity & Inclusion Consultant, and Aarin Miles, City Attorney, presented amendments to the HRCA’s membership criteria that would eliminate the numerical racial quotas. Ms. Miles explained that state and federal law prohibit racial quotas. Tanya Rodriguez, the HRCA Chairperson, inquired about alternatives to the numerical quota, such as implementing specific percentages of members based on race instead so that “our color isn’t diluted out of the Commission.”

22. The HRCA voted in favor of the proposed amendments to the membership criteria on July 21, 2022. The City Council then adopted Ordinance No. 4967 on September 13, 2022, amending the membership criteria to remove the numerical quotas. As such, section 2-185.25(b)(2) was revised to state: “In appointing members to the HRCA, the Council should endeavor to use the following criteria:

- a. Members should have demonstrated an interest and experience in human relations;
- b. Membership should reflect the groups of individuals that the human relations program is intended to assist and protect, including but not limited to individuals from different races, ethnicities, sexual orientation and socioeconomic backgrounds. Commission representation shall take into consideration the diverse nature of the Asheville community. Membership on the Commission shall include, but not be limited to, the following:
 - Black or African Americans;

- Latino/a or Hispanic individuals;
- Native Americans and Indigenous People;
- Asian Americans;
- members of the LGBTQ+ community;
- Youth members between the ages of 18 and 25;
- Individuals who live in public housing;
- Individuals with a disability or disabled individuals;
- Individuals who are recognized as community leaders.”

23. Under the HRCA’s membership criteria, the City Council will not endeavor to appoint white residents unless they also satisfy a separate category, such as being a member of the LGBTQ+ community, a youth member, disabled, living in public housing, or recognized as a community leader. On the other hand, the City Council will automatically prefer minority applicants without requiring those applicants to satisfy a separate category.

24. On January 10, 2023, the City Council reduced the number of members on the HRCA from 15 to 9 members. It also allowed up to 3 members to be non-city residents of Buncombe County.

25. Following the revisions, the HRCA’s racial preferences persisted, and examples of these preferences appeared in City Council meeting materials. At the October 11, 2022, and June 13, 2023, City Council Meetings, for example, spreadsheets displaying the racial demographics of the HRCA members and applicants were included in meeting materials with reminders stating, “Endeavor to appoint ...” following a list that included African Americans and “Latinx” individuals. Neither Asian Americans nor Native Americans were listed despite the City Council adding them to the ordinance’s preferred racial categories. Copies of these spreadsheets are provided as Exhibit 1 to this Amended Complaint.

26. Updates to the City’s website for the HRCA around January 17, 2023, reflected the Commission’s enduring racial preferences, stating, “City Council will endeavor to appoint city residents (with up to three members residing in Buncombe County), meeting the following criteria

...” followed by a list that included the racial categories of Black or African American, Latino/a or Hispanic, Native American, and Asian American. The website also asked applicants to indicate on the separate Human Relations Commission Form whether they satisfy these qualifications. The website provided a link to the Human Relations Commission Form. A copy of the HRCA website from around January 17, 2023, is provided as Exhibit 2 to this Amended Complaint.

27. The City required applicants to the HRCA to fill out and submit the separate Human Relations Commission Form in order to be considered for an appointment. The form stated, “because the City Council will endeavor to appoint city residents meeting the following criteria, please list and further describe, as desired, any that may apply to you” This was again followed by a list that included the racial categories of Black or African American, Latino/a or Hispanic, Native American, and Asian American. A copy of the Human Relations Commission Form linked to the HRCA website from around January 17, 2023, is provided as Exhibit 3 to this Amended Complaint.

The City Council Declines to Appoint Plaintiffs to the Human Relations Commission

28. Around March 2023, the City advertised that it was accepting applications to the HRCA. To apply, the City required applicants to complete and submit the Boards & Commissions Application Form, which asks applicants to identify their race. Applications were due on April 30, 2023. Plaintiffs timely submitted their applications for appointment and noted on their applications their backgrounds, areas of expertise, education, and other factors that demonstrate their interest and experience in human relations.

29. David Shaw submitted his application for appointment to the HRCA on March 17, 2023. He indicated on his application that he was completing a master’s degree in social work and

interning at a hospital. He stated that he cared about the health of the City and its residents. He indicated his race as white.

30. John P. Miall, Jr., submitted his application around March 21, 2023. He attached his resume to his application, which listed his extensive experience as a speaker on behalf of pharmaceutical companies, and work with the American Pharmacists Association Foundation, in addition to his time as an employee for the City of Asheville. He indicated his race as white.

31. Robyn Hite submitted her application on March 27, 2023. Her application mentioned her time on the North Buncombe Elementary PTO, her presidency of the North Windy Ridge PTO, and her experience organizing fundraisers, facilitating meetings with parents and staff, and writing newsletters. She indicated her race as white.

32. Danie Johnson submitted his completed Human Relations Commission Form on April 21, 2023. He stated on the form that while he does not meet any of the criteria for residents that the City Council would endeavor to appoint, he was concerned with the human rights of all individuals and that "I feel I could contribute diverse viewpoints to the Commission's discussions."

33. Willa Grant submitted her application around April 24, 2023. She mentioned on her application that she was serving at the WNC Rescue Mission and assisted homeless persons with regaining housing and stability. She had also completed around nine years of social work. She indicated her race as white.

34. On June 13, 2023, the Boards & Commission Committee made recommendations for the appointment of applicants to six positions on the HRCA. The Committee recommended that two other applicants, Candace Blanchard and Susan Ann Sacco, be appointed to the HRCA and that the other four remaining positions be readvertised to the public.

35. The City Council subsequently adopted the Committee's appointment recommendations on June 13, 2023, appointing Ms. Blanchard and Ms. Sacco to the HRCA. Prior to making these appointments, the City Council had information and materials that identified applicants' races, including copies of applications and spreadsheets listing applicant racial data.

36. Thereafter, the City advertised vacancies on the HRCA, with applications for appointments due on August 27, 2023. The City Council is scheduled to make appointments at its October 10, 2023, meeting. A copy of the City's announcement of board and commission vacancies is included as Exhibit 4 to this Amended Complaint.

37. At the September 21, 2023, HRCA meeting, City Attorney Brad Branham presented a revision to the language of the ordinance setting the Commission's membership. Section 2-185.25(b.)(2) would be potentially revised to state:

“Membership should reflect the groups of individuals that the human relations program is intended to assist and protect, including but not limited to individuals from different races, ethnicities, sexual orientation and socioeconomic backgrounds. Commission representation shall take into consideration the diverse nature of the Asheville community. The Consideration of appointment of members shall provide equal access and opportunity to serve upon the Commission to all historically disadvantaged groups, including but not limited to the following”

The specific racial categories of Black or African Americans, Latino/a or Hispanic individuals, Native Americans and Indigenous People, and Asian Americans were not revised and followed that section. Mr. Branham explained that the HRCA was the only board that “calls out a requirement to guarantee access to those individuals.” The City's adoption of this revision would thus preserve and continue the race-based appointment preferences for the HRCA.

38. The City Council will decide on the proposed revision at its meeting on October 10, 2023.

39. The City Council has not appointed any of the Plaintiffs to the HRCA.

FIRST CLAIM FOR RELIEF

(42 U.S.C. § 1983 – Violation of the Equal Protection Clause)

40. Plaintiffs incorporate and reallege each and every allegation contained in the preceding paragraphs of this Amended Complaint.

41. 42 U.S.C. § 1983 provides a private right of action to those aggrieved by constitutional violations undertaken by municipalities acting under color of law.

42. State actors and their agents, under the color of state law, will enact and enforce the City of Asheville's racial preferences for appointment to the HRCA. Defendants authorized, developed, and implemented the preferences for minority applicants to the HRCA.

43. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

44. The City of Asheville's appointment preference for minority applicants to the HRCA treats Plaintiffs differently than similarly situated applicants on the basis of race.

45. The City of Asheville's appointment preference for minority applicants to the HRCA is subject to strict scrutiny because it classifies individuals on the basis of race.

46. Defendants do not have a compelling interest in giving appointment preferences to applicants to the HRCA on the basis of race.

47. Defendants have not identified with specificity any past racial discrimination to be remedied by making racial classifications in the City of Asheville's appointments to the HRCA.

48. Defendants cannot prove that the City of Asheville's appointment preference for minority applicants to the HRCA is narrowly tailored to a compelling interest.

49. Plaintiffs are qualified to be appointed to and serve on the HRCA. Yet because the Plaintiffs are not racial minorities, they are disadvantaged in competing for an appointment to the HRCA pursuant to the City of Asheville's appointment preference for minority applicants.

SECOND CLAIM FOR RELIEF

(42 U.S.C. § 1981 – Deprivation of Civil Rights Based on Race)

50. Plaintiffs incorporate and reallege each and every allegation contained in the preceding paragraphs of this Amended Complaint.

51. Section 1981 prohibits discrimination on the basis of race and protects the right of all persons in every State to the full and equal benefit of all laws and proceedings for the security of persons and property.

52. Defendants violated section 1981 by purposefully and willfully denying Plaintiffs the equal opportunity to be considered for an appointment to the HRCA because of Plaintiffs' race.

53. Defendants' actions were in accordance with an official policy and custom of the City of Asheville, specifically and not limited to the City of Asheville's ordinance requiring the City Council to provide an appointment preference for minority applicants to the HRCA. Defendants' actions caused the deprivation of Plaintiffs' rights.

54. Plaintiffs are members of the racial category that Defendants disfavor for appointment to the HRCA. Defendants were aware of Plaintiffs' race at the time Defendants considered Plaintiffs' applications for appointment to the HRCA and carried out the race-based appointment preferences in determining appointments. Defendants' deprivation of Plaintiffs' rights occurred due to Plaintiffs' race.

CLASS ACTION ALLEGATIONS

55. Plaintiffs incorporate and reallege each and every allegation contained in the preceding paragraphs of this Amended Complaint.

56. Plaintiffs bring this class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure.

57. Plaintiffs seek to represent a class of all nonminority applicants that are qualified to apply for appointment to the HRCA.

58. The number of individuals in this class makes joinder of individual class members impracticable.

59. There are questions of law common to the class, such as whether the City of Asheville's appointment preference for minority applicants to the HRCA violates the Equal Protection Clause of the Fourteenth Amendment.

60. Plaintiffs' claim is typical of those of other members of the class. Each of them would benefit from a decision enjoining Defendants and their agents from enacting the City of Asheville's appointment preference for minority applicants to the HRCA.

61. Plaintiffs adequately represent the interests of the class and have no interests antagonistic to the absent class members.

62. A class action is appropriate under Rule 23(b)(2) because Defendants are acting on grounds generally applicable to the class, so that final injunctive and declaratory relief is appropriate respecting the class as a whole.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

- (a) Declare the City of Asheville’s appointment preference for minority applicants to the HRCA unconstitutional under 42 U.S.C. §§ 1981 & 1983 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;
- (b) Permanently enjoin Defendants and their agents from enforcing or giving any effect to the City of Asheville’s ordinance and any other policy, practice, or procedure in existence or being proposed that provides appointment preferences to minority applicants to the HRCA, and from otherwise discriminating on the basis of race in making appointments to the HRCA;
- (c) Issue an award of attorneys’ fees and costs in this action pursuant to Federal Rule of Civil Procedure 54(d) and 42 U.S.C. § 1988;
- (d) Issue an award of nominal damages in the amount of \$1.00; and
- (e) Provide such other and further relief as the Court deems just and proper.

DATED: September 26, 2023.

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**Pro Hac Vice motion forthcoming*

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2023, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following:

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