



#161360-EM06 Fred Carroll  
vs. Seafood International  
a division of  
Salsnek Fisheries, Inc.

Order  
Nanette L. Reynolds, Director



STATE OF MICHIGAN  
CIVIL RIGHTS COMMISSION  
STATE OF MICHIGAN PLAZA BUILDING  
1200 SIXTH AVENUE  
DETROIT, MI 48226

MICHIGAN DEPARTMENT OF CIVIL RIGHTS,  
ex rel FRED CARROLL,

Claimant,

No. 161360-EM06

v

SEAFOOD INTERNATIONAL, A  
DIVISION OF SALSNEK FISHERIES,  
INC.

Respondent.

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ORDER

At a meeting of the Michigan Civil Rights Commission  
held in Ferndale, Michigan on the  
24<sup>th</sup> day of April, 2001.

In accordance with the Rules of the Michigan Civil Rights Commission, a Hearing Referee heard proofs and arguments and made proposed findings of fact and recommendations regarding the issues involved in this case. Oral arguments in support of or in objection of the Referee's report were heard at a public meeting of the Commission held on January 22, 2001. Commissioner Mossa-Basha has issued an Opinion, adopted by a unanimous vote of the Commission. That Opinion shall be made a part of this Order. The Commission therefore makes the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

1. Claimant, Fred Carroll, is an African American male.
2. Respondent, Seafood International, a Division of Salasnek Fisheries, Inc. employed claimant as a truck driver.
3. On February 15, 1999, Claimant's, delivery truck was stolen.
4. The truck driven by Claimant was recovered within a matter of hours; however, Respondent suffered a loss of \$14,947 as a result of stolen or ruined product.
5. On the day the Claimant's truck was stolen, he was suspended from his employment pending further investigation of the theft.
6. Per a letter dated February 19, 1999, claimant was informed that his employment with Respondent was terminated.
7. Claimant was a member of Teamsters Local Union 337.
8. On February 23, 1999, claimant filed a grievance protesting his discharge of employment.
9. A grievance meeting was held on March 18, 1999, which was attended by representatives of Local 337 and Respondent's Personnel Director and Vice President of Administration, Michael Pickens.
10. At the Grievance Meeting held on March 18, 1999, discussion was had regarding the amount of product that had been lost.
11. At the Grievance Meeting held on March 18, 1999, Claimant protested what he considered to be unfair treatment, grieving his discharge of employment and alleging that another driver had lost his vehicle, twice, under similar circumstances and

was still employed and the other driver was identified as Kenneth Stephens, who is Caucasian.

12. Mr. Stephens had one truck stolen and his truck was empty of product at the time when it was stolen.

13. Mr. Stephens' truck was stolen approximately five years ago.

14. Mr. Stephens testified that he received a written reprimand, however, the written reprimand was not produced at the Rule 12 Hearing.

15. The decision maker as to termination of the Claimant, Mr. Carroll, was Mr. Michael Pickens.

16. On or about April 20, 1999, Teamsters Local Union 337 convened a Fact Finding Panel to review Claimant's grievance.

17. Following the Fact Finding proceeding, Mr. Pickens agreed with the Union to return Claimant to his current job with full seniority but with no back pay for the period of time he had been off from work.

18. Claimant, Mr. Carroll, refused the opportunity to return to work on or about April 26, 1999.

19. On February 25, 1999, Claimant filed a charge of discrimination with Michigan Department of Civil Rights alleging he had been discharged as a result of his delivery truck being stolen while on route and that he was aware of other incidents involving white drivers who had had their truck stolen and were not disciplined or discharged.

20. Claimant was discharged not because his truck was stolen but, rather, because of the loss of approximately \$15,000 worth of product.

21. That there was difference between the two situations pointed to by Claimant, the truck stolen from Mr. Stephens was empty of product while his was not.

22. There is no evidence in the record to substantiate any determination that Claimant was discharged based on the time of day that his truck was stolen.

23. The Referee, who was there to determine the credibility of the witnesses, determined that Mr. Pickens did not endorse or concur in discriminatory practices and this is supported by the record.

24. There is no evidence presented that Mr. Pickens took into account Claimant's race when he made the decision to terminate him.

25. Claimant did not meet his burden of proof that his race was a motivating factor in Respondent's decision to terminate him.

26. That the record was not fully developed as to the impact or non-impact on Respondent's business as it relates to the lost product being insured.

### **CONCLUSIONS OF LAW**

1. The Michigan Civil Rights Commission has jurisdiction over this matter.
2. Claimant, Fred Carroll, as an African American male, had standing to bring a claim of racial discrimination under Section 202 of the Civil Rights Act, MCL 37.2202; MSA3.548(202).
3. Claimant was not subject to disparate treatment based on race.
4. Claimant was not able to rebut Respondent's legitimate business reasons for terminating his employment.
5. Respondent's legitimate non-discriminatory reasons for terminating Claimant

were based on legitimate business reasons that were not pretextual.

6. Respondent did not violate the Elliott-Larson Civil Rights Act.

7. The Hearing Referee committed reversible error by granting defendant's Motion in Limine to preclude the introduction of evidence of insurance loss then improperly relying upon that evidence as one of her factors in finding pretext.

Wherefore, it is hereby Ordered that Claimant's complaint under the Elliott-Larsen Civil Rights Act is dismissed.

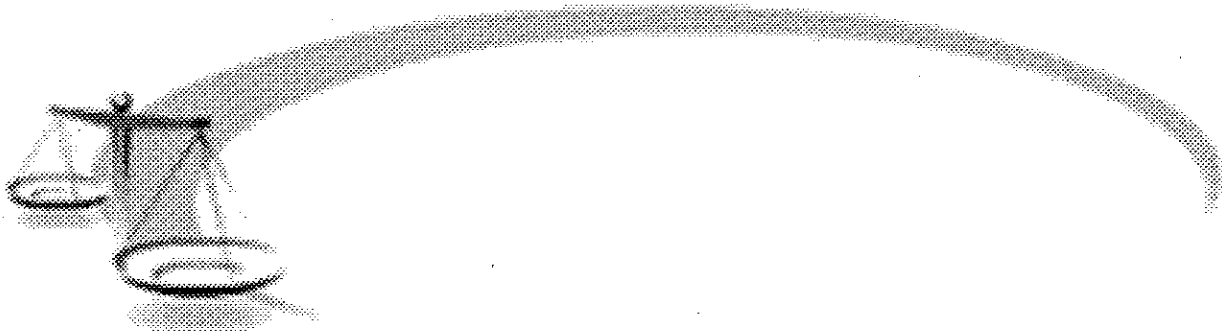
MICHIGAN CIVIL RIGHTS COMMISSION

Dated: April 24, 2001

Nanette Lee Reynolds  
Nanette Lee Reynolds, Ed.D., Director

**NOTICE OF RIGHT TO APPEAL**

You are hereby notified of your right to appeal within thirty (30) days to the Circuit Court of the State of Michigan having jurisdiction provided by law. MCLA 37.2606.



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Opinion  
Dr. Yahya Mossa-Basha, Commissioner



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\_\_\_\_\_ /

OPINION

**Yahya Mossa-Basha, M.D., Commissioner**

The present action alleges discrimination based on race arising out of Claimant, Fred Carroll, an African American, being terminated from his employment after his delivery truck was stolen while he was on the job.

On February 15, 1999, Mr. Carroll left his warehouse with his delivery truck to make daily deliveries. Upon arrival at his first stop of the day, he left his vehicle unattended with the keys in the ignition and the engine running. Claimant had a second set of keys and the truck was locked. There was testimony presented that leaving the vehicle running while unattended was against company policy. There was



also testimony presented that this was a common practice by the drivers and that they often would leave the vehicles running and locked while they made their deliveries.

The truck was recovered within a matter of hours; however, only a portion of the product was recovered and only a portion of that recovered product was salvageable. The amount of loss was valued at \$14,947.36.

There was no evidence that Mr. Carroll was in anyway in cahoots with the thief. In fact, he and a customer of the store where he had been delivering to chased the truck, but were unable to catch the thief.

Upon his return to the Respondent's warehouse, after the theft, Claimant was suspended by company president, Jordan Salasnek pending further investigation of the matter. Claimant testified that on or about February 19, 1999, he met with Michael Pickens, Respondent's Personnel Director and Vice President of Administration. Claimant testified he discussed with Mr. Pickens what had been lost and also the possibility of his being fired. Per a letter dated February 19, 1999, Claimant was informed that his employment with Respondent, Seafood International, a Division of Salasnek Fisheries, Inc. was terminated.

Claimant was a member of Teamsters Local Union 337. On February 23, 1999, Claimant filed a grievance protesting his discharge. A first step grievance meeting was held on March 18, 1999. Present were the Claimant, Mr. Pickens and representatives of Local 337. Claimant testified at this first step grievance meeting they discussed the amount of the product that had been lost. Claimant protested what he considered to be his unfair treatment. The grievance stated that another driver had lost his vehicle,

twice, under similar conditions and was still employed without suffering any reprimand. That other driver was identified as Kenneth Stephens, who is Caucasian.

Mr. Stephens testified that he had one truck stolen while he was employed and that the truck was empty of product. Testimony was that he received a written reprimand; however, that written reprimand was never produced at the Rule 12 Hearing. The incident involving Mr. Stephens had occurred approximately five years prior to Mr. Carroll's having his truck stolen. Mr. Pickens testified that at the time he made the decision to discharge Mr. Carroll, he had forgotten about the theft of Mr. Stephen's truck. However, after being reminded of the incident, Mr. Pickens testified the distinction in his mind between the situation involving Mr. Stephens and Mr. Carroll was that Mr. Carroll's truck contained approximately \$15,000 worth of seafood product when it was stolen. Mr. Stephens' truck, at the time it was stolen, had no product on it. Mr. Pickens stated the Respondent had no financial loss as a result of Mr. Stephens having his truck stolen because the truck was recovered. Mr. Pickens testified that the reason that the Claimant was discharged, and Mr. Stephens only received a written reprimand, was as a result of the loss of a significant amount of product.

After the initial meeting with the Union, on April 20, 1999, Teamsters Local Union 337 convened a fact-finding panel to review the grievance. Following the fact-finding proceeding, Mr. Pickens agreed with the Union to return the Claimant to his current job with full seniority but with no back pay for the period he had been off work. There was some testimony that initially the company wanted Mr. Carroll to reimburse it for the loss of the product but he was financially unable to do so. When Mr. Carroll was

offered the opportunity to return to work, without back pay, there was no further demand that he make payment for the lost product. Claimant refused the opportunity to return to work. That occurred on or about April 26, 1999.

On February 25, 1999, Claimant filed a Charge of Discrimination with the Michigan Department of Civil Rights wherein he alleged he was discharged on February 24, 1999 as a result of his delivery truck being stolen while on route. Claimant alleged that he was aware of other incidents involving white truck drivers who had their trucks stolen and were not disciplined or discharged. Claimant alleged that he felt he was unfairly disciplined and discharged by the Respondent due to his race. The Charge of discrimination was issued by the Department on January 21, 2000. A Verified Answer to the Charge was filed by the Respondent on February 8, 2000. On April 11, 2000, a Rule 12 Hearing was held before a Referee. The Referee issued a report finding in favor of the Claimant and awarded Claimant \$3,725 for sixty-five days of back pay an additional sum of \$3,725 for emotional distress damages. On December 19, 2000 Respondent filed Exceptions to the Findings of Fact and Recommendations of the Hearing Referee. On January 16, 2001, Claimant filed a Response to the Exceptions filed by Respondent. On January 22, 2001, oral argument was held before the Commission with both parties participating.

#### ANALYSIS

While the Respondent files a number of exceptions to the Referee's report, there are two issues raised that will be discussed herein. Did Claimant bear his burden of

proof of persuasion that Respondent's pro-offered reason for termination was pretext for discrimination? Did the Referee's reliance in her report on evidence which she ruled would be excluded cause the Referee's report to be fundamentally flawed necessitating reversal?

Section 202 of the Civil Rights Act, MCL 37.2202; MSA 3.548 (202), provides in part:

An employer shall not do any of the following:

(a) fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of his religion, race, color, national origin, age, sex, height, weight, or marital status.

Under Section 202, a party asserting a claim of racial discrimination must show that race was a motivating factor in the employer's decision to discriminate, but need not show that race was the exclusive cause, Bryant v Automatic Data Processing Inc., 151 Mich App 424, 428 (1986). Claimant herein alleges that he was treated differently than a white employee for the same or similar conduct, thus alleging a disparate treatment versus a disparate impact claim. (See paragraph IV of the Charge of discrimination). A disparate treatment claim may be established "under ordinary principles of proof by the use of direct or indirect evidence" Town v Michigan Bell Telephone Company, 455 Mich 688 (1997). "Alternatively, [courts may use] the prima facie case articulated... in McDonnell Douglas Corp. v Green, [411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973),] as a framework for evaluating [discrimination] claims."

Town, 455 Mich 695. Under that test, as applied in this state, a Claimant may establish a prima facie case of prohibited discrimination by establishing he suffered an adverse employment action under circumstances giving rise to an inference of discrimination. See, Wilcoxon v Minnesota Mining and Manufacturing 235 Mich App 347 (1999). After the prima facie case is established, the employer has the burden of coming forward with a legitimate non-discriminatory reason for the adverse employment action. If the employer does so, the Claimant has the burden of proving that the stated reason is merely a pretext for discrimination, and this burden is then merged with the Claimant's overall burden of proving the claim. Wilcoxon, Id.; Lytle v Malady On Rehearing 458 Mich 153 (1998); Meagher v Wayne State University, 222 Mich App 700 (1997); Reisman v Regents of Wayne State University, 188 Mich App 526 (1991).

Courts often categorize disparate treatment cases by the alternative evidentiary methods used to establish them. The cases are labeled as "mixed motive" (i.e. established by ordinary principles of evidence) and "pretextual" (i.e., established by using McDonnell Douglas burden shifting) cases. Wilcoxon, supra. Where the Claimant can present ordinary evidence that, if believed, would require the conclusion that discrimination was at least a factor in the adverse employment action, the McDonnell-Douglas burden-shifting framework is not applicable, rather, a defendant's articulation of a non-discriminatory purpose creates a "mixed motive" case. Id; relying on Downey v Charlevoix Rd Comm'rs, 227 Mich App 621 (1998).

The elements of a mixed motive case are: (1) the claimant's membership in a protected class; (2) adverse employment action; (3) the employer was predisposed to discriminating against members of claimant's protected class; and, (4) the employer actually acted on the predisposition in visiting the adverse employment action on the claimant. Wilcoxon, supra, relying on Reisman, supra.

In the instant action, we are dealing with a mixed motive case. The Respondent articulated a non-discriminatory reason for the adverse employment action. That reason was the loss of approximately \$15,000 worth of product.

The Referee stated in her report that the Respondent alleged a legitimate non-discriminatory reason for its actions. The Referee further stated in her report:

...the law is clear. Fairness is not an issue in this case, nor whether the company exercised appropriate business judgment in terminating the Claimant. The issue is solely whether the Claimant was dismissed from his job for misconduct, while a similarly situated coworker outside the protected class was retained. The comparison, by definition, must reflect misconduct of the same degree of seriousness in order for it to be applicable.

The Referee further went on to state in her Report:

...the consequences of negligent behavior is relevant with respect to subsequent action taken by the employer. In the one case involving Mr. Stephens, there was no loss of product. The Claimant's case resulted in a loss of approximately \$15,000 in product. The Respondent, employer, summarily dismissed the Claimant in the exercise of his business judgment. The Respondent is correct in arguing that the exercise of prudent business judgment by the Respondent is not an issue for determination for this hearing's officer, but I do find that the Respondent has articulated a legitimate,

non-discriminatory reason for his decision to dismiss the Claimant, while later offering him reinstatement, but without back pay, as "punishment" for his actions.

(emphasis in the original).

All of the above quotations from the Referee's Report are a correct articulation of the law. However, rather inexplicably, the Referee misapplied the law to the facts and substituted her own business judgment for that of the employer.

The Hearing Referee found:

...The time of day that a theft occurs should not be the determining factor in whether or not the negligence was so egregious as to justify termination and failure to pay back pay; nor should the amount of loss in and of itself be the determining factor....

It is very clear that the Hearing Referee has substituted her own business judgment for that of the employer. The decision-maker in this case, Mr. Pickens, never wavered from his position that the reason that the Claimant was discharged was because of the negligent loss of a large amount of product. Claimant submitted no proofs that there was any other employee who lost \$15,000 worth of product and was not discharged. Rather, Claimant pointed to a situation that was not substantially similar. He pointed to a situation, which had occurred five years earlier, where a white driver had his truck stolen, but the truck was empty of product. The truck was subsequently recovered and the company suffered no financial loss.

Mr. Pickens, the Respondent's agent who made the decision to terminate the Claimant is also the person who made the decision to offer reinstatement to the Claimant, without the loss of seniority and also without the payment of back pay. The

Referee stated that because Mr. Stephens received a reprimand for the loss of his truck and Mr. Pickens made the determination to terminate the Claimant, that he exercised his judgment for "essentially the same offense" in a disparate manner. The Referee's findings are not supported by the record. The record clearly substantiates that the concern all along on the part of the Respondent was the loss of the product. Claimant testified that at his initial meeting with Mr. Pickens they talked about the loss of the product (transcript page 37). At the first step of the grievance meeting there was testimony that the amount of the product was discussed (transcript page 46). At the April 20, 1999 fact finding hearing, according to Claimant, Mr. Pickens again discussed the gross negligence and carelessness which resulted in the company having a large financial loss (transcript page 57).

There is absolutely no support in the record that the Respondent made a decision to terminate one employee versus another based on the time of the day that a truck was stolen. The record is unrebutted that the Respondent was concerned about the large monetary loss that had resulted from the truck being stolen. When the Referee states in her report that the amount of loss in and of itself should not be a determining factor she is substituting her business judgment for that of the Respondent. This conclusion directly contradicts her earlier statement in the Report that "fairness is not an issue in this case, nor whether the company exercised appropriate business judgment in terminating the plaintiff."

In a mixed motive case, as set forth above, the Claimant must show that the defendant was predisposed to discriminate against members of plaintiff's protected



class and that the Respondent actually acted on that predisposition. The evidence submitted by the Claimant in this regard was that the owner of the company had contempt for the Claimant wanting to take Martin Luther King Day as a vacation day and that there was an incident reported to Mr. Pickens that while making a delivery a staff member at a customer's place of business referred to one of the delivery drivers as a "nigga". Upon reporting this to Mr. Pickens he took no action. The evidence also established that the majority of the driver workforce is African American and that Mr. Pickens was involved with hiring that workforce. In fact, he hired the Claimant. The Referee, who was there to assess the credibility of the various witnesses stated in her report:

*...failure of the employer to take action when their staff was verbally abused and called "nigga", as well as the contempt that Mr. Salasnek had for the Claimant attempting to take Martin Luther King Holiday are evidence of a climate of discrimination at the facility, although, I do not find that Mr. Pickens endorsed or concurred in those actions taken.*

(emphasis added)

The referee further stated regarding the decision-maker Mr. Pickens:

*...It was clear, however, that the allegation of racism is something that Mr. Pickens, a man who tries to do the right thing, found particularly abhorrent although he did believe that the loss of the product was enough to justify termination of the employee...*

(emphasis added)

The Referee, again, who was there to assess the credibility of the witnesses,

made a specific finding that Mr. Pickens did not endorse or concur in inappropriate racial actions, that allegations of racism is something that he found abhorrent and he is a man who tries to do the right thing.

Mr. Pickens was the decision-maker. The Referee specifically found that the decision-maker was not predisposed to discriminate against members of plaintiff's protected class and specifically found that he did not act on any predisposition in making his adverse employment decision. Thus, the Referee's conclusion that the decision to terminate the claimant was discriminatory is directly contradictory to the factual findings made by the Referee. This warrants reversal. The Claimant did not meet his burden of proof that his race was a motivating factor in the employer's decision to terminate him based on the factual findings of the Referee which are supported by the record. There was no evidence presented that Mr. Pickens took into account the Claimant's race when he made a decision to terminate him.

There is a second significant error in the Referee's Report and that is her reliance upon evidence that she excluded during the Rule 12 Hearing. At the outset of the Rule 12 Hearing, Respondent brought a Motion in Limine to preclude the introduction of evidence that the employer had insurance for the loss of the product.

The Referee ruled:

... information concerning whether you were paid for the insurance, I agree. Or your insurance paid you for the claim, either for the truck or for the materials and food that was on the truck is completely irrelevant...

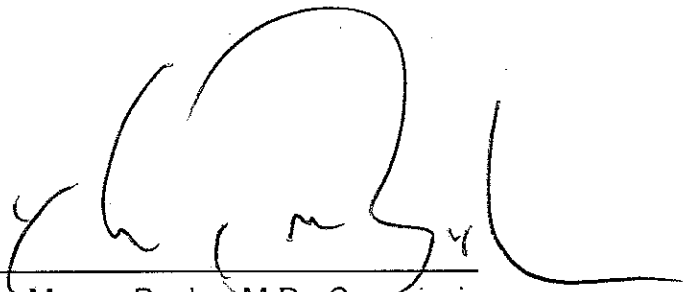
(transcript page 17)

Contrary to this evidentiary ruling, during the course of the Rule 12 Hearing, Claimant attempted to introduce evidence regarding insurance reimbursement, and on each occasion the Referee sustained Respondent's objection to the evidence. (Pages 186 of the transcript and 191, on page 191 the Referee indicated that certain testimony regarding insurance would even be stricken from the record).

In her Report, the Referee found that the Respondent's asserted legitimate business reasons for Claimant's discharge were pretextual, in part relying upon the statement that the loss of the product was an insured loss. After the Referee had ruled that this evidence would be excluded and ruled it would not be part of the record, she cannot subsequently use that stricken evidence as a basis for her decision. Had the Referee not granted the Respondent's Motion in Limine and ruled that this evidence would not be taken into account, perhaps the Respondent would have put on other proofs to negate or rebut the inference made by Claimant that because the loss was insured Respondent purportedly suffered no financial loss. The exclusion of this testimony precluded the record from being fully developed and Respondent did not submit proofs on the issue relying on the Referee's ruling in favor of its Motion in Limine. The Referee's reliance on evidence ruled to be excluded from the Rule 12 Hearing is plain error. To prevail, the Claimant must submit admissible evidence to prove that the employer's non-discriminatory reason is not the true reason and that race was the motivating factor in the employer's decision. Town, supra. Conversely, a fact finder can only rely on that evidence that has been ruled admissible.

It is further true that a fact finder should refrain from probing an employer's business judgment. Hartsel v Keys 87 F3rd 795, 801(6th Cir 1996), cert denied, 117 S Ct 683 (1997) ("the law does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with. Rather, employers may not hire, fire, or promote for impermissible discriminatory reasons.") While the Referee may have disagreed with the decision to terminate Mr. Carroll, the admissible evidence did not establish Mr. Carroll was terminated for an impermissible discriminatory reason.

Dated: 4-24-01



Yahya Mossa-Basha, M.D., Commissioner