



#133369-EM09 Daniel Gutierrez
vs. Bay County

Order
Nanette L. Reynolds, Director



STATE OF MICHIGAN
CIVIL RIGHTS COMMISSION

MICHIGAN DEPARTMENT
OF CIVIL RIGHTS, ex rel,
DANIEL GUTIERREZ,

MDCR No. 133369-EM09

Claimant,

v

BAY COUNTY,

Respondent.

ORDER

At a meeting of the Michigan Civil Rights Commission
held in Lansing, Michigan
on the 25th day of June, 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.

At the public meeting of the Commission held on September 25, 2000, counsel for the parties had an opportunity to make presentations in support of, or in objection to, the Referee's Findings of Fact and Recommendations.

Commissioner Simmons has issued an Opinion which the Commission adopted by a unanimous vote. 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, Daniel Gutierrez is a Hispanic male who was laid off from his position as Director of the Bay County Juvenile Home as part of a county wide reorganization plan in March 14, 1993.
2. Claimant subsequently applied for the position of Supervisor of the Bay County Juvenile Home but the position was awarded to Thomas Lambert, a Caucasian, who previously held the position of Program Coordinator of the Bay County Juvenile Home.

CONCLUSIONS OF LAW

1. The Michigan Civil Rights Commission has jurisdiction over this matter.
2. Claimant, Daniel Gutierrez, a Hispanic male, is protected from ethnic origin discrimination in his employment by MCL § 37.2101 et seq commonly known as the Elliott-Larsen Civil Rights Act ("ELCRA"):
3. Claimant failed to establish his ethnicity was a determining factor in Bay County's ("Respondent") decision, as part of a county wide reorganization plan, to eliminate Claimant's position as Director of the Bay County Juvenile Home.
4. Claimant failed to establish Respondent's legitimate, non-discriminatory reasons for not selecting Claimant for the newly created position of Supervisor of the Bay County Juvenile Home were pretextual or otherwise not worthy of belief.
5. Claimant also failed to establish an alleged ethnic slur uttered by a Bay County Commissioner was a "substantial" or "motivating" factor in Respondent's

decisions to eliminate Claimant's position and to hire Mr. Lambert instead of Claimant for the Bay County Juvenile Home Supervisor position.

IT IS HEREBY ORDERED That: Claimant's complaint under the Elliott-Larsen Civil Rights Act is dismissed.

MICHIGAN CIVIL RIGHTS COMMISSION

Dated: 6.25.01

Nanette Lee Reynolds, Ed.D.
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
Valerie P. Simmons, Commissioner



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OPINION

Valerie P. Simmons, Commissioner

I. Overview

This is an ethnic origin discrimination case. Claimant Daniel Gutierrez, a Hispanic male, charges that his former employer, Respondent Bay County¹ (hereinafter "Bay County") discriminated against him based on his ethnicity in violation of the Elliott-Larsen Civil Rights Act, M.C.L. § 37.2202 ("ELCRA").

On November 23 and 24, 1999, the Hearing Referee conducted an extensive evidentiary hearing. On February 10, 2000, the Hearing Referee filed her Findings of Fact

¹ While Claimant filed a complaint against Bay County Juvenile Home, there is apparently no such legal entity as the Juvenile Home is simply a part of Bay County.

and Recommendations. ("Report") The Report found insufficient evidence to establish Respondent violated Claimant's rights under the ELCRA.

On March 13, 2000, Claimant filed a brief objecting to the Report. On April 3, 2000, Respondent filed a brief responding to Claimant's objections. On September 25, 2000, counsel for Claimant and Respondent appeared before the Commission and presented their respective positions.

After reviewing these briefs and the record below, based on the evidence presented and applicable law, the Commission finds:

1. Claimant failed to prove that his ethnicity was a determining factor in Respondent's decision, as part of a county wide reorganization plan, to eliminate Claimant's position as Director of the Bay County Juvenile Home. (See discussion infra at pp. 5-6)
2. Claimant also failed to establish Respondent's legitimate, non-discriminatory reasons for selecting Thomas Lambert instead of Claimant for the newly created position of Supervisor of the Bay County Juvenile Home were pretextual or otherwise not worthy of belief. (See discussion infra at pp. 6-9)
3. Claimant also failed to establish that an alleged ethnic slur uttered by a Bay County Commissioner was a "substantial" or "motivating" factor in Respondent's decisions to eliminate Claimant's position and to hire Mr. Lambert instead of Claimant for the Bay County Juvenile Home Supervisor position. (See discussion infra at pp. 9-11)

II. Relevant Facts

In 1993, Respondent eliminated Claimant's position as Director of the Bay County Juvenile Home as part of a county wide reorganization plan. Claimant is a Hispanic male. As part of the same reorganization plan, Respondent also eliminated the position of Program

Coordinator of the Bay County Juvenile Home. This position was held by Thomas Lambert, a Caucasian.

Claimant and Mr. Lambert both subsequently applied for the newly created position of Supervisor of the Bay County Juvenile Home. The Supervisor position was awarded to Thomas Lambert and not Claimant.

III. Legal Analysis

A. Claimant's Ethnic Origin Claims

1. Legal Standards

Under the ELCRA, Michigan courts analyze employment discrimination cases by the alternative evidentiary methods used to establish them. One type of case is often referred to as a "pretext" case (i.e., established by using the McDonnell Douglas v. Green, 411 US 792 (1979), burden-shifting analysis). Another type of case is referred to as a "mixed motive" case (i.e., established by ordinary principles of evidence). See Harrison v. Olde Financial Corp, 225 Mich App 601, 607-611 (1997).

a. "Pretext" Cases

The elements of a "pretext" type prima facie case are (1) claimant was a member of the protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position; but (4) she suffered the adverse employment action under circumstances that give rise to an inference of unlawful discrimination. Lytle v. Malady, 458 Mich 153, 172-173 (1998). Circumstances give rise to an inference of discrimination when the plaintiff

"was treated differently than persons of a different class for the same or similar conduct."
Reisman v. Regents of Wayne State University, 188 Mich App 526, 538 (1991).

If a claimant establishes a prima facie case of discrimination, the second prong of the "pretext" case requires the respondent to articulate a legitimate, nondiscriminatory reason for its employment action. Meagher v. Wayne State University, 222 Mich App 700, 711 (1997). If the respondent meets this burden, the claimant must show by a preponderance of the evidence that the respondent's legitimate reasons were a mere pretext.

b. "Mixed Motive" Cases

Cases involving direct evidence of discrimination, such as ethnic slurs by a decision maker, are sometimes called "mixed motives" cases as often the evidence includes both some evidence of the employer's discriminatory motive coupled with some evidence the employer had a legally permissible motive for its employment related decision. Where a claimant can present ordinary evidence that, if believed, would require the conclusion that discrimination was at least a factor in the employment related decision, the McDonnell Douglas burden-shifting framework is not applicable and it is erroneous for a fact finder to use the McDonnell Douglas framework. Harrison v. Olde Financial Corp., supra at 613.

The elements of a "mixed motive" case are (1) the claimant's membership in a protected class, (2) an adverse employment action, (3) the respondent was predisposed to discriminating against members of the claimant's protected class, and (4) the respondent **actually acted on that predisposition** in visiting the adverse employment action on the claimant. See Reisman v. Regents of Wayne State University, supra at 538. If the claimant succeeds in meeting her initial burden of proving that the illegal conduct was more likely than

not a "substantial" or "motivating" factor in the employer's decision, the employer "has the opportunity to show by a preponderance of the evidence that it would have reached the same decision without consideration of the protected characteristic." Harrison v. Olde Financial Corp., supra at 611.

2. Claimant Failed To Prove His Ethnicity Was Even Considered By Respondent In Deciding To Eliminate Claimant's Position As Part of A County Wide Reorganization Plan

In 1992, Thomas Hickner ran unopposed in the Bay County Executive election. With his election assured, Mr. Hickner began making plans to restructure Bay County's governmental positions when he assumed office in January 1993. Mr. Hickner testified it was his goal upon assuming office to reduce management layers within Bay County's government. (Tr II at p. 6)

The reorganization plan was "county wide" and not limited to Bay County's Juvenile Home. The proposed plan was openly discussed in public meetings prior to its implementation. (Tr I at p. 82) There was no evidence of any "agenda" by Mr. Hickner or his staff to use this reorganization as a ruse to eliminate Claimant's position.

Indeed, Claimant does not contest the legitimacy of the reorganization plan. Instead, Claimant argues the implementation of the plan was a sham as it relates to the decision to eliminate the Juvenile Home Director's position and create a new Juvenile Home Supervisor's position. Claimant contends this newly created supervisor's position was, in effect, his old job.

However, the evidence shows the reorganization plan was not a sham. The plan called for the elimination of two managerial positions at the Juvenile Home: (1) Claimant's

position as Director and (2) the Program Coordinator position held by Thomas Lambert.² The newly created supervisor's position was truly a new job. It included responsibilities previously performed by the Program Coordinator (i.e., the position held by Tom Lambert) and some of the responsibilities previously performed by the Director (i.e., the position held by Claimant). The administrative responsibilities previously performed by the Director were reassigned to the Director of Recreation and Youth Services position. (Respondent Exhibit 14)

Based on the evidence presented, Claimant failed to prove either that Respondent's purpose for instituting a reorganization plan was in any way pretextual or its decision to eliminate Claimant's job was in any way based on Claimant's ethnicity.³

3. Claimant Failed To Prove His Ethnicity Was A Determining Factor With Respect To Respondent's Decision Not To Hire Claimant To The Supervisor Position

² The reorganization plan was not limited to the Juvenile Home. The plan also eliminated other Bay County managerial positions at various levels in other Bay County departments. The plan was truly implemented county-wide.

³ Claimant also argues his position was eliminated while the Animal Control Director's position, held by a Caucasian, was retained for at least one (1) year. According to Claimant this disparate treatment evidences a discriminatory animus. However, the evidence shows Respondent determined, while intent on making changes in that department, there still was a need for someone to handle the Animal Control Director's responsibilities. That situation is quite different from here as Respondent determined most of Claimant's job duties and all of Mr. Lampert's job duties could be performed by one person.

Perhaps more importantly, there was insufficient evidence that this Animal Control Director's was similarly situated to Claimant's position. To be similarly situated, "all of the relevant aspects' of plaintiff's employment situation must be "nearly identical" to those of the employee(s) with whom she compares herself. Town v Michigan Bell Telephone Co, 455 Mich 688, 699-700; 568 NW2d 64 (1997)(Brickley, J). See also Mitchell v Toledo Hospital, 964 F2d 577, 583 (CA 6, 1992). Moreover, Respondent presented evidence that it eliminated the positions of other Caucasian directors as part of its reorganization plan. These county-wide job elimination decisions indicate that Claimant's ethnicity had nothing to do with the reorganization decision or its implementation.

It is undisputed that County Executive Thomas Hickner, based on the recommendation of Bryan Redmond, Bay County's Director of Human Resources, made the decision to hire Thomas Lambert (a Caucasian) instead of Claimant for the newly created Bay County Juvenile Home Supervisor position. There was no evidence presented that either Mr. Hickner or Mr. Redmond harbored any discriminatory animus against Claimant.

In reaching their decision to hire Mr. Lambert and not Claimant, Mr. Redmond testified he met with 12 employees of the Bay County Juvenile Home. (Tr II at pp. 74-88) Based on his interviews with these 12 employees, he concluded: "[T]here were some serious problems with respect to the relationship between . . . many employees and . . . Mr. Gutierrez [Claimant] and that there was a poor relationship between the leadership of the two Steelworkers unions and Mr. Gutierrez." (Tr II at p. 88)

Later, Mr. Redmond interviewed both Mr. Lambert and Mr. Gutierrez. Based on these interviews and meetings with Juvenile Home employees, Mr. Redmond recommended Mr. Lambert for the supervisor position. As Mr. Redmond testified:

I made that recommendation because it was clear to me that there was a poor working relationship with many of the staff members at the juvenile home with respect to the relationship with Mr. Gutierrez. It was very clear to me that there was a poor working relationship with the leadership of the two Steelworkers unions with respect to Mr. Gutierrez.

It was clear to me there was a poor relationship between Mr. Gutierrez and Mr. Lambert. And I thought that the situation had deteriorated to an extent that it was unlikely to improve under the leadership of Mr. Gutierrez.

I was looking for someone who could settle down those workers at the juvenile home. I was looking for someone who could settle down the union leaders at the juvenile home. And I was looking for someone who would get those employees' focus back on their work rather than focusing on the employee relations difficulties that existed at the juvenile home.

I thought that Mr. Lambert could do that job. Regarding Mr. Lambert, he had five years as a crime investigator which I like that law enforcement background. He had a Bachelor's degree in criminal justice. I think he had four or five years experience as administrator at the juvenile home.

In addition to that and this was crucial for me, based on my discussions with the employees and with many discussions I had with the union leadership Mr. Lambert appeared to be acceptable to the employees, many of the employees and to the union leadership. And that was very important to me because it would be very difficult to accomplish what I wanted to see accomplished at the juvenile home concerning settling the place down, [if] the employees and the Steelworkers leadership did not buy into the new supervisor at the juvenile home. (Tr II at pp. 100-102)

Whether this case is treated as a "pretext" or a "mixed motive" case, Claimant still has the burden to show by a preponderance of the evidence either: (1) Respondent's legitimate, non-discriminatory reasons for selecting Mr. Lambert and not Claimant for the supervisor position were pretextual; or (2) Claimant's ethnicity was a substantial or motivating factor in this selection decision. Under either approach, Claimant has failed to carry its burden of proof.

Simply put, Respondent presented ample evidence that Mr. Redmond made his recommendation based on legitimate non-discriminatory reasons including, without limitation: (1) Claimant's poor relations with the Juvenile Home's staff; (2) Claimant's poor relations with the Juvenile Home's unions; and (3) Claimant's admittedly permitting violations of certain state licensing rules resulting in two separate 1991 investigations by the Michigan Department of Social Services while he was Director. (See Respondent Exhibits 4 and 5)

Claimant argues that these criticisms are suspect because: (1) Claimant was never disciplined or criticized for any such perceived performance problems; (2) most of the

problems were due to employees (and union members) who simply chose to file petty grievances against Claimant instead of cooperating and implementing his well-intentioned policy changes; and (3) Mr. Lambert bears responsibility for many of these purported performance issues in light of his position as day-to-day manager of the facility.

Many of these criticisms, however valid, do not rebut Mr. Redmond's and County Executive Thomas Hickner's legitimate, non-discriminatory conclusion that Claimant did not have the support of the Juvenile Home's employees or its unions. Since, Mr. Redmond wanted to hire a supervisor who could "settle the place down" and could get the employees' "focus back on their work rather than focusing on employee relations difficulties", he recommended Mr. Lambert because he was acceptable to the Juvenile Home employees and their unions. (Tr II at pp. 101, 102)

County Executive Hickner echoed Mr. Lambert's sentiments testifying Claimant lacked the "real life day to day experience" like Mr. Lambert who "was very extensively involved in the day to day management of the facility and in that capacity worked very closely with the staff." (Tr II at pp. 48, 51) Mr. Hickner testified in depth about his reorganization plan and his goal of instituting a "team-based approach where issues were resolved in a problem solving consensus building process." (Tr II at p. 48) Based upon this stated goal, Mr. Hickner testified at length as to why he believed Mr. Lambert was a better candidate than Claimant. (Tr II at pp. 46-55)

In conclusion, Claimant presented insufficient evidence that Mr. Redmond's reasons for recommending Mr. Lambert instead of Claimant, and Mr. Hickner's decision to hire Mr. Lambert instead of Claimant, were pretextual or in any way based on Claimant's ethnicity.

4. **Claimant Failed to Establish a Sufficient Nexus Between Respondent's Alleged Discriminatory Conduct and an Alleged Ethnic Slur by William Powell, A Bay County Commissioner.**

Finally, Claimant presented testimony from Patrick Duggan, Esq., Bay County's former corporation counsel, that he "frequently" overheard William Powell, one of 9 members of the Bay County Board of Commissioners, use the epithet "spic" when referring to a person of Hispanic descent.⁴ (Tr II at pp. 180-81) Mr. Duggan testified Mr. Powell made these comments on occasion during committee meeting breaks and "on the record." (Tr II at pp. 181, 183) However, Claimant presented no evidence: (1) whether Mr. Powell allegedly made these derogatory remarks in reference to Claimant; (2) when Mr. Powell allegedly made these derogatory remarks; and (3) whether any Bay County Commissioners overheard Mr. Powell allegedly make these derogatory remarks. (Tr II at pp. 181-84)

Claimant argues that these ethnic slurs allegedly made by Mr. Powell constitute relevant evidence of Respondent's discriminatory misconduct. I disagree.

Michigan courts routinely refer to comments such as this as "stray remarks". Under Michigan law, the relevancy of stray remarks is reviewed based on the following factors:

- (1) Were the disputed remarks made by the decisionmaker or by an agent of the employer uninvolved in the challenged decision?
- (2) Were the disputed remarks isolated or part of a pattern of biased comments?
- (3) Were the disputed remarks made close in time or remote from the challenged decision?

⁴ There remains a factual dispute as to whether Mr. Powell actually made these deplorable and derogatory remarks. Mr. Powell submitted an Affidavit denying making any such ethnic slurs. (Respondent Ex 48) However, I need not resolve this factual dispute based on the evidence presented.

- (4) Were the disputed remarks ambiguous or clearly reflective of discriminatory bias? Krohn v Sedgwick James of Mich, ___ Mich App __ (Dckt No. 211111; Jan 12, 2001)

Here, if the disputed remark was made at any time by Mr. Powell, it clearly reflects a discriminatory bias. There is no ambiguity. Use of a vulgar slur such as "spic" by a Bay County Commissioner even if "off the record" arguably indicates a discriminatory bias under the circumstances. However, as required under Michigan law, in order for this evidence to be considered relevant, Claimant must show: (1) Mr. Powell was a true "decision maker" with regard to the Bay County reorganization plan and, more particularly, with regard to the decision not to hire Claimant to the supervisor's position;⁵ (2) the disputed remarks by Mr. Powell were not isolated but, instead, part of a pattern of biased comments; and (3) Mr. Powell made these comments around the time he voted in favor of the reorganization plan or Claimant was not offered the supervisor's position.

Michigan and federal courts have consistently held that isolated or vague comments made by nondecisionmakers long before the adverse employment decision is made are not probative of an employer's discriminatory motivation. Here, under these circumstances, the alleged stray remarks by Mr. Powell are not sufficiently probative to support Respondent's ethnic origin discrimination claims. There was simply insufficient evidence establishing "a

⁵ While Mr. Powell voted in favor of the reorganization plan and, therefore, technically played a role in this decision, he could hardly be deemed the "decisionmaker". There was no evidence presented that Mr. Powell played any role other than: (1) as a passive Bay County Commissioner who, along with 8 other Commissioners unanimously voted in favor of the recommended reorganization plan; or (2) as Chairman of the Personnel/Judicial Committee which appears to have unanimously approved newly elected County Executive Thomas Hickner's job elimination plan. Perhaps most importantly, Mr. Powell had no input into the decision to not to hire Claimant for the newly created supervisor's position.

nexus between [Mr.] Powell's alleged ethnic slur, if it was made, and the actions of the Respondent in its reorganization or hiring process." (Report of Hearing Referee p. 27)

IV. Conclusion

Admittedly, there is rarely a "smoking gun" as to a discriminator's intent. Intent is most often proved by circumstantial evidence:

Employment discrimination is often accomplished by discreet manipulations and hidden under a veil of self-declared innocence. An employer who discriminates is unlikely to leave a "smoking gun" such as a notation in an employee's personnel file attesting to a discriminatory intent ... A victim of discrimination is therefore seldom able to prove his or her claims by direct evidence and is usually constrained to rely on the circumstantial evidence. Rosen v Thornburgh, 55 FEP Cases 580, 583 (2nd Cir 1991) (Citations omitted.)

As another court has noted:

Overt and blatant discrimination is a relatively rare phenomenon ... It is intentional discrimination in its covert hidden form that now poses the real problem. Evidence of illicit intent may be extremely difficult to obtain [when] ... the responsible individuals are conscious of their bias, and therefore likely to try to hide it Shaw v Cassar, 588 F Supp 303, 316 (ED Mich 1983) (Citations omitted.)

However, based on all of the facts and circumstances of this case, Claimant failed to establish that his ethnicity was a determining factor in either: (1) Respondent's decision to eliminate Claimant's job as part of a county wide reorganization or (2) Respondent's decision not to hire Claimant for the supervisor's position. Additionally, the alleged ethnic slur by Mr. Powell, while deplorable, is simply not relevant under the facts of this case to establish Respondent violated Claimant's rights under the ELCRA.

For these reasons set forth in this Opinion, Claimant, Daniel Gutierrez, is not awarded any damages against Respondent Bay County.

Dated: 6/25/01



Valerie P. Simmons, Commissioner