SWANSON, MARTIN & BELL, LLP

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Discrimination Based on Different Skin Color Within the Same Race is Actionable

Also: *Severance Pay is Taxable*

Northern District Judge Allows Claim for Same Race Skin Color Discrimination

On March 21, 2014, U.S. District Judge Joan Gottschall wrote an opinion allowing a woman to pursue a §1981 discrimination claim alleging that her dark-skinned black supervisor denied her job opportunities because she is a light-skinned black person. 1492 U.S.C. § 1981 guarantees that everyone within the United States shall have the same right "to make and enforce contracts" that is "enjoyed by white citizens." In denying Jordan's former employers' motion to dismiss, Judge Gottschall concluded that §1981 extends beyond race to include discrimination claims on the basis of skin color.

Background

Jordan, a light-skinned African-American woman, worked as a security guard for Whelan Security of Illinois beginning in 1999. During her last five years with the company, Jordan worked at two Blue Cross and Blue Shield offices in downtown Chicago. In June 2011, Jordan and the other security guards were informed that the Blue Cross office at 111 E. Wacker would be closing and that they had to apply for positions at the 300 E. Randolph location. Although Jordan applied, she did not hear back for several weeks. After she learned that five of her male co-workers had been offered interviews for the new positions, she complained to her supervisor, a dark-skinned African-American man.

Jordan was eventually extended an interview with her supervisor and two representatives from Blue Cross and Whelan. There, she was told she was unqualified for the new position because she had not completed a multi-week training course in how to work in a building's control room. Jordan alleged, however, that the training was only offered to dark-skinned black men.

For weeks, Jordan unsuccessfully continued to apply for various positions at the 300 E. Randolph location. When she learned that her supervisor had selected a dark-skinned African American man and a white woman for two of the jobs she had applied to, Jordan filed a discrimination charge with the Equal Employment Opportunity Commission. Eleven months later in August 2012, Jordan was fired. Her employers alleged that she had stolen a company cell phone to make personal calls, but Jordan believed it was in retaliation for her EEOC charge.

Decision

Jordan's ten count complaint against defendants Whelan and Blue Cross alleged retaliation and discrimination on the basis of race, color, and gender in violation of Title VII of the Civil Rights Act and §1981. In her complaint, she alleged that defendants discriminated by providing training to men only and by selecting employees with less seniority than her for the positions. She specifically alleged that she was the only light-skinned African American guard in her department on the 19th floor of the former Blue Cross office.

In moving to dismiss the §1981 count, Jordan's former employers claimed that §1981 does not recognize a claim based on skin color. They referenced a 1984 Northern District of Illinois decision that stated "Section 1981 applies only to race discrimination, not to discrimination on the basis of color." *Waller v. International Harvester Co.*, 578 F. Supp. 309 (N.D. 1984). Defendants also cited to a 1986 decision, where the Northern District dismissed a discrimination claim by a dark-skinned Nigerian man against his light-skinned African American supervisor. *Sere v. Board of Trustees of University of Illinois,* 628 F. Supp. 1543 (N.D. Ill. 1986). The court noted the "well-settled" rule that discrimination on the basis of national origin was not actionable. *Id.*

In spite of these holdings, Judge Gottschall denied defendants' motion to dismiss. She first noted that the *Waller* court "did not cite any authority to support [its] proposition" and that "no case has ever cited *Waller*'s holding with approval." *Terra T. Jordan v. Whelan Security of Illinois, Inc., et al.,* No. 12 C 10158. With regard to *Sere*, Gottschall observed that the court had stated "discrimination based on skin color may occur among members of the same race," but the plaintiff there had merely offered no support for that contention.

She also pointed out that the U.S. Supreme Court shed light on the topic in 1987 in *Saint Francis College v. Al-Khazraji*. 481 U.S. 604 (1987). The Court held that §1981 "at a minimum reaches discrimination against an individual because he or she is genetically part of an ethnically or physiognomically distinctive subgrouping of homo sapiens. . . [But] a distinctive physiognomy is not essential to qualify for Section 1981 protection." *Id*.

Gottschall noted that a number of lower courts have held that §1981 *does* recognize a claim based on skin color. In *Walker v. Secretary of Treasury, I.R.S.*, the Northern District of Georgia found that a person's skin color "is closely tied to his ancestry and could result in his being perceived as a 'physiognomically distinctive sub-grouping of homo sapiens,' which in turn could be the subject of discrimination." 713 F. Supp. 403 (N.D. Ga. 1989). Gottschall also recognized that the *Walker* court "recognized that *Waller* and *Sere* arrived at the opposite conclusion, but it found that those cases were superseded by *St. Francis*." *Jordan,* No. 12 C 10158. Moreover, Gottschall noted that *Walker* "has been widely cited by courts that have found that §1981 recognizes claims based on color." *Id*. (citing *Uzoukwu v. Metro. Wash. Council of Gov'ts*, No. 11-CV-391 (RLW), 2014 WL 211 937, at *2 (D.D.C. Jan. 21, 2014) ("[C]laims based on color, race and/or ethnicity are actionable under Section 1981."); *Miller v. Bed, Bath & Beyond, Inc.*, 185 F. Supp. 2d 1253, 1261 (N.D. Ala. 2002) ("Section 1981, like Title VII, prohibits discrimination on the basis of color, as well as race."); *Franceschi v. Hyatt Corp.*, 782 F. Supp. 712, 722 (D.P.R. 1992) ("[I]ntra-racial discrimination is actionable under the statute.")).

Conclusion

In the end, Judge Gottschall denied the motion to dismiss, agreeing with the courts holding that "*St. Francis* compels the conclusion that §1981 encompasses claims of color discrimination." Employers within the jurisdiction of the Northern District should be aware of this current trend in the law expanding the reach of §1981 discrimination claims.

Supreme Court Clarifies Tax Rules for Certain Severance Payments

On March 25, 2014, a few days after the Northern District issued its *Jordan* opinion, the United States Supreme Court also issued an opinion affecting the employment law attorneys and their clients. In *United States v. Quality Stores, Inc.*, the Supreme Court held that severance payments to employees who are voluntarily terminated are taxable wages for purposes of the Federal Insurance Contributions Act (FICA). In an 8-0 opinion by Justice Kennedy (Justice Kagan took no part in the consideration of the case), the Court reversed and remanded a decision by the Sixth Circuit finding that the payments were *not* taxable.

Background

In 2001, Quality Stores faced financial difficulties and ultimately filed for bankruptcy. In doing so, the company terminated thousands of employees, offering severance packages in varying amount depending on, for example, the employee's position within the company and his or her years of service. Quality Stores reported the payments as wages, then paid its share of FICA taxes and withheld the employees' share. Once Quality Stores received permission from its former employees, the company brought suit to pursue roughly $1 million in FICA refunds.

Decision

The issue presented in the case was whether those payments were considered "wages" for purposes of FICA's payroll tax. Prior to this decision, the Circuit courts were split over whether severance payments are "wages" subject to taxation under the FICA. While the Sixth Circuit found that the payments were *not* taxable, the Third, Eighth and Federal Circuits disagreed. In its ruling, the Supreme Court rejected the Sixth Circuit's holding and found that payments made to terminated employees are subject to the FICA tax. The Court did note, however, that Quality Stores' severance payments in this case were distinct from "supplemental unemployment compensation benefits" (SUBs) that are tied to eligibility for unemployment compensation. Because Quality Stores' payments 1) were paid to employees terminated against their will; 2) varied based on position and seniority; and 3) were not linked to state unemployment benefits, those payments were taxable.

Conclusion

The Quality Stores ruling not only settles the debate regarding whether severance payments are subject to FICA taxes, but also allows employers and employees to avoid the tax by tying payments to the receipt of state unemployment benefits.

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