



RIGHTS STUFF

A Publication of The City of Bloomington
Human Rights Commission

City of Bloomington

October 2014

Volume 182

You Need More Than Belief to Win a Discrimination Case

Bernard B. Idlisan is an Asian man with a disability. He lives in Brooklyn and has repeatedly applied for jobs through the New York State civil service program, without success.

He passed the New York State civil service exam for beginning clerical workers with a 90% rating. In May of 2011, Idlisan applied for a clerical position at the New York State Department of Tax and Finance, but the department had no entry-level openings at the time. In March of 2012, five entry-level jobs opened up, but the state did not offer Idlisan a job. The openings were in Albany and he lives in Brooklyn, almost three hours away. All of the new hires were from Albany. He filed a discrimination complaint, but the Equal Employment Opportunity Commission (EEOC) found for the employer. The EEOC gave him a right to sue letter, its standard practice.

Idlisan also passed civil service tests for hospital patient services clerk I, nursing station services clerk I and beginning clerical worker. He has experience working as a hospital clerk, having been a medical clerk and records officer at the Philippines Children's Medical Center from 1986 until 1994. He applied for 34 clerk positions at SUNY Upstate during 2012, receiving no job offers. He filed another discrimination case in March, 2012. In April, he was scheduled for a job interview, but he cancelled it without explanation. Instead, he took his case to court, and lost.

The state was able to show that of the 32 people hired for entry-level positions, 22 were white, eight were African American and two were Hispanic. All of them were as qualified as Mr. Idlisan, if not more so, and all had more recent employment experience than he did. He had no evidence that he was not given a job because of his Asian descent or Filipino national origin. In fact, he had no evidence that the people doing the hiring knew of his race or national origin.

In his complaint, Idlisan talked at length about stereotypes and misconceptions about Asians, including that they do not speak English well, that they speak with heavy accents and that they are poorly educated. But he had no evidence that anyone in charge of the hiring believed those alleged stereotypes. His argument that "assumptions can be made" about why he was not hired was deemed "simply more speculative hypothesizing and not the type of direct or circumstantial evidence necessary to prevail on summary judgment" by the Court.

New York won its motion for summary judgment, meaning Idlisan did not have enough evidence to justify going to trial. The case is Idlisan v. New York State Department of Tax and Finance, 2014 WL 3888279 (N.D. NY 2014).

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Woman Wins Punitive Damages in Race Discrimination Case

When an individual wins an employment discrimination case, she typically is awarded back pay, perhaps front pay and depending upon the facts, attorney's fees. It's not common for a plaintiff to also win punitive damages, but a woman in Wisconsin recently did.

Porscha Campbell is an African American woman who worked for Slice Restaurant. The owner of the restaurant, Jerry Kurth, told the manager to fire Campbell because he "didn't want any n_____ working there." He told the assistant manager he wanted to "get rid of the n_____." The manager objected to this order; Kurth then fired him as well. Campbell said that after she was fired, she was hospitalized for depression and had thoughts of suicide. She was

unable to support her young children; she and the children moved in with her mother.

At an earlier hearing, a Court awarded Campbell \$27,648 in back pay. Another hearing was held to determine if she was entitled to additional damages. The Court explained that punitive damages are awarded when a court finds that the employer displayed malice or reckless indifference towards an employee's right not to be discriminated against. The Court found that "Kurth's undisputed use of racial slurs supports a finding of maliciousness or recklessness." The Court awarded her \$50,000 in punitive damages.

She also sought two years of

front pay, money to live on until she can find another job. The Court said she should not take that long to find comparable employment and awarded her one year of front pay.

Her attorney sought attorney's fees in the amount of \$225 an hour for almost 47 hours of work, or about \$10,000. The Court said he needed to provide at a minimum an itemized billing statement setting forth all of the work done and the hours spent on the case.

Kurth apparently did not appear in Court.

The case is Campbell v. ECW, Inc., d/b/a Slice Restaurant, 2014 WL 3895534 (E.D. WI 2014).

Bloomington Council for Community Accessibility Seeks Nominees for Annual Awards

The City of Bloomington's Council for Community Accessibility (CCA) is accepting nominations for its annual awards ceremony. The awards, to be held on Monday, October 27, 2014, will recognize individuals, businesses and organizations that make the community more accessible for people with disabilities.

The CCA advocates on behalf of people with disabilities, promoting awareness and working to develop solutions to problems of

accessibility in the community. Award categories include the following:

- Kristin Willison Volunteer Service Award
- Business Service Award
- Professional and Community Service Award
- Housing Service Award
- Self Advocacy Award
- Mayor's Award

Nominations may be submitted online at www.bloomington.in.gov/cca. The deadline for submitting nominations is October 10, 2014.

For information about nominations for the CCA, contact Lucy Schaich, by email at cca@bloomington.in.gov or by phone at 812.349.3433.



Employers Can't Require Medical Tests Before Making Conditional Job Offers

A woman with a disability worked for the City of Baltimore Sheriff's Department from 2001 through 2008 as a dispatcher. In June of 2008, she applied for a job as a fire dispatcher with the city's fire department. After she did well in an interview, she completed screening tests, including a typing test, a radio communications/dispatch test and an audio test. Of the 15 applicants who took the screening tests, she had the highest typing score and had one of the highest combined scores for the three tests.

She was then directed to report for a pre-employment physical examination and drug screening, as were all other applicants who had done well on the tests. During the exam, the doctor asked her disability-related questions. Another doctor reviewed her medical records going back six years. Her medical records included a letter from her own doctor that said, "There are no limitations for physical or other activities that may be required for employment." The reviewing doctor decided, without having

met the woman, that she was "unfit" for employment. He wrote that she had "chronic, long-standing medical disorders that require she work in a low stress environment and precludes shift work. As a result she is not able to safely and reliably perform all of the duties of a dispatcher in a regular and reliable manner."

The department, not surprisingly, declined to hire the woman, and she filed a complaint alleging discrimination on the basis of a disability in violation of the Americans with Disabilities Act (ADA). The Department of Justice recently announced a settlement in her favor.

The employer agreed to do the following:

- not conduct medical exams or ask about disabilities before making a conditional offer of employment;
- implement procedures and

policies in compliance with the ADA;

- designate an employee to be the department's ADA compliance officer;

- train its employees on the ADA; and

- pay the woman \$65,000.

Under the ADA, employers may not require applicants to undergo medical exams before making a conditional job offer. Once a conditional job offer has been extended, medical exams are permitted. If the exam discloses an impairment that would interfere with the applicant's ability to do the job, and if there is not a reasonable accommodation that would make it possible for the applicant to do the job, then the employer may withdraw the job offer. That decision has to be made carefully. Nor may employers ask about disabilities before making a conditional job offer.

DOL Proposes FMLA Expansion for Same-Sex Marriage Employees

The federal Family and Medical Leave Act (FMLA) has always allowed covered employees to take time off when their spouses have serious medical issues without fear of losing their job. Now, the U.S. Department of Labor (DOL), which enforces the FMLA, has announced that it plans to ex-

tend the reach of the law to all eligible employees in same-sex marriages as well.

Thomas E. Perez, the U.S. Secretary of Labor, said in June that a new proposed rule would ensure that "the FMLA will be applied to all families

equally, enabling individuals in same-sex marriages to fully exercise their rights and responsibilities to their families."

If you have questions about the FMLA, contact your human resources department or the U.S. Department of Labor.



Fired Employee Has Right to Documentation

Sylvio Baltodano worked for Merck, Sharp and Dohme in Puerto Rico. He is not Puerto Rican.

He said that he and another employee, who was not from Puerto Rico, were told by a supervisor that they had to work harder than their Puerto Rican co-workers in order to advance. But the company promoted him more than once.

In 2005, Merck gave Baltodano a "final warning" for not completing some certifications on time. He said his Puerto Rican co-workers were given more time to get this type of work finished.

Early the next year, the company suspended him for three days for not submitting expense reports on time. He was given a second "final warning" but also received a merit raise that same month.

A few months later, Nilda Vazquez became Baltodano's supervisor. According to the Court's description of Baltodano's pleadings, Vazquez was lurking in the background, "waiting all the time for a chance to exercise her xenophobic animus against him." He said that he had asked to be transferred to Miami. Those plans fell through when he was fired for again submitting expense reports late. After he was fired, he was offered a job in Miami with a different company, but that offer was revoked after Merck gave him a bad reference. In response, he

sued Merck, alleging discrimination on the basis of national origin.

On May 29, 2008, during a deposition, Baltodano's attorney asked Vazquez if she had disciplined other managers for the same misconduct that had been the basis for her warnings and termination of Baltodano. She said she could not remember. The attorney formally asked Merck for this information. Merck objected.

Later, Merck filed a motion for summary judgment. In its motion, Merck agreed "to describe the disciplinary actions (verbal, written, warnings), if any . . . taken by [Merck] as to [other] managers for failures to submit expense reports or follow scheduling for product certification." Baltodano's attorney asked the Court to delay its ruling on the motion for summary judgment so that he could supplement his reply brief once he had the materials from Merck. The Court never ruled on this. According to the Court of Appeals, "Merck repeatedly and unilaterally pushed back the date that, it said, it would finally comply with the agreement to provide the requested documentation."

But Merck never provided the requested information. Baltodano asked the Court to compel the company to do so. Merck eventually told the Court,

vaguely, that "some business managers may have failed [to] comply with certification scheduling due dates; if such were the case, generally, each situation is managed individually." The trial Court granted Merck's motion for summary judgment and Baltodano appealed, successfully.

The Court of Appeals noted that "summary judgment is appropriate only where the record reflects no genuine issue of material fact and where, with all reasonable inferences drawn in favor of the non-moving party, the moving party is entitled to judgment as a matter of law." Here, the plaintiff had not been able to secure evidence in Merck's possession. In such a case, where the defendant has "fought tooth and claw to keep from disclosing certain information even after agreeing to disclose it," courts should not grant summary judgment.

The Court said that "Merck has never definitively said that the requested and promised but still-unproduced evidence is unavailable - indeed, Merck's careful documentation of Baltodano's missteps would suggest otherwise. Instead, it has played at multiple personalities, appearing cooperative one moment and combative the next." The case is Baltodano v. Merck, Sharp and Dohme (I.A) Corp., 637 F. 3d 38 (1st Cir. 2011).