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RACE DISCRIMINATION

Court affirms $1.6 million verdict in favor of firefighters

by Michael Futterman and Jaime Touchstone

California's Second Appellate District recently upheld a $1.6 million jury verdict against the Los Angeles Fire Department (LAFD) for race discrimination based on the department's unjustified discipline of two white firefighters for their involvement in a prank perpetrated on a black firefighter.

Firehouse prank goes too far

Chris Burton and John Tohill were accomplished captain-level firefighters for Station 5 of the LAFD. Both men are white. In October 2004, members of Station 5 played in a volleyball game during which firefighter

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Tennie Pierce referred to himself as "the Big Dog." Pierce is black. In response to the "Big Dog" comments, Tohill bought a can of dog food and, as a joke, planned to leave the unopened can, a spoon, and a bowl on top of the stove for Pierce to see. Before Pierce arrived at dinner that night, a junior firefighter opened the can of dog food and mixed it into Pierce's dinner. Pierce took a few bites, noticed something was wrong, and saw the other firefighters laughing at him. Burton noticed the commotion and ordered Pierce's plate be taken away.

Tohill explained the situation to Burton, and both captains apologized to Pierce in private, taking responsibility for the prank. Pierce acknowledged the joke had gone too far but didn't want the incident reported. Practical jokes among firefighters were common, the LAFD's policy against hazing and horseplay was rarely enforced, and discipline was rarely imposed. Indeed, two days earlier, several firefighters, including Pierce, had hazed a white firefighter, and the incident went unreported.

Pierce later changed his mind and complained about the incident. During an internal investigation, he admitted he was upset by the prank but failed to mention race discrimination or a hostile work environment until pressed by one of the black fire chiefs. Pierce ultimately sued the city for discrimination and negotiated a lucrative settlement.

The commander of operations conducted predisciplinary hearings, during which he expressed concern about imposing severe punishment but explained that he was "under a lot of pressure." Burton and Tohill were transferred from Station 5 and issued unprecedented lengthy suspensions without pay. They lost significant income and were emotionally and physically devastated. Fearing he would be terminated, Tohill elected a deferred retirement option, which cut his anticipated pension by almost 50 percent.

Burton and Tohill sued the city for race discrimination. The trial court found in their favor, and the jury awarded them substantial damages. The city appealed.

Jury finds discrimination

Trial courts decide claims of employee discrimination using a three-stage burden-shifting test:

(1) The employee must establish that he is a member of a protected class and that in spite of being qualified for a job or performing a job well, he suffered an adverse employment action (in this case, a transfer/suspension) and that the circumstances surrounding the adverse action suggest employer discrimination.

(2) The employer can refute the employee's claims by providing a legitimate nondiscriminatory reason for the adverse employment action.

(3) The employee must then prove that the employer's reason for the adverse employment action was a pretext for unlawful discrimination.

In this case, the city argued that the trial court should have dismissed the case without a trial. However, the court of appeal held that because the issue of whether the white firefighters had suffered discrimination was fully litigated at trial, there was no miscarriage of justice.

Damage award upheld

The city asked the court of appeal to overturn the damages awarded to Burton and Tohill on the grounds that they were so excessive they "shocked the conscience." The jury awarded Burton $11,808 for wages lost during his suspension and $580,000 to compensate him for past and future emotional and physical distress. The jury awarded Tohill $7,488 for lost wages, $467,250 to compensate him for lost wages as the result of his early retirement, and $577,500 to compensate him for past and future emotional and physical distress.

The court of appeal noted that juries are afforded a wide range of discretion in awarding damages because they see and hear the witnesses and frequently the resulting injury. In this case, the court of appeal observed that substantial evidence had been introduced in support of the firefighters' damages and that the amount awarded wasn't so grossly excessive that it "shocked the conscience." *Burton v. City of Los Angeles* (California Court of Appeal, Second Appellate District, 2/18/10, unpublished).

Some misconduct, even between members of different races, isn't necessarily motivated by racial animus.

Bottom line

In this unusual case, the employer mistakenly characterized an out-of-line prank against an African American employee as race discrimination. In doing so, it failed to recognize that some misconduct, even between members of different races, isn't necessarily motivated by racial animus. By missing that point, the LAFD paid twice: first, a substantial sum paid in settlement to the African-American firefighter out of fear of a jury verdict and second, substantial sums to satisfy the jury verdict rendered in favor of two white firefighters because of the city's race-based overreaction.

It's hard to draw lines in the complex area of race relations in the employment context. Cooler heads in this hothouse of a fire department may have been able to avoid this very disruptive — and expensive — result.

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