HRHero.com

UTAH

EMPLOYMENT LAW LETTER

Part of your Utah Employment Law Service

Darryl J. Lee, Editor — Kirton McConkie

June 2013

RACE DISCRIMINATION

Irish vs. Hispanic: When is it reasonable to suspect illegal discrimination?

by Brinton M. Wilkins

In the 1800s, Irish immigrants to the United States were looked down on and treated poorly. Indeed, they were so ill-treated that saying someone had the "luck of the Irish" was a humorous way of saying that the person was unlucky. Irish stereotypes developed, several of which persist today—including the Irish policeman. It is perhaps ironic then that in a recent case from Colorado, the party accused of race discrimination was a police captain with a decidedly Irish name. Despite the irony, the case helps illustrate when an employee may have a justifiable belief that he has been the subject of race discrimination.

A sergeant up in arms

Bobby Espinoza, who is Hispanic, was a correctional officer for the Colorado Department of Corrections (DOC) at the Colorado Territorial Correctional Facility (CTCF). In 2007, the department promoted him to sergeant, subject to a six-month trial period.

Shortly after the promotion but during the trial period, Espinoza's son was in a car accident. Espinoza, who was scheduled to work a graveyard shift, called into work and took sick leave. Because he missed the graveyard shift, the correctional facility's staffing fell below the required minimum, and other officers were required to cover his shift. The next day, Espinoza also took his regularly scheduled day off. In effect, because of the unexpected leave, he had two days off that week.

Espinoza's supervisor, captain Gary Moroney, who is white, prepared a "performance document" that chastised Espinoza for taking the extra time off. According to the document, Espinoza failed to set "positive accountability/organizational commitment examples" and set a "very bad example and sent a very negative message to supervisors and subordinates alike about [his] leadership skills."

On June 27, five days after Espinoza missed his shift, he met with Moroney to discuss the performance document. There was a conflict about who became angry at the meeting, but Espinoza refused to sign the document and called it "chicken shit." Moroney then prepared a report about Espinoza's absence, his "chicken shit" statement, and his refusal to sign the performance document.

On July 2, Moroney again met with Espinoza. Major Linda Maifeld, who is white, was also present, as was associate warden Michel Arellano, who is Hispanic. After beginning the meeting, Arellano left. Again, there was a dispute about what happened in the meeting after Arellano left, but it was clear that at one point, Espinoza accused Moroney of "lying through his teeth." Maifeld and Moroney then escorted Espinoza from the facility, and he refused to return to complete requested paperwork.

On July 3, Espinoza met with a union representative and Arellano. Espinoza gave Arellano his version of the previous day's events and accused Moroney of race discrimination. Arellano "acknowledged that cultural differences existed at CTCF."

Two weeks later, warden James Abbott, who is black, met with Espinoza and issued a corrective action (i.e., a written reprimand). The basis of the reprimand was Espinoza's "chicken shit" comment and "extremely insubordinate" behavior toward Maifeld and Moroney. The corrective action imposed four sanctions on Espinoza. Specifically, he was required to:

(1) Submit a report to Moroney regarding the DOC's code of conduct;

(2) Attend professionalism and unlawful discrimination/sexual harassment training;

(3) Prepare a report on a "self-discipline and emotional conduct" video; and

(4) Write an apology to Moroney.

One week later, on July 23, Espinoza filed a complaint with the department's Office of the Inspector General (OIG) claiming an "abusive, hostile, demeaning and discriminatory work environment." While the OIG investigated, Espinoza was granted relief from the corrective action; ultimately, he never had to fulfill any of its requirements. In the end, the performance document and corrective action were removed from his personnel file, and he received a promise to "end . . . the abusive, retaliatory and hostile work environment if it occurred."

During the OIG's investigation, Espinoza's trial period ended, his promotion was certified, and, upon his request, he was transferred to a different facility. He also had 184 hours of leave reinstated. However, prison officials refused to reimburse him for his attorneys' fees (it appears he hired a lawyer soon after the problems began) or reinstate all the leave he took during the grievance process. The Colorado State Personnel Board upheld those decisions.

Espinoza filed a lawsuit against the DOC in federal district court alleging that the department had retaliated against him for complaining to Arellano that Moroney had engaged in race discrimination. The trial court dismissed his case without a trial, and he appealed to the U.S. 10th Circuit Court of Appeals (whose rulings apply to all Utah employers).

Retaliation claim

Title VII forbids an employer from retaliating against an employee who objects to what he believes is illegal discrimination. However, if there is no direct evidence of retaliation, an employee asserting a retaliation claim must show:

(1) He engaged in protected opposition to discrimination.

(2) He suffered an action that a reasonable employee would have found significantly adverse.

(3) A causal nexus exists between the opposition to discrimination and the adverse action.

The 10th Circuit decided that Espinoza's claim for retaliation failed because he couldn't show that he engaged in protected opposition to discrimination. To do so, he had to show not only that he opposed what he perceived to be illegal discrimination but also that his belief that he was opposing illegal discrimination was objectively reasonable.

Insufficient 'data points'

Espinoza pointed to several "data points" as evidence that he objectively and reasonably believed he was engaged in protected opposition to discrimination. The data points included the following assertions:

(1) Moroney didn't discipline white sergeants who missed their shifts.

(2) Espinoza had witnessed Moroney "mistreat a black employee."

(3) Espinoza had "heard rumors that Hispanic employees were segregated together in one CTCF cell house."

(4) Arellano was "unsurprised" by Espinoza's discrimination complaint and said "cultural differences existed at CTCF."

Unfortunately for Espinoza, the data points had significant weaknesses.

Perceived treatment of white sergeants

First, the only evidence Espinoza provided of white sergeants being treated differently was his own affidavit. And even though he had covered for white sergeants in the past, there was no evidence that their absences hadn't been scheduled in advance. However, Espinoza's absence clearly was last-minute and unscheduled and resulted in the facility dropping below minimum staffing requirements.

Additionally, even though Espinoza had covered the shifts of absent white sergeants, doing so hadn't required him to report to work when he wasn't already there. By contrast, his last-minute absence required officers to work parts of a graveyard shift when they otherwise would have been off. Thus, he failed to present facts showing that the treatment meted out to white sergeants who behaved in similar ways was any different from how he was treated.

Treatment of a black employee

Second, Espinoza admitted that although he had seen Moroney tell a black employee he would "kick [his] ass" before telling the sergeant to "just get back over and do what you're supposed to do," he was "not sure what the whole thing was about."

While Moroney's actions might have appeared unusual to an outside observer, Espinoza provided no evidence that it wasn't how other employees were treated at CTCF, regardless of race. Further, the 10th Circuit noted that Title VII is not a code of civility, and Espinoza's mere belief that the treatment was race-based was insufficient.

Even though the black employee also felt the treatment was race-based, those feelings, without more factual evidence, weren't enough to make it objectively reasonable for Espinoza to believe that Moroney's actions were illegal discrimination. Accordingly, he couldn't use the incident as a basis for an objectively reasonable belief that by complaining to Arellano, he was opposing illegal discrimination.

Racial rumors, statements about cultural differences

Third, Espinoza couldn't point to rumors of racial segregation as a basis to establish an objectively reasonable belief that he was opposing illegal discrimination. That's because his experience reflected that Hispanic employees weren't segregated.

Finally, Arellano's comments about cultural differences didn't help Espinoza form an objectively reasonable belief that he was opposing discrimination because the comments were made after Espinoza complained. Thus, he couldn't present any evidence that would make it objectively reasonable for him to believe that Moroney discriminated against him on the basis of race. His data points were too speculative and attenuated.

Without an objectively reasonable belief, the 10th Circuit concluded that Espinoza wasn't engaged in protected opposition to discrimination. And because he wasn't engaged in protected opposition, he couldn't sustain a claim that the DOC had retaliated against him for doing so. *Espinoza v. Department of Corrections,* 2013 WL 409676 (10th Cir., 2013).

Lessons learned

The DOC won because Espinoza was unable to rally enough objective evidence of discrimination, but that doesn't mean there wasn't any. Indeed, it was the perception of at least three employees—Espinoza, Arellano, and the unnamed black employee—that CTCF had race-based problems. Whether those perceptions were "true" may be beside the point. Employers should be aware of mere perceptions of illegal discrimination and work to nip them in the bud before they explode into lawsuits.

Further, a little understanding could have gone a long way in this case. Espinoza took time off because his son was involved in a car accident. Sometimes things happen, and no one has control over them. When faced with similar situations, employers have an opportunity to build employee goodwill, or, like the DOC did in this case, they can take actions that appear to punish an employee for electing to take care of his family during a real emergency. ✤