



Alleged Race Based Hiring Criteria Supports Discrimination Claim

By Kathleen Henderson, King & Ballow Partner & Healthcare Practice Chair

khenderson@kingballow.com

A health care services company for correctional facilities lost its attempt to dismiss a physician's discrimination claim for failure to retain him as medical director at a Jackson, Mississippi correctional facility. The physician alleges a company representative told him he could not be hired or retained for the position because he is white.

Joseph Blackston, M.D., J.D., was employed by a medical staffing contractor when he worked as the medical director for Central Mississippi Correctional Facility. When the Mississippi Department of Corrections did not renew its contract with the contractor, Blackston contacted Wexford Health Sources, Inc. (CMCF's provider for health care services) about continuing his position as medical director. Blackston avers a Wexford representative told him he could not be hired because he is white and MDOC was looking for a black candidate.

Blackston filed his discrimination claim under 42 U.S.C. § 1981, which prohibits racial discrimination in the making and enforcing of contracts. The action was filed before the U.S. District Court for the Southern District of Mississippi in Jackson. Wexford, which is located in Pittsburgh, Pennsylvania, provides health care services to more than 100 correctional facilities throughout 13 states.

Wexford asserted its decision not to hire Blackston was based upon legitimate non-discriminatory reasons and asked the court to dismiss the action. It also submitted an affidavit from a black female supervisor with MDOC who said Blackston was not a "good fit" and should not be hired. The federal district judge dismissed the case before trial concluding Blackston's claim was based only upon an inference of discrimination which Wexford successfully rebutted with the affidavit from its client MDOC providing a legitimate non-discriminatory reason for its decision.

On November 16, 2009, the U.S. Court of Appeals for the Fifth Circuit reversed the decision and held that "evidence that someone was told he could not be hired for or retained in a position because of his race is direct evidence of discrimination." Having presented



direct evidence of discrimination, Wexford could not prevent the case from proceeding to trial by showing a legitimate non-discriminatory basis for failure to retain the physician. The Fifth Circuit also noted it was not necessary for Blackston to allege any animus or hostility on the basis of his race. His testimony that he was told he could not be hired because he is white sufficed to establish direct evidence of discrimination.

This case illustrates the distinction between indirect evidence of discrimination, for which it is easier to obtain a dismissal in summary judgment without a trial, versus direct evidence of discrimination, which cannot be defeated in summary judgment with unrebutted evidence purporting to state legitimate non-discriminatory reasons for the adverse action.

Blackston v. Wexford Health Source, Inc., No. 08-60855, 2009 U.S. App. LEXIS 25039 (5th Cir. Nov. 16, 2009)

For more information contact: Kathleen Henderson, Partner & Health Care Practice Chair at King & Ballow, khenderson@kingballow.com, phone (615) 726-5489.

For more posts of interest to health care professionals go to:
www.kingballow.com/healthcare.php

These opinions and comments are intended only for the purpose of providing recent updates and general information and are not intended, and should not be used, as a recommendation for any specific situation or entity or as a substitute for legal counsel. Always consult with an attorney for specific legal counsel concerning your particular situation.