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SECOND CIRCUIT REVIEW

CIVIL PROCEDURE: SUFFICENCY OF EVIDENCE

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This month, we discuss a significant recent decision by the United States Court of Appeals for the Second Circuit re-examining and strengthening the standards for granting judgment notwithstanding the verdict under Federal Rule of Civil Procedure 50(b), in the context of a highly charged case involving allegations of racial discrimination by faculty members of a prominent city university.

The 'Tolbert' Case

In *Tolbert* v. *Queens College*,[1] in an opinion written by Judge Amalya L. Kearse and joined by Judges Guido Calabresi and Sonia Sotomayor, the Second Circuit reversed the district court's grant of judgment in favor of defendants pursuant to Rule 50(b); the district court[2] had granted judgment for defendants on the ground that the evidence presented at trial, in the judge's view, was insufficient to permit a rational juror to find that defendants discriminated against plaintiff on the basis of race.

The Second Circuit, after closely parsing the record, ruled that defendants were not entitled to judgment as a matter of law for lack of proof of intentional racial discrimination. Instead, the court ruled that the district court judge, though correctly articulating the standards for granting judgment under Rule 50(b), did not, as required, view the evidence as a whole, assess that evidence in the light most favorable to plaintiff, or disregard evidence favorable to the defense that the jury was not required to believe.

Plaintiff Derek I. Tolbert, an African-American, was an English teacher in the New York City school system. In 1989, to maintain his teaching eligibility and to qualify for a higher-salaried position, Mr. Tolbert enrolled in the Media Studies program at the Queens College Department of Communication Arts and Sciences (the department) to pursue a master's degree in communications. Defendants Stuart Liebman and Helen Smith Cairns were professors in the Department; Ms. Cairns was chair of the department at all times relevant to the dispute.

In or about 1990, Mr. Tolbert temporarily withdrew from the Media Studies program for personal reasons; the hiatus lasted approximately two years, and he received grades of "Incomplete" in three courses. On his return to the program in 1992, Mr. Tolbert sought to complete the requirements for his degree and began to work with Professor Jonathan Buchsbaum, coordinator of the Media Studies program. Mr. Tolbert testified at trial that his efforts to obtain his master's degree were frustrated because "they just kept changing standards or kept changing what was asked of me"; among other examples, Mr. Tolbert testified that in two of the courses in which he received grades of "Incomplete," taught by Professors Ibok and Mohammadi who had since left Queens College, he understood that his papers would be sent to the departed professors for grading. He submitted the two papers and subsequently was informed that Professor Ibok

had graded the paper for her course a "B." However, when Mr. Tolbert spoke to the college registrar, he was informed that his grade had not been changed to B, but remained an Incomplete. When he inquired of Mr. Buchsbaum, Mr. Tolbert was informed that the grade "was not to [Buchsbaum's] liking" and that Mr. Buchsbaum said "he had taken over the matter." Mr. Buchsbaum asserted that the papers Mr. Tolbert submitted for Professors Ibok and Mohammadi were unacceptable because they had been submitted by Mr. Tolbert in other courses (the "allegedly recycled papers").

Mr. Tolbert testified that Mr. Buchsbaum, in discussing his rejection of one of the allegedly recycled papers, "was gleeful in what he was saying." After successfully resubmitting papers for the Ibok and Mohammadi courses, Mr. Tolbert researched and prepared what was to be his final paper, to be graded by Mr. Buchsbaum. Mr. Buchsbaum subsequently accused Mr. Tolbert of plagiarizing most of his final paper. Though Mr. Tolbert denied the accusation, contending that he had made adequate attribution of the contents to their sources, Mr. Buchsbaum found the plagiarism "astonishing," and gave the paper to Mr. Liebman. Mr. Liebman reviewed it and testified at trial that the paper was "plagiarized in the most obvious, amazing, astounding way [he] had ever seen in all [his] years as an instructor." Mr. Buchsbaum had previously brought Mr. Tolbert's allegedly recycled papers to the attention of other members of the department at meetings attended by Mr. Liebman and Ms. Cairns; a third meeting was held specifically to discuss the accusation of plagiarism. Notwithstanding the seriousness of the charge, which Mr. Liebman termed "cheating," the department decided simply to fail Mr. Tolbert on that paper, allow him to submit another paper, and gave him a "C" in the course.

To receive a master's degree from the department, candidates were required, in addition to their course work, to pass a comprehensive examination. The examination consisted of a number of pass/fail essay questions from which the candidate was to select four to answer; passing grades were required on all four. Each essay was graded initially by two professors; if the grades from those two professors differed, the essay was graded by a third professor to break the deadlock.

After learning that he had received failing grades on all four essays, Mr. Tolbert requested a meeting with faculty members to discuss the issue. A meeting was held on Oct. 6, 1993, and was attended by, among others, Liebman, Cairns, Tolbert and Tolbert's public school teaching colleague Binnie Meltzer. When Mr. Tolbert asked why he had received failing grades, Mr. Liebman responded that much of the content of the essays was erroneous or not well documented. Mr. Tolbert, however, disputed that assessment and pointed out specific passages in his essays and the sources he had cited in them. Mr. Tolbert testified that, after he refuted the criticisms of the essays' contents, the department members "more or less conceded that the factual content was indeed okay and backed up off that position and went to that my writing was substandard. They switched horses in the middle of the stream."

Non-Native English Speakers

Mr. Tolbert testified that when the criticism was redirected to his writing, he asked, "Are you telling me that some of the non-native American speaking students, particularly

Chinese students in the room answered their questions and answered better than I did. I asked out of pure curiosity." Mr. Liebman's response was "that the Chinese students were allowed for certain inconsistencies in their writing because they weren't born here more or less and that they were cut slack on their exams." Ms. Meltzer's account of the meeting was similar: she testified that Mr. Liebman said "we give extra slack to Chinese students," and that Ms. Cairns "definitely" indicated her agreement by nodding.

Finally, Ms. Meltzer testified that, both during and after the Oct. 6 meeting, she unsuccessfully inquired as to the department's grading standards. At the meeting, she asked to see the grading "criteria," "the weight of the questions" and "the standard by which [Mr. Tolbert's] exam was graded"; Ms. Cairns said "we don't have those things." Immediately after the meeting, Ms. Meltzer asked Ms. Cairns how the examinations could be graded without some set of objective criteria; Ms. Meltzer testified that Ms. Cairns "said we can mark as we set [sic] fit. We don't need to have objective criteria."

Based largely on Mr. Liebman's statement at the Oct. 6 meeting that the department "cut slack" for Chinese students, Mr. Tolbert commenced suit in 1994 against the college, Liebman, Cairns and Gander, asserting that he had been the victim of racial discrimination by the college in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (1994). Defendants moved to dismiss on various grounds, including Eleventh Amendment immunity, failure to state a claim and qualified immunity.

District Court Dismisses

The district court dismissed Mr. Tolbert's claims for money damages against the college and the individual defendants in their official capacities insofar as those claims were asserted under 42 U.S.C. § 1983 for violation of §1981.[3] The court also granted a motion to dismiss all claims against Gander, given that he had awarded Tolbert only passing grades. The district court denied a motion by Liebman and Cairns for summary judgment on the ground of qualified immunity; the court noted that the premise of that defense was defendants' contention that there had been no discrimination, and ruled that the record revealed triable questions of fact on that issue. Although Liebman and Cairns immediately sought review of that ruling, their appeal was dismissed for lack of appellate jurisdiction.[4]

Following dismissal of that appeal, a four-day jury trial was held on the Title VI claim against the college and the § 1981 claims against Mr. Liebman and Ms. Cairns. The trial witnesses were Tolbert, Meltzer, Liebman, Cairns and Buchsbaum. At the close of Mr. Tolbert's case, defendants moved for judgment as a matter of law, arguing that Mr. Tolbert had failed to prove that defendants took any action against him because he was African-American; that Mr. Tolbert's claims were based entirely on "a very ambiguous remark" at the Oct. 6 meeting; and that, even "if there was any [racial/ethnic] discrimination floating in the air, there was no way to execute it" because the examinations were graded anonymously. The court reserved judgment on defendants' motion.

The jury was given a verdict form setting out discrete questions with respect to (i) the liability of Liebman, Cairns and the college, and (ii) compensatory, nominal and punitive damages. The jury returned a verdict finding that Mr. Tolbert had proved, by a preponderance of the evidence, that he was the victim of race discrimination. It awarded no nominal or compensatory damages, but awarded $50,000 in punitive damages against Mr. Liebman, Ms. Cairns and the college.

Defendants, pursuant to Rule 50(b), renewed their motion for judgment as a matter of law.[5] The district court granted the motion by order dated Jan. 7, 2000 (the opinion and order). The district court held that there was a "complete lack of evidence to support the jury's finding as to liability." The court quoted Mr. Tolbert's testimony as to the "statement made by Professor Liebman to the effect that the department 'cuts slack' for students who do not speak English as their native language," and stated that Mr. Tolbert's "entire case against Professor Liebman is based on this single comment, and the fact that Professor Liebman was one of the readers who gave a failing grade to three of plaintiff's essay answers. Plaintiff's entire case against Professor Cairns is that she, as the chair of the department, failed to intervene when Professor Liebman made this comment." On this record, the court ruled that "there is simply no evidence from which a reasonable jury could have found that Professor Liebman's comment regarding cutting slack for Asian or Chinese or ESL students meant that Professor Liebman, or the media studies department generally, had a racially discriminatory grading policy. . . . All of the evidence is to the contrary."

Tolbert's Appeal

On appeal, Mr. Tolbert challenged the granting of judgment as a matter of law, arguing that he presented sufficient evidence to permit a rational juror to find in his favor.

Title VI provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. § 2000d. Section 1981 provides that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. § 1981(a). To establish a claim based on either statute, a plaintiff must show, *inter alia*, that the defendant discriminated on the basis of race,[6] that the discrimination was intentional,[7] and that the discrimination was a "substantial" or "motivating factor" for the defendant's actions.[8] A finding of discriminatory intent is a finding of fact,[9] as are findings of discrimination[10] and causation.[11] "An invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . ." *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). Such a finding may be supported by evidence that the defendant has given conflicting reasons for its treatment of plaintiff.[12]

Task on Review

Thus, the trial court was required to consider whether the evidence admitted at trial was sufficient to support the jury's verdict, as to each of the above elements. Rule 50(b) standards Rule 50(b) obligates the trial court to "consider the evidence in the light most favorable to the party against whom the motion was made and to give that party the benefit of all reasonable inferences that the jury might have drawn in his favor from the evidence. The court cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury." *Smith* v. *Lightning Bolt Productions, Inc.*, 861 F.2d 363, 367 (2d Cir. 1988).[13]

In making its evaluation, the court should "review all of the evidence in the record," but "must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). The same standards apply to an appellate court reviewing the grant of a Rule 50(b) motion.[14]

The Second Circuit concluded that the district court, though correctly stating these standards, did not view the evidence as a whole, or consider it in the light most favorable to Mr. Tolbert, or disregard evidence favorable to the defense that the jury was not required to believe. According to the Second Circuit, the district court ignored the fact that Professor Liebman's "cut slack" statement, left unexplained at the Oct. 6 meeting, is susceptible to differing interpretations and ignored circumstantial evidence and Mr. Tolbert's direct testimony that he was told at the Oct. 6 meeting that he failed because of his writing style based on a standard that was applied differently to individuals of differing ethnic backgrounds.

Linchpin of Case

Professor Liebman's comment that the department "cut slack" for Chinese students was the linchpin of Mr. Tolbert's case: the statement appeared to express a deliberate, differential treatment on the matter of ethnicity, which would constitute a policy seemingly in violation of Title VI.

The ultimate question, therefore, is what was meant by the statement "we cut slack" with respect to Chinese students. The district court termed the statement "ambiguous," Opinion and Order at 11. The jury certainly could have adopted the ordinary meaning of to "cut slack," which is to apply a relaxed standard. Defendants contended at trial that the statement differentiated only between content and writing style, but the jury could reasonably infer that the "cut slack" statement referred to differentiation between groups, given Mr. Tolbert's testimony that the department members at the Oct. 6 meeting had just "conceded that the factual content [of his essays] was indeed okay."

The district court's view that defendants had "conclusively disproved" the existence of a departmental discriminatory policy implicitly accepted as true the trial

testimony of Professor Liebman and certain of the testimony of Ms. Cairns, while apparently rejecting that of Mr. Tolbert. As the Second Circuit observed, however, acceptance of defendants' versions of the facts was not within the province of the district court in ruling on a motion for judgment as a matter of law, particularly insofar as Professors Liebman and Cairns were not disinterested witnesses and thus their testimony could not be accepted where it conflicted with the testimony given by Mr. Tolbert. Nor could Mr. Buchsbaum, though not a party, reasonably be considered a disinterested witness, for he was the coordinator of the college's Media Studies program and the professor who had accused Mr. Tolbert of recycling old papers and an "astonishing" plagiarism, after a series of disagreeable confrontations with Mr. Tolbert.

Aside from defendants' obvious interest in the outcome of the litigation, the jury plainly was not compelled to accept at face value the meaning that defendants attributed to the "cut slack" statement at trial. Moreover, the evidence as a whole, the Second Circuit observed, might also support the jury's verdict. That evidence included Mr. Tolbert's testimony that the department had repeatedly changed the ground rules for his completion of the necessary course work; for example, he was told that the papers required to resolve his Incomplete grades would be graded by the professors who had taught those courses, only to be informed thereafter that Mr. Buchsbaum insisted on grading the papers. Ms. Meltzer testified that Ms. Cairns took the position that the department does not "need to have objective [grading] criteria" and "can mark as [it] sees fit." The Second Circuit ruled that it was beyond the power of the district court or of the Second Circuit itself to second-guess the jury's factual inferences and credibility assessments.

Second Circuit

Because the Second Circuit concluded that the evidence at trial permitted inferences that the department believed itself free to grade arbitrarily, that it repeatedly altered the prerequisites Mr. Tolbert was required to meet in order to obtain his degree, that it took inconsistent positions as to why Mr. Tolbert had failed his examination essays, and that it had intentionally injected consideration of ethnicity into its exam-grading decisions and applied a more rigorous standard to Mr. Tolbert than to students of other ethnicity, defendants were not entitled to judgment as a matter of law for lack of proof of intentional racial discrimination. In its careful dissection of the facts, the Second Circuit both reaffirmed the importance of judicial detachment when considering motions for judgment as a matter of law and provided valuable guidance for academics and administrators seeking an understanding of their duties and responsibilities under Title VI.

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ENDNOTES

[1] 2001 U.S. App. LEXIS 2595 (2d Cir. Feb. 22, 2001).

[2] Honorable Bernard A. Friedman, of the United States District Court for the Eastern District of Michigan, sitting by designation.

[3] See, e.g., *Will* v. *Michigan Department of State Police*, 491 U.S. 58, 64-71 (1989) (neither a state agency nor a state official sued in his or her official capacity is a "person" within the meaning of § 1983).

[4] See *Tolbert* v. *Queens College*, 164 F.3d 132 (2d Cir. 1999) (denial of qualified-immunity-based motion for summary judgment because of existence of genuinely disputed issues of material fact is not immediately appealable).

[5] Before a case is submitted to the jury, a party may move pursuant to Fed. R. Civ. P. 50 for judgment as a matter of law ("JMOL") on the ground that there is no legally sufficient evidentiary basis for a reasonable jury to find for the opposing party on an issue essential to a claim or defense. Fed. R. Civ. P. 50(a)(1). The Rule requires the party making such a motion to "specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." Fed. R. Civ. P. 50(a)(2). After an unfavorable verdict, Rule 50(b) allows the party to "renew" its motion. "The post-trial motion is limited to those grounds that were 'specifically raised in the prior motion for [JMOL]'"; the movant is not permitted to add new grounds after trial. *McCardle* v. *Haddad*, 131 F.3d 43, 51 (2d Cir. 1997) (quoting *Samuels* v. *Air Transport Local 504*, 992 F.2d 12, 14 (2d Cir. 1993)); see also *Kirsch* v. *Fleet Street, Ltd.*, 148 F.3d 149, 164 (2d Cir. 1998); *Lambert* v. *Genesee Hospital*, 10 F.3d 46, 53-54 (2d Cir. 1993).

[6] See, e.g., *Guardians Association* v. *Civil Service Commission*, 463 U.S. 582, 602-03, 607 n.27 (1983); *General Building Contractors Association, Inc.* v. *Pennsylvania*, 458 U.S. 375, 391 (1982).

[7] See, e.g., *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977).

[8] See *Gierlinger* v. *Gleason*, 160 F.3d 858, 868 (2d Cir. 1998) (quoting *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1977)).

[9] See, e.g., *Pullman-Standard* v. *Swint*, 456 US. 273, 287-90 (1982).

[10] See, e.g., *Anderson* v. *Bessemer City*, 470 U.S. 564, 573 (1985).

[11] See, e.g., *Joseph* v. *New York City Board of Education*, 171 F.3d 87, 93 (2d Cir.), cert. denied, 528 U.S. 876 (1999); *Sedor* v. *Frank*, 42 F.3d 741, 746 (2d Cir. 1994), cert. denied, 515 U.S. 1123 (1995).

[12] See generally *EEOC* v. *Ethan Allen Inc.*, 44 F.3d 116, 120 (2d Cir. 1994) (from discrepancies in employer's versions of the events and deliberations leading to termination of employment, "a reasonable juror could infer that the explanations given by [the employer] at trial were pretextual, developed over time to counter the evidence suggesting age discrimination"); *Castleman* v. *Acme Boot Co*., 959 F.2d 1417, 1423 (7th Cir. 1992) (jury is entitled to rely on "inconsistencies and less than credible assertions" in deciding that employer's proffered rationale for firing employee was pretext for age discrimination).

[13] See also *Kim* v. *Hurston*, 182 F.3d 113, 117 (2d Cir. 1999); *Piesco* v. *Koch*, 12 F.3d 332, 343 (2d Cir. 1993)

[14] See, e.g., *Kim* v. *Hurston*, 182 F.3d at 117; *Galdieri-Ambrosini* v. *National Realty & Development Corp.*, 136 F.3d 276, 289 (2d Cir. 1998).