New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 255—NO. 80
WEDNESDAY, APRIL 27, 2016

SECOND CIRCUIT REVIEW

Expert Analysis

Court Clarifies Classification Of 'Hispanic' Under Title VII

This month, we discuss *Village of Freeport v. Christopher Barrella*,[1] in which the U.S. Court of Appeals for the Second Circuit evaluated whether "Hispanic" should be treated as a "race" under Title VII. In a case involving a mayor's decision to promote one candidate over another for police chief, the court explicitly addressed for the first time whether discrimination based on Hispanicity constituted racial discrimination under Title VII, or if it instead amounted exclusively to national-origin discrimination.

In an opinion by Judge José A. Cabranes, joined by Judges Pierre N. Leval and Raymond J. Lohier, Jr., the court held that discrimination based on Hispanicity is indeed racial discrimination under the statute. Because the Second Circuit also found that the district court erred by admitting lay opinions about the mayor's motives, however, the court vacated the judgment for the plaintiff and remanded for a new trial.

MARTIN FLUMENBAUM *and* BRAD S. KARP *are members of Paul, Weiss, Rifkind, Wharton & Garrison.* MATTHEW A. FELDMAN*, an associate at the firm, assisted in the preparation of this column.*

By **Martin Flumenbaum**

And **Brad S. Karp**

Background

The Village of Freeport elected Andrew Hardwick as its mayor in 2009. As mayor, Hardwick was responsible for appointing individuals to lead the Freeport Police Department. His preferred candidate for police chief was Lieutenant Miguel Bermudez, with whom he had served in the fire department and known for more than 25 years. Bermudez was born in Cuba but grew up in Freeport.

> The court held that discrimination based on Hispanicity is indeed racial discrimination under Title VII.

Another person vying for the job was plaintiff Christopher Barrella, an Italian-American who was born in the United States. Barrella considered himself to be more qualified than Bermudez. On an examination that determined eligibility to serve as police chief, Barrella scored the highest out of six contenders, while Bermudez came in third. Barrella also emphasized that he had a law degree and a master's degree in criminal justice, whereas Bermudez had not finished college. Barrella, however, did not reside in Freeport, and Hardwick did not know him. In November 2010, Hardwick promoted Bermudez to be the police chief.

Prior Proceedings

Barrella filed a charge with the Equal Employment Opportunity Commission in August 2011. In January 2012, he sued Hardwick and the Village, claiming that he was passed over for police chief because of his race and national origin, and alleging that during Hardwick's tenure, Hardwick systematically hired less qualified minority candidates over more qualified white candidates. Barrella

brought his claims under 42 U.S.C. §§1981 and 1983, Title VII, and the New York State Human Rights Law. After discovery, defendants moved for summary judgment.

On April 26, 2014, Judge Arthur D. Spatt of the Eastern District of New York granted defendants' motion with respect to Barrella's national-origin claims but denied it for all of his other claims. Jury trial then commenced and lasted for three weeks. At the close of the case, after five days of deliberation, the jury found that Hardwick had discriminated against Barrella because of his race, and it awarded Barrella $1.35 million in lost pay and punitive damages. Among the several post-trial applications that were filed, defendants moved for judgment as a matter of law, which the court denied.[2] Defendants appealed.

The Second Circuit's Decision

In its decision, the Second Circuit broadly framed the question presented as, "what does it mean to be Hispanic?"[3] Although the district court had found that the jury should decide whether "Hispanic" constituted a "race" under Title VII, the Second Circuit held that this issue was in reality a legal issue of statutory interpretation.

The court held that "Hispanic" is a "race" under the anti-discrimination statutes. In so holding, the court rejected defendants' argument that Hardwick did not racially discriminate against Barrella because both Barrella and Bermudez were white. Defendants had urged that Hardwick could not have racially discriminated by choosing among two candidates of the same race, even if one of the two was Hispanic.

The court began by acknowledging that common usage of the word "Hispanic"—both by the federal government and by communities who identify with that term—has varied greatly with respect to whether it refers to a race, an ethnicity, or a national origin. The court reviewed changes in the Census Bureau's use of the term over time, as well as the inconsistent approach adopted by the mainstream media. Debates over preferred terminology, including that between "Hispanic" and "Latino," have further complicated the issue, the court found.

Nevertheless, the court observed that while popular use has wavered in its classification of the term, the Second Circuit has long treated "Hispanic" as a "race" under §1981.[4] In pertinent part, that statute guarantees all persons in the U.S. "the same right in every State and Territory to make and enforce contracts…as is enjoyed by white citizens."[5] Although §1981 does not explicitly refer to "race," the Supreme Court has held that it prohibits "racial discrimination" and defined that prohibition to include discrimination based on ethnicity.[6] Accordingly, the Second Circuit noted, two people who identify as "white" may belong to different races under §1981 if they have different ethnicities. And because "reverse discrimination" is also prohibited, adverse employment action based on the lack of an ethnicity, including Hispanicity, can constitute racial discrimination under §1981.[7]

By comparison, the court found that the same issue had not been similarly settled with respect to Title VII. That statute makes it unlawful for an employer to take adverse action against an employee based on "race, color, religion, sex, or national origin."[8] Those categories are not mutually exclusive, and courts have often struggled with whether to treat "Hispanic" as a "race" and/or as a "national origin." Explaining why this distinction was not merely academic, the court emphasized that §1981 does not provide relief for "national origin" discrimination, which means that if Hispanicity were treated exclusively as a national origin under Title VII, a plaintiff proceeding under both statutes would need to present inconsistent factual arguments.

Squarely deciding the issue for the first time, the court held that Hispanicity is a "race" under Title VII, and therefore discrimination based on Hispanicity is racial discrimination under that law. The court offered two reasons to support its holding. First, it found no reason to treat race differently under §1981 and Title VII, which otherwise assess claims of racial discrimination identically. Second, earlier holdings had already assumed, without expressly holding, that claims of ethnicity-based discrimination were cognizable as race-discrimination claims under the statute.[9] Clarifying the scope

of its holding, the court noted that Hispanicity could still also constitute a national origin under Title VII depending on the facts of a case.

The court then proceeded to apply that legal holding to the case. Reviewing de novo the denial of defendants' motions for judgment as a matter of law, the court noted that because the jury had found for plaintiff, judgment could only be granted for defendants if, "viewing the evidence in the light most favorable to [plaintiff]…a reasonable juror would have been *compelled* to accept the view of [defendants]."[10] The court found that this standard had not been met. The court specifically rejected the contentions that: (1) "Hispanic" was not a race; (2) even if it were, the evidence failed to demonstrate that Bermudez and plaintiff Barrella were of different races; and (3) qualified immunity protected Hardwick from liability.

With respect to the qualified immunity issue, qualified immunity shields public officials from liability only if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[11] The court found that although this case did present complicated issues, this issue was not one of them, as the jury found that Hardwick chose Bermudez because he was Hispanic and passed over Barrella because he was not.

The court stated that Hardwick did not claim that his choice was part of a lawful affirmative action program. Instead, the court found, Hardwick should have known that he was violating a clearly established right because discrimination based on Hispanic ethnicity had been illegal for decades. Additionally, while the issue of how to categorize "Hispanic" for purposes of Title VII had been unresolved until this holding, it had long been clear that discrimination based on Hispanicity was unlawful under Title VII, even if it had been unclear which protected class was being implicated. Last, the court noted that in any event, Hardwick's personal liability stemmed from §1981, not from Title VII.

> Although the district court had found that the jury should decide whether 'Hispanic' constituted a 'race' under Title VII, the Second Circuit held that this issue was in reality a legal issue of statutory interpretation.

Admission of Lay Opinions

The court then turned to defendants' unrelated argument that the judgment should be vacated because the district court violated Rule 701 of the Federal Rules of Evidence. During trial, the district court allowed the jury to hear testimony from individuals who opined about what motivated Hardwick's decision to promote Bermudez. To prevail on this argument, defendants had to demonstrate on appeal that the evidentiary rulings constituted an abuse of discretion that clearly prejudiced the outcome of trial.[12] For the reasons described below, the court found that the admission of lay opinions did constitute prejudicial error, and that the judgment therefore had to be vacated.

Rule 701(b) permits a nonexpert to give an opinion that is "helpful to clearly understanding the witness's testimony or to determining a fact in issue." The rule does not permit a lay witness to instead give an opinion that would "merely tell the jury what result to reach."[13] In this context, moreover, it does not allow for "naked speculation concerning the motivation for a defendant's adverse employment decision."[14]

Here, the court found that multiple witnesses had provided "naked speculation" about Hardwick's choices. The court reviewed the testimony of Freeport's former assistant police chief and of Hardwick's former chief of staff. The former police chief testified that "there might have been a component of race" in Hardwick's decision, and suggested that Hardwick promoted unqualified individuals based on their race. And yet, the court recounted, the same witness admitted that he had no personal knowledge of those individuals' qualifications or the criteria that Hardwick applied to his decisions. Similarly, the mayor's former chief of staff stated on the stand that race motivated Hardwick. The court noted again, however, that this witness lacked personal knowledge of Hardwick's reasoning. For example, the witness testified that Hardwick hired an unqualified person to be

the buildings superintendent based on his race, yet the witness admitted he did not know that person's qualifications. The court found that the admission of such testimony violated Rule 701 and constituted an abuse of discretion.

The court then addressed whether the district court's error was prejudicial. The Second Circuit noted that courts are "especially loath to regard any error as harmless in a close case," and found that this case was "factually very close."[15] At trial, defendants submitted evidence which suggested that Hardwick had nondiscriminatory motives for promoting Bermudez. He and Bermudez were longtime colleagues, and the court noted that the anti-discrimination laws do not prohibit cronyism, so long as it is not based on race or other unlawful animus, and if it does not have an adverse impact on protected classes (which plaintiff did not argue). The same laws also do not target hiring decisions based on political strategy, and here, Hardwick testified that it was politically advantageous to hire Bermudez, who lived in Freeport, rather than plaintiff, who did not.

The court also reviewed potential weaknesses in plaintiff's claims. It acknowledged, for example, that Hispanics in Freeport were underrepresented among the town's department heads, notwithstanding the mayor's alleged systematic preference for minorities. The court further found plaintiff's arguments about his superior qualifications to be overstated, particularly as the anti-discrimination laws do not require that the most qualified candidate be hired. Last, although the mayor did refer to Bermudez as the town's "first Hispanic" police chief, the court found that an employer's express preference for diversity is not necessarily unlawful, particularly as the Supreme Court has approved of certain affirmative action initiatives. Hardwick's remarks, the court found, may have resulted from a permissible calculation about "identity politics."

In light of this competing evidence and the jury's lengthy, five-day deliberation, the court found that the lay opinions may have tipped the scale in favor of plaintiff. It therefore vacated the judgment and remanded for a new trial. Although the court did not decide a remaining issue regarding whether Freeport could be held liable under a respondeat superior theory, it noted that the mayor exercised exclusive authority when appointing the police chief, which meant that the decision could have represented official municipal policy, opening the town up to liability.

Conclusion

It is unclear whether either Freeport or Hardwick will be held liable upon retrial now that inadmissible opinion testimony will be excluded. What is clear, however, is that based on the court's clarifying ruling, employers in the Second Circuit are on notice that decisions based on Hispanicity, which are not part of a lawful affirmative action initiative, can give rise to liability for racial discrimination under Title VII, just like under §1981.

1. *Vill. of Freeport v. Barrella*, 814 F.3d 594 (2d Cir. 2016).

2. *Barrella v. Vill. of Freeport*, 43 F.Supp.3d 136 (E.D.N.Y. 2014).

3. *Barrella*, 814 F.3d at 598.

4. See *Albert v. Carovano*, 851 F.2d 561, 572 (2d Cir. 1988) (en banc); see also *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987) ("There can be no question that [§1981's protection] includes persons like plaintiff who are of Puerto Rican descent.").

5. 42 U.S.C. §1981(a).

6. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

7. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 286-87 (1976).

8. 42 U.S.C. §2000e-2(a).

9. *Malave v. Potter*, 320 F.3d 321, 324 (2d Cir. 2003); *Krulik v. Board of Education*, 781 F.2d 15, 21 (2d Cir. 1986).

10. *Cash v. Cty. of Erie*, 654 F.3d 324, 333 (2d Cir. 2011) (emphasis in original) (internal quotation marks omitted).

11. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (internal quotation marks omitted).

12. *Marshall v. Randall*, 719 F.3d 113, 116 (2d Cir. 2013).

13. *Hester v. BIC Corp.*, 225 F.3d 178, 181 (2d Cir. 2000).

14. Id. at 185.

15. *Barrella*, 814 F.3d at 613 (quoting *Hester*, 225 F.3d at 185 (internal quotation marks omitted)).