PUBLICATION

Is Forum Shopping for Equal Rights on the Horizon?

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Race discrimination claims brought by members of the racial *majority* have long been recognized as legitimate claims under Title VII of the Civil Rights Act of 1964 (Title VII) and various state discrimination laws. However, courts have not settled on a consistent standard for evaluating the merits of these claims. Quite naturally, such lack of uniformity and simplicity in the interpretation and application of laws related to these claims may lead to some creative pleading and forum shopping among employment discrimination plaintiffs.

Generally, with regard to Title VII, courts apply the McDonnell-Douglas burden-shifting paradigm to these so-called "reverse race discrimination" cases in the same way that it is applied to traditional race discrimination cases: plaintiff creates a *prima facie* case of discrimination; the burden shifts to defendant to proffer a legitimate, non-discriminatory reason for the adverse employment action; and the burden then shifts back to plaintiff to demonstrate that the offered legitimate reasons are contrived.

Notably, the Sixth Circuit, like some other courts, has modified the McDonnell-Douglas standard to address claims of race-based discrimination brought by Caucasian plaintiffs. In traditional race discrimination cases, the first prong of the *prima facie* case merely requires a plaintiff to show that she is a member of a protected class. On the other hand, in cases of alleged reverse race discrimination, the Sixth Circuit has adopted a modified, heightened standard of proof for plaintiffs. To satisfy the first element of the *prima facie* case, a majority plaintiff must show that background circumstances exist supporting the suspicion that the defendant is "that unusual employer" who discriminates against the majority. Although the Sixth Circuit has not developed a bright line test for what constitutes sufficient background circumstances, the following have been held to meet the standard: 1) evidence of unlawful consideration of race as a factor in employment decisions in the past; 2) statistical information that reveals a relationship between promotion and hiring patterns and race; and 3) evidence that the individual making the employment decisions is a racial minority.

In contrast, some courts have refused to impose this higher burden and do not require a "background circumstances" showing for reverse discrimination plaintiffs. Analysis of reverse discrimination under Michigan's Elliot–Larsen Civil Rights Act (ELCRA), for example, mirrors the standard McDonnell-Douglas framework and rejects the background circumstances requirement for the first prong of the plaintiff's *prima facie* case.

A recent Sixth Circuit decision highlights this discrepancy. In *Martinez v. Cracker Barrel Old Country Store, Inc.*, 703 F.3d 911 (6th Cir. 2013), the Sixth Circuit affirmed dismissal of a reverse racial discrimination claim brought by a Caucasian employee pursuant to ELCRA. The plaintiff contended that Cracker Barrel engaged in "reverse discrimination" when it terminated her for violating company policy by making certain racially-driven comments. In support, the plaintiff proffered evidence that similarly-situated African Americans were treated more favorably than she and were not fired for making similar remarks. Although the plaintiff's claim ultimately failed under Michigan law, the Court made a point to note that this same claim of reverse racial discrimination under federal law would have required a showing of "background circumstances supporting the suspicion that the defendant is that unusual employer who discriminates against the majority." The court emphasized, however, that the plaintiff did not need to satisfy this heightened standard of proof because Michigan law does not require it.

Thus, although to no avail in this particular case, the *Martinez* plaintiff might have – like many other reverse discrimination plaintiffs – made a conscious effort to forum shop and plead her case in such a way that capitalized on the most plaintiff-friendly standard.

Note to defense attorneys: Know the law of your particular jurisdiction. Because the standard for evaluation of reverse race discrimination cases varies by court, plaintiffs might be tempted to engage in strategic forum shopping and to file both federal and state discrimination claims. Prepare your defense accordingly.

Note to employers: Ultimately, consistent application of workplace policies and procedures is essential. Despite what might be labeled a heightened standard for non-minority claimants under Title VII, reverse discrimination cases should not be conceived as a separate type of employment discrimination. Employers should be mindful of the fact that Title VII is available to all, regardless of the race, color, religion, sex or national origin of the alleged victim. Accordingly, an employer should thoroughly review its equal employment opportunity policies, any affirmative action initiatives, and any anti-discrimination policies to ensure that discrimination on the basis of racial majority status does not become an unintended by-product of its compliance efforts. Further, employers should treat internally-reported race discrimination allegations by Caucasian employees with the same urgency and gravity as allegations of discrimination made by racial minorities. Failure to do so, in and of itself, could constitute disparate treatment under Title VII. Finally, employers should avoid statements and actions that might be construed as indicative of prejudice or preference with respect to all applicants and employees.