JUDGE'S COPY

FILED
CLERK
00 JUL 11 AM 10 14
CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

DARRYL SMITH,	*	
	*	
Plaintiff,	*	3-99-CV-10032
	*	
v.	*	
	*	
DAVENPORT COMMUNITY SCHOOL DISTRICT,	*	ORDER ON POST-TRIAL MOTIONS
	*	
Defendant.	*	

The Court has before it several post-trial motions: Defendant's Renewed Motion for Judgment as a Matter of Law or, in the Alternative, Request for a New Trial; Plaintiff's Motion for Equitable Relief; and Plaintiff's Motion for Attorneys' Fees and Costs. The motions have all been briefed and resisted and are considered fully submitted.

I. Defendant's Motion Pursuant to Rules 50(b) & 59(a)[1]

Defendant argues that it is entitled to judgment as a matter of law, or in the alternative, a new trial because: (1) Plaintiff failed to prove his prima facie case, (2) Plaintiff failed to prove pretext, and (3) the Court made erroneous evidentiary rulings.

Pursuant to Rule 50, a district court may grant judgment as a matter of law to a moving party following trial if the court finds the nonmoving party "has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *See Reeves v. Sanderson Plumbing Prods., Inc.*, --- U.S. ----, 120 S. Ct. 2097, 2109 (2000) (quoting Fed. R. Civ. P. 50(a)(1)); *Henderson v. Simmons Food Inc.*, --- F.3d ----, No. 99-1914, 2000 WL 772716, *2 (8th Cir. 2000). "A party seeking to overturn a jury verdict based on the

[1]Unless otherwise indicated, all references to rules are to the Federal Rules of Civil Procedure.

COPIES TO COUNSEL
MAILED ON 7-12-00
BY

87

insufficiency of the evidence faces an onerous burden." *Id.* at *3 (citing *United States v. Big D Enterprises, Inc.*, 184 F.3d 924, 929 (8th Cir.1999), *cert. denied*, --- U.S. ----, 120 S. Ct. 1419, 146 L. Ed. 2d 311 (2000)). "In evaluating a Rule 50 motion, the trial court must 'assume as proven all facts that the nonmoving party's evidence tended to show, give her the benefit of all reasonable inferences, and assume that all conflicts in the evidence were resolved in her favor.'" *Id.* (quoting *Hathaway v. Runyon*, 132 F.3d 1214, 1220 (8th Cir.1997)). A court should grant a Rule 50 motion "'[o]nly when there is a complete absence of probative facts to support the conclusion reached' so that no reasonable juror could have found for the nonmoving party." *Hathaway*, 132 F.3d at 1220 (quoting *Lavender v. Kurn*, 327 U.S. 645, 653 (1946)).

Under Rule 59(a), a new trial is appropriate when the first trial, through a verdict against the weight of the evidence, an excessive damage award, or legal errors at trial, resulted in a miscarriage of justice. *See Gray v. Bicknell*, 86 F.3d 1472, 1480 (8th Cir. 1996) (citations omitted).

First, Defendant alleges Plaintiff failed to prove his prima facie case by failing to prove that: Plaintiff was qualified for the position at issue, and Defendant had a widespread custom of race discrimination. Plaintiff brought his race discrimination claim pursuant to 42 U.S.C. § 1981. To prove a prima facie case of race discrimination in a failure to promote case brought under section 1981, the plaintiff must show: he is a member of a protected group; he was qualified and applied for a promotion to an available position; he was rejected; and similarly situated employees, not part of the protected group, were promoted instead. *See Shannon v. Ford Motor Co.*, 72 F.3d 678, 682 (8th Cir. 1996).

Finally, because a federal action to enforce rights under section 1981 against a school district must be brought pursuant to 42 U.S.C. § 1983, a plaintiff must prove that the defendant had a widespread custom of race discrimination that violated the law and caused his injury. *See Artis v.*

Francis Howell North Band Booster Ass'n, Inc., 161 F.3d 1171, 1181 (8th Cir. 1998). Specifically, a plaintiff must prove: the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees; deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and that plaintiff was injured by acts pursuant to the governmental entity's custom, i.e., that the custom was the moving force behind the constitutional violation. *See Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 653 (8th Cir. 1998) (citations omitted).

Under the deferential standard noted above, Plaintiff presented evidence legally sufficient for a reasonable jury to find he was qualified for the Utility Worker II position, including evidence that: he had worked for two years as a Utility Worker I, he had experience performing Utility Worker II tasks, he received favorable reviews, and two of his supervisors thought he was promotable. Likewise, Plaintiff presented sufficient evidence for the jury to find that Defendant had a widespread custom of race discrimination under *Springdale*, including evidence that: all Utility Worker II positions are held by whites except one; no non-white person has been promoted to a Utility Worker II position in twelve years; the selection process varied from promotion to promotion, sometimes conducted by a committee, sometimes involving a test, with much discretion left to the various individuals involved as to how much weight to give any particular factors; Plaintiff was not considered for both Utility Worker II vacancies in 1997, despite writing to a supervisor that he wished to be considered for both positions; Plaintiff's personnel file contained reprimands from supervisors with references to Plaintiff talking to a "white, blonde female"; racial displays and pictures, including a fake bloody glove, a black doll hung from the ceiling by a cord wrapped around its neck, a caricature of a black boxer, and a photograph of two white employees

dressed for Halloween in tribal costume, were displayed by employees at various times in the employee break room from 1995 until the summer of 1997; supervisors ignored the displays or thought some were "cute"; various charges of race discrimination by other employees put supervisors on notice; and supervisors did not respond to Plaintiff's internal complaint about race discrimination in the promotion process. Taking the evidence in a light most favorable to the jury's verdict, *see Henderson*, 2000 WL 772716 at *3, the Court finds that Plaintiff presented sufficient evidence for a reasonable jury to find that Plaintiff proved his prima facie case. The Court also finds the verdict did not result in a miscarriage of justice.

Second, Defendant alleges that Plaintiff failed to prove pretext, specifically, that race was the motivating factor[2] behind Defendant's decision not to promote him. As the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies in section 1981 race discrimination cases, if a plaintiff proves his prima facie case, and the defendant presents a legitimate non-discriminatory reason for the action, the plaintiff must point to evidence which, if believed, would expose the employer's reason as a mere pretext for intentional discrimination. *See Shannon*, 72 F.3d at 682. Defendant argued that it did not hire Plaintiff because he was not the most qualified applicant for either Utility Worker II position – he was not mechanically inclined, nor did he have woodworking experience.

Again, under the deferential standard noted above, Plaintiff presented evidence legally sufficient for a reasonable jury to find Defendant's proffered explanation for its promotional practices was not truthful, that neither mechanical ability nor woodworking was an actual job

---

[2]Courts state both that race must be *a* motivating factor, *see Hughes v. Ortho Pharm. Corp.*, 177 F.3d 701, 705 (8th Cir. 1999) ("a factor"); *Swampshire v. Baer*, 865 F.2d 948, 952 (8th Cir. 1989) (citing *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982)), *cited in* Eighth Cir. Model Jury Instr. 5.21 (1999), and *the* moving force, *see Springdale*, 133 F.3d at 653. It is clear, however, that the discrimination need not be the "but for" cause of the adverse action. *See Edwards v. Jewish Hosp. of St. Louis*, 855 F.2d 1345, 1348 (8th Cir. 1988).

requirement. Plaintiff offered evidence including that: Utility Worker II employees were explicitly told not to attempt mechanical repairs on equipment that broke in the field; Utility Worker II employees did not consider fixing broken equipment part of their job description; Defendant did not use objective methods to ascertain mechanical ability or woodworking experience, instead relying on the applicants' own evaluations of their strengths and weaknesses; and Plaintiff had woodworking experience as a Utility Worker I and he worked side-by-side with the person promoted to the "woodworking" Utility Worker II position to refinish 300 auditorium chairs. Taking the evidence in a light most favorable to the jury's verdict, *see Henderson*, 2000 WL 772716 at *3, the Court finds that Plaintiff presented sufficient evidence for a reasonable jury to find that Plaintiff proved pretext. The Court also finds there was no miscarriage of justice.

Third, Defendant alleges the Court made erroneous evidentiary rulings, specifically, that the Court: did not admit evidence of Plaintiff's previous convictions, and did admit evidence of racially derogatory statements, pictures, and objects made by co-workers between 1995 and 1997.

In its ruling on the admissibility of Plaintiff's prior convictions, the Court found that Federal Rule of Evidence 609(a)(1) applied, and that the prior convictions should be excluded because the probative value of admission of the conviction did not outweigh its prejudicial effect under Rule 403.

The Court found that Federal Rule of Evidence 609(a)(2) did not apply to Plaintiff's prior convictions because the elements of burglary and official misconduct do not require proof of fraud or deceit. *See* 28 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 6135 (1998); 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 609.03[1] (1998) (cited in *Fletcher v. City of New York*, 54 F. Supp. 2d 328, 331 (S.D.N.Y. 1999)); 720 ILCS 5/33-3; 720 ILCS 5/19-1. There is a question as to whether a district

court should look simply at the elements of the crime to decide whether a crime fits into Rule 609(a)(2), or whether the court should look beyond the elements to the circumstances of the crime in question. *See* 28 Wright & Miller § 6135. This Court rejects the second approach.

> One of the rationales for admitting conviction evidence to impeach is that there are no serious doubts concerning whether the witness engaged in misconduct since the conviction rests on a showing that satisfied the most demanding burden of proof. . . . Since other facts or circumstances cannot be deemed established by the conviction, an approach basing admissibility on those other facts or circumstances invites disputes over their existence or meaning. Such disputes will frequently leave doubts, suggesting this approach is particularly inappropriate for a rule that leaves no discretion for the trial court.

28 Wright & Miller § 6135 (citations omitted). This Court can imagine such disputes in the instant case. According to the statute, "[a] public officer or employee commits misconduct when, in his official capacity, he commits any of the following acts . . . Knowingly performs an act which he knows he is forbidden by law to perform . . . ." 720 ILCS 5/33-3(b). Defendant argues the official misconduct conviction at issue is a crime of dishonesty since as a police officer, Plaintiff breached his public trust by committing a burglary. While an appealing argument, the circumstances surrounding the burglary are subject to speculation. Was Plaintiff on duty? Was Plaintiff in uniform? Did he use his position as a police officer to gain entrance to the premises? Why was he stealing? Certainly these questions are relevant to the dishonest nature of the official misconduct. Without such a collateral inquiry, Defendant would automatically subject police officers to a stricter impeachment standard than others by virtue of the fact that they have been convicted of official misconduct, which can certainly encompass a wide variety of acts, because they would always be guilty of a "breach of public trust."[3] This Court finds the more prudent course is to look only to the

[3]Additionally, "official misconduct" does not seem to fit automatically within the category of "*crimen falsi*, commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." Fed. R. Evid. 609, advisory committee cmt. (1990 amendment).

elements of the crimes. *See, e.g.*, *United States v. Elk*, 682 F.2d 168, 170 n.3 (8th Cir. 1982) (stating in dicta that theft is not a crime of dishonesty or false statement); *but see United States v. Yeo*, 739 F.2d 385, 388 (8th Cir. 1984) (suggesting in dicta that while theft is not a crime of dishonesty or false statement, theft may be admissible if the crime was committed by fraudulent or deceitful means).[4]

As to Rule 609(a)(1), in *Bock Laundry* the Supreme Court held that the Rule requires a judge to permit impeachment of a *civil* witness with evidence of prior felony convictions *regardless* of any unfair prejudice to the witness or the party offering the testimony. *See Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989). However, the 1990 amendment to Rule 609(a) explicitly incorporates the Rule 403 balancing test into 609(a)(1). As the advisory committee notes state:

> The amendment reflects the view that it is desirable to protect *all* litigants from the unfair use of prior convictions, and that the ordinary balancing test of Rule 403, which provides that evidence shall not be excluded unless its prejudicial effect substantially outweighs its probative value, *is* appropriate for assessing the admissibility of prior convictions for impeachment of *any* witness other than a criminal defendant.

Fed. R. Evid. 609, advisory committee cmt. (1990 amendment) (emphasis added). The notes also make clear that "danger of unfair prejudice from the use of prior convictions in *not* confined to criminal defendants." *Id.* (emphasis added). Therefore, this Court finds that its ruling incorporating the Rule 403 balancing test into Rule 609(a)(1) was correct, and evidence of Plaintiff's conviction was correctly excluded. In addition, the Court does not find that Plaintiff placed his character into issue at any stage of the trial such that the convictions should have been allowed in as rebuttal.

---

[4]The Court also notes that Plaintiff's guilty plea was entered over ten years before trial, and only the fact that the sentencing order in the matter was filed nine years and nine months before trial kept the conviction from being presumptively excluded under 609(b).

Defendant also claims that the Court erred in admitting irrelevant evidence of the racially derogatory displays and pictures because Plaintiff did not bring a hostile work environment claim. The Court finds that the evidence was directly relevant to Plaintiff's burden of proving the *Springdale* factors, specifically the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees. The Court does not find legal error in its prior evidentiary rulings.

Pursuant to Rule 50(b)(1)(A) and Rule 59(a), this Court allows the judgment to stand.

II. Plaintiff's Motion for Equitable Relief

"A court may exercise its discretion to fashion injunctive relief to remedy the effects of racial discrimination." *EEOC v. HBE Corp.*, 135 F.3d 543, 557 (8th Cir. 1998) (citing *Briscoe v. Fred's Dollar Store*, 24 F.3d 1026, 1028 (8th Cir.1994)). Provisions of an injunction may be set aside, however, if they are broader than necessary to remedy the underlying wrong. *See id.* In this case, the underlying wrong involves race discrimination in promotional decisions within Defendant's Maintenance Department.

To remedy the effects of the discrimination as to Plaintiff, the Court finds appropriate the immediate instatement of Plaintiff to the position of Utility Worker II in Defendant's Maintenance Department at the rate of $14.72 per hour. In addition, his seniority, benefits, and entitlements should be adjusted as if he had been promoted to one of the two 1997 Utility Worker II positions.

In addition, Defendant is permanently enjoined from continuing any discriminatory practices in promotions, and it is strongly recommended that Defendant develop and implement objective and consistent criteria and practices with regard to departmental promotions. It is also strongly recommended that Defendant require all Maintenance Department employees to attend regular educational programs on employment discrimination. Such programs encourage

understanding among all employees, supervisory and non-supervisory, as to some of the causes and effects of discrimination, and they contribute to a workplace atmosphere free of such discrimination. And, of course, as Defendant is well aware, education is less costly than litigation.

III. Plaintiff's Motion for Attorneys' Fees[5]

Plaintiff requests fees in the amount of $61,693.25 for a total of 430.55 hours worked. Defendant resists, arguing that the fee award should be reduced for limited success and improper time entries.

"If a lawsuit results in only limited success, then an award of fees that is unadjusted to make it proportional to the relief obtained may well be excessive." *Parton v. GTE North, Inc.*, 971 F.2d 150, 156 (8th Cir. 1992) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)). Defendant argues that the award of fees should be reduced to 60% of the requested amount because Plaintiff only prevailed on one out of five original claims and Plaintiff was only awarded 46% of damages sought in closing argument.

While this Court will reduce the award for limited success, this Court will not punish Plaintiff's attorneys for vigorously advocating on his behalf and attempting to secure from the jury what they thought was appropriate compensation for their client. Plaintiff did prevail on one of two claims brought before the jury, and there was some overlap between the claims. The case was factually difficult, with no direct evidence of discrimination, and legally challenging, not being a standard Title VII employment discrimination case, as it involved claims under sections 1981 and 1983. Also, the case was aggressively defended. Keeping in mind that "[t]he function of an award

---

[5]Pursuant to Local Rule 54.1(C) and Rule 54(d)(1), any resistance to the taxation of costs is to be filed with the Clerk of Court within ten days of the filing of the Bill of Costs. The Clerk will then tax the costs in an amount he deems appropriate and either party may seek court review of the Clerk's action on motion served within five days. As the issue of costs is not properly before the Court, only attorneys' fees will be addressed at this time.

of attorney's fees [under section 1983] is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel," *see Gross v. City of Little Rock, Arkansas*, 151 F.3d 861, 865 (8th Cir. 1998), the award will be reduced by 10% for limited success.

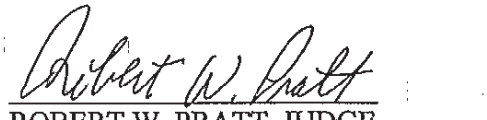
The Court finds that the Plaintiff's supplement to its fee application cured the cluster billing and vagueness of the improper time entries and will not further reduce the award on this basis.

IV. Conclusion

The following is **HEREBY ORDERED**:

1. Defendant's Renewed Motion for Judgment as a Matter of Law or, in the Alternative, Request for a New Trial (# 69) is DENIED;
2. Plaintiff's Motion for Equitable Relief (# 71) is GRANTED in part, and DENIED in part, specifically:
   a. Plaintiff should be immediately instated to the position of Utility Worker II in the Maintenance Department at an hourly wage of $14.72;
   b. Plaintiff's seniority, benefits, and entitlements should be adjusted as if he had been promoted to one of the two 1997 Utility Worker II positions; and
   c. Defendant is permanently enjoined from continuing any discriminatory practices in promotions.
3. Plaintiff's Motion for Attorneys' Fees and Costs (# 73) is GRANTED in part, and DENIED in part. Judgment is entered in the amount of $55,524 in attorneys' fees to Plaintiff, plus post-judgment interest as allowed by law.

Dated this 11th day of July, 2000.



ROBERT W. PRATT, JUDGE
UNITED STATES DISTRICT COURT