

## Lessons from a Florida Franchise Race Discrimination Case

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There appears to be a sharp increase in lawsuits filed against franchisors alleging race discrimination under Section 1981 of the Civil Rights Act of 1866 (codified at 42 U.S.C. § 1981, "Section 1981"). This is a Reconstruction-era statute providing all people, including recently freed slaves, with the same right as white people to make and enforce contracts. In the 1970s, plaintiffs' lawyers began to use the statute to prosecute discrimination in the workplace based on an employee's race. While race-based discrimination was already made illegal by Title VII of the Civil Rights Act, Section 1981 was attractive to plaintiffs' lawyers because it: (1) has a longer statute of limitations (four years versus approximately one year); (2) does not require employees who sue under this claim to file a charge of discrimination with the Equal Employment Opportunity Commission or administrative agencies before instituting such an action in court (unlike Title VII); (3) has no requirement for a minimum number of employees (unlike Title VII); and (4) has unlimited compensatory and punitive damages (unlike Title VII), while still providing for an award of attorney fees. Therefore, plaintiffs' employment lawyers began to add Section 1981 claims to their Title VII race claims, at a minimum, to pursue greater damages than would otherwise be available under just Title VII.

A recent decision out of a federal court in Florida offers an opportunity to discuss how courts generally analyze these cases in the non-employment context. In *Elbanna v. Captain D's*, 2009 U.S. Dist. LEXIS 11425, the plaintiff alleged that he was rejected as a franchisee because he was Arab. He brought claims seeking damages from Captain D's for alleged violation of Section 1981, among other claims. He had been approved by Captain D's to be a franchisee in 2005 to develop a restaurant in the Jacksonville area. However, two sites Elbanna selected at that time were rejected by the defendant as unsuitable due to either poor demographics or because an existing structure was too large to be converted to a standard Captain D's restaurant. By 2006, new senior management came to Captain D's. With this change came new requirements to be a franchisee in its system. For example, it increased its liquidity and net worth requirements. It also instituted a new policy that it would inspect the restaurants of prospective franchisees who operated existing restaurants with another company to determine the quality of operational performance in those restaurants.

In 2007, a Captain D's franchisee in Jacksonville sought to sell two existing restaurants and Elbanna contracted to buy them. Captain D's informed Elbanna that he would need to submit a new application because of the passage of time and because of the change in its net worth and liquidity requirements. After Elbanna submitted a new application, Captain D's sent one of its senior managers to conduct an unannounced inspection of Elbanna's existing restaurant operations. The inspections basically consisted of eating meals at three of Elbanna's restaurants and taking notes. After Elbanna's application was considered by Captain D's franchise committee, the defendant informed Elbanna that it could not approve the contract to purchase the existing Captain D's restaurants due to, among other reasons, "the observed quality of the operations of your existing restaurants."

In response to Plaintiff's lawsuit, Captain D's filed a motion for summary judgment, wherein it asked the court to dismiss the case because the evidence of discrimination was insufficient for a jury to consider. The court granted Captain D's motion. In analyzing Elbanna's Section 1981 claim, the court noted that, in order to recover, a plaintiff must demonstrate that he is a member of a protected class and that he suffered intentional discrimination because of this status which affected him in the making and performance of a contract. To

establish a prima facie case of discrimination circumstantially (where there's no direct evidence of intentional discrimination), Elbanna must show that: (1) he belongs to a protected class; (2) he was qualified, meeting Captain D's legitimate expectations with regard to operating a transferred franchise; (3) he suffered an adverse action; and (4) Captain D's treated similarly situated persons outside his classification more favorably.

According to the court's written opinion, if Elbanna establishes a prima facie case creating a presumption of intentional racial discrimination in connection with the 2007 franchise denial, the burden then shifts to Captain D's to rebut the presumption by articulating a legitimate, non-discriminatory reason which is clear, reasonably specific and worthy of credence. *Hall v. Alabama Ass'n of Sch. Bds.*, 326 F.3d 1157, 1166 (11th Cir. 2003). At this stage, Captain D's has a burden of production, not of persuasion; "[t]he defendant's burden, like Plaintiff's prima facie burden, is easily fulfilled," and defendant does not have to persuade a court that it was actually motivated by the reason advanced. *Hall*, 326 F.3d at 1166 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). The Eleventh Circuit has described this burden on the defendant as "exceedingly light." *Batey v. Stone*, 24 F.3d 1330, 1334 (11th Cir. 1994).

If Captain D's satisfies its burden, the presumption against the defendant is rebutted, and Elbanna must show that the defendant's proffered reason is merely pretext for an illegal motive. At this phase, Elbanna must "introduce significantly probative evidence showing the asserted reason is merely pretext for discrimination." *Sheppard v. Sears, Roebuck & Co.*, 391 F. Supp. 2d 1168, 1180 (S.D. Fla. 2005). The court's inquiry in this third step in the analysis "proceeds to a new level of specificity..." *Brooks v. County Comm'n of Jefferson County, Ala.*, 446 F.3d 1160, 1162 (11th Cir. 2006). "The plaintiff may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the [defendant] or indirectly by showing that the [defendant's] proffered explanation is unworthy of credence." *Brooks*, 446 F.3d at 1163.

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Plaintiff may defeat a motion for summary judgment by undermining the credibility of a defendant's explanations for its actions without directly showing that defendant harbored an illegal motive. *Arrington v. Cobb County*, 139 F.3d 865, 875 (11th Cir. 1998); *Barr v. City of Eagle Lake*, No. 8:06-cv-1568-T-27TGW, 2008 WL 717821, at \*7 (M.D. Fla. March 17, 2008).

[P]roof that a defendant's articulated reasons are false is not *proof* of intentional discrimination; it is merely evidence of intentional discrimination. However, evidence of intentional discrimination is all a plaintiff needs to defeat a motion for summary judgment. That evidence must be sufficient to create a genuine factual issue with respect to the truthfulness of the defendant's proffered explanation.

*Howard v. BP Oil*, 32 F.3d 520, 525 (11th Cir. 1994) (emphasis in original). Plaintiff may do this "by pointing to 'weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions' in the proffered explanation." *Brooks*, 446 F.3d at 1163 (citing *Jackson v. Alabama State Tenure Comm'n*, 405 F.3d 1276, 1289 (11th Cir. 2005)).

"A reason is not pretext for discrimination `unless it is shown *both* that the real reason was false, and that discrimination was the real reason." *Brooks*, 446 F.3d at 1163 (quoting *St. Mary's Honor Center v. Hicks*, 509

U.S. 502, 515 (1993)). Elbanna cannot establish pretext merely by questioning the wisdom of Captain D's reasons, at least not where the reason is one that might motivate a reasonable franchisor. *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1339 (11th Cir. 2000). Elbanna must meet Captain D's proffered reason - restaurant operations ability - head on and rebut it. *Austin v. Progressive RSC, Inc.*, 265 Fed. Appx. 836, 846 (11th Cir. 2008). Thus, Elbanna must do more than establish a prima facie case and deny the credibility of defendant's witnesses. *Howard*, 32 F.3d at 525-26 (citation omitted). "Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact" that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. *Brooks*, 446 F.3d at 1162. It is the Court's responsibility "for drawing the lines on what evidence is sufficient to create an issue on pretext." *Rojas*, 285 F.3d at 1344.

The court assumed, without deciding, that Elbanna established a prima facie case. In rebuttal, Captain D's proffered a legitimate nondiscriminatory reason for not approving Elbanna in 2007 for the franchise transfers - unsatisfactory operations, defeating the presumption of discrimination. The court examined whether Elbanna produced evidence sufficient for a reasonable jury to find that the proffered reason was pretext of intentional discrimination based upon Elbanna's race. Elbanna attempted to rebut Captain D's proffered reason for denial - that his existing restaurant operations were not up to Captain D's standards - by merely disputing whether Captain D's inspection observations were accurate and truthful, contending that "direct evidence contradicts Captain D's witness."

However, the court correctly observed that the issue was whether Captain D's perception of Elbanna's performance, accurate or not, was the real reason for denying him the opportunity to purchase the franchises in 2007. The question was not whether Captain D's made an erroneous decision; it was whether the decision was made with discriminatory motive. See *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir. 1995). "The existence of competing evidence about the objective correctness of a fact underlying a defendant's proffered explanation does not in itself make reasonable an inference that the defendant was not truly motivated by its proffered justification." *Little v. Republic Refining Co.*, 924 F.2d 93, 97 (5th Cir. 1991). The court stated:

The Court does not re-examine or second-guess Captain D's business decisions; rather the Court's inquiry is limited to whether Captain D's gave an honest explanation of its behavior. See *E.E.O.C. v. Total System Servs., Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000). This is not the forum to litigate whether or not Elbanna was in fact a good restaurateur. Where pretext is an issue, "the question the factfinder must answer is whether [defendant's] proffered reasons were 'a cover-up for a ... discriminatory decision.'" The Court reviews Captain D's decision for discrimination, not soundness.

The court found "[n]othing in the record indicates that Captain D's singled out Elbanna for increased review or inspections of his other restaurant operations." Further, the judge wrote "different evaluations of his restaurants by different entities does not establish pretext." The final decision, the court wrote, was made by the company's franchise committee in consideration of its investigation reports. There was no evidence of bad faith on the part of the management persons who inspected the restaurants and the committee's decision not to verify the reports' accuracy does not establish pretext. *Hawkins v. Ceco Corp.*, 883 F.2d 977, 980 n.2 (11th Cir. 1989).

In this case, Elbanna was adamant that he was a good restaurateur. He offered affidavits of others who stated that he did a good job with his restaurants. But, as the court noted, Section 1981 cases are not about differences of opinion; they are about race discrimination. The burden always remains with the plaintiff to prove that race discrimination was the real reason for the challenged action.