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CAN A WHITE CONSTRUCTION WORKER SUE FOR REVERSE DISCRIMINATION?

By Attorney Jonathan Sauer

I. INTRODUCTION.

Here's what happened. A white male construction worker, Terry Deets, a union crane oiler, was terminated by a general contractor on a federally-assisted state bridge project crossing the Mississippi River, connecting Illinois to Missouri. When asked why he was terminated, the general contractor's super, Mr. Todt, purportedly told him: "'[m]y minority numbers aren't right. I'm supposed to have 13.9 percent minorities on this job and I've only got 8 percent." (Mr. Todt denied having made that statement.) When Mr. Deets collected his last paycheck that very same day, *another* of the general contractor's superintendents said to Mr. Deets that he was "sorry to hear about this minority thing." A minority was hired on July 18, 2012 to replace Mr. Deets only one day after his termination on July 17, 2012.

His employment was complicated. Between May and December of 2012, he was hired and laid-off several different times and terminated twice, all as to this one project. He worked on three different kinds of cranes. He was a union member and the applicable collective bargaining agreement provided that a worker lost seniority on a machine when it was shut down for a week or longer. Arguably, the crane he was working on before his termination was shut down for a week or more, although this issue, along with many others, was contested by the general contractor.

He sued for reverse discrimination in Federal District Court, which found against him. But, it's important to note that this decision wasn't after a trial. It was through the mechanism of a motion for summary judgment, which is a legal application submitted to the court with a factual affidavit along with a legal brief seeking to end the case. In this case, such motion was filed by the Defendant. By rule, such a motion should only be granted when it is established that 'there are no genuine issues of material facts and the moving party is entitled to judgment as a matter of law' (this from an applicable Rule.) My own experience has been that an opposing party's establishing even just *one* material fact may be sufficient to prevent the allowance of such a motion.

The District Court concluded that Mr. Deets had not offered any direct "smoking gun" evidence that he was fired because of his race. The Court found that Mr. Deets's contentions concerning the super's statements about "minority numbers" was not direct evidence of discrimination because it wasn't clear that the statement referred specifically to Mr. Deets's

layoff but probably applied more to issues such as his potential for rehiring. The District Court found that there were no "fishy circumstances" present and that Mr. Deets was hired and fired in accordance with the applicable collective bargaining agreement.

He appealed to the Seventh Circuit Court of Appeals.

The name of the case is Deets v. Massman Construction Company *et al*.

II. MASSACHUSETTS WOMEN AND MINORITY BUSINESS REQUIREMENTS IN PUBLIC CONSTRUCTION.

Before we get to the decision in this case, which concerned the application of federal law in a federal court, a word on Massachusetts law on this subject. Whatever initials are assigned to them – DBE's or MBE's – female and minority requirements in Massachusetts public work are a reality. Sometimes they are mandatory requirements. Sometimes they are identified as only 'goals'. Some owners take these *very* seriously. I remember one matter I had where a state agency fined a general contractor I represented almost sixty thousand dollars because the listed 'MBE' didn't turn out actually to be a one hundred percent MBE. This, at least, by that Agency's determination. I've seen contract documents which state that a failure to meet these requirements/goals can be grounds for rejecting otherwise responsive and responsible bids and as serving as grounds for termination of contract when they aren't met.

Irrespective of what percentage of contractors/subcontractors working on a project are DBE's or MBE's, there are often requirements/goals for specific percentages of minority and female employees for the general contractor – such as occurred here – and for subcontractors. General contractors, with some justification, complain that where filed subbidders bid directly to the owner and do not have the same relationships with general contractors that general contractors have with 'Item 1' subcontractors, exactly how is a general contractor going to compel any particular filed subbidder to meet/maintain these percentages? And, as to actual DBE and MBE contractors/subcontractors, over the years I have heard numerous general contractor complaints that there is simply an insufficient pool of such subcontractors to pick from, particularly as to DBE subcontractors.

As to the tyranny of government and its indifferent and frequently brutal bludgeoning of its own citizens, I am reminded of two quotations.**

The first is from George Orwell's "Animal Farm", an allegorical story about a group of animals who oust the humans from the farm on which they live. This, only to find that running the farm themselves still resulted in a brutal tyranny of their own creation. The following statement is a proclamation by the pigs, who controlled the government at the animal farm: "All animals are equal, but some animals are more equal than others."

The second is from the British historian Lord Acton: "Power tends to corrupt and absolute power corrupts absolutely."

Such philosophical digression concluded, the following are some of the Massachusetts statutory legal requirements:

M.G.L.A. 7C § 6. Affirmative marketing program to ensure fair participation of minority-owned and women-owned businesses on capital facility projects and state assisted building projects, provides, in pertinent part:

> "(a) The general court finds that: (1) the Massachusetts commission against discrimination conducted hearings and investigations which documented a history of discrimination against minorities and women in the commonwealth; (2) and in 1994, the executive office of transportation and construction produced a disparity study which documented a history of discrimination against minority and women owned businesses, in which the commonwealth's agencies were participants; (3) this discrimination against minorities and women currently affects the use of minority and women owned businesses in state contracting; (4) the commonwealth has a compelling interest in promoting the use of minority owned business and women owned businesses through the use of the available and qualified pool of minority and women owned businesses; (5) it is the policy of the commonwealth to promote equality in the market and, to that end, to encourage full participation of minority and women owned businesses in all areas of state contracting, including contracts for construction, design, goods and services; and (6) in order to advance that policy, the commonwealth shall include language in all state construction contracts and state assisted construction contracts setting forth the participation goals of minority and women workers to be employed on each such contract and the processes and procedures to ensure compliance with those workforce participation goals, including reporting and enforcement provisions."

Another such statute:

M.G.L.A. 7 § 61. Powers and duties of supplier diversity office, provides, in pertinent part:

> ". . . (i) SDO may encourage state contract awarding authorities to seek to increase the incidence of joint ventures between nonminority state contractors and minority and women and veteran contractors, by specifically pointing out that such arrangements

would constitute one method of partially meeting affirmative action requirements imposed upon both nonminority state contractors and the state. The director of affirmative action shall be kept informed of actions taken under this provision. SDO shall follow advertisements for construction work by public bodies in the commonwealth, shall notify minority and women and veteran general contractors and subcontractors of the bid opening dates for the approximate amount of the contract and subcontract work being bid, may assist them in securing bonds and in bidding for that construction work and shall initiate a program to help qualified minority persons and women to get started as small business firms in the construction field by helping to arrange joint ventures with qualified general contractors and subcontractors and by arranging for administrative and accounting assistance to help them carry out their subcontract and general contract obligations during the period of contract performance."

III. APPLICABLE FEDERAL LAW AS TO THE CASE UNDER REVIEW.

The case at issue dealt with claims under two federal statutes, being 42 U. S.C., s. 2002e-2 and 42 U.S.C., s. 1981.

42 U.S. Code § 2000e–2 - Unlawful employment practices provides:

"(a) Employer practices It shall be an unlawful employment practice for an employer **. . . (2)** to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

And, 42 U.S. C., s. 1981 provides:

" (a) Statement of equal rights All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

IV. THE DECISION.

One has to keep in mind that Mr. Deets never truly got his day in court, if this is defined as a trial where witnesses and evidence are presented to a jury of his peers, which jury then decides the facts in the case. Summary judgment motions are decided before trial commences and are often decided *well* before trial commences. And, no jury is involved with their allowance.

The Court of Appeals stated that based on the super's statement about 'minority numbers':

". . . it does not take any inference to conclude that Deets was laid off because he was not a minority. That race was the factor that led to Deets's termination is clear on the face of Todt's statement. It is possible that a jury would credit Todt's denial that he ever made that statement, but that credibility determination may not be resolved at summary judgment."

The Defendant contended at oral argument that the motivation behind Mr. Deets's lay-off was immaterial because he was not entitled to work on the Liebherr crane when it went back into service based on the provisions of the applicable collective bargaining agreement. Both parties agreed that Mr. Deet lost his seniority on that machine when it went out of service per the terms of that collective bargaining agreement. But, the Court held:

". . . just because Deets was not entitled to that position does not permit MTA to lay him off because of his race. Title VII applies even to at-will employment and does not permit an employer either to fail to hire or to fire workers based on race."

The Court of Appeals also found that the District Court had erred as a matter of law when it concluded that there was insufficient circumstantial evidence to permit a reasonable juror to conclude that Mr. Deets was laid-off because of his race. According to this appellate Court, Mr. Deets had assembled sufficient "scraps of circumstantial evidence" to allow the trier of fact (**ED:** in this case, a jury) to conclude that discrimination more likely than not was behind the adverse action. In this case, these scraps included the "minority numbers" statement and the "sorry to hear ' statement. Also, the Court found that Todt had fired Mr. Deets knowing that the general contractor was out of compliance with its minority participation goals. And, the general contractor hired Green, a racial minority, to work on the Liebherr crane the next day after the termination of Mr. Deets.

The Court of Appeals reversed the judgment of the District Court and then sent the case back to the District Court for further proceedings.

V. CONCLUSION.

When I finished law school towards the end of the antediluvian times***, it was not uncommon for me to read in the help wanted ads in the local legal newspaper phrases such as 'minorities and women encouraged to apply'. Some of the ads were stronger in tone, to the effect that 'we want women and minorities to apply.' Legitimate inferences from such statements could be 'white guys should take a hike.'

Was this fair? (Especially, to those, such as myself, who are multiple X chromosome-challenged?)**** Can one form of unjust tyranny ever be justified to erase a previous form of unjust tyranny? Put another way, can *this* end justify *those* means?

This decision doesn't mean that Mr. Deets won his case. Whether he will ultimately win at trial or lose at trial has not been established because the judgment appealed came after proceedings where there had been no trial. Certain holdings in this decision seem favorable to Mr. Deets's claims and to providing some level of fairness to the rights of white people.

The only thing that is sure is that Mr. Deets will be entitled to have his rights determined at trial.

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* A *'squib'* is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a '*squib'* as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses." **This digression is in part to pay homage to certain writers who got paid – or who *get* paid - a penny for each word written. (There is a class of writers who are simply too dumb to *make* even a penny per each word written.) Some claim that this applied even to such literary notables as Charles Dickens. His writings strongly resonate with me. When it was clear that the Great Recession was here to stay in 2008, 2009 and, especially, in 2010 and with Sauer & Sauer limiting its practice solely to construction law issues, our office in Norwood had become, indeed, a Bleak House.***This references the time when a certain Owner - and we all know how some owners can be *difficult* - decided that it was imperative for there to be a very sudden and rather extreme rise in ambient water levels, thus threatening terrestrial and other forms of life. This *should* have been a boon to the shipbuilding industry but, in reality, only *one* builder took advantage of this opportunity. For more on this phenomenon, see the case of IN RE: NOAH. ****Human males have one X chromosome and one Y chromosome. Human females, on the other hand, have no Y chromosome but have *two* X chromosomes. Expert opinion differs as to what the significance of this difference is. When recently interviewed by CNN, noted feminist Cruella DeVille said: "Y chromosomes are inconsequential. They only govern such disgusting behaviors as swearing, rearranging one's private body parts in public, belching, spitting, cigar smoking and having an inordinate interest in far****. X chromosomes, on the other hand, govern intelligence." I, for

one, strongly reject such contentions. However, I have found no universally accepted paradigm identifying the significance of such male and female differences. Somewhat confused by all of this, I have made a note to myself to have my wife explain all of this to me. *Slowly.* After all, she has *two* X chromosomes while I have only the one.

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