Washington and Lee Journal of Civil Rights and Social Justice

Volume 6 | Issue 1 Article 12

Spring 4-1-2000

# FERRILL V. PARKER GROUP, INC. 168 F.3D 468 (11TH CIR.1999)

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/crsj

Recommended Citation

*FERRILL V. PARKER GROUP, INC. 168 F.3D 468 (11TH CIR.1999)*, 6 Wash. & Lee Race & Ethnic Anc. L. J. 165 (2000).
Available at: https://scholarlycommons.law.wlu.edu/crsj/vol6/iss1/12

This Comment is brought to you for free and open access by the Washington and Lee Journal of Civil Rights and Social Justice at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Journal of Civil Rights and Social Justice by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact lawref@wlu.edu.

# FERRILL V. PARKER GROUP, INC.
# 168 F.3D 468 (11TH CIR.1999)

## FACTS

The Parker Group, Inc. ("TPG") is a telephone marketing corporation.[1] In the weeks prior to elections, TPG hires temporary employees to make "get-out-the-vote" calls for political candidates.[2] Ten percent of these calls consist of race-matched calling meaning black employees call black voters using a "black" script, while white employees call white voters using a "white" script.[3] The black scripts were written to incite hostility toward the opposing candidates by emphasizing racial issues.[4] TPG utilized this strategy based on the underlying rationale that "black voters will more readily identify with and be more sympathetic to 'black voices' whereas white voters will more readily identify with and be sympathetic to 'white voices'."[5] TPG only employs this voice-matched strategy when its customers requested race-matched or regional dialect-matched calling.[6] In an effort to facilitate supervision, TPG also physically segregated employees engaged in race-matched calling.[7]

From September through November of 1994, a temporary agency placed Shirley Ferrill ("Ferrill") at TPG to fill its pre-election staffing needs.[8] TPG assigned Ferrill, a black woman without a discernable accent, to a race-matched "get-out-the-vote" project.[9] On several occasions, Ferrill complained to TPG about being segregated by race and the condescension in the black scripts.[10]

Following the election, TPG's business decreased by ninety percent.[11] Consequently, TPG laid off Ferrill and several other temporary callers in a foreseeable reduction-in-force.[12] Shortly thereafter, Ferrill filed an action against TPG in the United States District Court for the Northern District of Alabama. Ferrill alleged that TPG racially discriminated against her in both

1. Ferrill v. Parker Group, Inc., 168 F.3d 468, 471 (11th Cir. 1999).
2. Ferrill v. Parker Group, Inc., 967 F. Supp. 472, 473 (N.D. Ala. 1997).
3. *Ferrill*, 168 F.3d at 471.
4. Ferrill v. Parker Group, Inc., 985 F. Supp. 1331, 1332 (N.D. Ala. 1997).
5. *Ferrill*, 967 F. Supp. at 474.
6. 967 F. Supp. at 474.
7. 168 F.3d at 471.
8. *Id.*
9. *Ferrill*, 985 F. Supp. at 1332.
10. 985 F. Supp. at 1333.
11. 967 F. Supp. at 473.
12. *Id.*

her termination and her job assignment under 42 U.S.C. § 1981.[13] Section 1981 prohibits intentional discriminatory conduct that interferes with the terms and conditions of an employment contract. [14]

To establish a prima facie case of intentional discrimination under § 1981, an employee must show direct evidence of disparate treatment on the basis of race.[15] When circumstantial evidence is utilized to prove discriminatory discharge, the court employs the *McDonnell Douglas*[16] burden shifting analysis. This requires the plaintiff to show:

> (1) that she is a member of a protected minority; (2) that she was qualified for the job from which she was discharged; (3) that she was discharged; and (4) that her position was filled by a non-minority or deliberately not filled.[17]

Once the employee has made a prima facie case, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for its employment decision.[18]

Both Ferrill and TPG filed motions for summary judgment.[19] Ferrill's motion was granted in part, and TPG's motion was granted in part.[20] With respect to Ferrill's unlawful termination claim, the district court found that Ferrill failed to show her position was deliberately not filled or filled by a non-minority.[21] Ferrill also failed to rebut TPG's nondiscriminatory reason for her termination.[22] According to TPG, Ferrill's termination was the result of a "reduction-in-force" following the election.[23] The district court noted that Ferrill failed to "adduce any evidence that her position did anything, except evaporate."[24] The court granted TPG's motion for summary judgment on Ferrill's unlawful termination claim.[25]

---

13. *Id.* at 474.

14. 42 U.S.C. § 1981 states: "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." Ferrill was prohibited from suing TPG under 42 U.S.C. §2000e, *et. seq.* ("Title VII") because the temporary agency was her actual employer not TPG. *Id.* at 471 n.4. The difference between Title VII and Section 1981 claims are that Section 1981 claims can only be proven by direct evidence of disparate treatment, while Title VII claims can be proven by disparate treatment or disparate impact.

15. *Id.*

16. 411 U.S. 792 (1973).

17. 967 F. Supp. at 474 (quoting Edwards v. Wallace Community College, 49 F.3d 1517, 1521 (11th Cir. 1995)).

18. 967 F. Supp. at 475

19. *Id.* at 473.

20. *Id.* at 475.

21. *Id.* at 474.

22. *Id.* at 475.

23. *Id.* at 473.

24. *Id.* at 474.

25. *Id.* at 472.

In analyzing Ferrill's unlawful assignment claim, the district court found no evidence that TPG was acting with any racial animus.[26] However, the court found TPG liable as a matter of law based on its racial segregation and disparate treatment in the workplace.[27] The district court acknowledged:

> It is well established that assignment of job duties based solely on race violates Title VII, and accordingly § 1981... even where the discriminatory assignment is benign or well intentioned. Employers are forbidden by § 1981, and the other relevant employment discrimination statutes, from assigning work based on stereotyped assumptions, even if real world exigencies make such stereotyping politically desirable . . ..[28]

The court also criticized the political candidates who used the telephone solicitation for requesting "such an obvious violation of the law."[29]

After granting Ferrill's motion for summary judgment on her unlawful job assignment claim, the district court submitted the question of damages to the jury.[30] The jury awarded Ferrill $500 in compensatory damages, and $4,000 in punitive damages.[31] TPG renewed its motion for judgment as a matter of law.[32] Alternatively, TPG filed for an amendment to the judgment for a remittitur or for a new trial.[33]

The district court determined that Ferrill's testimony provided sufficient evidence for a jury to award $500 for her mental anguish.[34] The district court also found that the $4,000 award for punitive damages was not excessive.[35] TPG appealed to the Eleventh Circuit Court of Appeals claiming that the district court erroneously granted partial summary judgment for Ferrill on her unlawful job assignment claim because the district court did not find any evidence of racial animus.[36] TPG also appealed the jury's award of compensatory and punitive damages.[37]

---

26. *Id.* at 475.
27. 985 F. Supp. at 1332.
28. 967 F. Supp. at 475.
29. *Id.*
30. 985 F. Supp. at 1332.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 1333.
35. *Id.* at 1334.
36. 168 F.3d at 471.
37. *Id.*

## HOLDING

The United States Court of Appeals for the Eleventh Circuit affirmed the district court's finding that TPG violated 42 U.S.C. § 1981.[38] The Eleventh Circuit held that TPG intentionally discriminated on the basis of race in assigning jobs.[39] The Eleventh Circuit also affirmed the jury's compensatory damage award,[40] holding that punitive damages are inappropriate in the absence of either malice or recklessness.[41]

## ANALYSIS

Ferrill based her prima facie case on TPG's stipulations in the Pretrial Order that call assignments and scripts were based on the employee's race and that employees were physically separated according to race.[42] The appellate court affirmed the district court's finding that TPG intentionally discriminated based on TPG's admission of "disparate treatment on the basis of race."[43]

Relying on *Goodman v. Lukens Steel Co.*,[44] the Eleventh Circuit found that a defendant is liable under § 1981 without evidence of racial animus, as long as decisions are based on race.[45] In *Goodman*, Black employees sued their union under § 1981 for intentionally refusing to assert racial bias claims against their employer.[46] The Supreme Court held that the union violated § 1981, even though the record was devoid of any evidence showing racial animus toward Blacks.[47]

To determine whether TPG is liable for its intentional discrimination, the Eleventh Circuit analyzed whether TPG's discrimination fit into one of three categories of permissible discrimination.[48] The first exception is the bona fide occupational qualification ("BFOQ") defense, which originated in 42 U.S.C. § 2000e-2(e)(1).[49] Title VII asserts, if discrimination on the basis of religion,

38. *Id.* at 477.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 472 n. 6.
43. *Id.* at 472.
44. Goodman v. Lukens Steel Co., 482 U.S. 656 (1987).
45. 967 F. Supp. at 473.
46. *Goodman*, 482 U.S. at 656.
47. 482 U.S. at 669.
48. 967 F. Supp. at 473.
49. 42 U.S.C. § 2000e-2(e)(1) provides:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee

sex or national origin is necessary to the normal functioning of a business, an employer may discriminate on those grounds.[50] Although Congress discussed including race and color in the BFOQ exception, Congress specifically excluded race from the statute thereby disallowing the BFOQ defense for racial discrimination.[51] Consequently, because TPG engaged in racial discrimination, TPG cannot use the BFOQ defense.[52]

Despite the absence of a statutory BFOQ defense for racial discrimination, the Seventh Circuit created what could be construed as a racial BFOQ defense in *Wittmer v. Peters.*[53] The *Wittmer* court found that a discriminatory practice can survive strict "scrutiny only if the defendants show that they are motivated by a truly powerful and worthy concern and that the racial measure that they have adopted is a plainly apt response to that concern.[54] The defendants must show that they had to do something and had no alternative to what they did. The concern and the response, moreover, must be substantiated and not merely asserted."[55] The Seventh Circuit accepted this justification for discrimination based on expert evidence that black boot camp correctional officers must be in positions of authority at the camp in order for black inmates to respond to the harsh regimentation.[56]

Subsequently, in *McNamara v. City of Chicago*,[57] the Seventh Circuit acknowledged *Wittmer*'s justification.[58] However, the court declined to follow *Wittmer* because there was little evidence that firehouses with only white personnel firefighters would lack credibility, and be denied cooperation, in minority neighborhoods.[59] The Eleventh Circuit examined the Seventh Circuit's judicially crafted racial justification, however, they have declined to create a similar exception.[60]

The second exception to the prohibition against discrimination is the "business necessity" defense, which originated in *Griggs v. Duke Power Co.*[61]

---

> controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

*Id.*

50. 168 F.3d at 473.
51. *Id.*
52. *Id.*
53. 87 F.3d 916 (7th Cir. 1996).
54. *Wittmer*, 87 F.3d at 918.
55. 87 F.3d at 918.
56. *Id.* at 920.
57. 138 F.3d 1219 (7th Cir. 1998).
58. *McNamara*, 138 F.3d at 1222.
59. *Id.*
60. 168 F.3d. at 475.
61. 401 U.S. 424 (1971).

Under this exception, facially neutral employment practices that have a disparate impact are permitted if the practice has a legitimate, job-related purpose.[62] Accordingly, this defense is not available in a § 1981 claim where intentional discrimination is an essential element; rather, this defense is limited to cases involving neutral employment practices.[63] This limitation precludes TPG from utilizing the business necessity defense, as it had already stipulated to intentionally discriminating on the basis of race.[64]

The final exception to the bar against discrimination is in a situation where the alleged discrimination is part of an affirmative action plan to remedy past discrimination.[65] The court of appeals found that assigning Ferrill to call blacks was not "intended to correct racial imbalance. Rather, it was based on a racial stereotype that blacks" would respond to other blacks and "on the premise that [Ferrill's] race was directly related her ability to do the job."[66] Consequently, TPG could not avail itself of this exception.

After affirming that TPG had violated § 1981 by assigning job duties based on race, the Eleventh Circuit affirmed the jury's award of $500 in compensatory damages. The court based this on

> Ferrill's testimony that the terms, conditions, and privileges of her employment were adversely affected by TPG's disparate treatment of employees on the basis of race was sufficient evidence of harm . . . [specifically] that she was humiliated by TPG's physical separation of employees on the basis of race and by TPG's allocation of work and scripts according to race. [67]

Specifically, the circuit court noted that Ferrill's "humiliation and insult are recognized, recoverable harms."[68] The circuit court deferred to the findings of the district court "because the harm is subjective and evaluating it depends considerably upon the demeanor of the witnesses."[69]

In contrast, the Eleventh Circuit did not uphold the punitive damage award because "the district court specifically found that TPG lacked any racial

62. 62168 F.3d. at 473.

63. *Id.* at 474.

64. 42 U.S.C. § 2000e-2(k)(2) clearly states, "business necessity may not be used as a defense against a claim of intentional discrimination." Despite this statutory limitation, the Fifth Circuit has suggested that the business necessity defense may be justified on racial grounds in certain circumstances such as undercover infiltration or selection of actors. 168 F.3d. at 475.

65. 168 F.3d at 474.

66. *Id.* (quoting Knight v. Nassau County Civil Serv. Comm'n, 649 F.2d 157, 162 (2d Cir. 1981).

67. *Id.* at 476.

68. *Id.*

69. *Id.* (quoting Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 937-38 (5th Cir. 1996)).

animus[70] Punitive damages may be awarded under § 1981 when the defendant's conduct is motivated by malevolence.[71] Consequently, because the district court found that TPG acted without malice or reckless indifference, the district court erred in awarding Ferrill punitive damages.[72]

## CONCLUSION

The judgment will have a larger impact on employers and employees beyond political calling. All employers should take heed to the warnings of this court. The appellate court has made it clear that a plaintiff does not need to prove racial animus for a defendant to be held liable under § 1981.[73] The district court noted:

> The legal rule in this case might well prevent advertisers from employing, based on race, actors to solicit products to a certain group . . . or even prevent the exclusive hiring of black actors to play such roles as Othello. Nevertheless, this is the state of the law, and this court has found no authority to the contrary.[74]

This case also has important implications in employment law. This court makes it clear that a plaintiff does not need to prove racial animosity to recover compensatory damages in a § 1981 intentional racial discrimination claim.[75] A lack of evidence of racial hostility has no effect on compensatory damages for harms, including emotional harms, but it will preclude a punitive damage award.[76] The Eleventh Circuit explicitly refused to recognize a BFOQ or business necessity defense for § 1981 defendants.[77]

This decision will impact plaintiffs because they will have to prove only intentional discrimination to receive compensatory damages regardless of the defendant's intentions. However, the plaintiff must still prove a malicious intent to receive punitive damages. This will impact employers because many long-standing employment techniques need to be abandoned if they are premised on race.

In this case, TPG readily admitted to making race-based decisions because the decisions did not involve racial animosity toward blacks. The Eleventh

---

70. *Id.* at 477.
71. *Id.* at 476 (quoting Smith v. Wade, 461 U.S. 30, 56 (1983)).
72. *Id.* at 477.
73. *Id.* at 473.
74. 967 F. Supp. at 475.
75. 168 F.3d. at 473.
76. *Id.* at 477.
77. *Id.* at 474.

Circuit has made it clear that § 1981 does not take into account the employer's motive for the decisions, only that the decisions were intentionally made on the basis of race. Thus, the § 1981 defendant does not have many of the defenses available to those defending against a Title VII claim. Plaintiffs may want to consider this distinction before filing their complaint.

In the Eleventh Circuit, the BFOQ defense is only available to employers on the basis of religion, sex, or national origin; race is not an available defense. The business necessity defense is only available when there is a showing of disparate impact. The business necessity is unavailable to an employer defense in a § 1981 case because the courts look for disparate treatment, not disparate impact. Under the facts of this case, the only defense available was to prove that the disparate treatment was the result of an affirmative action plan. The court rejected this argument.

A potential defense for future defendants is to make a free speech argument. TPG tried to argue that "race-matched calling is political speech protected by the First and Fourteenth Amendments."[78] However, the Eleventh Circuit refused to consider this argument because it was not brought before the district court.

Another important aspect of this case is the Eleventh Circuit's decision on damages. The circuit court held that testimony could be used to prove compensatory damages.[79] Additionally, the standard of review for emotional harms will be deferential to the fact finder. If a "damage award has survived review by the trial judge, it will be difficult to overturn due to the presumption of validity."[80] This eases up the burden on plaintiff by allowing the plaintiff to use the testimony of the plaintiff or other witnesses to prove damages. This will also allow plaintiffs to avoid bringing in costly experts. The impact of this decision is favorable to plaintiffs because they may have been precluded from a damage award in the past, if their injuries were not damaging enough to visit a psychologist. It will be less favorable to defendants because it is very hard to dispute someone's personal assessment of himself or herself.

A § 1981 defendant's motives are relevant only for purposes of the punitive damage award. The purpose of awarding punitive damages is to punish the defendant and deter intentional discrimination. Therefore, the "defendant's conduct must be motivated by an evil intent, or by reckless or callous indifference to the rights" of their employees.[81] Social policy mandates that all decision based on race be punished by punitive damages. Employers

78. 168 F.3d at 475.
79. *Id.* at 476.
80. *Id.*
81. *Id.*

should know that intentionally treating someone different based on their race is illegal. Unfortunately, employers are unlikely to discontinue discriminatory practices in light of the court's refusal to implement punitive damage awards when a plaintiff can not prove a malicious intent.

Realistically, this case will have a limited impact on § 1981 termination claims. In most discrimination cases, the employer does not openly admit to making race-based decisions. The biggest burden on plaintiffs is providing proof of race based employment decisions. In the present case, the employer was very up front about their decisions due to the belief that they could not be held liable if their conduct was not motivated by racial animus. Most § 1981 plaintiffs will not be so lucky.

Summary and Analysis Prepared by:
Nakisha S. Sharpe