

June 15, 2015

Plaintiff pleads the Fifth, and panel says it's fair game

By Michael R. Lied

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It's not often that a plaintiff "takes the Fifth" in a civil case, much less 24 times. But that's what Adam Wiercinski did.

Wiercinski, a Polish native of Jewish descent, immigrated to the United States in 1981. He was employed by Mangia 57 Inc., a chain of self-service gourmet sandwich shops in midtown Manhattan.

Mangia is owned by Sasha Muniak. Malgorzata Cymanow, Muniak's sister, served as the general manager of the three Mangia locations.

Wiercinski worked at Mangia 57 until he took an extended leave of absence to visit family in Poland in late 2007. When he returned in early 2008, he asked to be rehired and was rejected.

Wiercinski sued Mangia 57 and six individual defendants, alleging discrimination on the basis of religion and national origin, retaliation, conspiracy, wrongful termination and violation of various New York state and city laws.

Wiercinski alleged that a night shift manager, Artur Zbozien, verbally harassed and abused him with anti-Semitic slurs.

The parties ultimately proceeded to trial on Wiercinski's sole remaining claim — a hostile work environment under federal Section 1981.

Wiercinski testified that he complained to Cymanow about the harassment on several occasions.

On cross-examination, Mangia undertook to impeach Wiercinski's credibility but was thwarted as a result of his repeated invocation of the Fifth Amendment privilege against self-incrimination.

Wiercinski invoked the Fifth Amendment privilege when asked about his use of a different name for payroll purposes while at Mangia, his failure to report income earned at Mangia on tax returns, his application for and receipt of Social Security and other public assistance benefits without reporting income earned at Mangia and his failure to report income earned at Cucina, a catering company where Wiercinski worked after 2007.

Wiercinski invoked the Fifth Amendment at least 24 times over the course of a brief cross-examination, including responses to questions as basic as whether or not he recalled giving prior deposition testimony.

Robert Ranfranz, a former co-worker of Wiercinski's, testified that he received a phone call from Wiercinski and that he offered him a bribe. Wiercinski asked Ranfranz if he would testify for him. Wiercinski said that he would offer Ranfranz \$1,000 or \$2,000 as an exchange, and that if he won the lawsuit, they could speak about additional money.

The jury found Mangia liable under Section 1981, concluding on a special verdict form that Wiercinski was subjected to a hostile work environment based on conduct perpetrated by his supervisors but not perpetrated by his co-workers. The jury awarded Wiercinski damages in the amount of \$1 and punitive damages in the amount of \$900,000.

The U.S. District Court found that Wiercinski's repeated invocation of the Fifth Amendment severely impacted his credibility and limited Mangia's opportunity to mount a defense.

The district court vacated the jury's liability verdict, conditionally granted Mangia's motion for a new trial on the issue of punitive damages and denied Wiercinski's application for fees and costs. Wiercinski filed a timely appeal.

The same "core substantive standards" that apply to claims of discriminatory conduct in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. are also applicable to claims of discrimination in employment in violation of Section 1981.

The district court determined that a judgment should be entered for the defendant notwithstanding the verdict because it had a "feel" of the case that was "indelibly engraved" upon its consciousness, having seen and heard the witnesses and with an awareness of the nuances of their testimony.

The court of appeals disagreed with the district court's explanation for vacating the liability verdict. This was a case based entirely on testimonial evidence from both parties. The district court was required to consider the evidence in the light most favorable to the party against whom the motion was made and to disregard all evidence favorable to the moving party that the jury was not required to believe.

Although the district court was justifiably concerned by what it correctly perceived to be troubling conduct by Wiercinski and his witnesses, the jury was properly instructed on how to consider Wiercinski's testimony in light of the invocation of the Fifth Amendment and chose to credit his version of the events as well as the testimony of his witnesses. Given that testimony, the jury could rationally have concluded that Zbozien subjected Wiercinski to a hostile work environment.

Alternatively, the district court found that the jury's verdict of supervisory liability could not be sustained because Zbozien was not a "supervisor."

The appeals court did not accept this alternative basis. The court did not need to determine whether Zbozien satisfied the *Vance v. Ball State University* 133 S. Ct. 2434 (2013) definition of "supervisor" because the district court failed to acknowledge that the jury's conclusion that the harassment was not perpetrated by co-workers was necessarily based on a determination that Zbozien was a supervisor.

Neither party requested an instruction as to the definition of "supervisor," nor was the jury provided a list of potential supervisors or co-workers who allegedly harassed Wiercinski.

Thus, even if the jury had been instructed that Zbozien could not be a "supervisor" as a matter of law, he certainly would have been a "co-worker." The jury could have credited Wiercinski's testimony that he informed Cymanow of the harassment and concluded that Mangia was vicariously liable for the harassing conduct of a co-worker because Cymanow, a supervisory agent of Mangia, knew, or should have known, of his conduct and failed to remedy the harassment.

However, the award of punitive damages was properly vacated. Punitive damages are "a discretionary moral judgment" that the defendant has engaged in conduct that is so reprehensible that it warrants punishment.

The showing required for an award of punitive damages is not the same as that required for liability. Rather, punitive damages may be awarded for claims of employment discrimination only where the employer engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual.

There was no evidence in the record that Mangia discriminated or retaliated against Wiercinski with conscious knowledge it was violating the law or that it engaged in egregious or outrageous conduct from which an inference of malice or reckless indifference could be drawn.

When Wiercinski complained to Cymanow about Zbozien's conduct, she transferred Zbozien to a different location. After Zbozien returned, Cymanow granted Wiercinski's request to be transferred to a different shift. Even if these efforts were not sufficient to remedy the harassment, the evidence showed that, far from acting maliciously or indifferently or egregiously, Mangia and Cymanow sought to, and did, address Wiercinski's complaints in good faith.

No reasonable jury could conclude that Mangia's conduct was driven by an evil motive or intent, or that it involved a reckless or callous indifference to Wiercinski's federally protected rights.

A plaintiff who recovers only nominal damages is still a prevailing party. Accordingly, the appeals court remanded to the district court to determine what fees and costs, if any, Wiercinski could recover.

According to the appeals court, "Given the highly unusual facts of this case, the district court would be well within its discretion to conclude that this is a rare instance where a plaintiff who 'formally prevails under Section 1988 should receive no attorney fees at all.'"

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