



ROBERT TAYAC, Plaintiff-Appellant, v. CITY & COUNTY OF SAN FRANCISCO, a municipal corporation; SAN FRANCISCO POLICE, through its Chief of Police; ANTHONY RIBERA; THE CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO, Defendants-Appellees.

No. 98-15130

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1999 U.S. App. LEXIS 31863

**February 11, 1999, Argued and Submitted, San Francisco, California
December 2, 1999, Filed**

NOTICE: [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *1999 U.S. App. LEXIS 38044*.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of California. D.C. No. CV-95-03424-CAL. Charles A. Legge, District Judge, Presiding.

DISPOSITION: AFFIRMED in part, REVERSED and REMANDED in part.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff police officer appealed an order of the United States District Court for Northern District of California, which granted summary judgment to defendants, a city and county and certain of its agencies and officials, in an action alleging employment discrimination and retaliation in violation of *42 U.S.C.S. § 1983* and Title VII.

OVERVIEW: Plaintiff police officer brought an action against defendants, a city and county and certain of its agencies and officials, alleging employment discrimination and retaliation in violation of *42 U.S.C.S. § 1983* and Title VII. The court held that the first decision not to promote plaintiff was untimely claimed since it was a specific employment decision, rather than part of a continuing violation, and plaintiff failed to show

that defendants' reasons for the second decision not to promote him were pretextual. But plaintiff demonstrated that issues of fact were raised concerning whether the withdrawal of an offer by defendant's city attorney to seek a work detail for plaintiff was based on retaliation. Filing an administrative claim of discrimination as a matter of law did not constitute a conflict of interest, and plaintiff's failure to advise the city attorney of the complaint thus could not raise questions concerning plaintiff's honesty.

OUTCOME: Summary judgment was affirmed in part because claims of failure to promote were untimely and unsupported, but reversed in part because plaintiff's discrimination claim did not create a conflict of interest and plaintiff's failure to advise defendants of the complaint thus could not justify the withdrawal of an employment opportunity.

LexisNexis(R) Headnotes

Governments > Legislation > Statutes of Limitations > Time Limitations

Labor & Employment Law > Discrimination

[HN1] *42 U.S.C.S. § 2000e-5(e)(1)* requires a claim of discrimination to be filed with the Equal Employment Opportunity Commission within three hundred days after the alleged unlawful employment practice occurred.

Labor & Employment Law > Discrimination > Retaliation > General Overview

[HN2] Under California law, the employer cannot terminate an employee solely or chiefly because he

engaged in the protected activity of filing an Equal Employment Opportunity Commission charge.

Labor & Employment Law > Discrimination > Retaliation > General Overview

[HN3] Attorneys who believe they have been discriminated against for protected activity may bring an antidiscrimination action in the manner available to other employees. Any conflict of interest that may arise as a result of the filing of such an action cannot be deemed a legitimate nondiscriminatory basis for making an adverse employment decision, whether that decision involves termination, transfer, failure to promote, or failure to follow through on an offer to seek a work detail.

COUNSEL: For ROBERT TAYAC, Plaintiff - Appellant: John Houston Scott, Esq., John Houston, PRENTICE & SCOTT, San Francisco, CA.

For CITY & COUNTY OF SAN FRANCISCO, SAN FRANCISCO POLICE, THE CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO, Defendants - Appellees: Frederick P. Sheinfeld, DCA, OFFICE OF THE CITY ATTORNEY, Pamela Thompson, CITY ATTORNEY'S OFFICE, San Francisco, CA.

For ANTHONY RIBERA, Defendant - Appellee: Pamela Thompson, CITY ATTORNEY'S OFFICE, San Francisco, CA.

For THE CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO, Defendant - Appellee: Linda M. Ross, Esq., San Francisco City Atty's Office, San Francisco, CA.

JUDGES: Before: KRAVITCH, ² REINHARDT, and T.G. NELSON, Circuit Judges.

2 Honorable Phyllis A. Kravitch, Senior Circuit Judge for the Eleventh Circuit, United States Court of Appeals, sitting by designation.

[*2]

OPINION

MEMORANDUM ¹

1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by *Ninth Circuit Rule 36-3*.

We have jurisdiction under 28 U.S.C. § 1291. We affirm in part and reverse in part.

A. Claims Barred by Statute of Limitations

1. Title VII Claim Regarding Failure to Promote in 1992

The San Francisco Police Department's failure to promote Tayac in 1992 was not part of a continuing violation. To the contrary, the Department's decision not to promote Tayac was a specific, concrete employment decision that occurred on a particular day in 1992. This single act by the Department was adverse to Tayac's interests and began the running of the statute of limitations as to that act. *See London v. Coopers & Lybrand*, 644 F.2d 811, 816 (9th Cir. 1981). Tayac did not file his EEOC charge regarding the 1992 promotion until December 27, 1994, ten months after the statute of limitations [*3] had run. *See* [HN1] 42 U.S.C. § 2000e-5(e)(1) (requiring claim of discrimination to be filed with the EEOC "within three hundred days after the alleged unlawful employment practice occurred").

2. Section 1983 Claim Regarding Failure to Promote in 1992 and 1993

Tayac did not file his 42 U.S.C. § 1983 claim regarding the 1992 and 1993 promotions until September 26, 1995, well after the one-year statute of limitations had run on these claims. *See Taylor v. Regents of Univ. of Cal.*, 993 F.2d 710, 711 (9th Cir. 1993) ("California's one-year statute of limitations for personal injury actions governs claims brought pursuant to 42 U.S.C. §§ 1981, 1983 and 1985.").

B. Title VII Discrimination Claim Regarding Failure to Promote in 1993

The City states that Tayac was not included on the list of "most qualified" candidates initially promoted in 1993 because (1) he lacked experience in certain areas, such as Field Training Officer, the Community Police Officer's Program, peer counseling, academy instruction and drug education; (2) he had an at-fault driving accident; (3) he had a disciplinary [*4] history; and (4) he lacked bilingual skills. These are legitimate nondiscriminatory reasons for not including Tayac on the "most qualified" list. The burden therefore shifted to Tayac to show that the City's stated reasons are pretextual. *See Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994).

In an attempt to meet this burden, Tayac points to the fact that he was not given a "plus" factor for being a Native American. This evidence is insufficient to show that the City's stated reasons are pretextual, in light of the City's argument that in failing to do so it was simply following the provisions of a court-ordered hiring and promotion procedure.

Tayac does not challenge the Consent Decree, the banding order or the affirmative action plan. Rather, he seeks relief pursuant to them. The Consent Decree specifically defines a "minority" as including only individuals who are "Black," "Hispanic" or "Asian" or "Pacific Area people." This definition does not include Native Americans. The Banding Order requires the use of selection criteria, including the use of a "plus" factor for a "minority" candidate, in order to comply with the terms of the Consent Decree. Thus, [*5] under the terms of the Consent Decree and the Banding Order, the City was required to give a "plus" factor only to "Black," "Hispanic" or "Asian" or "Pacific Area" individuals. The City was not, however, required, or even allowed, to give a "plus" factor to Tayac based on his status as a Native American.

Tayac's reliance on the Department's 1992 Affirmative Action Plan is similarly misplaced. Although the 1992 Plan sets out general goals for "Filipino" and "American Indian" individuals in several categories of jobs, it does not authorize the giving of a "plus" factor to Native Americans. Moreover, the Plan specifically listed as a goal the number of Native Americans to be promoted to sergeant as "Zero." Thus, Tayac was entitled to no relief under the 1992 Affirmative Action Plan. In view of the above, the City has established that its reasons were not pretextual.

C. Title VII and § 1983 Retaliation Claims

1. City Attorney's Retraction of Offer to Seek Work Detail

The City has offered two nondiscriminatory reasons for the City Attorney's withdrawal of the offer to seek a work detail for Tayac: (1) that Tayac had a conflict of interest; and (2) that Tayac illustrated [*6] a lack of judgment and honesty when he (a) failed to "timely" disclose that he had an EEOC charge pending against the Department and (b) offered to drop the EEOC charge if the City Attorney gave him a job. The burden therefore shifted back to Tayac to demonstrate that the proffered reasons are pretextual. *See Tarin v. County of Los Angeles*, 123 F.3d 1259, 1264 (9th Cir. 1997). Tayac has met this burden by demonstrating that substantial questions of fact exist as to whether these proffered reasons are pretextual.

a. Conflict of Interest

Although the City argues that the City Attorney retracted her offer not because Tayac had actually filed an EEOC charge, but because of the resulting conflict of interest, we find the filing of the EEOC charge to be "inseparable" from the alleged conflict of interest. *See St. John v. Employment Dev. Dep't*, 642 F.2d 273, 274 (9th

Cir. 1981) ("The Department argues that it transferred St. John not because she filed [an EEOC] charge, but rather because of the resulting conflict of interest. In this case the two are inseparable.") It is clear, [HN2] under California law, that the City Attorney's Office could not have terminated [*7] Tayac "solely or chiefly because he . . . engaged in [the] protected activity" of filing an EEOC charge. *See Santa Clara County Counsel Attys. Ass'n v. Woodside*, 7 Cal. 4th 525, 869 P.2d 1142, 1160 (Cal. 1994). As the California Supreme Court recognized: "Attorneys [HN3] who believe they have been discriminated against for protected activity may bring an antidiscrimination action in the manner available to other employees." *Id.* Any conflict of interest that may arise as a result of the filing of such an action cannot be deemed a legitimate nondiscriminatory basis for making an adverse employment decision, whether that decision involves termination, transfer, failure to promote or, as in the present situation, failure to follow through on an offer to seek a work detail.³ *See id.*

3 Our decision today is not inconsistent with our decision in *Smith v. Singer Co.*, 650 F.2d 214 (9th Cir. 1981). In *Smith*, we held that an EEO officer whose very purpose is to assist the employer in achieving compliance with equal employment opportunity orders and regulations and whose position requires him to act *on behalf* of his employer, could be legitimately fired for filing an EEOC complaint against his employer. *See id.* at 216-17. In so holding, we explicitly limited our holding as "applying only to the EEO officer appointed under the executive orders and regulations here involved." *Id.* at 217.

[*8] b. Lack of Judgment and Honesty

The City argues that the City Attorney was also motivated by Tayac's failure to disclose his pending EEOC charges in his previous conversations with the City Attorney and his attempt to bargain away these charges in exchange for a job which, the City contends, raised "questions about Tayac's honesty and judgment" and "shook the City Attorney's confidence in Tayac's ability to carry out her policies, represent her client (the Police Department) and represent the public."

The City contends that Tayac's failure to disclose the potential conflict of interest was a violation of ethical rules. As we held above, however, a potential conflict of interest arising from the filing of an EEOC claim cannot serve as the basis of the City's employment decision. It would make little sense to require an employee to disclose the filing of an EEOC claim to his employer prior to his employment, given that the employer is prohibited from basing any employment action on the existence of the claim. Therefore, the City cannot rely on

Tayac's failure to disclose his claim as the basis for its decision.

Furthermore, in its brief in support of summary judgment before the [*9] district court, the City did not argue that Tayac's offer to drop the EEOC charges played a role in the City Attorney's decision to withdraw the offer to seek the detail. It was only in response to Tayac's assertion, in his cross-motion for summary judgment, that he had offered to withdraw the EEOC complaint to cure any conflict of interest, that the City claimed Tayac's offer was in any way wrongful. The City's belated raising of this justification raises a question as to whether the justification is pretextual.

Moreover, there is a genuine issue of fact as to whether the conversation could reasonably cause the City Attorney to believe that Tayac was improperly pressuring the City. Tayac stated that if he obtained a job with the City Attorney's Office, he would withdraw his EEOC complaint against the Police Department. Viewing this conversation in the light most favorable to Tayac, the offer was perfectly legitimate and reasonable.

2. Failure to Promote in 1995

The City presented evidence that, in selecting the individuals to be promoted, the Department examined its list of "most qualified" candidates and selected the candidate best qualified to fill each individual vacancy; [*10] and that these decisions were made only after the Department received recommendations and input from the screening committee and command staff regarding their individual staffing needs. These are all legitimate, nondiscriminatory reasons for the Department's 1995 promotional decisions. The burden therefore shifted to Tayac to demonstrate that the City's articulated reasons are pretextual. *See Tarin, 123 F.3d at 1264.*

Tayac has failed to meet this burden. Although he asserts that pretext is shown by the fact that he was not given a "plus" factor for his minority status, as discussed previously, under the terms of the Consent Decree and Banding Order, Tayac was not entitled to receive a "plus" factor. Moreover, application of the "plus" factor would not have changed Tayac's candidacy for promotion, because he was already included on the "most qualified" list of candidates for promotion without the benefit of the "plus" factor.

3. Denial of Leave and Reinstatement

The City states that Tayac's leave request was denied because, at the time, the Department had ongoing staffing difficulties and was "under legal mandate to be fully staffed"; and that Tayac's request [*11] for reinstatement was denied because Tayac abandoned his position when denied leave, had a prior disciplinary

reprimand in his employment history and there was evidence of dishonesty in Tayac's initial application with the Department. These are legitimate nondiscriminatory reasons for denying Tayac's requests for leave and reinstatement. The burden therefore shifted to Tayac to show that the City's articulated reasons are pretextual. *See id.*

Tayac has not met this burden. Although Sergeant Corriea, a Caucasian officer, had previously been granted leave in a situation similar to Tayac's, the Department's decision to grant Sergeant Corriea's leave request was made prior to issuance of the mandate that the Department be fully staffed. The fact that the Department granted Sergeant Corriea's leave request and denied Tayac's is therefore insufficient to show that the City's articulated reasons for denying Tayac's requests for leave and reinstatement were pretextual.

4. Punitive Assignments and Pending Discipline

The City has given legitimate nondiscriminatory explanations for the two incidents of questionable nature that resulted in the discipline and transfers. Tayac offers a [*12] bare, unsupported statement that "the justifications for these assignments offered by the City are pretexts." This is insufficient to rebut the City's proffered reasons. *See Tarin, 123 F.3d at 1264* ("The plaintiff must then prove by a preponderance of the evidence that the proffered reasons are pretexts for retaliation.")

CONCLUSION

Summary judgment was proper as to Tayac's claims of discrimination in failing to promote him in 1992 and 1993. Summary judgment was also proper as to Tayac's claim that he was denied leave, reinstatement and a 1995 promotion in retaliation for filing an EEOC complaint. However, as to Tayac's claim that the City Attorney retaliated against him in violation of Title VII and 42 U.S.C. § 1983 for filing an EEOC complaint, questions of fact remain as to whether the City Attorney's articulated reasons were pretextual and whether the City Attorney would have made the same decision even if Tayac had not filed an EEOC complaint. Summary judgment as to these claims was therefore improper.

AFFIRMED in part, REVERSED and REMANDED in part. No costs allowed.