

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
CASE NO. 08-60855

JOSEPH W. BLACKSTON, M.D., J.D.,
Plaintiff/Appellant

VERSUS

WEXFORD HEALTH SOURCES, INC.,
Defendant/Appellee

BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

William H. Barbour, Jr., United States District Court Judge

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WEXFORD HEALTH SOURCES, INC.,
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Joseph W. Blackston certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal pursuant to Rule 13.6.1 of the United States Court of Appeals for the Fifth Circuit.

1. Joseph W. Blackston, Appellant;
2. Louis H. Watson, Jr., Counsel for Appellant;
3. Nick Norris, Counsel for Appellant;
4. Wexford Health Sources, Inc., Appellee; and
5. R. Jarrad Garner, Counsel for Appellee.



LOUIS H. WATSON, JR.

STATEMENT REGARDING ORAL ARGUMENT

At issue in this case are detailed facts. Explanation of these facts would be helpful to this Court in determining whether or not the Appellant has proffered sufficient evidence to have the Appellee's motion for summary judgment denied.

The district court improperly attributed direct evidence of race discrimination to the Appellee's customer without holding the Appellee liable for its employment decisions, and oral argument on this legal point is appropriate.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343, and this Court has jurisdiction over this appeal of the final judgment under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. The trial court erred in finding that the racial animus of the Appellee's customer could not be attributed to the Appellee when it made its employment decision.
2. The trial court erred in relying on *Price Waterhouse* as authority to discuss the Plaintiff's claim on summary judgment.
3. The trial court erred by making a finding regarding facts that are in dispute.

STATEMENT OF THE CASE

The Appellant, Joseph W. Blackston (hereinafter “Blackston”), was discriminated against on the basis of his race (white). Dr. Blackston filed suit on February 28, 2007, alleging race discrimination. After the close of the discovery period, the Appellee (hereinafter “Wexford”), filed for summary judgment, and on September 10, 2008, the trial court issued its opinion and order granting Wexford’s motion in full. On April 23, 2008, Appellant timely appealed.

FACTS

Plaintiff, Dr. Joseph Blackston, was hired in July 2003, by the Mississippi Department of Corrections (“MDOC”) as its Director of Medical Compliance. (R at 294). As the Director, Dr. Blackston had the responsibility of overseeing the performance of the medical staffing companies contracted to provide physicians and other health care services to the MDOC. *Id.* Dr. Blackston also worked with the Commissioner of the MDOC to approve and disapprove the vendor’s use of individual physicians at their correctional facilities. *Id.*

From 2003 to July 2006, Correctional Medical Services (“CMS”) was the vendor under contract with the State to provide these services. *Id.* One of the physicians hired by CMS to staff the Central Mississippi Correctional

Facility was Dr. Kentrell Liddell, who is a black female. *Id.* Dr. Blackston was approached by CMS in 2004, to discuss his interest in working for the company. *Id.* at 295. Around the same time, the MDOC had discussions with Dr. Liddell about replacing Dr. Blackston. *Id.* On September 1, 2004, Dr. Blackton and Dr. Liddell essentially exchanged jobs. *Id.* at p. 3.

Sometime between 2005 and 2006 it was decided that CMS would not renew its contract with the MDOC as of July 1, 2006. *Id.* In its place, Wexford was awarded the contract to provide physicians to the State's inmate population. *Id.* During the months just prior to Wexford taking over, Dr. Blackston interviewed for a position with the Defendant. *Id.*

On or about May 29, 2006, Dr. Emil Dameff, who was the Defendant's regional medical director, and Dr. Tom Lunquist, who was the Defendant's national medical director, went to Dr. Blackston's office to discuss with him the staff changes that would be made when the Defendant took over the contract for the Mississippi Department of Corrections. *Id.*

During this conversation, Dr. Lunquist informed Dr. Blackston that Wexford was looking for a "minority" to take over as the medical director. *Id.* According to Dr. Lunquist, Wexford would not be interested in Dr. Blackston continuing as the medical director because he was white. *Id.* Dr. Blackston

then asked Dr. Lunquist if the decision was made by Wexford or recommended by the Mississippi Department of Corrections. *Id.* Dr. Lunquist responded by stating that the Mississippi Department of Corrections had made the recommendation to hire a “minority” candidate for the medical director position, and Wexford would ratify its recommendation. *Id.* Dr. Lunquist then began asking Dr. Blackston about Gloria Perry and Rochelle Walker, who are black females that worked with Dr. Blackston, to see if he thought either of the two individuals could perform the medical director position. *Id.* at 296.

STANDARD OF REVIEW

This Court reviews a district court’s denial or granting of a summary judgment, according to the same standard as the district court. The standard for judging whether to grant summary judgment under Rule 56 is the same as that used in determining whether to grant judgment as a matter of law under Rule 50. *Anderson v. Liberty Lobby*, 477 U.S. 242, 250-51 (1986); *See also, Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

The standard established in *Reeves, supra*, was applied by Judge Barksdale in *Bazan v. Hidalgo County*, 246 F.3d 481 (5th Cir. 2001):

[A] “court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, *at least to the extent that that evidence comes from disinterested witnesses.*” *Reeves v.*

Sanderson Plumbing Prods, Inc., 530 U.S. 133, 151, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (emphasis added; internal quotation marks omitted). (Although the Court so stated in the context of a Rule 50 motion (judgment as a matter of law), it pointed out “the analogous context of summary judgment under Rule 56.” *Id.* at 150, 120 S.Ct. 2097.) In the case at hand, the evidence the Trooper claims is uncontradicted and unimpeached comes for the most part, if not exclusively, from an *interested witness* — Trooper Vargas. *Cf. Abraham v. Raso*, 183 F.3d 279, 287 (3rd Cir. 1999) (“Cases that turn crucially on the credibility of witnesses’ testimony in particular should *not* be resolved on summary judgment.” (emphasis added)); *Gooden v. Howard County, Md.*, 954 F.2d 960, 971 (4th Cir. 1992) (Phillips, J., dissenting) (“[B]ecause inevitably — liability being disputed — the officer’s account will be favorable to himself, the credibility of that account is crucial.”).

246 F.3d at 492.

SUMMARY OF THE ARGUMENT

In its opinion, the district court found that though there was direct evidence of race discrimination, this discrimination was only attributable to Appellee’s customer, MDOC. In error, the district court failed to acknowledge that the Appellee automatically assumed the racial animus of its customer when making the employment decision not to hire the Appellant. In addition, the trial court erred by relying on *Price Waterhouse* as proper authority for dismissing the Appellant’s cause at summary judgment. Further, the district court erred in making a determination regarding facts that are in dispute.

ARGUMENT I

THE TRIAL COURT ERRED IN FINDING THAT THE DISCRIMINATORY INTENT OF APPELLEE'S CUSTOMER COULD NOT BE ATTRIBUTED TO THE APPELLEE.

The Fifth Circuit and Ninth Circuit Courts of Appeal have long held that the customer preference for discrimination in employment by an employer can be attributed to the employer when it makes employment decisions based on the unlawful discriminatory preference of its customers. *See Diaz v. Pan Am. World Airways*, 442 F.2d 385 (5th Cir. 1970); *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981). The Seventh Circuit has also held that it is “clearly forbidden by Title VII, to refuse on racial grounds to hire someone because your customers or clientele do not like his race.” *Rucker v. Higher Educational Aids Board*, 669 F.2d 1179, 1181 (7th Cir. 1982).

The Appellee never asserted the affirmative defense of a bona fide occupational qualification (“BFOQ”). However, the district court essentially allowed the Appellee to put up a BFOQ affirmative defense. The district court then set apart as a separate issue whether the discriminatory intent could be attributed to the Appellee. Consistent with the express provisions of Title VII,

courts generally have rejected BFOQ as a defense to charges of race or color discrimination although a BFOQ defense may be asserted in certain circumstances involving discrimination based on religion, sex, or national origin. 42 U.S.C. § 2000e-2; *Ferrill v. Parker Group*, 168 F.3d 468 (11th Cir. 1999); *Swint v. Pullman-Standard*, 624 F.2d 525, 535 (5th Cir. 1980)(overruled on other grounds).

On facts similar to the present case, the Western District of Pennsylvania found that the employer assumed the customer's racial animus by following its client's direction to make an employment decision based on race. *White v. Community Care, Inc.*, 2008 WL 5216569 (W.D. Pa. December 11, 2008). In *White*, the employer admitted that it did not assign the plaintiff to a particular customer because the customer did not want a black person in their home. *Id.* at p. 3. In the current case, as in *White*, when the Appellee chose to make an adverse employment decision based on race at the recommendation of its customer, it automatically assumed the racially discriminatory intent of its customer. To find otherwise would leave employers a nearly irrefutable defense by showing that some other individual or entity told the employer to make adverse employment decisions based on race.

Pursuant to the express provisions of Title VII, as well as the Courts of

Appeal for the Fifth, Seventh, and Ninth Circuits, an employer is bound to reject the racial animus of its customers and clientele and to make employment decisions without regard to an employees race.

ARGUMENT II.

THE TRIAL COURT ERRED IN RELYING ON *PRICE WATERHOUSE* AS PROPER AUTHORITY FOR DISMISSING APPELLANT'S CAUSE ON SUMMARY JUDGMENT.

In the instant action, the district court found that once the Appellant proffered direct evidence of discrimination the burden then shifted to the employer to prove, by a preponderance of the evidence, that the same decision would have been made regardless of the discriminatory animus. (R. at 397). In its decision to grant the Appellee's motion for summary judgment, the district court relied on *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-53 (1989).

Price Waterhouse is not proper authority upon which the district court should have relied in making its determination in this cause. With the passage of the Civil Rights Act of 1991, Congress replaced the holding in *Price Waterhouse*. The Fifth Circuit acknowledged this amended application and applied the same in *Garcia v. City of Houston*, 201 F.3d 672, 676 (5th Cir.

2000). This Civil Rights Act of 1991 amended the *Price Waterhouse* opinion to establish that if an employer could demonstrate that it would have taken the same action in the absence of the impermissible motivating factor, the plaintiff's relief is limited to injunctive and declaratory relief, costs, and attorney fees. *Id.* The Civil Rights Act of 1991 did not establish that if an employer could demonstrate that it would have taken the same action in the absence of the impermissible motivating factor the Plaintiff's cause of action would fail. Therefore, even if, *arguendo*, the Appellee could show that its actions were not controlled by an impermissible motivating factor, the Appellant would still be entitled to proceed to trial given that injunctive and declaratory relief, costs, and attorneys fees remain as available remedies for Appellant's cause of action.

ARGUMENT III.

THE TRIAL COURT ERRED BY MAKING FINDINGS REGARDING DISPUTED FACTS.

In the current case, the Appellee has failed to meet the burden that it would have taken the same employment action even if race had not played a part in its employment decision to not hire the Appellant. The Appellant has proffered evidence that the Appellee informed Appellant that its customer did not want a white individual performing the position of medical director. The

Appellee has claimed that it did not hire Appellant because it did not feel Appellant would be a good fit for the medical director position, and because its customer requested that it not hire the Appellant. These are clear disputes of material fact that should be decided by the jury, and not the trial court. It is a question of fact, and the jury should be allowed to determine if Appellee made its decision based on race, and if so, would the Appellee have made the same decision if its customer did not have a racial preference as to who was hired for the medical director position.

The trial court claims that the Appellant did not dispute the Appellee's reasoning. However, that is simply not true. By offering direct evidence, the Appellant has put forward proof that his race was the only reason for the adverse employment decision. Therefore, the Appellee or its customer's alleged reason for not hiring Appellant is pretextual.

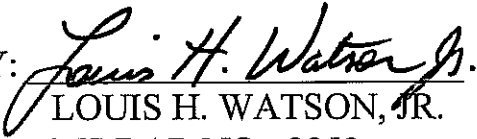
In the alternative, if this Court determines that the Appellee did meet its burden, then the trial court's opinion should still be reversed and remanded for trial to determine if race was a motivating factor in Appellee's decision not to hire Appellant. Then, the trial court may properly determine if the Appellant can be awarded injunctive and declaratory relief, costs, and attorney fees.

CONCLUSION

It is clear that the Appellee automatically assumed its customer's discriminatory intent when it made the employment decision to not hire the Appellant. Therefore, the trial court erred by (1) finding that the racial animus of the Appellee's customer was not attributable to the Appellee, (2) relying on *Price Waterhouse* in deciding to dismiss Appellant's cause of action on summary judgment, and (3) making a determination regarding disputed facts that should be left for the jury to decide.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Louis H. Watson, Jr. do hereby certify that I have this day by United States mail, postage prepaid, forwarded a true and correct copy of the above and foregoing document, as well as a WP 3.5 disk to:

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THIS, the 24TH day of December, 2008.


LOUIS H. WATSON, JR.

UNITED STATES COURT OF APPEALS
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CASE NO. 08-60855

JOSEPH W. BLACKSTON, M.D., J.D.,
Plaintiff/Appellant

VERSUS

WEXFORD HEALTH SOURCES, INC.,
Defendant/Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

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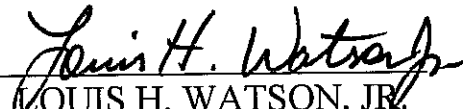
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Respectfully submitted,

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APPELLANT'S MANDATORY RECORD EXCERPTS

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CERTIFICATE OF SERVICE

I, Louis H. Watson, Jr., do hereby certify that I have this day, by United States mail, postage prepaid, forwarded a true and correct copy of the Record

Excepts to the following:

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THIS, the 24th day of December, 2008.


LOUIS H. WATSON, JR.