

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

United States District Court
Southern District of Texas
FILED

NOV - 2 2009

Clerk

CLIVE B HILGERS

CASE NO 7:07-CV-00094

PLAINTIFF

CONSOLIDATED WITH 7:09-CV-

✓

00154

GEORGE S MAY INTERNATIONAL

Company

DEFENDANT

PLAINTIFF'S MEMORANDUM OR LAW
IN SUPPORT OF PLAINTIFF'S REQUEST FOR
RECONSIDERATION AKA "ALTER OR AMEND
JUDGMENT UNDER RULE 59(c)"

PROCEDURAL BACKGROUND

PLAINTIFF TIMELY FILED A REQUEST
FOR RECONSIDERATION AKA "ALTER OR AMEND
JUDGMENT UNDER RULE 59(c)"

LEGAL STANDARD

IN ORDER TO PREVAIL ON A RULE 59(c)
MOTION, THE MOVANT MUST SHOW AT
LEAST ONE OF THE FOLLOWING (1) AN

(1)

INTERVENING CHANGE IN CONTROLLING LAW;
(2) NEW EVIDENCE NOT PREVIOUSLY
AVAILABLE, (3) THE NEED TO CORRECT
A CLEAR OR MANIFEST ERROR OF LAW
OR FACT; OR (4) A MANIFEST INJUSTICE.
IN RE BENJAMIN MOORE AND CO, 318
F3d 626, 629 (5TH CIR 2002)

NUMBERS (1) AND (2) ABOVE DO NOT
APPLY; BUT (3) AND (4) DO APPLY TO
THIS CASE.

NUMBER (3) THE NEED TO CORRECT
A CLEAR OR MANIFEST ERROR OF LAW OR
FACT. THIS COURT ERRORED DUE TO
DEFENDANT'S COUNSEL CASTING THIS CASE
AS A "SABINE" CASE. THIS CAUSED THE
COURT TO APPLY THE WRONG LAW TO THE
WRONG FACTS.

NUMBER (4) A MANIFEST INJUSTICE
ALSO HAS OCCURED DUE TO THE FACT
THAT THIS COURT HAS JUSTIFIED
DISCRIMINATION AGAINST CLIENTS, "IF
IT IS DONE RIGHT." DEFENDANT MAY
FOR OVER 80 YEARS HAS DEVELOPED A
PRACTICE, POLICY AND PROCEDURE OF DISCRIMIN-
ATION AGAINST SOME CLIENTS, DUE TO

THE CLIENT'S RACE, COLOR, NATIONAL ORIGIN. DEFENDANT MAY ALLEGES THAT THIS CAN BE DONE DUE TO THE ALLEGED "FACT" THAT WHEN AN EMPLOYEE IS PAID BY COMMISSION ONLY THAT EMPLOYEE HAS NO RIGHTS UNDER TITLE VII, SINCE THERE HAS BEEN NO HOLDING BY A COURT THAT THE WORD "INDIVIDUAL" AS USED IN TITLE VII ALSO INCLUDES BOTH A CUSTOMER AND/OR CLIENT.

PLAINTIFF NILGERT ALLEGES THAT THE WORD "INDIVIDUAL" AS USED IN TITLE VII CAN AND SHOULD INCLUDE BOTH CUSTOMER AND/OR CLIENT, BASED ON THE FACTS OF EACH CASE.

DEFENDANT MAY'S POSITION IS SIMPLE; "INDIVIDUAL" AS USED BY CONGRESS IN TITLE VII CAN ONLY BE AN EMPLOYEE AND/OR A APPLICANT FOR EMPLOYMENT, EXCLUDING ANY AND ALL OTHER POSSIBLE EMPLOYMENT CLASSES.

THE MAIN INTENT OF TITLE VII WAS TO PROTECT EMPLOYEES FROM EMPLOYER'S WHO WISHED TO CHANGE THE EMPLOYEE'S COMPENSATION, TERMS, CONDITIONS, AND

PRIVILEGES OF EMPLOYMENT BY SOME UNLAWFUL PRACTICES.

COURTS HAVE HELD THAT THERE MUST BE AN EMPLOYMENT RELATIONSHIP BETWEEN THE EMPLOYER AND THE INDIVIDUAL.

THERE WAS AN EMPLOYMENT RELATIONSHIP BETWEEN ALL THREE PARTIES IN THIS CASE. DEFENDANT MAY'S EMPLOYMENT AGREEMENT WITH PLAINTIFF HILBERT CLEARLY REQUIRES HILBERT TO PRODUCE A CLIENT THAT HAS SIGNED A CONTRACT WITH DEFENDANT MAY FOR CONSIDERATION TO RUN A SURVEY OF CLIENT'S BUSINESS (SEE FORM 68).

AFTER THE SIGNING, BY THE CLIENT, OF THE SURVEY CONTRACT IS WHEN DEFENDANT MAY CHOSE TO DISCRIMINATE AGAINST THE CLIENT (INDIVIDUAL) DUE TO THE CLIENT (INDIVIDUAL) RACE, COLOR, NATIONAL ORIGIN.

NO CASE LAW CITED BY DEFENDANT'S COUNSEL DOES THE WORD "CLIENT" APPEAR. DEFENDANT'S COUNSEL JUST ADDED THE WORD CLIENT TO THE WORD CUSTOMER IN HOPEING THAT THE COURT WOULD

NOT CATCH THE LEGAL DIFFERENCE.
IN THE NATIONALLY KNOWN CASE
SECRET SERVICE AGENTS V DENNY'S THE
FACTS OF THE CASE CLEARLY SHOW HOW
AN EMPLOYER CAN DISCRIMINATE AGAINST
CUSTOMERS (THE SECRET SERVICE AGENTS) DUE
TO THE AGENT'S RACE, COLOR, AND
NATIONAL ORIGIN AND AT THE SAME
TIME DISCRIMINATE AGAINST THE
WAITSTAFF (WAITERS/WAITRESS) WHO ARE
MAINLY PAID BY TIPS.

THE SECRET SERVICE AGENT, AMONG
MANY OTHERS, SETTLED THEIR CASES,
COSTING DENNY'S MILLIONS OF DOLLARS
IN DAMAGES; BUT THE WAITSTAFF
EMPLOYEES OF DENNY'S FAILED TO REALIZE
THAT THEY TOO HAD BEEN DISCRIMINATED
AGAINST UNDER TITLE VII DUE TO THE
FACT THAT THEIR EMPLOYER (DENNY'S)
CHANGED THE EMPLOYEE'S COMPENSATION,
TERMS, CONDITIONS AND PRIVILEGES OF
EMPLOYMENT; DUE TO THEIR EMPLOYER'S
DISCRIMINATION AGAINST THE CUSTOMER
(SECRET SERVICE AGENTS)

(5)

PLAINTIFF HILGERT ALLEGES THAT THE WAITSTAFF OF DENNY'S, LIKE HILGERT HIMSELF, WERE DAMAGED BY THE UNLAWFUL ACTS OF THEIR EMPLOYERS AGAINST CUSTOMERS AND/OR CLIENTS.

EMPLOYERS IN THE RESTAURANT INDUSTRY, LIKE DENNY'S, TAKE WHAT IS KNOWN AS THE "TIP CREDIT" AND ONLY PAY WAITSTAFF ABOUT ONE HALF OF THE MINIMUM WAGE IN THE AREA THAT THE WAITSTAFF WORKS.

THIS SYSTEM USUALLY WORKS OUT WELL, THAT IS AS LONG AS THE EMPLOYER DOES NOT DISCRIMINATE AGAINST ANY CUSTOMER, ^{OR CLIENTS} DUE TO THE CUSTOMER'S/CLIENT'S RACE, COLOR, NATIONAL ORIGIN; BUT IF THE EMPLOYER DOES DISCRIMINATE THEN THE WAITSTAFF IS ALSO DISCRIMINATED AGAINST DUE TO A CHANGE IN THEIR COMPENSATION, TERMS, CONDITIONS AND PRIVILEGES OF EMPLOYMENT.

MOREOVER, UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(B), A COURT MAY RELIEVE A PARTY FROM A COURT ORDER FOR (1) MISTAKE, INADVERTENCE, SURPRISE OR EXCUSABLE NEGLECT; (2) NEWLY

(4)

DISCOVERED EVIDENCE; (3) FRAUD; (4) THE JUDGMENT IS VOID; (5) THE JUDGMENT HAS BEEN SATISFIED, RELEASED OR DISCHARGED; OR (6) ANY OTHER REASON THAT JUSTIFIED RELIEF. FED R. CIV P 60(b); BATTIS V TOW-MOTOR FRANKLINT CO. 66 F3d 743, 747 (5TH CIR 1995)

A DISTRICT COURT HAS CONSIDERABLE DISCRETION TO GRANT OR DENY A MOTION UNDER RULE 59(e). SEE HOWARD H. BOBKIN CO. V BANNER CO. 6 F3d 350, 355 (5TH CIR 1993). THE COURT, MUST "STRIKE THE PROPER BALANCE BETWEEN THE NEED FOR FINALITY AND "THE NEED TO RENDER JUST DECISIONS ON THE BASIS OF ALL THE ~~THE~~ FACTS"

EVERY EMPLOYEE MUST BE PROTECTED FROM AN EMPLOYER THAT CAUSES THE EMPLOYEE A LOSS OF COMPENSATION, TERMS, CONDITIONS AND PRIVILEGE OF EMPLOYMENT PARTICULARLY WHEN THE EMPLOYEE IS PAID ONLY ON COMMISSION OR IN MOST PART ON TIPS; THAT IF NOT PAID WOULD RESULT IN THE EMPLOYEE NOT EVEN RECEIVING MINIMUM WAGE.

(7)

PLAINTIFF HILBERT ALLEGES THAT GIVEN THE FACTS IN THIS CASE AND THE FACT THAT CONGRESS CHOSE NOT TO GIVE A DEFINITION OF THE WORD "INDIVIDUAL" AS CONGRESS USED THE WORD IN TITLE VII THERE WOULD NOT BE A CHANGE IN THE LAWS; BUT ONLY A NEW APPLICATION OF EXISTING LAWS.

IN THE ALTERNATIVE IF EXISTING LAWS DO NOT COVER THE FACTS AS ALLEGED BY PLAINTIFF HILBERT AND THE EXAMPLE OF SECRET SERVICE AGENTS DENNOYS WHERE THE WAITSTAFF DID NOT EVEN KNOW THAT THEY HAD RIGHTS UNDER TITLE VII THAT WAS ENTIRELY INDEPENDENT FROM THE RIGHTS OF THE CUSTOMERS (SECRET SERVICE AGENTS)

THIS CASE ALLEGES FACTS THAT SHOULD BE THE REASON(S) FOR A CHANGE IN EXISTING LAW SO AS TO COVER ALL THOSE THAT ARE PAID ON COMMISSION ONLY AND HAS THE EMPLOYER DISCRIMINATE AGAINST THE CUSTOMER OR CLIENT.

CONCLUSION

CONGRESS IN USING THE WORD "INDIVIDUAL" IN TITLE VIII HAVE LEFT IT TO THE COURTS TO DETERMINE, BASED ON THE FACTS, WHO IS OR WHOM IS NOT AN INDIVIDUAL.

PLAINTIFF HILGERT ALLEGES THAT IN BOTH CASES (THE ONE BEFORE THIS COURT AND SECRET SERVICE AGENTS V DENNY'S) THAT IT IS REASONABLE TO ASSUME THAT CONGRESS USED THE WORD "INDIVIDUAL" TO INCLUDE BOTH CUSTOMERS AND CLIENTS, AGAIN BASED ON THE FACTS OF EACH CASE.

THE WAITSTAFF AT DENNY'S, UNLIKE PLAINTIFF HILGERT, DID NOT REALIZE THAT THEY TOO HAD A CLAIM UNDER TITLE VIII DUE TO THE FACT THAT THEIR EMPLOYER'S HAD DISCRIMINATED AGAINST A CUSTOMER AND/OR CLIENT, THAT RESULTED IN THE EMPLOYER (DENNY AND GSM) CHANGING THEIR COMPENSATION, TERMS, CONDITIONS AND PRIVILEGE OF EMPLOYMENT.

THIS COURT, BASED ON DEFENDANT'S COUNSEL CASTING OF THE CASE ASSUMED IN ERROR THAT THE CASE WAS JUST A "SABINE" AND THAT PLAINTIFF HILGERT

HAD JUST FAILED TO PROVE THAT HE WAS IN FACT A PROTECTED PERSON UNDER TITLE VII, AFTER ATTEMPTING TO SETTLE THE FACTS INTERNALLY WITH DEFENDANT MAY; BUT RESULTED IN FILING A COMPLAINT IN THIS COURT ON MAY 1-2007.

PLAINTIFF HILGERT ALLEGES THAT THIS COURT UNDER RULE (59e)(3)(4) NEEDS TO CORRECT A CLEAR OR MANIFEST ERROR OF LAW OR FACT AND (4) A MANIFEST INJUSTICE ALSO HAS OCCURED. DUE TO THE WAITSTAFF AT DENNY'S EITHER DID NOT KNOW OR UNDERSTAND THE RIGHTS GRANTED TO EMPLOYEES UNDER TITLE VII; BUT PLAINTIFF HILGERT DID; RESULTING IN THIS FIGHT FOR JUSTICE.

"DISCRIMINATION AGAINST ANY AND ALL INDIVIDUALS NO MATTER WHAT THEY ARE CALLED - EMPLOYEES, APPLICANTS, CUSTOMERS OR CLIENTS, BY EMPLOYERS MUST BE STOPPED WHEN THE DISCRIMINATION RESULTS IN A CHANGE IN THE EMPLOYEE'S COMPENSATION, TERMS, CONDITIONS, AND PRIVILEGE OF EMPLOYMENT.

THIS COURT NEEDS TO ADDRESS

PLAINTIFF HILBERT'S ALLEGATION OF
MANIFEST INJUSTICE BY SOME EMPLOYERS
TOWARD THEIR EMPLOYEE WHEN THE
EMPLOYEES ARE PAID COMMISSION ONLY
AS HILBERT WAS, OR ON A "TIP CREDIT"
BASIS AS WERE THE WAITSTAFF AT
DENNY'S.

EMPLOYEES, WHETHER PAID COMMISSION ONLY
OR A "TIP CREDIT" IS TAKEN ALL HAVE A
SIGNIFICANT ECONOMIC STAKE IN THE
OUTCOME UNDERLYING THE LITIGATION
OF THIS CASE WHICH WOULD RESULT
IN CREATING A SIGNIFICANTLY PROTECTABLE
INTEREST.

RESPECTFULLY SUBMITTED

Clive B. Hilbert

CLIVE B. HILBERT

2500 N 32 ST APT 2

MCCALLEN TX 78501


956-566-4540

(11)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND
CORRECT COPY OF THE FOREGOING DOCUMENT
WAS SERVED UPON COUNSEL OF RECORD
LISTED BELOW BY PREPAID MAIL ON
THIS 2 DAY OF NOV 2009.

DENNIS A CLIFFORD
SEYFARTH SMITH LLP
700 LOUISIANA ST SUITE 3700
HOUSTON, TX 77002


C. B. HILLERS