

2nd Cir.: Racial Bias of Person Recommending Tenure Denial Taints Decision

By David A. Scott 7/24/2015

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A teacher will be able to present his racial bias claim to a jury because the principal who recommended that he be denied tenure allegedly made racially charged remarks, even though the principal did not make the ultimate tenure decision, the 2nd U.S. Circuit Court of Appeals ruled.

Rickey Tolbert was a culinary arts teacher at a predominantly black high school in Rochester City, New York. Tolbert, who is black, taught three culinary arts classes a day as a nontenured, probationary teacher. He received satisfactory evaluations during his first two school years.

In New York, teachers serve a three-year probationary period. If the teacher does not receive tenure at the end of the third year, he or she is usually terminated. The school district also has the option to extend the probationary term for one year and postpone the tenure decision. A teacher who receives tenure can only be terminated for cause.

Before the start of Tolbert's third year, the school hired a new principal, Richard Smith. Smith closed the kitchen in Tolbert's classroom after the county and state health departments cited the school for health violations. Tolbert blamed the janitorial staff and the school blamed Tolbert and his students.

Tolbert received three formal evaluations during his third school year from three different school administrators who observed his classes. The first evaluator rated Tolbert's performance as "unsatisfactory," the lowest possible rating. The second and third evaluators gave Tolbert a satisfactory rating of "meets professional standards."



When it was time for Tolbert's critical year-end evaluation, the school's administrative team circulated a memorandum to the teaching staff identifying the person who would be responsible for conducting each teacher's evaluation. The team assigned Tolbert's year-end evaluation to one of the two administrators who had rated Tolbert as satisfactory during the year. But, without notifying Tolbert of the change, Smith reassigned the task to the first evaluator who had initially rated Tolbert as unsatisfactory. Not surprisingly, her year-end evaluation of Tolbert was very negative. She gave Tolbert an overall rating of "below professional standards," including unprofessional marks in 12 of the 18 categories, and she recommended that Tolbert be denied tenure. Smith agreed with the assessment, but he recommended that Tolbert's probation be extended for a fourth year. Tolbert refused the offer of a fourth year of probation, and a recommendation against tenure was forwarded to the Rochester City School Board for further action.

The school board did not approve of the denial of tenure. However, the superintendent made a final decision to deny tenure based on the evaluations of Tolbert and on Smith's recommendation that Tolbert's probation be extended for a fourth year. In a final effort to keep Tolbert, the school district again extended the offer of a fourth year of probation; Tolbert again refused the offer. Tolbert then sued both Smith and the school district for racial discrimination.

To support his claim of racial bias in the tenure decision, Tolbert pointed to several racist remarks allegedly made by Smith. Tolbert alleged that Smith asked him if he "only knew how to cook black, or can [he] cook American too?" when Tolbert volunteered to cook for the homecoming breakfast in the fall of 2008. Tolbert claimed that Smith commented that "the kids we get at this school are not from much better than this" when they were inspecting areas in the classroom that Tolbert believed had not been cleaned by the janitorial staff.

Tolbert also presented evidence of comments allegedly made by Smith to other people. One of Tolbert's students stated that Smith asked her in January 2009 "how she expected to learn if all [she] was learning to cook was black food" during a conversation about reopening the kitchen in the classroom. When asked to define "black food," Smith said that he meant "American food." Another student stated that Smith told her in January or February of 2009 that "black kids can't learn in a cooking class because all they want to do is eat." A school counselor also stated that, near the beginning of the 2008-09 school year, Smith commented when referring to the students at the school that "my friends, they are not like us." The counselor perceived that as a comment about the students' race.

The federal district court judge dismissed the alleged comments as merely "stray remarks" that were not sufficient to prove that Tolbert was denied tenure because of his race. The judge concluded that Tolbert had not presented sufficient proof of a discriminatory intent, and he dismissed the case. Tolbert appealed.

The 2nd Circuit took a different view of the evidence and the school's arguments. The school first argued that Tolbert had not been harmed because he was offered a fourth year of probationary employment, and he would have been in no worse of a situation had he accepted the offer. The court observed that the school's argument missed the point that offering a fourth year of probation was "wrapped like a pretzel" with the denial of tenure. And Tolbert was harmed because, had he received tenure, he would only be subject to termination for cause. Without tenure, he could be dismissed for any lawful reason.

The school argued next that the alleged racial remarks by Smith were not proof of racial bias factoring into the tenure decision because they were not connected to the decision itself. The court observed that there is no bright-line rule for deciding when remarks become too attenuated to prove discriminatory intent. But the court concluded that Smith's remarks could not be ignored because all occurred during Tolbert's third school year, some of the comments were critical of Tolbert's qualifications as a teacher and the remarks clearly suggested a racial bias. Although Smith denied making the remarks, that was a credibility assessment that a jury would have to make.

Finally, the school argued that the ultimate decision to deny tenure was made by the superintendent, not Smith. The court of appeals was not persuaded. The court referred to Smith as the “de facto decision-maker.” Although the superintendent in fact made the ultimate tenure decision, he testified that he relied on Smith’s recommendation. The court observed that the impermissible bias of a single person at any stage of the promotion process may taint the ultimate employment decision. So, therefore, Tolbert should be allowed to present his discrimination claim to a jury.

Tolbert v. Smith, 2nd Cir., No. 14-1012-cv (June 24, 2015).

Professional Pointer: This case illustrates the importance of training even at the highest levels of an organization. A few ill-timed remarks can tarnish an organization’s reputation and lead to costly battles in the courtroom.

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