IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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ANTHONY SMITH and FLYING A.J.'S TOWING COMPANY, LLC,

Plaintiffs,

v.

JOHN WILSON and TOWN OF BELOIT,

Defendants.

OPINION AND ORDER

10-cv-062-wmc

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Unless subjected to racism, it is likely difficult to fully appreciate the feelings one might have when he suspects, but does not know, that an action taken against him was motivated by his race. Certainly, in this day and age, when some believe, or want to believe, that racism, at least blatant racism, is a thing of the past, it must be all the more painful to learn that one's worst suspicions are true when it come to the motives of a public official, particularly if the official is the chief of police. That is what happened to plaintiff.

Smith suspected for a number of years, and eventually brought suit alleging that defendant John Wilson, the former Chief of Police for the Town of Beloit, had denied his company Flying A.J.'s Towing Company, LLC an opportunity to be placed on the Town's towing list because Smith is African American. After hearing the evidence, a jury returned the following answers to the special verdict on liability:

> QUESTION NO. 1: Was Smith's race a motivating factor in defendant John Wilson's decision to deny plaintiffs an opportunity to apply for inclusion on the Town of Beloit's towing list?
>
> ANSWER: Yes __X__ No____

> QUESTION NO. 2: Even if race were not a motivating factor, would Wilson still have denied plaintiffs an opportunity to apply for inclusion on the Town's towing list?
>
> ANSWER: Yes __X__ No_____

(Dkt. #225.)

In light of this mixed verdict, the court requested that the parties provide proposed judgments and supporting briefs. Plaintiffs have also filed a motion for a new trial on damages or, in the alternative, a new trial on all issues. (Dkt. #233.) Finally, pending before the court is plaintiffs' motion for attorney's fees. (Dkt. #239.) There is overwhelming evidence supporting the jury's finding that racial animus motivated the defendants' conduct. Unfortunately for Smith, there is also sufficient evidence to support the jury's further finding that the defendants would have acted the same even if race played no role. This finding legally bars *all* of plaintiffs' requested relief. Accordingly, this court will (1) enter judgment for defendants, (2) deny plaintiffs' motion for a trial on damages or a new trial, and (3) deny plaintiffs' motion for attorney's fees.[1]

## BACKGROUND

The Town of Beloit's Chief of Police from 2003 to 2011, John Wilson, regularly used racial slurs to describe people of color, especially African Americans. Wilson acknowledged using the word "nigger" to describe African Americans on numerous

[1] Also pending is plaintiffs' motion to strike defendants' memorandum in support of order on liability judgment. (Dkt. #237.) Since the court did not rely on any confidential statements in defendants' brief in reaching its decisions, this motion is denied as moot.

occasions while on duty, and specifically acknowledged using that word to refer to plaintiff Anthony Smith. Other Town of Beloit employees also testified to Wilson's regular use of phrases like "fucking nigger" and "goddamn nigger" while on the job. Specifically, after speaking with Smith about his request to be placed on the Town's towing list, a number of employees recalled Wilson telling others "that fucking nigger was not going to tow for the Town of Beloit."

At the time, Smith was not aware Wilson spoke those words, though he suspected that racism may have played a role in his company being denied inclusion on the Town's towing list. Smith's suspicions seemed confirmed when Wilson's use of racial epithets -- including specific references to Smith -- were reported to the Town of Beloit by the police department's union in late 2008.

The jury plainly relied on all of this evidence in finding that Smith's race was a motivating factor in Wilson's decision to deny plaintiffs an opportunity to apply for inclusion on the Town of Beloit's towing list. As reflected above, however, the jury ultimately decided that Wilson and the Town would have made the same decision regardless of Smith's race.

## OPINION

Plaintiffs contend that the two answers by the jury -- that race was a motivating factor in denying a place on the towing list *and* that Smith and his company would have been denied regardless -- constitute an inconsistent verdict, which the court should either: (1) throw out altogether by ordering a new trial or (2) convene another jury to

determine Smith's personal damages for the pain and suffering caused by Wilson's discrimination. This court can find no legal basis to grant either request.

Certainly, the jury *could* have found the other way -- that Wilson would have granted Smith's request had he not been African American -- since the evidence demonstrated that Wilson did not give Smith due consideration, at least in part, because of his race. But the undisputed evidence at trial also demonstrated that during the relevant period (1) *no* new companies were placed on the towing list and (2) at least one other company, a white-owned company, was denied placement on the list. Accordingly, the jury had a sound factual basis to find a mixed motive, as well as for concluding that Smith and his company would not have been allowed an opportunity for placement on the Town's towing list regardless of race.

As for Smith's demand for damages arising solely from Smith having to confront blatant racism, the court has no reason to doubt that Smith's claimed pain and suffering is real. Indeed, they may well be profound given that Wilson made such offensive remarks as the Town's appointed head of its police department. But the law does not permit recovery under Title VI and 42 U.S.C. § 1981 for racial animus alone.[2]

If this case had been an employment case under Title VII, the result would be different. In particular, Wilson's apparent mixed motive would not have precluded a liability finding, rather it would have limited the remedies available to plaintiffs. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (authorizing certain types of relief, including declaratory

[2] The court submitted the motivating factor special verdict question at plaintiffs' request. Defendants initially suggested a "because of" question, but acquiesced to the motivating factor question provided the court also instruct the jury on a mixed motive and required the jury to decide whether Wilson would have made the same decision.

relief, injunctive relief and attorney's fees).[3] Here, however, the jury's finding that Wilson would have made the same decision even if Smith's race were not a factor relieves defendants of any legal liability under § 1981 *and* Title VI. *See Texas v. Lesage*, 528 U.S. 18, 21 (1999) ("The government can avoid liability by proving that it would have made the same decision without the impermissible motive."); *see also Anderson v. City of Boston*, 375 F.3d 71, 94-95 (1st Cir. 2004) (extending the holding in *Texas v. Lesage* to Title VI and § 1981 claims of race discrimination).

More recently, the United States Supreme Court in *Gross v. Financial Services, Inc.*, 129 S. Ct. 2343, 2349-51 (2009), rejected the use of the mixed motive framework in Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA") claims. Unlike Title VII, the ADEA contains no "motivating factor" language. The Seventh Circuit has since applied the reasoning in *Gross* to foreclose a mixed motive instruction in First Amendment retaliation claims and ADA claims. *See Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010) (eliminating mixed motive instruction in ADA cases); *Fairley v. Andrews*, 579 F.3d 518, 525-26 (7th Cir. 2009) (applying *Gross* to First Amendment retaliation claim and specifically holding that "unless a statute . . . provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law").

Neither Title VI, nor § 1981, contain the motivating factor or mixed motive language added by Congress in an amendment to Title VII. If the court erred in this case, it was in granting *plaintiffs'* request for a mixed motive instruction and submitting

[3] Nor is this a procedural due process case like *Carey v. Piphus*, 435 U.S. 247 (1978), where the Supreme Court allowed an award of nominal damages for a procedural due process violation even where the student's suspension would have occurred absent the due process violation.

questions number 1 and 2 to the jury, instead of submitting a single "but for" question. Plaintiffs have waived any challenge to an instruction they proffered. Even if they did not, the court's error was harmless. In *Serwatka*, the Seventh Circuit held that the district court erred in asking similar questions, but concluded that by answering "yes" to a "same decision" question (like that in "question no. 2" here, as quoted above), the jury had found that plaintiff "did not show that her disability was a but-for cause of her discharge." 591 F.3d at 963. Accordingly, the Seventh Circuit vacated the district court's grant of declaratory judgment, injunctive relief and an award of attorney's fees and costs, and remanded to the district court with directions to enter judgment for defendant. *Id.* at 964.

The same result is required here. Absent a finding of liability on some claim, plaintiffs are not entitled to damages, including those for pain and suffering, nor are they a "prevailing party" under current law and, therefore, have no right to an attorney's fee award under 42 U.S.C. § 1988. Plaintiffs hint that the Town's change to its towing policy in March of 2010 could provide an alternative basis for attorney's fees, since the change occurred after this litigation was filed and was arguably motivated, at least in part, by this lawsuit. But this avenue, too, proves a dead end. In *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 605 (2001), the United State Supreme Court rejected attorney's fees premised on the so-called "catalyst theory," instead requiring an "alternation in the legal relationship of the parties" as a basis for awarding fees under 42 U.S.C. § 1988 and other fee-shifting statutes. *See also Walker v. Calumet City, Ill.*, 565 F.3d 1031, 1033-34 (7th Cir. 2009) (reversing award of attorney's fees because there was no "judicial imprimatur on" the "material alteration in the legal relationship between the parties"). But for the contrary,

controlling case law cited above, the court would have thought a similar right of recovery might be implied under Title VI, the grounds of relief expressly granted by Congress under Title VII being every bit as compelling under VI, if not more so.

The court's entry of judgment in defendants' favor is dictated by the jury's finding as to question no. 2. The Town and its former Chief of Police should, however, ponder the jury's answer to the first question -- that a chief of police in the first decade of this new millennium factored race into a decision to deny plaintiffs an opportunity to contract with the Town. Regardless of the outcome here, the jury's finding of a racial motive should elicit embarrassment -- not a sense of vindication -- on the part of defendants.[4]

ORDER

IT IS ORDERED that:

1) plaintiffs' motion for new trial on damages, or, in the alternative, a new trial (dkt. #233) is DENIED;

2) plaintiffs' motion for attorney's fees (dkt. #239) is DENIED;

3) the motion of plaintiffs' former counsel Gingras, Cates & Luebke to file a reply brief (dkt. #261) is GRANTED;

4) the motion for attorney's fee submitted by Gingras, Cates & Luebke (dkt. #240) is DENIED;

5) plaintiffs' motion to strike defendants' memorandum in support of order on liability judgment (dkt. #237) is DENIED;

[4] Because defendants offered on February 18, 2011, a substantial sum to plaintiffs to settle this case pursuant to Fed. R. Civ. P. 68, the court will award statutory costs after that date, including the costs of the videotaped depositions -- both the videotape and the transcript -- for two of defendants' witnesses who were unavailable at trial to which plaintiffs objected. Forbeck's videotaped deposition was played at trial and Robbins's would have been played if the case had progressed to damages. In light of this, the court finds that it is appropriate to award the costs associated with these two depositions.

6) plaintiffs' motion for discovery of defendants' attorneys' fees (dkt. #258) is DENIED AS MOOT;

7) plaintiffs' motions for costs (dkt. ##249, 253) is DENIED;

8) defendants' respective motions for costs are GRANTED; and

9) the clerk of the court is directed to:

   a. enter judgment in favor of defendants,

   b. award statutory costs to defendant Wilson in the amount of $717.65 and to defendant Town of Beloit in the amount of $3,716.86, and

   c. close this case.

Entered this 15th day of June, 2011.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge