

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BBF ENGINEERING SERVICES,
P.C., and BELLANDRA FOSTER,

Plaintiffs,

v.

Hon. Nancy G. Edmunds
Case No. 11-CV-14853

THE HONORABLE RICK SNYDER,
in his capacity as GOVERNOR OF THE
STATE OF MICHIGAN, KIRK T. STEUDLE,
in his capacity as DIRECTOR of the
MICHIGAN DEPARTMENT of TRANSPORTATION,
VICTOR JUDNIC, and MARK STEUCHER,

Defendants.

_____ /

MOTION FOR SUMMARY JUDGMENT

Detroit, Michigan - Wednesday, June 26, 2013

APPEARANCES:

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On behalf of Plaintiffs

On behalf of Defendants

- - -

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I N D E X

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1 **Detroit, Michigan**

2 **Wednesday, June 26, 2013**

3 **2:40 p.m.**

4 - - -

5 **LAW CLERK:** The court calls case number 11-14853,
6 BBF Engineering Services versus Rick Snyder, et al.

7 Please state your appearances for the record.

8 **MR. WILLIAMS:** Good afternoon, Your Honor. Avery
9 Williams appearing on behalf of plaintiffs, BBF Engineering and
10 Bellandra Foster.

11 **MR. DITTENBER:** Michael Dittenber, Assistant
12 Attorney General, appearing on behalf of all defendants.

13 **THE COURT:** This is defendant's motion for summary
14 judgment.

15 **MR. DITTENBER:** It is, Your Honor.

16 **THE COURT:** Mr. Dittenber.

17 **MR. DITTENBER:** Good afternoon, Your Honor.

18 **THE COURT:** Good afternoon.

19 **MR. DITTENBER:** Your Honor, the plaintiffs'
20 complaint in this case tells quite a story, and to borrow one
21 of their terms, a sordid tale, and a story or sordid tale may
22 get you past the motion dismiss, but after the summary judgment
23 stage, when the evidence sufficient to raise an issue of
24 material fact, and I submit that the brief and the evidence in
25 this case does not raise an issue on any of the claims.

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1 And I'd like to briefly address the claims as to
2 each defendant. Do you have any preference which order I
3 proceed?

4 **THE COURT:** I don't really need you to address the
5 issues with respect to Rick Snyder and Kirk Steudle. I would
6 prefer that you just focus your argument on Ms. Foster's both
7 direct and circumstantial case for race and gender
8 discrimination.

9 **MR. DITTENBER:** Certainly, Your Honor, and to do
10 that, I'll start with the claims against Mr. Steucher. That
11 involves a single contract, a single scoring panel for that
12 contract. And would it assist the Court if I briefly describe
13 the process?

14 **THE COURT:** No, I'm very familiar with the facts.

15 **MR. DITTENBER:** Okay. And the claim here is that
16 Mr. Steucher, in that scoring meeting made the statement, "I
17 hate her," and changed the scores.

18 **THE COURT:** Okay. So acknowledging that the
19 statement "I hate her" shows some animus, it doesn't really
20 show gender or race animus. I mean, what it shows --

21 **MR. DITTENBER:** I completely agree with you.

22 **THE COURT:** -- is personal, "I don't like her." I
23 mean...

24 **MR. DITTENBER:** I fully --

25 **THE COURT:** There are people that don't like me.

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1 That doesn't have anything to do with my race or gender, they
2 just don't like me for one reason or another, and that's
3 probably true or most of us.

4 **MR. DITTENBER:** I fully agree with that statement,
5 and there's nothing else in the record to add anything else to
6 that statement, to raise gender based discrimination.
7 Unfortunately, the English language does not have gender
8 neutral pronouns, we use "his" or "her," and until someone can
9 come up with a race neutral pronoun, this is the way the
10 English language works. If you're referring to a female, you
11 use the word "her," and without any evidence that Mr. Steucher
12 had any other motivations, personal animosity alone is not the
13 basis for an equal protection violation, and even if the courts
14 were to conclude that it were, it is not clearly established at
15 the time of the complaint. Mr. Steucher is entitled to
16 qualified immunity.

17 **THE COURT:** Okay. On the other hand, he does then
18 take her rating and move her to the bottom or move her off the
19 top three or four so that she's not considered for this
20 contract.

21 **MR. DITTENBER:** Those are the allegations. There is
22 another panel member that disagrees with those allegations.
23 I've submitted the affidavit. All four panel members signed at
24 the bottom that these were the rankings. Apparently, one panel
25 member, Mr. Dargin, has now retracted that, his signature.

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1 But again, is taking an action based on personal
2 animosity appropriate in the public contracting context?
3 Probably not. And if you accept Ms. Foster's allegations,
4 Mr. Steucher was not put on any further selection teams, but it
5 is still not an equal protection violation, and that's the only
6 claim against Mr. Steucher.

7 **THE COURT:** Okay.

8 **MR. DITTENBER:** I'd like to then move on to
9 Mr. Judnic, and unlike Mr. Steucher and a single decision, the
10 plaintiffs have made allegations involving essentially every
11 decision Mr. Judnic made over a three or four-year period that
12 they disagree with. Before we even get to direct or
13 circumstantial evidence with Mr. Judnic, would you like me to
14 get into the statute of limitations argument?

15 **THE COURT:** I already ruled on the statute of
16 limitations argument, so you don't have to go back over that
17 again.

18 **MR. DITTENBER:** Okay. And there are also certain
19 allegations that they appear to attribute to Mr. Judnic that
20 did not involve Mr. Judnic's personal involvement. Under 1983,
21 you have to be personally involved in the decision to be
22 liable, and there's two of those. The first one is the
23 allegations regarding the Gateway agreement. There's
24 allegations that Ms. Foster's company was not paid, and she was
25 a subconsultant on that project, so it was a consultant not

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1 paying her. And she's alleging that Mr. Judnic should have
2 caught onto this faster. At the very most, that might be a
3 claim for negligence, and negligence is not a basis for equal
4 protection violation.

5 And the second is, Ms. Foster alleges that certain
6 of her staff were required to take additional training, and
7 there are affidavits from both Mr. Judnic's supervisor at the
8 time, and the individual who made the decision, Tia Klein, was
9 another MDOT engineer, both stating that it was Ms. Klein's
10 decision, and Mr. Judnic was not involved in that decision.

11 **THE COURT:** How do you get past -- and I understand
12 that there are different standards here, but you've got the FHA
13 doing an independent investigation and finding basically that
14 there's sufficient evidence to warrant kind of a chastisement
15 of the department and request that their procurement policies
16 be revisited based on the exact same facts as alleged in this
17 complaint, really.

18 **MR. DITTENBER:** Well, the only findings that the
19 FHWA made with regard to Mr. Judnic were in regard to the 2006
20 contract, which Your Honor has already ruled before the statute
21 of limitations. There's no findings on any of the timely
22 claims that Mr. Judnic discriminated based on race or gender.

23 **THE COURT:** Well, I don't think there were any
24 findings that he discriminated based on race or gender. There
25 was just basically the finding where there's smoke there may be

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1 fire, so we'd like you to take another look at your procurement
2 policies. Wasn't that the finding?

3 **MR. DITTENBER:** That was the ultimate recommendation
4 based on some of the fact finding that the FHWA did, but
5 certainly any program can be approved without it being
6 discriminatory to begin with, and any measures that MDOT or any
7 individuals have taken are remedial measures that would be
8 inadmissible at trial.

9 **THE COURT:** Okay.

10 **MR. DITTENBER:** And with regard to the direct
11 evidence with Mr. Judnic, the statement that is attributed to
12 him is that, "No woman should make this type of money," or
13 something very close to that.

14 **THE COURT:** Right.

15 **MR. DITTENBER:** This statement was made sometime in
16 2006, we don't know when.

17 **THE COURT:** The statement -- the statement itself is
18 not actionable because of the statute of limitations, but the
19 statement certainly can be used as a lens through which you
20 look at what happened subsequently.

21 **MR. DITTENBER:** I agree with that, but it is at
22 least two, more possibly three or four years before any timely
23 action was taken, and we don't know who he was talking about,
24 we don't know when exactly the statement was made, and it's a
25 statement of opinion that has not been tied to any decision he

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1 subsequently made. While it certainly can be looked at as
2 possible evidence without any other evidence to connect it to
3 any type of decision on a contract, it's not direct evidence,
4 and if we go to the circumstantial test with Mr. Judnic, the
5 plaintiffs can't even get past a prima facie case.

6 There's two issues. The first is that to state a
7 prima facie case, and I've borrowed from employment law even
8 though I do not believe that her company or former spouse were
9 employees of the Department of Transportation, but just as
10 analogy, and under a prima facie case in employment law, you
11 have to show that there was an adverse reaction that was
12 material in some respect, and with the timely claims, none of
13 those rise to that level in the employment context. It's your
14 terminations, your lack of promotions your hirings, your
15 firings.

16 **THE COURT:** Well, she lost out on some big
17 contracts. I mean, she had a contract, half of it was taken
18 away from her, and after it was awarded to her it was
19 rescinded. I mean, that's a pretty big employment action.

20 **MR. DITTENBER:** But that was --

21 **THE COURT:** That's adverse.

22 **MR. DITTENBER:** But that was in 2006, though, and
23 Your Honor has already ruled that any claims related to that
24 are untimely.

25 **THE COURT:** To that directly, but, again, you can,

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1 you know, all of that kind of informs what happens later, so I
2 mean, if you look at it, you're right, it's not directly
3 actionable, I've already ruled that, but it's part of the
4 res gestae that you look at to look at the action that was
5 taken later.

6 **MR. DITTENBER:** But to proceed to trial, plaintiffs
7 have to identify a timely act that occurred within the statute
8 of limitations that was motivated by race or gender, and none
9 of the timely decisions that they've identified are materially
10 adverse. They usually have to do with meetings or with using
11 the FOIA process. The only one that's even close is an
12 evaluation, but the Sixth Circuit has ruled that mediocre
13 evaluations are not actionable, and the evaluation must affect
14 your future earnings or advancement, and there's no evidence
15 that this one evaluation, that if they would have gotten one
16 point higher on these categories, that they got sevens and
17 should have been higher, that that would have --

18 **THE COURT:** What about, I mean, the problem that I
19 have with a lot of -- with this case, I've looked at it a lot,
20 is that it's hard to point to one thing. It's not like she was
21 demoted or denied or -- but if you look at the accumulation of
22 things over the years, the Love Charles incident, the fact that
23 her contract was reduced, her 2008 contract was reduced from
24 two years to one until she complained about it, and then it was
25 reinstated, the whole thing about the 2010 RFP requiring her to

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1 have five leased vehicles where she was not allowed -- then the
2 other incident in which she was not allowed to bill as a
3 principal.

4 I mean, there are a lot of little things that
5 accumulated with the relationship between her and MDOT, and
6 specifically involving Mr. Judnic, and what I'm trying to do is
7 look at this as the Sixth Circuit might look at it, and say is
8 this really amenable to summary judgment here? Is there
9 nothing here that goes to the possibility that there was animus
10 based on race or gender?

11 **MR. DITTENBER:** In response to that, Your Honor, I
12 don't believe that you can aggregate claims. It's not a
13 hostile work environment type claim. It's a disparate
14 treatment claim, and there has to be a specific act within the
15 statute of limitations that would satisfy the McDonnell Douglas
16 burden shifting test, and even if we forget a minute about
17 whether it's materially adverse, there's been no indication
18 that Mr. Judnic was treating others differently. They
19 identified no companies that he was holding these meetings with
20 that he was giving better evaluations to when there is the same
21 documented performance deficiencies.

22 And what the RFP, that was, that was an
23 advertisement for proposals to all companies. Every company
24 that wanted to submit a proposal for that project had to, would
25 have had to comply with it, and there are affidavits from both

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1 the MDOT project engineer and the consultant project engineer
2 saying that the consultant that did win that contract did
3 comply with that requirement, and if it's a requirement that is
4 based on the size of her company, her company doesn't meet
5 that, that the size of her company, you know, is not a
6 protected class, it's a race neutral, gender neutral
7 requirement.

8 **THE COURT:** Okay.

9 **MR. DITTENBER:** Okay.

10 **THE COURT:** Mr. Williams.

11 **MR. WILLIAMS:** Yes, Your Honor.

12 **THE COURT:** You know, you do have some problems with
13 your prima facie case here. I mean, first of all, I don't see
14 any evidence that Mr. Judnic treated white males differently or
15 better than he treated her.

16 **MR. WILLIAMS:** Well, Your Honor I --

17 **THE COURT:** And I don't see any adverse employment
18 action. I see, as I said to Mr. Dittenber, a lot of kind of
19 little annoying things, but I don't know that it rises to an
20 adverse employment action.

21 **MR. WILLIAMS:** Well, Your Honor, I would
22 respectfully beg to differ. I mean, if you look at the
23 totality of what has happened here, Mr. Judnic did a lot of
24 things that impacted BBF Engineering, and BBF Engineering, as
25 Mr. Dargin testified to in his deposition, was adverse, the

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1 company in the southeastern Michigan region. When Mr. Judnic
2 came in, he promoted a number of majority companies, HNTB and
3 others, including going to work for HNTB after the fact.

4 If you look at the whole vehicle purchase idea, that
5 was there to wipe out this minority contractor that didn't have
6 the capital to make the purchase, and so who does? Just the
7 large majority companies.

8 You can't just look at this and say, well, you
9 haven't proven your case, prima facie. I think, Your Honor,
10 enough has been raised on a question of fact that we ought to
11 be able to go to a jury to allow them to hear. This is not a
12 case where we ought to be, at this stage, required to prove,
13 you know, for summary judgment purposes.

14 **THE COURT:** No, but you do have to meet the
15 requirements of the prima facie case. You have to show an
16 adverse employment action, and you have to show -- or an
17 adverse action, I think she's an independent contractor, not an
18 employee. And you also have to show disparate treatment. You
19 have to show that he treated white males differently.

20 **MR. WILLIAMS:** And, Your Honor, I believe he did.
21 If he goes to work for HNTB after he's done with all of this,
22 after he's moved BBF out of the way, BBF bids on 22 contracts
23 and gets none after he starts working for MDOT, that is
24 adverse, that is different.

25 HNTB got the Gateway project. You know, there were

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1 other majority firms that were asked to split the contract with
2 her on the M10. When MDOT came into southeastern Michigan and
3 began working on major projects, suddenly BBF Engineering was
4 not good enough. She was moved out, and all of a sudden we've
5 got the majority companies in playing the game.

6 I think that is adverse, and I think it's pretty
7 clear that not bidding a winning contract after 2008, you're
8 the DBE of the year, and suddenly you're no longer good enough,
9 you don't need anything?

10 We have Charles Love testifying that this was an
11 orchestrated plan to eliminate him from her company for
12 purposes of getting her out of this region, and he was the
13 person that worked for MDOT all of these years, putting DBE's
14 on jobs, coordinating with DBE's. That testimony is unrefuted.
15 There's nobody else in the record that says anything about this
16 process that would refute what he says. And Mr. Judnic came in
17 with a plan to get rid of BBF Engineering, and they implemented
18 it, and part of that, at the end of 2008 or early 2009, was
19 wiping him out, and then now they claim --

20 **THE COURT:** Slow down, Mr. Williams.

21 **MR. WILLIAMS:** But now the claim is, Your Honor,
22 well, it was just an evaluation. It wasn't just an evaluation.
23 He didn't just get a negative evaluation, he was moved out, and
24 then they brought him back and hired him directly. His
25 testimony. Even after they said he wasn't good enough when he

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1 was working for BBF, but they bring him back after the fact to
2 work directly for MDOT doing basically the same type of work,
3 the same job? And that's not a question of fact as to
4 disparate treatment of BBF in this context? Your Honor, I --

5 **THE COURT:** Well, it's not disparate, it may be
6 problematic, but you have to say that he treated nonminority
7 men differently. I mean, how did he interact differently
8 with --

9 **MR. WILLIAMS:** Well, Your Honor, BBF is the only
10 African American female-owned company that was treated this
11 way. He treated no other company this way.

12 When she asked for meetings with him to -- because
13 you got to understand the process. The process is this
14 evaluation process is very subjective. When they go through
15 this process of doing evaluations, and evaluating these
16 companies, a loss of one point means the loss of a contractor.

17 He understood that if he evaluated her very lowly --
18 low, the impact on BBF Engineering was going to have
19 repercussions down the road everywhere because she loses jobs
20 everywhere. Just a low evaluation on one project affects her
21 ability to bid on and win other projects.

22 And this isn't like the bid process as we normally
23 understand it where the low bid wins and, you know, the lowest
24 number gets awarded the contract. This is a subjective
25 analysis on this form where they're going through writing

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1 numbers and coming up with an evaluation for a contractor, and
2 that evaluation trails that contractor across time.

3 So the impact of evaluating her differently had
4 repercussions across the board for her, just as it did when
5 Mr. Steucher did the same thing. These evaluations and this
6 process were things that affected BBF and stayed with BBF. No
7 other company was treated the same way, no other company that
8 had the same -- had the same issues that BBF Engineering had in
9 this case.

10 And if you look at the emails from Mr. Steudle and
11 Mr. Johnson that were part of the record in this case, they
12 reflect that, here we go again. They have these problems with
13 our process and how we're selecting these minority contractors.
14 And this is about minority contracting and the treatment of
15 this contractor. This is not simply a case of, well, you got
16 to compare her with somebody else. There's no minority,
17 there's no minority engineering firm of her size that we're
18 going to be able to point to. What you got is the big boys
19 come in, these gentlemen go out and then work and get rid of
20 BBF, they evaluate BBF differently, and then, all of a sudden,
21 the next thing you know, they're working for those majority
22 firms and they leave the employ of the state.

23 **THE COURT:** Okay. Thank you.

24 **MR. WILLIAMS:** Thank you, Your Honor.

25 **MR. DITTENBER:** I'd like to respond just briefly,

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1 Your Honor, and I'd like to pick up where Mr. Williams left
2 off, with not that there is a discrimination against race in
3 general or gender in general, but it's just this company. That
4 sounds more like a class-of-one claim than a race- or a
5 gender-based claim, and Mr. Williams, in the response brief,
6 waived any such claim, and those claims are not available in
7 the public contracting context.

8 And it also sounds like we have -- BBF's problem is
9 not discrimination but competition. Says that the big firms
10 came in, when MDOT started doing bigger jobs, and all of a
11 sudden BBF is not getting as much work. That's a competition
12 issue. It's not discrimination because this company happened
13 to not be able to compete with the companies that are now
14 seeking out this work and perhaps they did not in the past.

15 As far as the evaluation goes, it's well documented
16 the performance issues on the contract where Ms. Foster's
17 company received 7's, and even if we're going to assume that a
18 7 out of 10 is a negative evaluation, it's well documented,
19 there's no indication that Mr. Judnic evaluated her more
20 harshly than other companies with these similar documented
21 performance issues.

22 And to say that she lost all these contracts because
23 of one evaluation, the evaluation forms are averaged, and then
24 all the total evaluations are averaged, so we're talking about
25 fractions of a point, and the total average, that you would

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1 have to have the jury point to some contract and have testimony
2 that, yes, this different selection panel would have rated her
3 differently if she was a tenth or a hundredth of a point
4 different on her past evaluation scores. That's pure
5 speculation at that point, Your Honor.

6 And my last point with regard to Mr. Judnic is it
7 sounds like there is disagreement with the way MDOT selects,
8 with the way it runs its programs, but Mr. Judnic cannot be the
9 scapegoat for MDOT or for the way the selection process works.
10 He could only be held liable for his own intentional acts of
11 discrimination.

12 And I don't have anything further, Your Honor,
13 unless you'd like me to touch on either the damages or the
14 whistleblower claim.

15 **THE COURT:** No, I'm fine on those, thank you.

16 **MR. DITTENBER:** Thank you.

17 **THE COURT:** And I'll take the matter under
18 advisement. It will be a couple weeks before I get something
19 out to you.

20 **MR. WILLIAMS:** Your Honor, can I just make one
21 point?

22 **THE COURT:** No, it's his motion, he gets the first
23 and last word. Sorry, Mr. Williams.

24 **MR. WILLIAMS:** Thank you, Your Honor.

25 (Proceedings concluded 3:10 p.m.)

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C E R T I F I C A T I O N

I, Suzanne Jacques, Official Court Reporter for the United States District Court, Eastern District of Michigan, Southern Division, hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date set forth.

Date: June 30, 2013

s:_____

SUZANNE JACQUES, CSR, RMR, CRR
Official Court Reporter
Eastern District of Michigan