IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

_____

No. 93-4120

_____

FAIRFIELD PROPERTY
MANAGEMENT,

Plaintiff-Appellant,

v.

HOUSING AUTHORITY
OF SHREVEPORT, ET AL.

Defendants-Appellees.

---

Appeal from the United States District Court
for the Western District of Louisiana
(5:90-CV-l487)

---

(February 7, 1994)

Before REYNALDO G. GARZA, KING and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Appellant Fairfield Property Management ("Fairfield") appeals a judgment of the district court finding in favor of defendant Housing Authority of Shreveport ("SHA") and its insurer Colonia Insurance Company ("Colonia")[1] (together referred to as

---

[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

[1] Colonia adopted the liability arguments of its insured, SHA, but also proffers for our consideration issues regarding the

"Defendants") after a bench trial. Fairfield, a partnership owned by white individuals, brought suit against SHA, alleging that SHA, in awarding a federal housing administration contract to a minority-owned corporation, had violated its rights under the Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments, thus stating claims under 42 U.S.C. §§ 1981 and 1983. Since we are not perfectly clear that the district court applied the correct standard in rendering its findings of fact and conclusions of law, we vacate the judgment and remand the cause to the district court for the limited purpose of allowing it to clarify its analysis and render a judgment in accordance with this opinion.

## I. Background

The SHA has the responsibility, inter alia, for administering a housing program financed by the Department of Housing and Urban Development ("HUD"). This program, which is referred to as the "Section 8" program, provides rent subsidies to assist low-income families in obtaining housing in qualified properties. The SHA typically contracted with outside entities to handle its administrative tasks, including inspections of participating properties, tenant counseling, and insuring

---

extent of its coverage, which, if resolved in its favor, would result in its dismissal. Virtually identical issues were raised to the district court on oral motion and were rejected. Colonia has failed to cross-appeal from that ruling and may not now enlarge the scope of the appeal to address those issues. Sec. Exch. Comm'n v. AMX, Int'l, Inc., 7 F.3d 71, 74 n.4 (5th Cir. 1993); Ayers v. United States, 750 F.2d 449, 457 (5th Cir. 1985) (appellee must cross-appeal to preserve its challenge to error in the lower court).

compliance with the various reporting requirements imposed by the HUD.

The commissioners of the SHA determined in early 1990 to put the administration service contract out to the public for bids. Fairfield, who had been administering the Section 8 contract for several years prior, and Pendleton Development Corporation ("PDC") were the only two bids received which were deemed to be responsive. By a vote of three to two, the SHA commissioners voted to award the contract to PDC, a corporation owned principally by Dr. Louis Pendleton ("Pendleton"), a black dentist who was politically active in the Shreveport community. This lawsuit followed.

Upon pre-trial motion, the district court dismissed Fairfield's due process claims against SHA, finding that Fairfield had not demonstrated a constitutionally-protected property interest.[2] The case then proceeded to a bench trial on the merits of Fairfield's equal protection claim against the SHA. At trial, Fairfield presented testimony from the three commissioners who voted in favor of PDC that they considered the race of Dr. Pendleton favorably in determining to award the Section 8 contract to PDC. SHA elicited countervailing testimony from each of the three commissioners that (i) race, although considered, was not a determinative factor, and (ii) each

[2] The district court also dismissed Fairfield's claims against the three commissioners who voted in favor of PDC, Larry English, Virginia R. Harris, and Patrick L. McConathy, on qualified immunity grounds.

believed himself or herself bound by certain SHA policies regarding minority and women-owned businesses to consider minorities favorably in awarding such contracts.[3]

After the close of the evidence, the district court rendered a judgment in favor of the Defendants. Specifically, the court below concluded:

> Evidence has clearly shown that race was a factor considered by the three commissioners in their decision to award the contract to PDC. The burden shifts to the Defendants to establish that the same decision would have been made by all three commissioners even if race had not been considered by the commissioners. The Defendants have met this burden. All three of the commissioners wanted Dr. Pendleton for reasons that they felt justified the additional sixty to eighty thousand dollars the PDC contract would cost the SHA, and through it, the tenants and the taxpayers.

Order styled "Facts" entered December 10, 1992 (the "December 10 Opinion") at 4 (citations and footnote omitted). The court went on to identify the various personal reasons upon which each of the commissioners had based his or her decision. Id.

## II. Analysis and Authorities

The district court was correct in concluding that the individual commissioners' admission of a race-based motive shifted the burden to SHA to show that "the same decision would have resulted even if the impermissible purpose had not been considered." Arlington Heights v. Metropolitan Housing Dev.

---

[3] These policies were promulgated in response to an executive order and resultant HUD directives, and the individual commissioners testified that it was their understanding that SHA would have lost HUD funding if it had failed to comply with such directives.

Corp., 429 U.S. 252, 271-71 n.21 (1977).[4] It thus became SHA's burden to show that its legitimate reason, standing alone, would have induced it to make the same decision. Id.; cf. Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Hunter v. Underwood, 471 U.S. 222, 228 (1985). The district court concluded that the commissioners "voted as they did because they were **personally** convinced that Dr. Pendleton was accountable for PDC; that he was the preferred operator. . . . It was for those PERSONAL reasons that they preferred him."[5] December 10 Opinion

---

[4] Although the parties cite extensively to Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), we note that the case was overruled by Congress in enacting Section 107 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1075 (the "Civil Rights Act" or "Act"). Price Waterhouse was a so-called "mixed-motive" Title VII case, where the plaintiff demonstrated that her gender had been inappropriately considered in preventing her consideration for partnership. The Supreme Court in Price Waterhouse held that the defendant could avoid Title VII liability by showing that it would have made the same employment decision absent consideration of the impermissible factor. 490 U.S. at 252. Price Waterhouse was abrogated in the Title VII context by Congress' decree that the plaintiff need only show "that race, color, religion, sex or national origin was a **motivating** factor for any employment practice, **even though other factors also motivated the practice**," in order to prevail. Act, 105 Stat. at 1075 (emphasis added).

The Civil Rights Act is specific to the private employment context, and we do not read its provisions to extend to the situation presented. Rather, as discussed below, we find the analysis in Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977), and Mt. Healthy Board of Educ. v. Doyle, 429 U.S. 274 (1977), to control the outcome of this case since both of those cases involved alleged discrimination by public entities. Moreover, Fairfield's equal protection claim in this case is inherently constitutional, as were the First Amendment claim in Mt. Healthy and the Fourteenth Amendment violation in Arlington Heights. For these reasons, we hold that burden allocation set forth in those cases governs the case at bar.

[5] The district court specifically found that Ms. Harris was dissatisfied with Fairfield's performance of the contract in

at 4. The court below then went on to hold that its duty was to determine "whether the reason for SHA's decision was purely [or even principally] racial and therefore malum prohibitum," concluding that "[i]t was not." Id. As both this court and the Supreme Court have noted, however, the test is not whether the decision was based purely -- or even principally -- on impermissible racial considerations; rather, the relevant inquiry is whether the same result would have been reached if the illegitimate factor were removed from the equation. Arlington

---

previous years and that she felt Dr. Pendleton had the "requisite sensitivity" which she considered important to the task. December 10 Opinion at 3. It further concluded that Mr. English "wanted his **friend** to have the contract and was determined to go in that direction." Id. Finally, the court below decided that Mr. McConathy had "determined (for reasons that he found persuasive) that it was time for [Fairfield] to go," and further attributed the decision to a favorable impression of Dr. Pendleton's personal abilities. We note that the commissioners' conclusions that these were appropriate factors for consideration cannot be set aside by this court under the guise of equal protection. E.g., Wilkerson v. Columbus Separate School Dist., 985 F.2d 815, 819 n.13 (5th Cir. 1993) ("Of course, the relevant inquiry is not whether [the plaintiff's] conduct was serious enough to warrant termination . . . but whether the board members truly believed it was."). Cf. St. Mary's Honor Ctr. v. Hicks, ___ U.S. ___, 113 S. Ct. 2742, 2756 (1993) (holding, in Title VII context, that even where "employer's proffered reason is unpersuasive, or even obviously contrived, [it] does not necessarily establish that the plaintiff's proffered reason of race is persuasive").

Heights, 429 U.S. at 270-71 n.21.[6] See also Mt. Healthy, 429 U.S. at 287.

We thus remand the case to the district court to request that it reconsider the trial evidence in light of the principles discussed above.[7] In doing so, we caution that the SHA may not discharge its burden by offering a legitimate and sufficient

---

[6] Indeed, the principal or "motivating" factor test is relevant to whether the **plaintiff** has met its burden of demonstrating that an impermissible factor infected the defendant's decision-making process. See, e.g., Arlington Heights, 429 U.S. at 270-71 n.21. Using the "motivating factor" analysis once the burden has shifted to the defendant would alter the burden allocation scheme carefully set out in Mt. Healthy and Arlington Heights. In those cases, the Supreme Court made clear that liability cannot be imposed absent adequate causation -- i.e., the defendant's consideration of the illegitimate factor must be a "but for" cause of the complained of result. See, e.g., Peters v. Shreveport, 818 F.2d 1148, 1161 (5th Cir. 1987) ("A fundamental precept of our system of justice is that it is unfair to impose liability for a result which would have occurred absent the defendant's wrongdoing . . . ."). Consequently, the defendant is allowed to show that, even if the impermissible factor were an important or motivating factor in making the contested decision, the same result would have occurred in its absence, thereby avoiding liability. Arlington Heights, 429 U.S at 270-71 n.21. In this case, it is conceded that the race of PDC's principal shareholder was considered to be a factor sufficient to shift the burden to SHA, and thus any "motivating" or principal factor analysis is inappropriate.

[7] We decline Fairfield's invitation to "take the opportunity of this appeal to adopt a rule in discrimination-based civil rights actions that where (as here) the plaintiff's prima facie case is demonstrated by the defendant's admission of a race-based motive," the defendant must meet an elevated burden of proving that the same result would have occurred by "**objective** evidence." Appellant's Brief at 14. The Supreme Court in Price Waterhouse specifically refused to accept the plurality's suggestion that the defendant must meet its burden solely on the basis of objective evidence. 490 U.S. at 261 (White, J., concurring). Although that case, as discussed supra note 4, was overruled by Congress on other grounds, we find no support for employing an "objective evidence" standard in this case.

reason for its decision to award the contract to PDC if that reason did not actually motivate it at the time of the decision.

For the foregoing reasons, we VACATE the judgment of the district court and REMAND the cause to that court for the limited purpose of re-evaluating the evidence in light of the standards set forth in this opinion and advising whether it would reach the same result. Any appeal from that judgment will be to this panel.

VACATED and REMANDED.