

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-7354  
Summary Calendar

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DENNIS CROSBY and UDELL CROSBY,

Plaintiffs-Appellants,

versus

WILLIE KILGORE, Individually and  
in his Official Capacity as Agent  
of Wayne Poultry & Continental  
Grain Company, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Southern District of Mississippi  
(2:90-CV-136)

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(November 12, 1993)

Before POLITZ, Chief Judge, JONES and EMILIO M. GARZA, Circuit  
Judges.

POLITZ, Chief Judge:\*

Dennis and Udell Crosby, both black citizens of Mississippi,  
appeal an adverse bench trial judgment in their race discrimination  
and tortious interference with contract suit against Wayne Poultry,

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\*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should not be published.

Continental Grain Company, and their agent, Willie Kilgore. We affirm.

#### Background

The Crosby brothers have raised chickens as independent contractors of Wayne Poultry for over a decade. Wayne Poultry is a division of Continental Grain Company. The Crosbys' contract with Wayne Poultry provides that Wayne is to supply chicks, feed, and necessary medicines; the Crosbys, in turn, are to raise the chicks in a properly equipped facility and return them to Wayne when fully grown.

The Crosbys' principal contact at Wayne Poultry was Willie Kilgore, the company's live production manager. Kilgore was responsible for managing the chicken production process and, along with his assistants Chester Ivy and Eldridge Husband, overseeing contractors and their facilities. During their dealings with Kilgore and Wayne Poultry the Crosbys have been the recipients of treatment which, if shown to have been based upon their race, would constitute statutorily proscribed discrimination. After a bench trial the district court rejected both the 42 U.S.C. § 1981 claim and the state law tortious interference claim. The Crosbys timely appealed.

#### Analysis

The Crosbys' primary claim arises under 42 U.S.C. § 1981 which grants racial minorities "the same right . . . to make and enforce

contracts . . . as is enjoyed by white citizens . . . ." Under section 1981, a cause of action would lie if the Crosbys could prove Kilgore or Wayne Poultry intentionally discriminated on the basis of race in their performance of the subject contracts.<sup>1</sup> Poor treatment alone, however, without a showing of both actual discrimination and intent to discriminate, will not support such a claim.<sup>2</sup> To establish racial discrimination the Crosbys must show by direct or circumstantial evidence that they received poor treatment because of their race.<sup>3</sup> Proof that similarly situated whites received better treatment than the Crosbys could create the necessary inference and set the predicate for establishing the section 1981 claim.

The district court found that the Crosbys had not established discrimination on the basis of race.<sup>4</sup> We review such findings of

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<sup>1</sup>See 42 U.S.C. § 1981(b) (right to "make and enforce contracts" includes "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship").

<sup>2</sup>**Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania**, 458 U.S. 375 (1982); **Irby v. Sullivan**, 737 F.2d 1418 (5th Cir. 1984). We find wholly unpersuasive the Crosbys' assertion that Justice Marshall's dissent in **General Building Contractors** is controlling and that no showing of intent is now required in section 1981 suits.

<sup>3</sup>We disagree with the Crosbys' reading of the district court's conclusions as requiring direct proof of discriminatory intent. The trial judge found that the Crosbys did not present adequate direct or circumstantial proof of discrimination based upon race or of intent to so discriminate.

<sup>4</sup>The trial court found that the Crosbys had not been "treated differently than growers of other races." While the Crosbys apparently were treated poorly by Kilgore and Wayne Poultry, the court specifically found that white contractors had been treated virtually the same way. Race was not the determinant.

fact against the clearly erroneous standard.<sup>5</sup> Additionally, we accord great deference to the district court's credibility determinations.<sup>6</sup>

The Crosbys allege several specific instances of discrimination by Wayne Poultry and its agents. They received letters advising of equipment modifications required to upgrade their chicken houses to Wayne Poultry's standards.<sup>7</sup> They maintain that similarly situated white contractors were not required to make comparable repairs and upgrades. The district court found persuasive evidence to the contrary. Even though white contractors were told of the upgrade requirements orally and compliance with the upgrades by a few white contractors was delayed, white contractors generally faced the same demands as the Crosbys and, like the Crosbys, immediately purchased the required equipment. The district court's finding that disparate treatment went unproven on this claim is fully supported by the evidence.

The Crosbys next suggest that Kilgore and Wayne Poultry discriminated against them by: (1) providing inferior chicks; (2) forcing them to "lay out" of production for longer than white contractors; and (3) subjecting them to more frequent inspections than white contractors. The record contains both documentary and

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<sup>5</sup>Fed.R.Civ.P. 52(a).

<sup>6</sup>**Anderson v. City of Bessemer**, 470 U.S. 564 (1985); **Nielsen v. United States**, 976 F.2d 951 (5th Cir. 1992).

<sup>7</sup>We note that Dennis Crosby had requested this letter to enable him to apply for a loan from the Farmer's Home Administration.

testimonial evidence that white contractors had experienced and complained of precisely the same problems. The Crosbys rely on speculative testimony unsupported by any relevant evidence accepted by the trial court, whose credibility assessments must be given definitive weight.

Although the Crosbys were poorly treated by Kilgore and Wayne Poultry, their treatment was not demonstrably different from that received by the white contractors. It appears that Wayne Poultry was evenhanded in its marginal treatment of its contractors. On these facts, there is no demonstrated discrimination and no basis for a section 1981 claim.<sup>8</sup>

The Crosbys also appeal the dismissal of their state law tortious interference with contract claim against Kilgore. Under Mississippi law, the defendant in such a claim must be a "total stranger" to the subject contract.<sup>9</sup> The entire relationship between the Crosbys and Kilgore revolved around the Crosby/Wayne Poultry contract. It is factually and legally ludicrous to suggest that Kilgore, Wayne Poultry's principal agent, was a "total

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<sup>8</sup>We find no merit in the claim of racial discrimination because Wayne Poultry did not deliver chicks to the Crosbys between July and September 1988. This suspension was occasioned by the inspector for the U.S. Department of Agriculture finding a certain disease in one flock of chicks which triggered Wayne Poultry's policy of temporarily suspending delivery of chicks until a sufficient time had elapsed for eradication of the residuals of the disease found by the USDA inspector.

<sup>9</sup>**Robinson v. Coastal Family Health Center, Inc.**, 756 F.Supp. 958 (S.D.Miss. 1990).

stranger" to that contract.<sup>10</sup>

AFFIRMED.

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<sup>10</sup>**Columbus v. Reliance Ins. Co.**, 626 F.Supp. 1147 (S.D.Miss. 1986).