

Intentional Acts Exclusion Precludes Coverage for “Disparate Treatment” Racial Discrimination

August 2005

The United States Court of Appeals for the Fifth Circuit, applying Louisiana law, has held that the intentional acts exclusion in an educators legal liability policy precluded coverage for alleged racial discrimination and harassment against an insured that was premised on "disparate treatment" as opposed to "disparate impact." *Coleman v. School Bd. of Richland Parish*, 2005 WL 1714369 (5th Cir. July 25, 2005).

The court also determined, however, that coverage for allegations of breach of contract and abuse of rights against the insured were not barred by the exclusion because a trier of fact could find the insured liable for those causes of action without concluding that the insured intended to cause harm.

An insurer issued an educators legal liability policy to a Louisiana school board. Under the policy, the insurer agreed to defend and indemnify the school board against allegations of "wrongful act[s]" against the board, its directors and employees. The policy defined "wrongful acts" to include "any actual or alleged act . . . including . . . actual or alleged discrimination, whether based upon race . . . [or] actual or alleged sexual or racial harassment." The policy also contained an intentional acts exclusion, which precluded coverage for any claim "brought about or contributed to in fact by . . . any Wrongful Act committed with actual knowledge of its wrongful nature or with intent to cause damage."

In September 2000, the school board hired an African-American woman as the associate principal at an elementary school. In October 2000, the woman was asked to resign. When she refused to resign, the school held a hearing to consider nine charges of insubordination against her. The board found her guilty of four charges and terminated her employment. The woman brought suit against the board, alleging that the associate principal position was created as a "concession" by white school board members so that African-Americans would campaign for a school bond proposal in the African-American community. According to the woman, the day after the bond proposal passed she was asked by the school superintendent to resign. When she refused to resign, the board allegedly threatened to "ruin[]" her career" and began to write her up for false work violations. In her complaint, the woman alleged racial discrimination in violation of Title VII of the Civil Rights Act as well as state law causes of action of breach of contract and abuse of rights.

The board tendered the complaint to the insurer for defense and indemnity. The insurer declined to defend, asserting that the intentional acts exclusion precluded coverage for the racial harassment. Coverage litigation ensued. The board asserted that the policy explicitly provided coverage for actual or alleged racial harassment. Moreover, the board argued that racial discrimination was an intentional act and that application of the intentional acts exclusion would make coverage illusory and contravene the reasonable expectations of insureds.

The court of appeals rejected the board's argument that application of the exclusion rendered coverage for racial harassment "illusory and meaningless" and contrary to insureds' reasonable expectations. The court first concluded that the policy was unambiguous. According to the court, "the clear and explicit language of the policy indicates that coverage is available for acts of racial discrimination or harassment only if they are committed by an insured without actual knowledge of their wrongful nature or intent to cause damage." In support for this conclusion, the court noted that, while an ambiguity is created where a policy grants coverage in one clause and takes it away in another, Louisiana courts give effect "to unambiguous exclusions that cut back, but do not eliminate particular grants of coverage for intentional acts." In the court's opinion, coverage for racial discrimination under the policy would turn on whether an underlying complaint alleged "disparate treatment," which suggested an intent to discriminate, or "disparate impact," which suggested unintended discrimination. The court found that the underlying plaintiff was alleging disparate treatment and therefore the policy's intentional acts exclusion precluded coverage.

The court then rejected the board's assertion that the court should consider the reasonable expectations of the board even if the policy was not ambiguous because typical policyholders would believe they had coverage and would not have engaged in the "semantic hair splitting" necessary to reconcile the coverage grant with the exclusion. The court found this argument "foreclosed by Louisiana law" and refused to "re-write the terms of the insurance policy" in the face of unambiguous policy language.

The court did, however, conclude that the insurer had a duty to defend against the underlying complaint because the abuse of rights and breach of contract causes of action were not precluded by the intentional acts exclusion. The court began by noting that under Louisiana law, an abuse of rights cause of action can only be asserted where: (1) one party exercises their rights "exclusively for the purpose of harming another," (2) the interest being asserted is neither "serious" nor "legitimate," (3) the right is used "in violation of moral rules, good faith or elementary fairness" or (4) the exercise of the right was for a purpose other than that for which it was granted. The court rejected the insurer's assertion that the facts supporting the abuse of rights claim were based on intentional conduct. Instead, construing the underlying complaint "liberally," the court found that a set of facts existed that could support liability without intent—for instance, if the jury concluded that the complainant was fired without cause but not because of intentional racial discrimination.

The court also found that the allegations in the complaint "support[ed] a garden variety breach of contract claim." Although the insurer had argued that the allegations were premised on "bad faith" by the school board, the court concluded that a jury could find that the board did not act with the "intentional and malicious failure to perform," the requirement under Louisiana law to sustain the cause of action. Accordingly, the court concluded that this claim likewise triggered the insurer's duty to defend.

For more information, please contact us at 202.719.7130