

# Chicago Daily Law Bulletin.

## Despite evidence of discrimination, court rejects Wisconsin man's suit

February 7, 2013

By James G. Sotos

James G. Sotos heads The Sotos Law Firm P.C. in Itasca, concentrating in government representation. Sotos represents Illinois municipalities and governmental officials in federal and state litigation at the trial and appellate levels. He is a 1985 graduate of The John Marshall Law School.

A jury's finding that race was a motivating factor in a police department's refusal to add a certain towing firm to its towing list did not entitle the business owner to relief.

•

For a decade, Anthony Smith, who is black, attempted to have his Flying A.J.'s Towing Co. placed on the towing list for Beloit Township in Wisconsin. When the township appointed the township's chief law enforcement officer, John Wilson, in 2003, Smith called Wilson to offer his company's services when the police department required towing.

After speaking to Smith, Wilson sought information about the company and was advised there were rumors Smith was involved in drug dealing. Wilson reportedly used a racial slur and stated, "That settles it then, that (expletive) isn't going to tow for us."

Ultimately, several Beloit officers testified that during the many occasions Smith would renew his request to be included on the towing list, Wilson would bluntly respond:

"[T]hat stupid (expletive) isn't going to work or tow for me'; 'I'm not letting that (expletive) tow for us'; 'That (expletive) is not towing for us and that's the bottom line'; 'I'm not going to put that (expletive) on the tow list.'" Wilson conceded making some of these comments and

acknowledged that there was a "free-flowing use of racial slurs" in the police department throughout the relevant period.

Smith and his company filed a federal civil rights lawsuit against Wilson and the township, alleging that his civil rights were violated as a result of the defendants' blatant discrimination. Following a three-day trial, a jury found that, though race was a "motivating factor" in Wilson's decision not to include Smith on the list, Wilson would not have added Smith even if race had played no part in Wilson's thinking.

As a result, the district court concluded that the mixed verdict precluded Smith's requested relief and entered judgment for the defendants on all counts. In doing so, the district court nonetheless expressed its hope that the victory would be bittersweet for defendants:

"The district judge nevertheless acknowledged how 'painful [it must be] to learn that one's worst suspicions are true when it comes to the motives of a public official, particularly if the official is the chief of police.'"

It concluded its opinion with an admonishment that bears repeating: "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."

The plaintiffs appealed and the 7th U.S. Circuit Court of Appeals very reluctantly affirmed. *Smith, et al. v. Wilson, et al*, No. 11-2496

The appeals court initially set forth the basis for the jury verdict in favor of the defendants and the limited scope of review of that verdict:

"[The jury affirmatively answered] Question No. 2 on the special verdict form, which asked '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?' Bearing in mind that a verdict may be set aside only if 'no rational jury could have rendered' it, we conclude that the district court did not abuse its discretion in denying a new trial on this ground."

In support of its affirmance, the court reviewed the evidence indicating Wilson would not have included Flying A.J.'s on the town's towing list

even if he had not acted partly on the basis of race:

"While the overwhelming evidence of Wilson's racism certainly could have allowed a jury to attribute Smith's exclusion solely to race, it was not irrational for this jury to reach a contrary conclusion. The defendants presented testimony that Wilson inherited a satisfactory tow list in 2003 and that he had no reason to supplement the roster with additional companies. In 2004, Wilson removed Ace Towing from the list after receiving a complaint that the company damaged a vehicle, but there is no evidence that Wilson ever restored Ace or any other company to the vacated position. ... Wilson grew frustrated with Dewey in 2008 and Smith now argues that Wilson removed Dewey from the list before 're-adding' it.

"But there was also evidence that Wilson merely reconfigured the order of the two-company list in 2008, temporarily demoting Dewey without changing the composition of the list. Smith actually advanced this latter interpretation of events during his closing argument. In short, the jury was entitled to credit Wilson's testimony that he simply 'didn't see any need to be putting on any more tow companies' after 2003."

In further support of the jury's verdict, the appeals court pointed to additional evidence:

"The jury could have relied on evidence that another white-owned tow company, C&C Towing, unsuccessfully petitioned for a place on the tow list during part of the relevant period to buttress Wilson's explanation. The owner of C&C Towing testified that he stopped by the town's police department repeatedly over three or four years, hoping to speak with someone about adding his company to the list, to no avail. This testimony, showing that Wilson also rebuffed entreaties from a similarly situated, white-owned tow company, also supports the jury's finding."

Despite its decision to uphold the jury's verdict, the appeals court closed with a stinging rebuke of Wilson's conduct:

"We conclude by noting that no one should have to experience the kind of racial bigotry that Smith endured for years — an experience confirmed by the jury's verdict. We would have liked to believe that this kind of behavior faded into the darker recesses of our country's

history many years ago. When the chief law-enforcement officer of a Wisconsin town regularly uses language like (expletive) in casual conversation, however, it is obvious that there is still work to be done.

"As a result of our holding today, Anthony Smith will end up paying statutory costs of \$4,423.51 to John Wilson and the Town of Beloit, unless the defendants in the interests of a broader vision of justice choose to forgive that payment.

"We can only hope that the outcome of this case does not discourage future plaintiffs who seek to challenge official misconduct and vindicate the basic guarantees of our Constitution and laws."

[Chicago Daily Law Bulletin](#) – [SUBSCRIBE](#) | [Chicago Lawyer](#) – [SUBSCRIBE](#) | [Chicago Lawyer Network](#) | [Law Bulletin Publishing Co.](#)