

BNSF Railway Co.

by Rachel Atterberry

A FREEBORN & PETERS LITIGATION VICTORY

 On September 9, 2013, BNSF Railway Company (“BNSF”) won a significant victory before the United States District Court for the Northern District of Illinois in *Mays v. BNSF Railway Co.*, Case No. 10 CV 153.

Plaintiff Altion Mays, an African-American male, was employed by Rail Terminal Services (“RTS”) as a spotter at BNSF’s Corwith, Illinois yard. RTS, as an independent contractor, performed loading and unloading services at the Corwith yard. The RTS contract specified that individuals with felony convictions within the previous seven years were not allowed on BNSF property. After an audit revealed that Mays possessed a felony conviction within the prior seven years, he was not allowed to work at the BNSF yard and RTS did not offer him alternate employment.

Mays claimed that BNSF’s criminal conviction policy was discriminatory and violated Title VII of the 1964 Civil Rights Act by interfering with his employment with RTS. Mays argued that the policy had a disparate impact against minorities. The Court granted BNSF’s motion for summary judgment and dismissed Mays’ claims, rejecting his interference theory. Judge Gary Feinerman opined that while the Seventh Circuit had not yet expressly ruled on the issue, the interference theory announced in *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973) has received mixed reviews among federal appellate courts and the Seventh Circuit has issued decisions making clear it likely would reject the theory if directly faced with the question. Judge Feinerman noted that the theory has had a “near death experience” in the Seventh Circuit.

Significantly, the Court also opined that even in jurisdictions in which it has been adopted, the interference theory is limited to Title VII claims alleging disparate treatment, not disparate impact. And, the Court said that the interference theory is only applicable to defendants that act as an intermediary between the employee and employer, not to consumers of the employer’s services such as BNSF. The Court also rejected Mays’ claim that BNSF was his joint employer along with RTS.

The case was handled by Steve Hartmann and Rachel Atterberry.