

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MICHAEL O'NEILL,

Plaintiff,

v.

GOURMET SYSTEMS OF
MINNESOTA, INC., d/b/a Applebee's
Neighborhood Grill and Bar, and
APPLEBEE'S INTERNATIONAL, INC.,

Defendants.

ORDER

01-C-401-C

This is a civil suit brought pursuant to 42 U.S.C. § 1981; Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a; and Wisconsin's public accommodation law, Wis. Stat. § 106.52, in which plaintiff Michael O'Neill, a member of the Red Lake Band of Chippewa Indians, contends that defendants Gourmet Systems of Minnesota, Inc. and Applebee's International, Inc. discriminated against him on the basis of his race when a server at an Applebee's Neighborhood Grill and Bar franchise in Superior, Wisconsin, refused to accept his tribal identification card as proof that he is old enough to buy alcohol. In an opinion and order dated July 8, 2002, I granted defendants' motion for summary judgment as to their

federal law claims and declined to exercise supplemental jurisdiction over plaintiff's state law claims. Judgment was entered in favor of defendants on July 9, 2002.

Presently before the court is plaintiff's Fed. R. Civ. P. 59(e) motion to alter or amend the judgment or, alternatively, for relief from judgment pursuant to Fed. R. Civ. P. 60(b). "The time of a motion's service controls whether a motion challenging a judgment is a 60(b) or a 59(e) motion. Such a motion, if served within ten days of a final judgment, is a 59(e) motion." Helms v. Resolution Trust Corp., 43 F.3d 1163, 1166 (7th Cir. 1995). Accordingly, plaintiff's motion, which was filed on July 19, 2002, is a motion to alter or amend the judgment in this case pursuant to Fed. R. Civ. P. 59(e). As the ground for his motion, plaintiff argues that defendants withheld from him "critical evidence" in the form of an Equal Employment Opportunity Commission reporting form indicating that no female American Indian servers were employed at the Superior Applebee's during a two-week period in August 2001. Plaintiff notes that in support of their summary judgment motion, defendants submitted the affidavit of plaintiff's server, Robin Krawza, who averred among other things that her ancestry was one-quarter Blackfoot Indian. Krawza worked at the Superior Applebee's in August 2001. In plaintiff's eyes, this fact raises an inconsistency between Krawza's affidavit and the restaurant's Equal Employment Opportunity Commission reporting form.

Plaintiff maintains that had he been aware of defendants' "mendacity" in this regard,

he would have responded to defendants' summary judgment motion differently. As the court's July 8, 2002 opinion and order noted, in responding to the summary judgment motion, plaintiff did not

allege that the person who waited on him, Robin Krawza, refused to serve him brandy as a result of personal racial animus. According to plaintiff, Krawza "refused to serve [him] his brandy solely because she followed pre-existing corporate orders, handed down to her by the restaurant general manager . . . to dishonor [plaintiff's] Tribal ID because it was not on Applebee's 'approved' list. . . . She just carried out a corporate decision."

Opinion and Order dated July 8, 2002, dkt. #42, at 9. On the sole basis of the alleged discrepancy between Krawza's affidavit and the reporting form, plaintiff now wants to change his entire theory of the case and argue that Krawza refused to serve him alcohol because he is American Indian, not because she was simply following a pre-established corporate policy.

Plaintiff's motion to alter or amend the judgment in this case will be denied. As an initial matter, plaintiff has submitted no evidence suggesting that it is "mendacious" or even contradictory for a person to describe her race as something other than American Indian on a government reporting form, but also to note in an affidavit that her ancestry is one-quarter American Indian. Even assuming the reporting form fairly calls into question Krawza's ancestry (a topic plaintiff deemed irrelevant in his response to defendants' proposed findings of fact, dkt. #31, at 31, ¶35), the mere fact that Krawza may not be registered as an

American Indian or even of American Indian ancestry is insufficient to justify an about face with regard to plaintiff's legal theory at this late date. In this regard, I note that plaintiff has been in possession of this "critical evidence" since at least June 13, 2002, nearly a month before defendants' summary judgment motion was granted, but that he has only now seen fit to bring it to the court's attention. This suggests that plaintiff did not view this information as genuinely critical, but rather that he is merely seeking a belated second bite at the apple, a function for which Fed. R. Civ. P. 59(e) is not intended.

ORDER

IT IS ORDERED that plaintiff Michael O'Neill's motion to alter or amend the judgment in this case pursuant to Fed. R. Civ. P. 59(e) is DENIED.

Entered this 23rd day of July, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge