Suing Alma Mater

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Published by Johns Hopkins University Press

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If there had been no formal record, it would have been hard to conjure up a better set of facts to challenge the prejudicial practices of a medical school in hiring faculty and other medical personnel than the 1984 case of *Abrams v. Baylor College of Medicine*.\(^1\) Jewish anesthesiology faculty members at Houston’s Baylor College of Medicine (BCOM) were denied participation in a prestigious and lucrative summer rotation in Saudi Arabia, and the trial court found that the reasons for excluding Jews were both pretextual (alleging that “the Saudis did not want any Jews in their country” and that BCOM had “‘concern’ for the safety of Jews traveling to Arab lands”) and also, in any event, unlawful. Normally, I would not quote so extensively from the trial record of a case, for both stylistic and substantive reasons. However, I have taken the unusual liberty of citing substantial portions of this case, both because it is so extraordinary, given how few plaintiffs prevail in academic discrimination claims, and because the trial judge went out of his way to articulate the unbelievable examples of the practices and to pin down the discriminatory details of the program and personnel assignments:

The objective criteria established by Baylor for participation in the program (regarding anesthesiologists) are that (1) the person must be a member of the Baylor Department of Anesthesiology faculty; and (2) that the person must be certified by the American Board of Anesthesiology or hold an equivalent foreign certification recognized by the American Board of Anesthesiology.

The evidence clearly establishes that both Plaintiffs met the objective criteria set forth immediately above during times material to this lawsuit.

In addition to the objective criteria, Baylor has posited what may be labelled as the “team player criteria” as being necessary to qualify for the program. (We note
that this “team player” qualification was raised at trial but was not put before the EEOC [Equal Employment Opportunity Commission].) The Court is not convinced that a requirement of being a “team player” is in any way objective in nature. “Team player” requirements are innately subjective and amorphous. As such, the Court finds that the “team player criteria” are not objective occupational requirements. . . .

BCOM’s doctors never gave good reasons why Jews were not involved in the Saudi program, and the Saudis never indicated that Jews could not participate. Indeed, other medical schools involved in the Saudi program not only involved Jews but also insisted on nondiscrimination clauses in the comprehensive contracts negotiated over the years with the Saudis.

District Judge James DeAnda’s decision in Abrams was upheld: “The Court concludes the exclusion of Jews from the King Faisal program was not justified by either a business necessity or by a BFOQ. In any event, the Court concludes that the Plaintiffs have amply met their burden of showing discrimination . . . which is the ultimate issue in a Title VII case.” The Court of Appeals called Baylor College of Medicine’s assertions “A Theoryless Theory”:

One of the chief difficulties in this case is that Baylor simply never arrived at a theory of its case. There was at least a theoretical possibility that Baylor could assert that “non-Jewishness” was a bona fide occupational qualification (BFOQ) for the Faisal Hospital rotation program, notwithstanding the fact that the exclusion of Jews as Jews would normally be prohibited from discrimination under Title VII. Baylor just danced all around this; it never zeroed in on this as a BFOQ. In order to substantiate that defense though, Baylor would have to prove that the official position of the Saudi government forbade or discouraged the participation of Jews in the program. That would have meant that Baylor would have to obtain formally an authoritative statement of the position of the Saudis. Yet [BCOM Chancellor and Heart Surgeon Dr. Michael] DeBakey testified that it was not until 1983, more than a year after suit was instituted, that Baylor attempted to obtain such a statement. While the failure to seek or obtain such a critical determination is puzzling—and goes a long way toward knocking the props from under the BFOQ defense—a good explanation may well be the District Court’s finding that Baylor’s inaction was motivated, in part, by its desire not to “rock the boat” of its lucrative Saudi contributors.

I attended much of this bench trial in the Houston federal courthouse and had been alerted in advance when BCOM president Michael DeBakey would be
testifying. It was an electric moment when he was asked whether he knew about the discrimination that, by that time, had been so clearly established in the courtroom. He said, “May I indicate to you that one of the reasons that I had not asked for a policy before was because we never had a problem. It has never come up before, and I have on occasions had Jewish physicians go [to Saudi Arabia] to see special patients I wanted them to see. And we had no difficulty getting visas for them.” It was a sad sight to see such a distinguished heart transplant surgeon in a tangled web of his own institutional making. Which would be sadder: if he were telling the truth and did not know, or if he were not telling the truth and did know? After all, he had been president or chancellor of the elite institution for more than a dozen years. The special Saudi summer program was his brainchild and existed largely because he had made the cardiac unit among the best in the world. Given the substantial number of Jewish medical personnel who would have been affected and the prominence of the Baylor program, it is hard to believe that he or the senior administrators could have thought that such a policy would pass muster, or whether it was the proper thing to do, at the least. Readers could plausibly wonder: How could it have gotten to this point late in a complex federal trial, when an institutional CEO plaintively testified under oath, “We never had a problem”? I witnessed the BCOM lawyers visibly sag in this highly cinematic moment.

Doctors Abrams and Linde had the good fortune to find their compelling case in the trial court of Judge James DeAnda, who had a long and distinguished plaintiff’s trial practice and civil rights background. At the time of the trial, he was the only Mexican American federal judge in the Southern District of Texas, Houston bench. Recall Judge DeAnda’s careful and nuanced delineation of the genuine, formal job requirements for the Saudi medical faculty personnel and his demonstration that the Baylor College of Medicine had instead substituted inappropriate subjective criteria—what he labeled “innately subjective and amorphous” “team player criteria” that excluded only Jews from selection.

Even the Fifth Circuit judges, normally known to be quite hard-nosed toward the range of employee discrimination claims were dubious of BCOM’s assertions, characterizing the defense as “just dancing all around this.” It is difficult to discern if this metaphor was employed as a veiled gibe at Baylor University’s prohibition on its students dancing on the Waco campus of Baylor University, several hundred miles north. In 1996, when the university changed this policy, it issued a tongue-in-cheek press release: “Stop the Presses! Dance Fever to Hit Baylor April 18. The Berlin Wall has fallen, Big Macs have invaded Russia, and there are lights at Wrigley Field. Mankind’s last great resistance is about to be
history: There will be dancing at Baylor University. It’s true. Boogie Fever has hit Waco. The ‘D’ word will no longer be taboo at the world’s largest Baptist university.”

Following the careful and detailed record established by Judge DeAnda at trial, the circuit court was required to deal with the clearly pretextual defense offered by the medical school’s lawyers. The “team player” defense is sometimes invoked in higher education collegiality cases, but prevailing on the theory is difficult for the proof reasons and technical reasons noted earlier, and because most judges defer to academic decisionmakers on the theory that faculties have the necessary authority and expertise. Judges also assume bona fides and objectivity unless there is clear evidence otherwise, as was the case here.

The straightforward case actually had several unusual procedural twists to it, both before the trial and after the Fifth Circuit’s affirmation. Before the trial, on August 5, 1983, Judge DeAnda ruled on three motions: the “Defendant’s Motion to Dismiss or in the Alternative for Summary Judgment” (which he granted in part and dismissed in part), the “Plaintiffs’ Unopposed Motion for Continuance” (which he granted), and the motion of Marcee Lundeen, a Jewish nurse in the unit, to “Intervene as a Plaintiff” (which he denied, inasmuch as she had not filed in a timely fashion). Stuart Nelkin, the plaintiffs’ lawyer, on behalf of Nurse Lundeen, had filed several causes of action, and BCOM sought to have them all dismissed before trial. In its “Motion to Dismiss,” BCOM argued that Dr. Abrams and Dr. Linde had failed to plead all the necessary elements of a prima facie case as required by Title VII and that he had filed his charge with the Equal Employment Opportunity Commission too late. Judge DeAnda determined that the plaintiffs had pled the elements of a prima facie case, and because the “discriminatory system” persisted, he permitted Dr. Abrams and Dr. Linde to pursue the Title VII claim.

The college also challenged the right to sue under the Export Administration Act, arguing that the statute—which also regulates U.S. companies that conduct business with countries that boycott Israel (such as Saudi Arabia)—did not allow a private right of action. Judge DeAnda concluded: “A private right of action is appropriate under the circumstances and in light of the legislative history of the statute.” This was the first time that a private right to bring suit had been allowed under the EAA, and another federal district court had ruled earlier in the same year that there was no private right to sue under the EAA.

Interestingly, Judge DeAnda did accept the argument by BCOM that Abrams could not bring an action under civil rights statute Sec. 42 U.S.C. § 1981, on the grounds that the legislation required “race” as a predicate. DeAnda ruled, “While
the term ‘race’ is rather unscientific, Jews as a group are not a ‘race’ protected under this law.”16 This ruling was interesting, in part because Jews have been historically racialized and demonized in a racially-stigmatizing fashion17 and also because cases were working their way through to the Supreme Court (and which were decided together on the same day in 2007), including a college law case that would have allowed the judge to rule differently. In *St. Francis College v. Al-Khazraji*, the Court determined that persons of “Arabic ancestry” may file § 1981 claims, even if they were considered “present-day Caucasians”18; in *Shaare Tefila Congregation v. Cobb*, the Court held that Jews could state § 1982 claims.19 If there had been any lingering doubt about the existence of institutional anti-Semitism, the detailed facts in this BCOM matter surely removed those doubts. And the defendants dodged a worse bullet because Judge DeAnda also chose not to venture into the ugly thicket of who should have known what and when they should have known it—including Dr. DeBakey. Thus, he could write: “The discriminatory actions of Baylor were, as noted above, the result of intentional discrimination, together with indifference and insensitivity. However, the Court does not find that the conduct was so wilfully malicious and egregious as to support the imposition of punitive damages.”20

While he thoroughly detailed the case against BCOM, it was ironic that he would have ruled in this narrow fashion on the racialization issue. In 1954, *Hernandez v. Texas*, the first civil rights case taken to the U.S. Supreme Court by Mexican American lawyers—including the young James DeAnda, only recently graduated from law school—determined that the equal protection doctrine applied to Mexican Americans, legally considered “white” by the state of Texas. DeAnda and the team were successful in convincing Justice Earl Warren and the Court that their Mexican American client tried in criminal court and convicted by an all-Anglo jury had not received a trial judged by his peers. The case reversed a murder conviction and required that the defendant be re-tried with Mexican jurors.21

While the BCOM lawyers may have had reason to believe that the Fifth Circuit would not have agreed with the findings of the trial court, the decision was both very detailed and straightforward. But the trial was very tense, with sharp elbows thrown by both sides. One of the Baylor lawyers, in all apparent seriousness, observed that “the safety of the doctors themselves could be considered and there could conceivably be ‘judicial notice of the fact that Saudi patients might not want a Jewish doctor’ treating them.”22 After losing at the Fifth Circuit, the medical school did not seek certiorari to the U.S. Supreme Court, in part because prolonging the dispute could have seriously jeopardized its ability
to receive federal funds for medical research, and because losing in such a conservative appellate venue likely convinced them that they would not have prevailed at the U.S. Supreme Court, particularly in such a case, where Jewish and other civil rights groups would undoubtably have entered the fray.

The BCOM lawyers may have thought that, if the Fifth Circuit had been incredulous about the behavior of Chancellor DeBakey and BCOM’s “see no evil” senior administrators, the Supreme Court would be equally likely to hold that the doctors had acted as fools—or worse, knaves. After all, the circuit had raised a substantial eyebrow at the medical school’s behavior: “Both Dr. Abrams and Dr. Linde were informed, by various Baylor officials, that there were problems securing visas for Jews. Yet, Baylor never attempted to substantiate that ‘problem,’ and the veracity of those assertions is called seriously into question by the . . . testimony of Dr. DeBakey.”

Abrams’s attorneys, husband and wife Stuart Nelkin and Carol Nelkin, had tried to get Jewish organizations on board at the trial level but could convince none to do so until the appeal, when the Anti-Defamation League of B’nai B’rith filed an amicus brief; it was the only amicus to appear in the proceedings. Behind the scenes, Jewish friends of the lawyers had sussed out the lesser-known case of a Jewish nurse (Marcee Lundeen) who was also precluded from service in the Saudi program, but this information came too late for her to be certified, and she decided not to litigate the matter further and delay the main trial. Ironically, she later became a lawyer in Houston, where she practices today.

The last laugh in this sad matter went to Stuart Nelkin, who had his lawyer’s fees reduced by the circuit but who later prevailed in the final order, where Judge DeAnda spelled out his extraordinary trial skills and awarded him the larger amount. When the final check was issued for his clients Abrams and Linde, Nelkin was summoned to the downtown Houston high-rise where the firm of Baylor’s lawyer William R. Pakalka was located and where he commanded a majestic view of downtown Houston. In front of a phalanx of firm lawyers involved in the case, Pakalka dismissively threw the check at Nelkin across his desk and told him to take it and leave. Nelkin picked up the check, and in a move that justified his reputation as a skilled litigator and antagonist, insisted that Pakalka produce a driver’s license for identification purposes. He could have laughed again when he was awarded the higher level of attorney fees from BCOM for the work performed in the trial and appeal.

Attorneys Stuart Nelkin and Carol Nelkin continue to practice civil rights law and employment law in Houston, joined by their son. Dr. Linde and Dr. Abrams received substantial damages, and both eventually left BCOM—Dr. Abrams
soon after the case went to trial and Dr. Linde at a later date. At the time of the trial, Abrams was still on the BCOM staff, although he was punished by moving him to a lesser-ranked hospital assignment,26 he eventually left Texas and became an associate professor of clinical anesthesiology and director of cardiothoracic anesthesiology at the SUNY Downstate Medical Center, in Brooklyn, New York, and currently is in private practice in New Jersey. Linde remains in private practice as an anesthesiologist in the Houston area.

After a decade of service as Baylor’s president, Dr. DeBakey served as the medical school’s chancellor from 1979 until early 1996, after which time he served as chancellor emeritus. He continued to perform cardiac surgery there until just before his death in 2008, at the age of ninety-nine. In 2009–2010, BCOM attempted a complex merger with nearby Rice University, but the affiliation talks collapsed in January 2010, when the Baylor debt ballooned and long-standing clinical relationships with Methodist Hospital and St. Luke’s Episcopal Hospital, its former partners at the Houston Medical Center, ended, leaving the medical school with no affiliated hospital facilities.27

Judge DeAnda died in 2006, and I was asked to speak at his funeral, where I recounted the details of the Hernandez Supreme Court case. His sister, who lives in Houston, came up and told me afterwards, “Michael, that was lovely. But I had not known Jimmy ever tried a Supreme Court case.” My dear friend was such a modest and unassuming man that he had never even told his sister, with whom he was very close, about that important case. In February 2012, the Houston Independent School District dedicated a new school to honor him, the Judge James DeAnda Elementary school, in the heart of Mexican Houston.