# UNITED STATES SUPREME COURT MAKES TRIALS OF EMPLOYMENT DISCRIMINATION CLAIMS EASIER TO OBTAIN

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The United States Supreme Court has significantly lightened the burden on employment discrimination plaintiffs in order to obtain a trial of their claims and to defend jury verdicts in their favor. In *Reeves v. Sanderson Plumbing Products, Inc.*, 2000 WL 743663 (U.S. June 12, 2000), the Court held unanimously that so long as the plaintiff has sufficient evidence to create a question of fact whether the employer's articulated reasons for its adverse employment actions are false, the plaintiff need not have any other evidence of discrimination other than the minimum necessary to present an initial *prima facie* case. Although some lower courts had reached this conclusion in prior years, many others (including the Second Circuit Court of Appeals in New York) have required a significantly higher level of proof by discrimination plaintiffs in order to be entitled to a trial. In this regard, the Court has markedly eased the way for employees to establish intentional employment discrimination.

## EXISTING LAW

In earlier decisions, the Supreme Court articulated a tripartite, shifting of burdens of proof analysis to be used in most employment discrimination cases:

(1) First, a plaintiff must establish a *prima facie* case of discrimination, which, in a discharge case, for example, requires only a showing that the employee (i) belongs to a protected class, (ii) was discharged, and (iii) was replaced by a member outside the protected class.

(2) The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse action in order to rebut the inference of discrimination created by the *prima facie* case. The employer's burden at this stage is only one of production, not persuasion; the ultimate burden of proof always resting with the plaintiff.

(3) In order to prevail, the plaintiff must then establish that the employer's articulated legitimate nondiscriminatory reason is false and a pretext to mask unlawful discrimination.

The latter factor was the subject of discussion by the Supreme Court in its 1993 decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), with the Court at that time emphasizing that it was the plaintiff's obligation to prove not only the falsity of the employer's articulated reason but also that discrimination was the real reason behind the employer's actions. Although the Court in *Hicks* also stated that there may be some situations in which the plaintiff's evidence in support of the *prima facie* case would be sufficient when accompanied by proof that the

employer's given reason was untrue, many of the lower courts have relied upon the basic holding of *Hicks* that, in order to present a jury question (*e.g.*, to survive an employer's motion for summary judgment), a plaintiff who has established a *prima facie* case must have evidence not only that the employer's reason is false but also that discrimination was the employer's true reason.

By way of example, the Second Circuit Court of Appeals in one significant decision, *Fisher v. Vassar College*, 114 F.3d 1332 (2nd Cir. en banc 1997), held that a finding that the employer gave a false reason does not generally go to prove that the real reason was an illegal reason. The Second Circuit held that the import of the finding of a false reason could be due to so many equally possible motivations (some lawful, some not) that none emerge with any persuasive force and the inaccuracies in the reasons given by the employer in that case gave little if any support to the plaintiff's argument that the employer had discriminated against her:

> As to the employer's proffer of a nondiscriminatory reason which the factfinder finds to be false, its probative force is also highly variable.... [E]mployers characteristically give false explanations for their employment decisions for many different reasons. That an employer has done so means that there is something to hide. Discrimination is without doubt one of the things employers may seek to hide by giving a false explanation. It is by no means the only one. The fact that the employer is hiding something does not necessarily mean that the hidden something is discrimination. Generally speaking, the stronger the evidence that illegal discrimination is present, the greater the likelihood that discrimination is what the employer's false statement seeks to conceal. And, conversely, the weaker the evidence of discrimination, the less reason there is to believe that the employer's false statement concealed discrimination, as opposed to the numerous other reasons for which employers so frequently give false reasons for employment decisions.

114 F.3d at 1346-1347. The Court of Appeals went on to hold that whether a trial is appropriate in the first instance, or whether a jury verdict for the plaintiff can be properly sustained, depends on court's view of all of the evidence with the fact of falsity of the employer's reason being only one factor to consider.

**THE FACTS OF REEVES**

The plaintiff in *Reeves*, age 57, was terminated from his job as supervisor after 40 years of employment because, the employer claimed, an audit of plaintiff's department conducted after receipt of a complaint that "production was down" revealed that plaintiff, among others, was responsible for "numerous timekeeping errors and misrepresentations" and related payroll discrepancies. Based on the audit, plaintiff and another employee were fired. The plaintiff sued the employer contending that he was discharged because of his age and that he and the other employees were replaced with employees under age 40. The employer asserted that the termination was due to plaintiff's failure to maintain accurate attendance records. Plaintiff presented evidence at trial that he *had* accurately recorded attendance and hours for his

employees, and that he was not responsible for any failure to discipline late and absent employees.[1]

During the trial, the District Court twice denied plaintiff's motions for judgment as a matter of law and the case went to the jury which returned a verdict in favor of the plaintiff. The District Court also denied the employer's subsequent motion for judgment notwithstanding the verdict and entered a judgment for the plaintiff. On appeal, the Court of Appeals for the Fifth Circuit reversed the District Court and dismissed the action, holding that even though the plaintiff "very well may" have offered sufficient evidence to prove that the employer's explanation for its employment decision, *i.e.*, that plaintiff maintained inaccurate records, was false, this alone was insufficient to sustain a finding of liability and plaintiff had not introduced sufficient evidence for a rational jury to conclude that he had been discharged because of his age.

**THE SUPREME COURT RE-EVALUATES THE IMPORTANCE OF PRETEXT**

In *Reeves,* the Supreme Court reversed the Court of Appeals and held that for a plaintiff to prevail he need only establish (i) a *prima facie* case of discrimination, and (ii) that the employer's legitimate non-discriminatory reason for the allegedly discriminatory action is pretextual, without regard to what the true reason for the employer's action may have been. According to the Court in *Reeves*, once a plaintiff has met the minimal standard of establishing the *prima facie* case of discrimination, proof that the employer's reason for the employment action is false is no longer but one neutral fact which, *along with other evidence of discrimination*, may lead to a finding of liability. The Court, in what is a rejection of the view expressed by the Second Circuit in *Fisher v. Vassar College* and by other courts as well, now places greater weight on evidence of the falsity of the employer's reason as being potentially potent evidence of guilt, which then permits the plaintiff to obtain a trial and a jury to find liability for discrimination.

This ruling has far-reaching implications for employers making summary judgment motions at the close of discovery, as now a plaintiff merely raising an issue of fact with respect to the truth of the reason proffered by an employer for its actions — even if that issue of fact

1. Most of plaintiff's alleged timekeeping errors involved employees who were not marked late when they were marked as having arrived at the plant at 7 a.m.; *i.e.*, an employee who arrives at 7 a.m. could not have begun working at 7 a.m. However, plaintiff testified, and the employer admitted, that the automated timeclocks would often malfunction recording no time of arrival and supervisors would then manually mark the time of arrival as 7 a.m. for all employees who were at their workstations at 7 a.m. Similarly, plaintiff testified that he assigned additional work to employees who arrived early or stayed late so that they would not be overpaid. With regard to plaintiff's alleged failure to discipline late and/or absent employees, he testified, and the employer conceded, that another manager was responsible for disciplining late and absent employees. Finally, plaintiff countered that company policy typically provided that an employee's next paycheck be adjusted for any previous overpayment.

evidences absolutely nothing about discriminatory intent — will now be sufficient to send a case to trial assuming that the minimal *prima facie* burden is also met by the plaintiff.

There remains room for advocacy on behalf of employers to obtain summary judgment, a directed verdict or post-verdict relief based upon some of the language of the *Reeves* decision. The Court recognizes in the opinion that in theory not every argument by a plaintiff that the employer's reason is pretextual will require a trial, as there are variations in the strength of possible proofs of falsity. Similarly, the Court noted that the resolution of a case will also depend on the strength of the plaintiff's *prima facie* case, and suggests that a trial may be avoided were the employer to "conclusively reveal" that there was some other non-discriminatory reason for the action apart from the false reason. Employers should not, however, take great solace in the existence of these issues as the Court in *Reeves* was very careful to hold that it was relying only on the spartan *prima facie* case established by that plaintiff (with the only evidence of possible discrimination before the Court on this issue being his having been replaced by a persons under the age of 40) along with a fairly strong proof of pretext, in reaching the conclusion that those alone were sufficient for the jury to find the employer to be liable.[2]

**PRACTICAL ADVICE TO EMPLOYERS ON THE ISSUE OF PRETEXT**

To a considerable degree, the observations of the Second Circuit in *Fisher v. Vassar College* are correct: employers frequently, for a variety of reasons, do not express the real reason, or all of the actual reasons, for employment decisions to the affected employees. The motivation can be internal political considerations or a desire not to speak harshly or frankly to an employee about the reasons for termination, particularly when the employee is a senior executive. Beyond the considerations of employee communications, it sometimes occurs that the employer's initial articulation of its reasons is not as complete or reasoned as it may become during litigation and with renewed attention to the matter.

Not conveying the honest reasons for termination has always been fraught with danger for employers, as providing any opportunity for an adversary in a jury trial to prove mendaciousness of key employer witnesses risks calling into question the credibility of those witnesses on other matters as well. Until *Reeves*, employers have often argued in support of their motions for summary judgment that notwithstanding evidence of pretext the employee

2. The Court's rigor in referring only to the plaintiff's *prima facie* case and evidence of pretext was remarkable in that later in the decision the Court highlighted the other proof of discrimination introduced by the plaintiff at trial, which included evidence that the discharge decisionmaker had made age-related comments at another time that the plaintiff was too old for his job. Employers may attempt to support their future motions for summary judgment by arguing that this direct evidence of discrimination was as much a part of the plaintiff's *prima facie* case as were the ages of those who replaced him. The Court, however, took a much narrower view of what constituted the *prima facie* case and did not refer to any of the other evidence of discrimination in deciding whether proof of pretext need to coupled with additional evidence of discrimination to avoid dismissal.

has nonetheless failed to prove that discrimination was the real reason. These arguments have resonated with courts and provided the basis for dismissals without trial as well as reversals of jury verdicts in favor of employees. Now, however, the additional proof of actual intention is no longer required (except perhaps in a minority of cases).

Employers are best protected in this environment by stating only the real reasons for the termination or other employment decisions to the employees at the time of the action, and by being careful not to overstate the employer's case. Particular care should be taken in focusing upon the reason for the action and the facts supporting it before it occurs, and contemporaneous documentation should be considered to support the selected rationale. When administrative proceedings or litigation is commenced, it is critical that a full and complete investigation of the facts take place by counsel so that the reasons expressed for the action in the initial position statement or pleading are an accurate, complete and a consistent basis upon which the defense may be built.

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