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Employment Law

Same Evidence Used to Reject Bias Claim, Support Retaliation Claim

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The (over)use of the summary judgment process in employment discrimination cases has been heartily scrutinized over the years. As this column has pointed out, there is at least one prominent federal judge (U.S. District Judge Mark W. Bennett of the Northern District of Iowa) who thinks the use of summary judgment, as a practice, should be eliminated in these types of cases. (See "Time to Abolish Summary Judgment in Employment Law Cases?" published in The Legal on July 26, 2013.)

Oftentimes, federal courts are loath to meddle with most employment-related business decisions, claiming it is not for the courts to second-guess as a kind of "super-personnel department." The result is oftentimes a judicial rubber stamp of sorts, giving employers the imprimatur to fire/discipline at will.

Of course, when courts do undertake the fact-intensive approach to employment disputes and apply legal standards intended to allow juries to decide these cases, the summary judgment process can backfire for the employer. As we have all heard countless times in our legal careers, it is the facts that drive the case. Take, for example, the decision rendered this week in *Lassiter v. The Children's Hospital of Philadelphia* (E.D. Pa. Sept. 21, 2015, No. 14-1037).

According to the published opinion, Carl Lassiter, who is African-American, began working at the Children's Hospital of Philadelphia (CHOP) in February 1983 as a medical technologist and was promoted to senior medical technologist in 2005. Shortly after his promotion, Lassiter, along with six other African-American employees, filed a race discrimination lawsuit against CHOP. Lassiter alleged in that lawsuit that he was not promoted to the supervisor position in Central Laboratory Services because of his race. Eventually, in 2008, summary judgment was entered in favor of CHOP and against Lassiter on all claims.

Fast-forward to October 2011. There were many in the CHOP community, including Lassiter's immediate supervisor, who did not think that Lassiter was worthy of the promotion, and his performance as senior medical technologist came under fire. There was a prevailing thought that

Lassiter was only in that position because of his previous race discrimination lawsuit against CHOP and/or fear that he would bring another claim due to his race, according to the opinion. In fact, following a meeting with Lassiter, his boss conveyed as much in notes where he dressed down Lassiter for performance deficiencies, on Oct. 24, 2011. After several more months of purported performance issues, Lassiter was terminated by CHOP based on his "inability to perform the job" on March 12, 2012.

Lassiter filed suit under Title VII alleging race discrimination and retaliation, as well as claims under the Americans with Disabilities Act for failure to accommodate his disability (a serious back impairment). Lassiter contended that CHOP discriminated against him on the basis of his race when he was placed on a performance improvement plan (PIP), and later terminated, despite having positive performance reviews, and the different treatment afforded to employees outside his protected class. Lassiter claimed that the notes and statements from his supervisor indicating that Lassiter was only promoted because of his prior discrimination lawsuit constituted "direct evidence" of racial bias.

This is where the case gets interesting. The court thoroughly analyzed the evidence, including the supervisor's deposition testimony that he believed that Lassiter was in the promoted position only because he had previously brought a racial discrimination claim. Despite Lassiter's strong contention that such testimony was direct evidence of racial animus by a person "involved in the decision-making process that reflect[s] a discriminatory or retaliatory animus of the type complained of in the suit," the court rejected that argument. The court wrote that a trier of fact would have to "infer the discrimination" from the remarks identified by Lassiter and, as such, they are not direct evidence of discrimination, citing *Torre v. Casio*, 42 F.3d 825, 829 (3d Cir. 1994). The supervisor's statement referred only to Lassiter's prior lawsuit, not the fact that he was African-American.

On to step two, which is to analyze the evidence in the context of the *McDonnell Douglas* burden-shifting framework, developed in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). In this instance, Lassiter proffered evidence that each of the employer's proffered non-discriminatory reasons were "either a post hoc fabrication or otherwise did not actually motivate the employment decision." The court then went through painstaking detail to analyze each one of CHOP's proffered reasons. This included a comprehensive review of Lassiter's alleged record of ignoring requests, missing deadlines, poor communication and overall incompetence. To that end, the court noted there was no question that CHOP's management of Lassiter was far from stellar. Lassiter consistently received positive reviews throughout his nearly three decades of employment, and the record showed that his positive evaluations came despite documented unsatisfactory performance, an unfortunate discrepancy that was due to "a poor management choice on behalf of [Lassiter's supervisor]."

From there, the court's analysis seemed to take a hard right turn. While CHOP's decision to continually provide positive reviews to an underperforming employee may have been imprudent, the court noted that its role is "not to determine whether the employer made the best or even a sound business decision, but whether the real reason [for the adverse action] is discrimination." As a result, the court found that Lassiter was unable to identify evidence that race was a motivating or determinative factor in the employment decision.

Just like that, the court dismissed Lassiter's race discrimination claims. But that did not end the inquiry. Recall that there was also a retaliation claim. And further recall that Lassiter's first lawsuit

was filed in 2005 and ended in a dismissal in 2008. Under ordinary causation principles of retaliation, an almost seven-year gap between protected activity and adverse action would likely fail, as a matter of law. Here, however, the court was persuaded by the supervisor's preoccupation with Lassiter's protected activity, which had the effect of extending the conclusion of the first lawsuit until Lassiter's termination in 2012. Furthermore, the supervisor confirmed his belief that Lassiter had the promoted position because he had previously brought a race discrimination lawsuit, and that he treated Lassiter differently because he feared he would file another lawsuit against CHOP. These same sentiments were expressed by other CHOP representatives.

It was this quantum of evidence that compelled the court to find that there was sufficient evidence gleaned from the record, as a whole, suggestive of a causal connection between the protected activity and the adverse employment decisions made by CHOP. Thus, the same evidence that was not sufficient to create an inference of racial discrimination was the same evidence used to bolster the retaliation claim. This well-thought-out decision, with the varying nuances and levels of review, demonstrates that courts will not always rubber-stamp an employer's business decision. The court ferreted through all of the arguments, on both sides, and reminded practitioners that the entire record, as a whole, should be examined. The easier, dare I say lazier, way out would have been to simply throw out the entire case. Instead, the court examined evidence in its proper context and ultimately came to a conclusion that is neither results-oriented nor knee jerk. Kudos to the court for using the summary judgment process the way Bennett intended.

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