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To Tell the Truth: Successfully Defending Discrimination Lawsuits

By James Wilcox and Pablo Quiñones

The Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, reminds employers that they need to provide credible, business reasons for discharging an employee. But the decision also has much broader implications for successfully defending an employment discrimination action.

Generally, an employee may prove a *prima facie* case of discrimination by demonstrating the employee was a member of a protected class, that the employee was qualified for the position he held, that despite the employee's qualifications the employee was discharged, and that the employment termination occurred under circumstances that give rise to an inference of unlawful discrimination. In Reeves, the Court revisited the issue of whether an employer's reason for an employment decision, if unworthy of credence, coupled with prima facie proof of age discrimination, is sufficient to sustain a jury verdict in a disparate treatment claim under the Age Discrimination in Employment Act (ADEA). Mr. Reeves was a 57 year-old supervisor, whose responsibilities included recording the attendance and hours worked by employees under his supervision. His employer asserted that Mr. Reeves had been fired because of his "shoddy record keeping" in maintaining accurate records of employee attendance and hours. At trial, Mr. Reeves offered evidence showing that this proffered reason was false and that a company director, who was one of three people who recommended his termination, had demonstrated age-based animus in dealings with him. In particular, the company director had allegedly:

- told Mr. Reeves he was "too damn old to do his job"
- told Mr. Reeves he was "so old he must have come over on the Mayflower"
- treated Mr. Reeves "as you would... treat... a child with whom you're angry"

The jury returned a verdict for the employee and the lower court denied the employer's motions for post-trial relief. On appeal to the Fifth Circuit, the employer did not dispute that the employee had established a prima facie case of age discrimination. The Fifth Circuit further acknowledged that Mr. Reeves offered sufficient evidence for "a reasonable jury

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Labor Law Update:

"Weingarten" Right to Representation Extended to Non-Union Employees and Workplaces

By Bennett Pine

In a decision with potentially broad-ranging impact, the National Labor Relations Board ("NLRB" or "the Board") has ruled that a non-union employee now has the right, upon request, to have a co-worker present at an investigatory interview that the employee reasonably believes may lead to discipline, *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 92 (July 10, 2000). In so ruling, the Board extended the right previously afforded only unionized employees by *NLRB v. Weingarten*, 420 U.S. 251 (1975) to all employees. The Board also found that the termination of an employee for demanding that a co-worker be permitted to accompany him at an investigatory interview violated the National Labor Relations Act. Reinstatement with backpay was ordered.

It must be noted that the broad impact of the Board's decision in *Epilepsy Foundation* is limited, however, by the following principles.

- The so-called *Weingarten* right to a representative arises only in situations where the employee requests representation;
- The burden is on the employee to make the request. Employers have no obligation to advise employees of the *Weingarten* right or to ask them, specifically, whether they would like a co-worker to be present during the interview;
- The right applies only in situations where it can objectively be stated that the employee "reasonably believes the investigation will result in discipli-

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to have found that [the employer's] explanation for its employment decision was pretextual." The Fifth Circuit, however, did not consider a prima facie case, plus evidence of pretext, sufficient to satisfy the ultimate burden of proving age motivated the employer's decision to terminate Mr. Reeves. The Fifth Circuit found that there was insufficient evidence to demonstrate age had motivated the employer's decision because (i) the director's comments were not made in the context of Mr. Reeves termination, (ii) the other individuals who recommended Mr. Reeves' discharge were not alleged to have an age animus, (iii) two of the decisionmakers involved in Mr. Reeves' termination were over the age of 50, (iv) all three of the supervisors in Mr. Reeves' department were accused of inaccurate record-keeping practices, and (v) other supervisor positions were filled by employees over age 50 after Mr. Reeves' termination. As a result, the Fifth Circuit reversed and rendered judgment for the employer.

The Supreme Court of the United States reversed the Fifth Circuit and reinstated the jury verdict for the employee. Speaking for the Court, Justice O'Conner held that: "[a] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." The Court reasoned that: "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." The Court reached this result, primarily for two reasons:

1. An inference of intentional discrimination is "consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt; and
2. Once the employer's justification is eliminated as the reason for the employer's actions, "it is more likely than not that the employer, who we generally assume acts with some reason, based his decision on an impermissible consideration."

In light of the Court's reasoning, an employer who offers a false reason for an employment decision will provide an employee circumstantial evidence that is probative of intentional discrimination.

That circumstantial evidence is not always sufficient, however, to support a jury verdict of intentional discrimination. As stated by the Court, "[a]n employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." The Court ultimately held that, "because a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Fifth Circuit's core error was "proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination." Thus, the probative value, if any, of the falsity of an employer's reason will necessarily depend on the quality and quantity of proof offered to support the *prima facie* case and the reason for the employer's decision.

Broader Implications

After *Reeves*, an employee may find it easier to survive a defendant's motion for summary judgment and employers may be proceeding to trial more often in employment discrimination actions. If an employee can show: 1) a *prima facie* case and 2) pretext or sufficient evidence that the employer's reason may be false, then the case could proceed to trial to determine whether, based on the totality of the record, an unlawful purpose was, in fact, the motivating factor in the adverse employment action. *Reeves*, however, offers employers two main guideposts to preventing an employment discrimination claim from proceeding to trial.

Do Not Automatically Concede A Prima Facie *Case*

Most courts now find that an employee has a minimal burden to satisfy a prima facie case of employment discrimination. After Reeves, however, employers should aggressively challenge the employee's *prima facie* case and not simply rely on its own evidence and explanation when presenting its defense. Most employers should refuse to concede that an employee has met the *prima facie* burden. In addition, employers

must now argue against the notion that an employee's burden is minimal or lower in cases alleging employment discrimination. A burden of proof that can be transformed into a finding of guilt can hardly be considered minimal.

Provide a Precise and Accurate Business Reason for an Employment Decision

Under *Reeves*, when sufficient evidence exists to show that an employer's explanation may be false, a factfinder could conclude that discrimination was the only possible motive for the employer's decision. Understandably, a supervisor may find it easier to "sugar coat" an employment decision, rather than tell the employee the real reason for the action. In an appropriate case, however, an employer who offers a false reason to mask its real motive (whatever that might be) may risk violating employment discrimination laws. As a result, an employer must be very careful when offering its non-discriminatory reason in a particular case. Placing too much reliance on the general recollections of company employees or undocumented problems may prove to be a costly gamble. As *Reeves* cautions, employers are presumed to act with some business reason in mind when making business decisions. While courts will not second-guess an employer's business decision, they will scrutinize whether the business decision or some discriminatory reason was the motive for an adverse employment action against an employee in a protected class.

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nary action." It does not apply to run-of-the-mill workplace conversation, training, giving corrections, etc., or where an employee is simply being advised of a decision, already made, to impose discipline;

- Only a co-worker can be the non-union employee's representative at an investigatory interview. The non-union employee has no right to bring an attorney, family member, clergyman, "union" representative or other non-employee third party;
- The employee has no right to insist on the presence of a *particular* co-worker as representative if the individual is unavailable when the employer wishes to conduct the investigatory interview;
- The co-worker/representative may assist, advise and consult with the employee (including prior to the meeting) but may not obstruct the meeting or convert it into an adversarial proceeding.

Nevertheless, employers must proceed with caution. Employers may be committing unfair labor practices by (i) denying an employee's request to have a co-worker present, (ii) proceeding with disciplinary action despite such a request or (iii) retaliating against employees who seek to exercise their *Weingarten/Epilepsy Foundation* rights. ■

EMPLOYMENT

Q: Can an employer's health insurance plan exclude coverage for prescription contraceptive drugs and devices available only to women?

A: On December 13, 2000, the U.S. Equal Employment Opportunity Commission issued a decision finding merit in two sex discrimination charges that claimed the employer's health insurance plan improperly excluded coverage for prescription contraceptive drugs and devices available only to women, such as birth control bills and Depo Provera contraceptive injections, while covering other reproductive drugs, devices and services, such as surgical sterilization and Viagra.. According to the EEOC, the Pregnancy Discrimination Act's prohibition on discrimination against women based on their ability to become pregnant "necessarily includes a prohibition on discrimination related to a women's use of contraceptives."

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