Pennsylvania Bar Institute
Employment Law Institute - 2018

Summary Judgment Land

Presented By:

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Applicable Rules of Procedure

- Federal Rule of Civil Procedure 56
  - "The court shall grant summary judgment if the movant shows that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law."

- Local Rules of Western District of PA
  - Concise statement of material facts.

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Reasons for Filing Summary Judgment Motions

- Interrogatory No. 1
  - Please state the legal and factual basis that supports your position in this action.
- Interrogatory No. 2
  - Please provide a road map outlining your counsel's impressions of the liability and damage issues he or she believes are your most strong, and your weakest.

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The Plaintiff's Prima Facie Case (Discrimination)

1. Protected Class
2. Adverse Employment Action
3. Qualified
4. Something else.
   a. Replaced by someone outside plaintiff's protected class.
   b. Employer continued to seek applicants.
   c. Qualified
   d. Other circumstances suggesting discrimination.

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The Plaintiff's Prima Facie Case (Retaliation)

1. Protected conduct.
2. Followed by adverse action
3. Causation.

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Proving Pretext

The Plaintiff can prove pretext through two approaches:

1) Provide evidence in addition to the prima facie case, either direct or circumstantial, to demonstrate that discrimination was more likely than not the reason.

   Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 331 (3d Cir. 1995); *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994). This is sometimes called "prong 1." *See, Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1108 (3d Cir. 1997)(en banc).

2) Cast doubt on the employer's stated reason by identifying such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered reasons for its action that a reasonable fact finder could rationally find them unworthy of credence.

   Tomasso v. Boeing Co., 445 F.3d 702, 706 (3d Cir. 2006); *Brewer*, 72 F.3d at 331; *Fuentes*, 32 F.3d at 765. This is sometimes called "prong 2." *Keller*, 130 F.3d at 1111.

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Proving Pretext (cont.)

- Under either prong, the fact finder's disbelief of the employer's stated reasons justifies an inference that the reasons offered are pretextual, particularly when the employer is suspected of mendacity. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48, 120 S.Ct. 2097, 2108 (2000); Hicks, 509 U.S. at 510, 511, 113 S. Ct. at 2749.

  - If the plaintiff can discredit the employer's proffered reasons, he or she need not produce additional evidence beyond the prima facie case in order to survive summary judgment.
    - *Reeves*, 530 U.S. at 147-48, 20 S.Ct. at 2108-09; *Burton v. Teleflex Inc.*, 707 F.3d 417, 427 (3d Cir. 2013); *Waldron v. SL Industries, Inc.*, 56 F.3d 491, 495 (3d Cir. 1995).

  - At the summary judgment stage, a plaintiff need not provide evidence directly contradicting each and every reason offered by the employer.
    - *Sala v. Hawk*, 481 Fed.Appx. 729, 733 (3d Cir. 2012); *Tomasso*, 445 F.3d at 706; *Antol v. Perry*, 82 F.3d 1291, 1300 (3d Cir. 1996); *Fuentes*, 32 F.3d at 764. *Boyle v. County of Allegheny*, 139 F.3d 386, 393 (3d Cir. 1998).

Pretext Factual Scenarios

- Can A Reasonable Jury Disbelieve An Employer's Uncontradicted Witnesses?

  It Depends on the Third Circuit Panel . . .

- On motion for judgment as matter of law Court should not give credence to the evidence favoring the nonmovant unless it is:

  1. Uncontradicted;
  2. Unimpeached;
  3. From a Disinterested Witnesses.

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Reeves Means What It Says.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 149-151, 120 S.Ct. 2097, 2110 (2000).

When evaluating a summary judgment motion in an employment discrimination case, the court should give no weight to even uncontradicted testimony of an interested witness where the testimony supports the moving party.

Hill v. City of Scranton, 411 F.3d 118, 131, n. 22 (3d Cir. 2005):

The fact that [the plaintiffs] do not directly challenge [an interested witness' testimony]...is irrelevant...when evaluating a summary judgment motion, a court should not consider even uncontradicted testimony of an interested witness where that testimony supports the movant.

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Reeves Means What It Says.

Ridley v. Costco Wholesale Corp., 217 Fed. Appx. 130, 135 (3d Cir. 2007),

Court disregarded uncontradicted testimony of interested witness who testified in a retaliation case that she was not aware of plaintiff's protected activity, citing Reeves and Hill, because a reasonable jury is free to discredit that testimony.

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Reeves Means What It Says

Armour v. County of Beaver, 271 F.3d 417, 420 (3d Cir. 2001),

Court noted it would give credence only to evidence supporting the moving party that was uncontradicted and unimpeached, if it came from a disinterested witness.

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Reeves Doesn't Mean What It Says

Lauren W v. DeFlaminis, 480 F.3d 259, 271-72 (3d Cir. 2007)

The testimony of individual defendants, although clearly interested witnesses is only to be disregarded if it is contradicted or "inherently implausible."

"The fact is, that in considering a motion for summary judgment, the court should believe uncontradicted testimony unless it is inherently implausible even if the testimony is that of an interested witness.

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Reeves Doesn't Mean What It Says

Kautz v. Met-Pro Corp., 412 F.3d 463, 475 (3d Cir. 2005)

On a summary judgment record the mere fact that a witness is interested does not permit the court to treat his or her testimony as false. Rather, citing no authority, the panel majority held the employee plaintiff must assert there is no factual basis for the witness statement, and then present some evidence supporting this claim.

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Employer Quick On the Trigger

- Pretext can be inferred where employer jumps on the first instance of misconduct or bad performance review.
- *Colgan v. Fisher Scientific Co.*, 935 F.2d 1407 (3d Cir. 1991)
- *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 285 (3d Cir. 2000)

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Employer Slow on the Trigger

- On the other hand, long history of poor performance may also be looked upon as suspicious, since the court is likely to question what took the employer so long to take action.
- *Delli Santi v. CNA Insurance Companies*, 88 F.3d 192 (3d Cir. 1996)
- *Kellerman v. UPMC St. Margaret*, 317 Fed. Appx. 290, 291 (3d Cir. 2009)

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Continuously Evolving Reason for Discharge

- Inconsistencies in the employer's statements prior and subsequent to the employment decision support an inference of pretext.
- *Fuentes*, 32 F.3d at 764
- *Siegal v. Alpha Wire Corp.*, 894 F.2d 50, 55 (3d Cir. 1990)
- *Gunby v. Pennsylvania Electric Co.*, 840 F.2d 1108, 1117 (3d Cir. 1988).

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Different Treatment of Employees Not in Plaintiff's Protected Class

- Pretext can be inferred where there is evidence that Plaintiff is treated different to employees not in the protected class.
- *Iadimarco v. Runyon*, 190 F.3d 151, 164 (3d Cir. 1999)

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Unlevel Playing Field

- An employer fails to train Plaintiff and uses lack of training as a reason for discharge.
- Employer provided advantages to one class of employee, but not another.
- *Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989)

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Good Performance Evaluations

- Other employees or supervisors found the plaintiff to be a good performer
- *Smith v. Davis*, 248 F.3 249 (3d Cir. 2001)

Although employee was discharged for absenteeism, evidence that Plaintiff had satisfactory evaluations from supervisors for 6 years created a genuine issue of material fact as to the true reason he was terminated.

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Challenging The Employer's Business Judgment

An employer may not use evaluation criteria that lacks any relationship at all to the performance of the employee, because to do so would be inconsistent with and contradictory of the employer's purpose.

Kautz v. Met-Pro Corp., 412 F.3d 464, 468 (3d Cir. 2005)

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C'mon! Challenging The Employer's Business Judgment

- A fact finder may consider the reasonableness, or lack thereof, of an employer's business judgment, insofar as it may assist in determining the employer's state of mind.
- *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259, 101 S. Ct. 1089, 1096-97 (1981)

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Challenging The Employer's Business Judgment

- While the issue is not whether the employer was wise, shrewd, prudent or competent, a decision foolish, imprudent or incompetent by comparison to the employer's normal mode of operation can render it implausible, inconsistent, contradictory or weak.
- *Fuentes v. Perskie*, 32 F.3d 759, 765 & n. 8 (3d Cir. 1994).

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The employer provides a “laundry list” of reasons for the adverse employment action

- Where the employer offers a “laundry list” of legitimate reasons, and Plaintiff can cast substantial doubt on a number of them, this may cast doubt on the remainder of the employer’s reasons.
- *Stephens v. Kerrigan*, 122 F.3d 171, 182 (3d Cir. 1997)

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Contradicting Specific Underlying Facts The Employer Claims.

- Refuting “core facts” put forward by employer as its “legitimate reason” for discharge.
- *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)
  - Employer said it fired Reeves because he failed to report one absent employee on two days in Sept. 1995. But Reeves testified he was in the hospital those two days, and that therefore someone else was responsible for the failure to report. The Court held, was a "substantial showing" that the employer's explanation was false.

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"Stray Remarks"

- Doctrine of “Stray Remarks”
  - From Justice O'Connor concurring opinion in *Price Waterhouse*, 490 U.S. at 278-279, 109 S. Ct. at 1805 (O'Connor, J. concurring)
- *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 521 (3d Cir. 1997)
  - “Comments by individuals outside the decision-making chain are stray remarks, which, standing alone, are inadequate to support an inference of discrimination.”
  - *Gomez v. Allegheny Health Servs., Inc.*, 71 F.3d 1079, 1085 (3d Cir. 1995)

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Holding An Employer To Its Own Standards

- The employer failed to follow its own policies.
- *Stewart v. Rutgers University*, 120 F.3d 426 (3d Cir. 1997)
  - Rutgers' rejection of its grievance committee's recommendation created a material issue of fact on whether the reasons offered were pretextual, thus precluding summary judgment in a Title VII case.

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Timing

- Especially in pregnancy, FMLA and retaliation cases, the timing of the employment decision may establish causation.
- *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1072 (3d Cir. 1996)
  - Jury could reasonably find that defendant's complaints of deterioration in plaintiff's previous excellent work performance were pretext for retaliation for her complaints about discrimination because, before the complaints, she was top performer.

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“Me Too” Testimony

- Other employees in the same protected class as the plaintiff have also experienced discrimination.
- *Sprint/United Management Company v. Mendlesohn*, 552 U.S. 379 (2008).
- *Glass v. Philadelphia Elec. Corp.*, 34 F.3d 188, 194 (3d Cir. 1994)
  - “Me too” testimony is highly probative.

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Employer's History of Discriminatory Treatment

- Evidence of employer's history of discriminatory treatment of, or hostility towards, people in protected class is critical to determining whether discrimination could have motivated the employer's decision.
- *Glass v. Philadelphia Elec. Co.*, 34 F.3d 188 (3d Cir. 1994)

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Reduction in Force (RIF)

- Proof that RIF was pretextual
  - Attack the underlying rationale for the RIF;
  - Attack the RIF criteria;
  - Show RIF criteria did not apply to Plaintiff.

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RIF – Replacement is key

- Perhaps the most blatant evidence of pretext is to show that an employee who was told she was being RIFed, was replaced shortly after.
  - Such evidence is itself sufficient to preclude summary judgment.
  - *Waldron v. SL Industries, Inc.*, 56 F.3d 491, 495 (3d Cir. 1995)

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Document Destruction, Creation and Tampering

- *Harding v. Careerbuilder, LLC*, 168 Fed. Appx. 535, 539 (3d Cir. 2006)
  - In an attempt to prove defendant's reasons for firing Plaintiff were pretext, defendant apparently lost most of the relevant data and records that would have documented his job performance.
  - The court held evidence of lapses of the employer's record-keeping cannot on its own establish a pretext claim.
  - However, poor documentation/lost documentation by the employer will strengthen a plaintiff's case if the plaintiff has "evidence of an alternative reason, evidence that the asserted reason had no basis in fact, or evidence that the employer intentionally destroyed or concealed the relevant documents."

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Manipulating the Decision-Making Process.

- While an employer is clearly permitted to use whatever criteria it chooses when making hiring and firing decisions, when it chooses a criteria it knows will favor a certain class of employees, material factual issues arise precluding summary judgment.

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Hiding the Decision-Maker

- *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 149-151 (2000)
  - Employer argued that decision to fire Plaintiff was made by 3 people, therefore statements made by company director concerning Plaintiff's age should be discounted.
  - Supreme Court found sufficient evidence that Director was the actual decision-maker behind his firing.

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Cat's Paws and Rubber Stamps: Who is the Decision-maker?

- *Staub v. Proctor Hospital*, 130 S.Ct. 2089 (2010)
- An employer may be liable for a subordinate supervisor's bias even if the organization uses a neutral representative outside the chain of command to "rubber-stamp" the supervisor's recommendation.

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Some of Defendants' Favorite Cases

A. *Ezold*, 983 F.2d at 515- The Employer's Business Judgment.

B. *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d at 1103-04- The Employer's Reason is True

C. *Simpson v. Kay Jewelers* - Choosing the Right Comparator

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Summary Judgment in Sexual Harassment Cases

- *Faragher* and *Ellerth*
  - When a supervisor creates a sexually hostile work environment for an employee, but the employee suffers no tangible adverse employment action, the employer may avoid liability by raising the affirmative defense that it had an effective policy against sexual harassment, which the plaintiff unreasonably failed to use.
  - However, the supervisor takes an adverse employment action against the employee, the employer loses the affirmative defense and is held strictly liable for the actions of its supervisor.

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Questions & Answers

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