

SJC Rules in Employment Discrimination Cases a Plaintiff Need Only Show the Reason for Discharge was Untrue to Survive Summary Judgment

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March 01, 2016

On February 29, 2016, the Massachusetts Supreme Judicial Court (“SJC”), in *Bulwer v. Mount Auburn Hospital*, articulated the type of evidence required for a plaintiff to survive summary judgment and have his claims heard by a jury in an employment discrimination case. For decades, courts have grappled with questions regarding parties’ evidentiary burdens in these types of cases, because plaintiffs rarely can present direct evidence of discrimination. Rather, the issue in most cases is whether the employer’s legitimate, non-discriminatory reason for an adverse employment action (*i.e.* termination) is a pretext for unlawful discrimination.

The questions before the SJC, in *Bulwer*, relate to what evidence is required to establish pretext, and at summary judgment, who has the burden to show it. Under federal law, a plaintiff must provide evidence not only that the employer’s reason was false, but also that the real reason was unlawful discrimination. By contrast, the SJC in *Bulwer* held that under Massachusetts’s anti-discrimination law, a plaintiff faces a lower burden: so long as a plaintiff presents evidence of a false reason for his termination, the question of whether the reason was given to cover up discriminatory animus goes to a jury.

The plaintiff in this case, Mr. Bulwer, is a black male of African descent originally from Belize. He has a medical degree from a foreign medical school and practiced medicine internationally until 2002, when he came to the United States. To practice in the country, Mr. Bulwer needed to complete a residency program. In 2005, he applied and was accepted to a program at Mount Auburn Hospital. The residency agreement was for a one year term, with the option to renew for two years upon satisfactory completion of the first year.

Beginning in September 2005, Mr. Bulwer rotated each month to a different specialty in the hospital. At the end of each rotation, the supervising physicians evaluated his work. The record showed that after several rotations, Mr. Bulwer received polarized reviews: some considered him outstanding, others described his performance as horrendous. The hospital’s residency review board discussed these evaluations, and in April 2006, decided to not extend Mr. Bulwer’s contract beyond one year. Mr. Bulwer challenged this decision, and the evidence showed that some, but not all of the hospital’s procedures were followed in addressing Mr. Bulwer’s appeal. In May 2006, the chair of the department of medicine affirmed the review board’s decision, and further decided to terminate Mr. Bulwer effective immediately, citing concerns for patient safety as the reason.

Thereafter, Mr. Bulwer filed a lawsuit against the hospital and individual doctors claiming he was terminated on the basis of his race and national origin. The trial court granted summary judgment to the defendants, but this was overturned by the Appeals Court. The defendants obtained further appellate review by the SJC.

The SJC explained that at summary judgment, a plaintiff can establish pretext by presenting evidence that the employer gave a false reason for his termination. Further, the employer, as the moving party, bears the burden of proving that there are no questions of material fact on the issue of pretext, even though the plaintiff bears this burden at trial. In other words, the plaintiff need not connect a false reason for termination with an effort to cover up discrimination. So long as he shows the reason for his termination was untrue, the case proceeds to trial. At summary judgment, the motion judge cannot weigh or evaluate the credibility of the evidence.

In this case, the SJC found five categories of evidence from which a jury could infer that the hospital’s reason for terminating Mr. Bulwer was untrue: (1) conflicting performance evaluations raised fact questions; (2) evidence that similarly-situated, non-black interns were treated differently than Mr. Bulwer; (3) testimony from an African-American physician describing more favorable treatment for poor-performing, white doctors; (4) statements from Mr. Bulwer’s evaluations which could be interpreted as showing discriminatory animus; and (5) the hospital’s failure to follow its procedures for terminating a resident’s agreement. Taken together, the SJC concluded there was a genuine issue of material fact on the issue of discriminatory intent and remanded the case for trial.

The decision in *Bulwer* makes clear that Massachusetts law diverges from federal law regarding a plaintiff’s burden at summary judgment on a discrimination claim. Essentially, under Chapter 151B, a plaintiff will be able to reach a jury if he can prove the employer’s stated reason is false and regardless of whether he can ultimately prove that discrimination was the real reason. *Bulwer* highlights that

employers cannot pull punches regarding the reasons for a termination. For example, an employee who is terminated for poor performance should be told the truth; an employer should not characterize the termination as a layoff.

Further, *Bulwer* is troublesome in its treatment of performance evaluations. Rarely, if ever, are evaluations in perfect agreement regarding an employee's performance, yet this decision suggests that wide variations in evaluations can be evidence of pretext. While we suspect that this decision was driven by its facts, employers will need to carefully review and come to terms with the totality of performance evaluations when making employment decisions.

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