

One Minute Memo®



Listen Up! Says The Fifth Circuit: Evidence Of Pretext Does Not Always Defeat Summary Judgment

The vast majority of plaintiffs lack direct evidence of discrimination or retaliation at the summary-judgment stage, so the *McDonnell Douglas* burden shifting framework finds its way into most employment discrimination lawsuits. But what happens if the plaintiff presents some evidence that the employer's non-discriminatory or non-retaliatory reason for the adverse employment action is false or unworthy of credence? The plaintiff automatically defeats summary judgment, right? That's not always the case according to the Fifth Circuit.

In a recent unpublished opinion involving a failure-to-hire claim, the Fifth Circuit provided guidance to determine when a plaintiff presents sufficient evidence of pretext to survive summary judgment. *Churchill v. Tex. Dep't of Criminal Justice*, No. 12-20691, 2013 U.S. App. LEXIS 17240 (5th Cir. August 19, 2013).

In *Churchill*, There Was Some Evidence Of Pretext

Churchill (who was African American) applied for a training instructor position with the Texas Department of Criminal Justice ("TDCJ"). When he learned that TDCJ hired a Caucasian female for the position, he sued alleging, among other things, that: (1) TDCJ failed to hire him based on his race; and, (2) the Caucasian female was substantially less qualified for the position than he was.

After losing the case on summary judgment, Churchill appealed only one discrete issue: Whether TDCJ's stated reason for hiring the Caucasian female was pretext for unlawful race discrimination. The Fifth Circuit found that the plaintiff did not meet the very difficult burden to prove he was "clearly better qualified" for the position than the Caucasian female. According to the court, "[o]ne can hardly find mendacity by the employer when 'its judgments on qualifications are somewhere within the realm of reason.'"

The Fifth Circuit upheld the grant of summary judgment in spite of its acknowledgment that the plaintiff had offered at least some evidence that TDCJ's stated reason for hiring the Caucasian female was false or unworthy of credence. Specifically, the Fifth Circuit identified some evidence of pretext because TDCJ did not strictly follow its own hiring policy, relied on previously unmentioned job requirements in the selection process, and the relevant decision maker gave inconsistent reasons for selecting the Caucasian female. Despite this evidence, the Fifth Circuit held that summary judgment in favor of TDCJ was appropriate.

Some Evidence Of Pretext Is Not Always Sufficient To Defeat Summary Judgment

The Fifth Circuit, citing the Supreme Court in *Reeves v. Sanderson Plumbing Prods., Inc.*, stated that “although a plaintiff may have set forth sufficient evidence to reject the defendant’s proffered explanation, it may still present a circumstance where ‘no rational factfinder could conclude that the action was discriminatory.’ This could occur when ‘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.’” According to the Fifth Circuit, this was one of those cases.

Here, the primary decision maker was an African American male who had hired other African Americans for three of the four training instructor positions available at that time. The only training instructor position TDCJ did not hire an African American for was the one to which the plaintiff applied. According to the Fifth Circuit, the plaintiff’s subjective belief that race was a motivating factor was not supported by the record, and “no rational factfinder could conclude that the action was discriminatory.”

Although *Churchill* is an unpublished opinion, it provides valuable guidance on the question of pretext at the summary-judgment stage. Employers should not shy away from the next summary-judgment motion just because there are some inconsistencies in the employer’s explanations or because the employer did not strictly follow a policy at issue. Remember: Some evidence of pretext will not automatically doom the employer’s case, particularly when there is other evidence in the record that conclusively reveals a non-discriminatory or non-retaliatory reason.

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