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New York Appellate Court Clarifies Summary Judgment Standards in Discrimination Cases

It turns out that reports of the death of summary judgment under the New York City Human Rights Law ("City HRL") were greatly exaggerated. A new decision from the New York Supreme Court, Appellate Division - First Department ("First Department") has made clear that plaintiffs asserting discrimination claims under the City HRL who seek to avoid summary judgment must produce evidence that they actually suffered discrimination. The decision, *Melman v. Montefiore Medical Center*, -- N.Y.S. 2d --, 2012 WL 1913930 (1st Dep't May 29, 2012), goes a long way to alleviating employer fears that New York's courts would permit even near frivolous City HRL claims to proceed to trial.

Those concerns were stoked by a First Department decision from last December, *Bennett v. Health Management Systems, Inc.*, 936 N.Y.S. 2d 112 (1st Dep't 2011). On the surface, *Bennett* appeared to significantly expand an employee's ability to defeat summary judgment on discrimination and retaliation claims brought under the City HRL, even when the employee fails to proffer any evidence of unlawful conduct. [Click *here* to read our previous alert on the *Bennett* case.] Of particular concern, Bennett seemed to suggest that a City HRL plaintiff could survive summary judgment simply by showing that "at least one of the reasons proffered" for an adverse employment action was "false, misleading, or incomplete," even without evidence that the proffered reason was a pretext for discrimination. 936 N.Y.S. 2d at 123. Under the broadest interpretation of *Bennett*, an employer who labeled an employee's separation as a layoff could, conceivably, be denied summary judgment if the evidence suggested that the termination was, in fact, motivated by unsatisfactory job performance -- even if the plaintiff produced no evidence of discriminatory intent. While *Bennett* actually affirmed a grant of summary judgment, showing that the tool was still available in these cases, some of its language was widely viewed as overly permissive towards plaintiffs. This prompted fears that *Bennett* might significantly curtail summary judgment's viability in City HRL claims.

Melman has now substantially relieved those worries. In *Melman*, the First Department held that *Bennett* merely requires a summary judgment motion on a City HRL claim to "be analyzed both under the *McDonnell Douglas* framework and the somewhat different 'mixed motive' framework." But *Melman* makes clear that *both* these approaches require a City HRL plaintiff to produce actual evidence of discrimination in order to survive summary judgment, at least where an employer proffers a legitimate non-discriminatory reason for its actions. Under the *McDonnell Douglas* method, a plaintiff must produce evidence showing "**both that the stated reasons were false and that discrimination was the real reason**" for the challenged employment decision. (emphasis supplied) Under the similar "mixed motive" approach, a plaintiff must produce evidence showing that the action "was more likely than not based in whole or in part on discrimination." Accordingly, *Melman* makes clear that, notwithstanding the City HRL's "uniquely broad and remedial purposes," a plaintiff cannot survive summary judgment without "com[ing] forward with evidence from which a jury could reasonably find that the challenged actions were motivated, either in whole or in part" by discrimination. It is not enough for a plaintiff to impeach one non-discriminatory reason with evidence of a different non-discriminatory reason.

Melman is important for another reason as well. In discrimination cases, plaintiffs often try to manufacture issues of fact by arguing that the challenged adverse employment action was unfair, unwise or ill-considered. *Melman* reiterates that questioning an employer's decision "as contrary to sound business or economic policy" does not support an inference of discrimination. This is because courts "should not sit as a super-personnel department that reexamines an entity's business

decisions." Consequently, it is irrelevant if the employer supplies "a good reason, a bad reason, or a petty one," for its acts, provided the "stated reason . . . was nondiscriminatory."

Through its holdings, *Melman* effectively brings the City HRL closer to the familiar standards applied to federal and state discrimination claims on summary judgment. As such, *Melman* makes clear that, while the City HRL must be given the broad remedial reading it is intended to have, neither will plaintiffs be able to avoid summary judgment when they cannot adduce evidentiary support of actual discriminatory or retaliatory treatment.

Melman may not be the last word. The New York Court of Appeals has never definitively opined on what summary judgment standard should be applied in City HRL claims. *Melman* may give it just that opportunity.

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