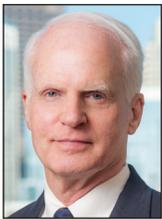


Decisions explain how employer adverse actions can seem pretextual

By David C. Henderson



An employee claiming employment discrimination or retaliation under Massachusetts state law frequently can defeat the employer's summary

judgment motion merely by providing evidence, at a critical phase of analysis, from which a reasonable jury could conclude that the employer's stated reasons for an adverse action are false and therefore "pretext." See, e.g., *Blare v. Husky Injection Molding Sys. Boston, Inc.*, 419 Mass. 437, 443 (1995).

That result of "pretext only" is considerably more favorable to employees than federal law. Cf. *Johnson v. University of Puerto Rico*, 714 F.3d 48, 53-54 (1st Cir. 2013) (requiring in analogous circumstances a showing both that the employer's proffered reason is pretextual and that the actual reason for the adverse employment action is discriminatory).

It therefore is significant that, in the first half of this year, the Supreme Judicial Court issued two major opinions, each by Justice Barbara A. Lenk, explaining how employer behavior can

establish such pretext and thereby be enough by itself to ensure that an adverse claim will be able to reach a jury.

The cases both involved discrimination/retaliation claims initially brought in Superior Court by a highly educated professional in the greater Boston area.

'Bulwer'

The first case, decided on Feb. 29, was *Bulwer v. Mount Auburn Hospital*, 473 Mass. 672 (2016). A black male doctor from the Central American country of Belize brought race, color and national origin discrimination claims against the hospital that discharged him.

The hospital defended itself in *Bulwer* by arguing that it behaved lawfully and that it legitimately discharged the doctor because of his various performance issues.

But on appeal of the Superior Court judge's award of summary judgment to the hospital, the SJC outlined some of the evidence to the contrary, vacated the judgment in favor of the hospital, and remanded the case.

Remand was required under Massachusetts law, the SJC said, because the doctor made a sufficient showing of pretext with evidence of the following:

- The hospital's adverse action was inconsistent with the doctor's performance evaluations.
- The hospital treated the doctor differently from similarly situated

employees who were not in the doctor's protected categories.

- The hospital had not disciplined other hospital employees when they engaged in deficient performance or displayed bias or animus creating an unlawfully discriminatory or harassing environment.

- The hospital allowed a working environment in which employees frequently voiced views based on "stereotypical thinking" about other groups or classes of people.

- And the hospital also failed to follow its own policies and procedures in the ways in which it dealt with the doctor.

As explained above, once the doctor made this sufficient showing of pretext, there was no additional state law requirement at the summary judgment phase, as there is under federal law, that he also show that the reason for his discharge was, in fact, discriminatory.

'Verdrager'

Three months later, on May 31, the SJC repeated the same method of analysis in a different case.

In *Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, 474 Mass. 382 (2016), an attorney brought gender discrimination and unlawful retaliation claims against the law firm that initially demoted, and then subsequently discharged, her. A Superior Court judge, just as in *Bulwer*, entered

David C. Henderson is a partner in the litigation department and member of the labor, employment and benefits practice group at Nutter, McClennen & Fish in Boston.

summary judgment for the employer and dismissed the claims.

And once again the SJC vacated that portion of the lower court's ruling, reinstated the claims, and remanded the case for further proceedings.

The law firm in *Verdrager*, like the hospital in *Bulwer*, argued and presented evidence tending to show that its adverse employment actions, in fact, were based on legitimate, non-discriminatory and non-retaliatory reasons.

Specifically, the firm contended that it demoted the plaintiff for performance issues and that it subsequently discharged her for misconduct relating to confidential documents.

But in *Verdrager*, too, the plaintiff was able to present evidence from which a reasonable jury might be able to conclude that the employer's stated reasons for the adverse actions were false and thus pretextual. According to the court, the plaintiff made this limited showing with evidence of the following.

- The law firm treated similarly situated male employees differently from the way it treated the plaintiff, particularly to the extent that the firm criticized the plaintiff because of her unavailability for assignments but did not criticize a male associate for similar unavailability.

- One of the firm's members tried to undermine the plaintiff after the plaintiff complained about the member's sexually harassing behavior. (That, the SJC said, allows an

inference that the firm's negative perception of the plaintiff' resulted at least in part from the member's unlawful animus.)

- Various firm evaluators and supervisors of the plaintiff criticized her in terms that could be interpreted as reflecting a stereotypical view of women as not committed to their work because of family responsibilities.

- Women at the firm, and particularly women in the plaintiff's practice area, generally believed that they were subject to discriminatory treatment. Many of them believed that it was more difficult for them to work at the firm than it was for men, that they were not given the same assignments and opportunities as men, and that there were fewer women in management for them to look up to and receive support from. (The SJC said that can be relevant to a showing of pretext, to the extent that it shows the law firm's general practice and policies concerning other members of the protected class.)

- Some in the firm had long-held negative views of the plaintiff as someone who would not leave the firm voluntarily and who could not otherwise be fired because of her pending discrimination claims. According to the SJC, a jury thus could infer that the plaintiff's firing was not motivated merely by her copying of confidential documents, as the firm claimed.

- The particular chronology of events in the case otherwise allowed the inference that a pattern of

retaliatory conduct within the firm began soon after the plaintiff complained of gender discrimination.

In short, in both *Bulwer* and *Verdrager*, the SJC found that there was sufficient evidence of misconduct to forestall the employer's motion for summary judgment.

A ruling of that nature, by itself, can be a significant victory for a plaintiff employee because it can increase the plaintiff's settlement negotiation leverage, at least for a while. That could be the result, even though the court does not then resolve whether the plaintiff's evidence ultimately will be enough to persuade a jury of employer misconduct.

Bulwer and *Verdrager* thus show, like other cases before them, how important it is that employers act fairly, ensure working environments free of animus or harassment, follow their own established policies, and treat employees consistently.

And perhaps their most important reminder is this: When an employer explains its reasons for an adverse action, the explanation has to be honest, accurate, consistent and patently nondiscriminatory.

An employee who can show that the employer's explanation is false, and thus pretextual, will virtually guarantee that a disparate-treatment or retaliation claim under Massachusetts law will be able to reach a jury (even though the jury later may decide, on the basis of all the evidence, in favor of the employer). **MLW**



Seaport West
155 Seaport Boulevard
Boston, MA 02210
617.439.2000
nutter.com