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EXPERT ANALYSIS

5 Sure-Fire Ways Employers Can Make Nondiscriminatory Reasons Seem Pretextual

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A plaintiff-employee usually can reach a jury with a disparate-treatment claim if he or she can show that the defendant-employer's reason for taking an adverse action is "pretextual." For that reason, the Massachusetts Supreme Judicial Court's recent opinion in *Bulwer v. Mount Auburn Hospital,* 473 Mass. 672 (Feb. 29, 2016), should be of major interest to employers.

In *Bulwer*, the state high court carefully outlined five ways employers, through error or inadvertence, can increase the likelihood that their stated reasons will be deemed pretextual.

The plaintiff in *Bulwer* was a black male doctor of African descent from the Central American country of Belize whom the defendant hospital had discharged from its residency program.

The hospital ostensibly based the discharge, at least in part, on poor performance evaluations, the opinion said. The hospital said its clinical competence committee had expressed concerns about the doctor's ability to analyze complex information, "build effective therapeutic relationships" and present information to team members. The record also showed that the hospital's departmental chair told the doctor that additional concerns about patient safety required that he be relieved of his responsibilities immediately, the opinion said.

Upon being discharged, the doctor filed a charge of race, color and national origin discrimination in the Massachusetts Commission Against Discrimination, and then took his claims to court. After allowing discovery by the parties, the trial court granted a defense motion for summary judgment and dismissed the doctor's discrimination claims.

On appeal, the Supreme Judicial Court vacated the lower court judgment in favor of the hospital and remanded the discrimination claims for further proceedings (perhaps to include a jury trial).

Much of the high court's appellate ruling was unremarkable. There was the usual explanation of the familiar three-stage, burden-shifting paradigm first set out by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). According to that paradigm, a plaintiff ultimately can prevail at trial on an unlawful discrimination claim only by proving:

- Membership in a protected class.
- An adverse employment action.
- "Discriminatory animus" by the employer.
- The unlawful animus caused the adverse action.

A plaintiff without direct evidence of unlawful action can start an alternative path to a jury on those ultimate issues by proving a prima facie case of discrimination by showing that he or she:

- Is a member of a protected class.

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- Performed his job acceptably.
- Was terminated.

Further, once the plaintiff overcomes the challenge of establishing a prima facie case, the burden will shift to the employer to articulate a legitimate, nondiscriminatory reason for the challenged action.

If the employer can articulate such a reason, the plaintiff will *still* be allowed to take the discrimination claim to a jury if he or she can provide evidence that the employer's articulated justification is false (a pretext).[1]

The parties in *Bulwer* did not fight over each of those points. The hospital conceded that the doctor established the necessary prima facie case. The hospital nevertheless argued that the doctor's discharge was nondiscriminatory and should be upheld because it was based on poor performance evaluations and concern for patient safety.

But a major set of problems for the hospital remained. In *Blare v. Husky Injection Molding Systems Boston Inc.*, 419 Mass. 437, 439 (1995), the Massachusetts high court stated that summary judgment is a "disfavored remedy" in employment discrimination cases based on disparate treatment because the ultimate issue — whether the employer had discriminatory intent — is a factual question to be resolved by a jury.

According to the *Bulwer* court, the record contained "at least five categories of evidence from which a jury might infer that [the hospital's] stated reasons were not the real reasons that the plaintiff's employment was terminated."

The court thus concluded that, when "taken as a whole rather than viewed in isolation," this substantial amount of evidence could lead a rational jury to conclude that the hospital's reasons for the doctor's discharge were pretextual. As a result, the trial court's award of summary judgment in favor of the hospital had to be vacated, and the case had to be returned to the lower court, possibly for trial.

The lessons of *Bulwer* are clear. Employers must be fair and consistent, and they must base adverse actions on legitimate, nondiscriminatory reasons. Also, they must be able to express coherently the reasons behind the adverse actions, if challenged by an employee claiming unlawful discrimination. Only in that manner can employers avoid, or at least minimize, circumstances that will make their stated reasons seem pretextual to a judge or jury.

Or to view the lessons of *Bulwer* from the opposite perspective, there are at least five ways that employers can follow the hospital's example and *maximize* chances that employee discrimination claims will survive long enough to reach a jury.

Take action against an employee that is inconsistent with the employee's performance evaluations.

Conflicting evaluations quite obviously raise issues of material fact about the true reasons for an employer's adverse action.[2]

It was significant in *Bulwer* that a number of the doctor's performance evaluations included comments that were inconsistent with the hospital's particular criticisms. For example, some hospital evaluators said that the doctor had "excellent" ability to analyze and interpret clinical data, even though the hospital ostensibly premised his discharge on an inability to analyze data in critical cases.

Similarly, some evaluators said that the doctor's patient progress notes were thorough, detailed and informative, even as others said that his patient documentation generally did not meet expectations. As the court noted, those and other factual disparities went so far as to prompt one hospital official to note that "it is interesting how one set of behaviors can elicit such different perception."

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The marked disparities in the record about the true nature of the doctor's performance thus raised a material issue of fact about whether the hospital's stated reasons for the discharge were the real reasons. That precluded the award of summary judgment to the hospital and made trial by jury necessary, the court said. Accordingly, the lower court ruling in favor of the hospital could not stand.

Treat the employee differently from similarly situated employees not in the protected category.

When an employer treats a member of a protected category less favorably than similarly situated employees not in the protected category, there can be an inference of bias against the protected status.

There was exactly that type of evidence in *Bulwer*. The discharged doctor had been treated differently from similarly situated interns who are not black. This included evidence that two foreign interns, one white and the other apparently Asian, seemed to have had similar issues, but had been given more remedial opportunities and not been discharged so quickly.

As a result, there was a material issue about whether the plaintiff had been treated differently because of his race. And to resolve that issue as well, a jury would be needed.

Fail to discipline other employees when they engage in deficient performance or display bias or animus that creates an unlawfully discriminatory or harassing environment.

In *Bulwer*, the hospital's defense also suffered because of evidence that it had been inconsistent or at least less than diligent in the way it addressed other issues involving race.

There was evidence that three white doctors with deficient performance were disciplined only after long periods of complaints, and then only because of pressure from patients and other hospitals. Also, there was evidence that hospital administrators had declined to discipline employees who displayed white supremacist literature in the workplace.

Those circumstances, too, contributed to the material issue about whether the hospital had taken adverse action against the plaintiff because of his race.

Allow a working environment in which employees frequently voice views based on 'stereotypical thinking.'

Another set of circumstances the court held against the hospital in *Bulwer* should be particularly chilling for employers. The court critically noted that a reasonable jury could interpret a number of comments by the discharged doctor's evaluators and supervisors as reflecting "stereotypical thinking ... categorizing people on the basis of broad generalizations."

For example, one evaluator criticized the doctor for being "too confident for his own good." Another said an "intern is not supposed to be smart" and "[t]hat is why all this criticism is happening." A third said the doctor was "the least respectful person with whom [she had] ever worked" and that he "has no capacity whatsoever for self-assessment." And a fourth said that the doctor "is not well suited for a career in internal medicine in this country."

The court summarized the impact of the comments as follows:

> These kinds of comments can, of course, admit of different interpretations by a jury, including ones reflecting only untainted professional judgment. One interpretation a jury could make of such comments, however, is that, combined with [the behavior of one hospital official], they reflect a subconscious sense that the plaintiff, as a black man and a foreigner, did not "know his place."[3]

Accordingly, a jury would have to decide what comments of this nature meant in the case of this one, particular discharged doctor.

The lessons of Bulwer are clear. Employers must be fair and consistent, and they must base adverse actions on legitimate, nondiscriminatory reasons.

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Fail to follow your own policies and procedures.

The fifth set of circumstances that the court held against the hospital was evidence that the hospital did not follow its own policies and procedures.

Instead, the hospital departed from its written due process policy in at least four ways, by:

- Failing to include a resident on a committee charged with reviewing his discharge.
- Not allowing the doctor to attend two of the committee's three meetings.
- Failing to heed the doctor's request for materials from those meetings.
- Immediately terminating the doctor's employment without informing him, either before or after the committee meeting, that this step was being considered.

According to the court, policy deviations of that nature are significant because a failure to follow established procedures or criteria may support a reasonable inference of intentional discrimination. And once again, deciding whether there actually was intentional discrimination is a material issue of fact appropriate for a jury.

Bulwer's lessons thus are obvious. Employers have to act fairly, ensure working environments free of unlawful animus or harassment, follow their own established policies, and treat employees consistently. Explanations of adverse actions have to be honest, accurate, consistent and patently nondiscriminatory.

To fall short on any front is to appear to have acted with pretext. And appearing to have acted with pretext almost guarantees that an employee's disparate-treatment claim will survive to reach a jury.

NOTES

[1] Massachusetts thus is a "pretext-only" jurisdiction at the summary judgment phase of litigation, in the sense that the plaintiff needs only to prove that the employer's articulated reason for the adverse action is false. There is no additional requirement at the summary judgment phase for the employee to prove that the employer's reason was a cover for unlawful discrimination. The latter issue is an issue to be decided at trial. *Blare v. Husky Injection Molding Sys. Boston Inc.*, 419 Mass. 437, 443 (1993). *See also Wheelock College v. Mass. Comm'n Against Discrimination,* 371 Mass. 130, 139 (1976).

[2] *See Bulwer,* 419 Mass. at *8, citing *Cole v. Ruidoso Mun. Schs.*, 43 F.3d 1373, 1380 (10th Cir. 1994), and *Bonefont-Igaravidez v. Int'l Shipping Corp.*, 659 F.3d 120, 124 (1st Cir. 2011).

[3] *Bulwer,* 419 Mass. at *9, citing *Ash v. Tyson Foods Inc.*, 126 S. Ct. 1195 (2006) (judgment as matter of law for employer inappropriate where employer used ambiguous term that, though "not always ... evidence of racial animus," is not "always benign"). *See also Conway v. Electro Switch Corp.,* 825 F.2d 593, 597 (1st Cir. 1987) ("While evidence of a discriminatory atmosphere may not be conclusive proof of discrimination against an individual plaintiff, such evidence does tend to add 'color' to the employer's decision-making processes and to the influences behind the actions taken with respect to the individual plaintiff.").

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