

Overview of Employment Discrimination

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INTRODUCTION

An employee who has been discriminated against on the basis of his or her race, age, or membership in another protected category rarely **has** “direct” evidence of discrimination, because employers are unlikely to tell an employee that it is making an adverse decision about the employee because of the employee’s race, sex, age, or religion. Instead, the vast majority of discrimination cases involve “indirect” or circumstantial evidence of disparate treatment. For example, a highly qualified woman may claim that she did not receive a promotion because of her gender when the employer promoted a less qualified man instead. The adversely affected employee then must use circumstantial evidence, and the inferences a fact finder may draw from that evidence, to prove that the employer’s disparate treatment violated G.L. c. 151B or the applicable federal statute.

Counsel for both plaintiffs and defendants have prepared this overview of employment discrimination by focusing on disparate treatment cases and certain issues raised by them. The overview sets forth “black letter” law on the parties’ burdens in a disparate treatment case, and discusses the relatively recent clarification by the Supreme Judicial Court of what constitutes the plaintiffs burden at the third stage of the burden-shifting analysis typically utilized in these cases. The overview also provides a *summary* of a recent Supreme Court decision recognizing the viability of a disparate impact claim of age discrimination and updates the status of a respondent/employer’s right to a jury trial.

THE “BLACK-LETTER LAW” IN DISPARATE TREATMENT CASES

In a disparate treatment discrimination case under either G.L. c. 151B or its federal counterparts, such as Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 (ADEA), the parties follow a three-stage order of proof. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Matthews v. Ocean Spray Cranberries, Inc.*, 426 Mass. 122,

127 (1997). In the first stage, the plaintiff must show by a preponderance of the evidence a prima facie case of discrimination. *Abramian v. President & Fellows of Harvard Coll.*, **432 Mass. 107, 116 (2000)**; *Blare v. Husky Injection Molding Sys. Boston, Inc.*, **419 Mass. 437,441 (1995)**. For example, in a termination case, the employee must demonstrate that:
“he is a member of a class protected by G.L. c. 151B [or Title VII]”;
“he performed his job at an acceptable level”;
“he was discharged”; and
“his employer sought to fill the plaintiff’s position by hiring another individual with qualifications similar to the plaintiff’s.”

Blare v. Husky Injection Molding Sys. Boston, Inc., **419 Mass. at 441**. See also *Texas Dep’t of Cmty. Affairs v. Burdine*, **450 U.S. 248,254 (1991)** (interpreting Title VII). The elements of the prima facie case may vary depending on the particular circumstances giving rise to the claim of discrimination. *Blare v. Husky Injection Molding Sys. Boston, Inc.*, **419 Mass. at 441**. For example, an employee who is ostensibly discharged as a result of a reduction in force may nonetheless have been targeted for layoff in a discriminatory manner. In such a case, the plaintiff “may satisfy the fourth element of her prima facie case by producing some evidence that her layoff occurred in circumstances that would raise a reasonable inference of unlawful discrimination.” *Sullivan v. Liberty Mut. Ins. Co.*, **444 Mass. 34, 45 (2005)**.

If the plaintiff meets the burden of establishing a prima facie case, “unlawful discrimination is presumed.” *Matthews v. Ocean Spray Cranberries, Inc.*, **426 Mass. 122, 128 (1997)**. See also *St. Mary’s Honor Ctr. v. Hicks*, **509 U.S. 502,506 (1993)**.

In the second stage, the defendant must rebut the plaintiff’s prima facie case (i.e., rebut the presumption of discrimination) by producing evidence “articulating a legitimate, nondiscriminatory reason” for the decision that adversely affected the plaintiff. *Blare v. Husky Injection Molding Sys. Boston, Inc.*, **419 Mass. 437,441-42 (1995)**; see also *St. Mary’s Honor Ctr. v. Hicks*, **509 U.S. 502 (1993)**; *Texas Dep’t of Cmty. Affairs v. Burdine*, **450 U.S. 248,254 (1981)**; *Matthews v. Ocean Spray Cranberries, Inc.*, **426 Mass. 122, 128 (1997)**. The defendant satisfies its burden in the second stage even if its articulated reasons seem “absurd.” *Matthews v. Ocean Spray Cranberries, Inc.*, **426 Mass. 122, 126 (1997)**. If the defendant meets its burden, the third stage of the order of proof is reached and “[t]he presumption of discrimination disappears.” *Sullivan v. Liberty Mut. Ins. Co.*, **444 Mass. 34, 43 (2005)**; see also *St. Mary’s Honor Ctr. v. Hicks*, **509 U.S. at 507**. In this stage the plaintiff must demonstrate that the defendant’s proffered reasons for the adverse employment decision are “pretextual.” *St. Mary’s Honor Ctr. v. Hicks*, **509 U.S. at 511**.

Until several years ago, there was disagreement between state and federal courts as to whether the plaintiff needed to prove more than pretext in order to prove intentional discrimination. This debate was centered on the notion that federal courts required the plaintiff to prove “pretext plus” something more, and that state courts required the plaintiff to prove “pretext only.” For all intents and purposes, this debate is a thing of the past and the two approaches are now virtually identical.

Under both Title VII and the ADEA, the plaintiffs prove that the defendant's proffered reasons are false may or may not be enough for the plaintiff to prevail on the required finding that "discrimination was the real reason" for the adverse employment decision. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) (discussing Texas *Dep't & Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981)). Depending on the circumstances, the jury may infer the existence of intentional discrimination based solely on its finding that the employer's stated reason for the adverse action is false. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 147 (2000). Nonetheless, the Court made clear that such an inference may be unreasonable and therefore insufficient to prove intentional discrimination in a particular case. If, for example, "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," the plaintiff would still not prevail. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. at 148; *see also Zapata-Matos v. Reckitt & Colman, Inc.*, 277 F.3d 40, 47 (1st Cir. 2002) (applying this caveat in affirming summary judgment for the employer).

Put another way, "a prima facie case and sufficient evidence to reject the employer's explanation may [but will not *always* be sufficient to] permit a finding of liability." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 149 (2000).

Under Massachusetts law, the debate regarding precisely what a plaintiff must prove about the defendant's proffered reasons for the adverse employment decision has been addressed by the Supreme Judicial Court. It is now clear that Massachusetts does not require a jury to be told that if it finds pretext, it must decide the case in favor of the plaintiff. *See Abramian v. President & Fellows of Harvard Coll.*, 432 Mass. 107, 117-19 (2000), *on remand*, 14 Mass. L. Rptr. (Mass. Super. Ct. 2001) (No. 935968C). "In an indirect evidence case, if the fact finder is persuaded that one or more of the employer's reasons is false, it may (but need not) infer that the employer is covering up a discriminatory intent, motive or state of mind." *Lipchitz v. Raytheon Co.*, 434 Mass. 493, 501 (2001).

A discussion of the Supreme Judicial Court's three most recent decisions concerning the burden-shifting framework follows.

PLAINTIFF'S OBLIGATION UNDER MASSACHUSETTS LAW AT THE THIRD STAGE OF THE BURDEN-SHIFTING FRAMEWORK

Since the Supreme Judicial Court's decisions in *Blare v. Huskey Injection Molding Systems Boston, Inc.*, 419 Mass. 437 (1995), and *Matthews v. Ocean Spray Cranberries*, 426 Mass. 122 (1997), it has decided three important cases clarifying what a plaintiff must prove to sustain his or her burden of persuasion that the employer's conduct violated G.L. c. 151B. *Lipchitz v. Raytheon Co.*, 434 Mass. 493 (2001); *Weber v. Cmty. Teamwork, Inc.*, 434 Mass. 761 (2001); *Abramian v. President & Fellows of Harvard Coll.*, 432 Mass. 107 (2000). The Supreme Judicial Court acknowledged the confusion caused by its earlier decisions and illuminated two essential points. First, the plaintiff's burden to prove that the basis of the employer's decision was unlawful discrimination may be satisfied by showing that the reason advanced by the employer is

false; in other words, showing that the employer's reason is untrue may give rise to an inference that the basis for the employer's decision was unlawful discrimination. Second, while this inference may permit a verdict for the plaintiff, it does not compel it. While "pretext plus" is not the standard in Massachusetts, the Supreme Judicial Court has made it clear that the mere showing of pretext does not entitle the plaintiff to a verdict. *See Abramian v. President & Fellows of Harvard Coll.*, 432 Mass. at 117-18. "In *Blare*, we said that under 'the pretext only rule . . . a plaintiff who has established a prima facie case and persuaded a trier of fact that the employer's articulated justification is not true but a pretext, is entitled to judgment' . . . literally applied, that language improperly compels a verdict for the plaintiff. We never intended that result." *See Abramian v. President & Fellows of Harvard Coll.*, 432 Mass. at 117.

In *Abramian*, the Supreme Judicial Court found that the trial court erred in instructing the jury that if they found the employer's reason for the adverse action to be pretext, they were required to find that the employer had discriminated. *See Abramian v. President & Fellows of Harvard Coll.*, 432 Mass. 107, 117-19 (2000). Instead, the jury must be instructed that they could, but were not required, to find discrimination if they found the reason to be pretext. *See Abramian v. President & Fellows of Harvard Coll.*, 432 Mass. at 117-19. The Supreme Judicial Court found that there was sufficient evidence for the jury to find that the reason given by the employer for terminating the employee was not true, and that this alone might have provided the jury with a sufficient basis to find for the plaintiff. *See Abramian v. President & Fellows of Harvard Coll.*, 432 Mass. at 114, 117-18. However, the court made clear that a finding of pretext by the jury does not mandate a plaintiff's verdict. *See Abramian v. President & Fellows of Harvard Coll.*, 432 Mass. at 114, 117-18. If the employee proved that the stated reason was not the real reason for the decision, the employer could rebut the permissible inference of discrimination by proving that it had no discriminatory intent or that another, nondiscriminatory reason was the real reason for the termination. *See Abramian v. President & Fellows of Harvard Coll.*, 432 Mass. at 118. "Correspondingly, the plaintiff is not limited to the falsity of the employer's articulated reasons in proving discrimination." *Abramian v. President & Fellows of Harvard Coll.*, 432 Mass. at 118.

In *Lipchitz*, the Supreme Judicial Court cites *Abramian* in stating that "[t]he plaintiff presented sufficient evidence from which a reasonable jury could find that at least one of Raytheon's reasons was false and from this it properly could have inferred that she was not promoted because of unlawful discrimination." *Lipchitz v. Raytheon Co.*, 434 Mass. 493, 498 (2001). However, "[i]n an indirect evidence case, if the fact finder is persuaded that one or more of the employer's reasons is false, it may (but need not) infer that the employer is covering up a discriminatory intent, motive or state of mind," which according to the Supreme Judicial Court, strikes the proper balance of proof in discrimination cases. *Lipchitz v. Raytheon Co.*, 434 Mass. at 501. While the Supreme Judicial Court rejected the employer's argument for a "pretext for discrimination" standard, requiring the plaintiff to prove not only that the reason given by the employer for the adverse decision was false, but also that the reason was given to cover a discriminatory animus, it found that the trial court erred in failing to give an instruction "that the plaintiff had the burden of proving the elements of discriminatory animus, and that discrimination was 'the determinative cause' of the adverse employment decision." *Lipchitz v. Raytheon Co.*, 434 Mass. at 494-95, 500-01. Importantly, the Supreme Judicial Court recommended in *Lipchitz*, "that in discrimination cases based on indirect evidence, judges

abandon the use of jury instructions that rely on the terms ‘pretext’ and ‘pretext for discrimination,’ and that are framed in terms of shifting burdens.” *Lipchitz v. Raytheon Co.*, 434 Mass. at 495.

Thus, in *Lipchitz*, the Supreme Judicial Court stated that juries should be instructed that the plaintiff must prove the employer acted with discriminatory intent, motive, or state of mind. *See Lipchitz v. Raytheon Co.*, 434 Mass. 493, 501–02 (2001). In addition, juries must be instructed that the employer’s discriminatory intent, motive, or state of mind must be the determinative cause for the decision. *Lipchitz v. Raytheon Co.*, 434 Mass. at 504–07. Evidence of pretext may establish either of these elements, but it is not itself an element in a discrimination case. *Lipchitz v. Raytheon Co.*, 434 Mass. at 503. Noting that the plaintiff is “not required to disprove every reason articulated by the defendant or suggested in evidence” to meet the burden of proving causation, the Supreme Judicial Court states that the plaintiff “could meet her burden by persuading the fact finder that it was more likely than not that at least one reason was false.” *Lipchitz v. Raytheon Co.*, 434 Mass. at 506–07.

In *Weber*, the Supreme Judicial Court relied on its decisions in *Abramian* and *Lipchitz* and held that the trial court erred in treating a finding of pretext as synonymous with a finding of discriminatory animus and causation. *See Weber v. Cmty. Teamwork, Inc.*, 434 Mass. 761, 776 (2001). The Supreme Judicial Court reiterated that a finding of pretext is evidence that permits, but does not compel, a finding of discriminatory animus and causation. *See Weber v. Cmty. Teamwork, Inc.*, 434 Mass. at 775–76. As in *Lipchitz*, the Supreme Judicial Court laid out the four elements that a plaintiff must prove on a claim of unlawful discrimination: “that she is member of a protected class, she suffered harm as a result of an employer’s adverse employment action, and the employer harbored discriminatory animus, which was the determinative cause of the adverse action.” *Weber v. Cmty. Teamwork, Inc.*, 434 Mass. at 775. The Supreme Judicial Court found that the trial judge erred in failing to determine the final two elements of the plaintiff’s case, stating that “[a]lthough a finding of ‘pretext’ permits an inference that could satisfy Weber’s ultimate burden to prove that discriminatory animus was the determinative cause of her termination, the judge must indicate that she has drawn that inference.” *Weber v. Cmty. Teamwork, Inc.*, 434 Mass. at 775–76.

DISPARATE IMPACT CLAIMS UNDER THE ADEA

In a case of first impression, *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005), the Supreme Court ruled that disparate impact claims may be brought under the ADEA. Disparate impact claims involve facially neutral employment practices that, when applied, have an adverse impact on a protected group of employees. These claims focus not on the intent of the employer but on the effect of the employer’s practice or plan. The plan at issue in *Smith* was one that gave higher salary increases to police officers who had fewer than five years of service. The Court found that the statutory language prohibiting age discrimination under the ADEA is identical to the language in Title VII prohibiting race and gender discrimination. Applying the reasoning in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the seminal Title VII disparate impact case, the Court held that a disparate impact theory of liability is available under the ADEA. However, the scope of disparate impact liability under the ADEA is narrower than under Title VII because the

ADEA contains a provision that permits employment actions, otherwise prohibited, if they are based on “reasonable factors” other than age. *Smith v. City of Jackson*, 125 S. Ct. at 1543. The Court held that to pursue a disparate impact claim under the ADEA, plaintiffs must “isolate and identify the specific employment practices that are allegedly responsible for any observed statistical disparities.” *Smith v. City of Jackson*, 125 S. Ct. at 1545. The Court concluded that the plaintiffs did not identify a specific employment practice that was responsible for the disparities **and** that the salary plan was based on reasonable factors other than age.

Although not decided with certainty, dictum suggests that Massachusetts courts would also recognize an age discrimination claim based on a theory of disparate impact. *See Sullivan v. Liberty Mut. Ins. Co.*, 444 Mass. 34, 38 n.10 (2005) (while noting plaintiffs claims were based on disparate treatment theory, Supreme Judicial Court nonetheless commented on theory of disparate impact).

JURY TRIALS NO LONGER AVAILABLE TO EMPLOYERS FOUND LIABLE BY THE MCAD

An important procedural change was announced in *Stonehill College v. MCAD*, 441 Mass. 549 (2004), in which the Supreme Judicial Court held that a respondent/employer found liable at public hearing by the MCAD for employment discrimination is not entitled to a jury trial in superior court, and can only seek judicial review of the MCAD’s decision under G.L. c. 30A. In *Stonehill*, the court overruled *Lavelle v. MCAD*, 426 Mass. 332 (1997) to the extent that *Lavelle* permitted a respondent, after final agency action by the MCAD, to seek a jury trial in superior court under G.L. c. 151B, § 9.