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Employment Law

Direct Evidence or Mere 'Stray Remark'?

Proving discriminatory intent in the wrongful termination case

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Employers may have cause for concern over recent New Jersey state and federal court decisions that appear to cut back on employers' use of the "stray remark" doctrine as an evidentiary bar in discrimination cases.

Although the cases reaffirm that a plaintiff must show a nexus between the remark and the alleged discrimination to satisfy the burden of production, the nexus evidence that is required in order to survive an employer's summary judgment motion appears to be less than employers may have thought.

Recent decisions have found various alleged discriminatory statements to be admissible as direct evidence of discrimination, rather than inadmissible stray remarks. A manager with decision-making authority may expose both his employer and himself to liability by making such a discriminatory remark in the context of hiring, firing or promotion. These cases are a warning to managers to speak with caution, because even a single remark that reflects a discriminatory animus may be enough to satisfy the plaintiff's burden of production.

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Unlike courts in some other jurisdictions, neither the New Jersey state courts nor the federal courts in this district have established a bright-line rule to determine when a statement falls into the stray remark category, and is thus inadmissible as direct evidence of discrimination.

However, it has been held that "[a] statement is direct evidence of discrimination when it is made by a decision-maker with regard to the exact decision at issue." See *Sunkett v. Misci*, 183 F. Supp. 2d 691 (D.N.J. 2002), citing *Walden v. Georgia-Pacific Corp*., 126 F.3d 506 (3d Cir. 1997), and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). "For instance, direct evidence is a statement by Employer X, 'I am firing Employee Z because she is black,' or circumstantial evidence to the same effect. 'Stray remarks, temporally remote from the discriminatory incident, do not meet this standard.'" *Id*. quoting *Price Waterhouse*, 490 U.S. at 277.

Doctrine History

Justice Sandra Day O'Connor's concurrence in *Price Waterhouse v. Hopkins* — recognized as representing "the holding of the fragmented Court" in that case, *Fakete v. Aetna, Inc*., 308 F.3d 335, 337 n.2 (3d Cir. 2002) — established the backdrop against which New Jersey state and federal courts evaluate managers' remarks in discrimination cases.

In her concurrence, O'Connor explored the issue of when a stray remark constitutes direct evidence of discrimination, thereby satisfying the plaintiff's burden of production in a direct evidence-type case. She concluded that to sustain the burden of production, the plaintiff is required to come forward with evidence that an actual decision-maker placed substantial negative reliance on an illegitimate criterion in reaching his or her decision, such that a reasonable factfinder could draw an inference that the decision was made because of the plaintiff's protected status.

If the plaintiff produces such evidence, then the burden of proof shifts entirely to the defendant to convince the fact-finder that the decision was nonetheless justifiable by other, legitimate considerations. The concurrence further concluded that statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, would not satisfy the plaintiff's burden.

Essentially, *Price Waterhouse* provides a mechanism by which a plaintiff may avoid the burden of proof prescribed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). That case holds that in the context of an "indirect evidence" or "pretext" discrimination case, the plaintiff bears the ultimate burden of persuasion throughout the case, notwithstanding the shifting of the burden of persuasion between plaintiff and defendant. *Price Waterhouse* thereby enables a plaintiff to shift the burden of persuasion to the employer by coming

forward with direct evidence of discriminatory intent.

Price Waterhouse, however, provides no definition of what evidence would satisfy the plaintiff's burden. The federal circuits are in discord as to what quantum of evidence is sufficient to satisfy the plaintiff's burden under *Price Waterhouse*. Nevertheless, the Third U.S. Circuit Court of Appeals and the New Jersey state courts have had occasion since *Price Waterhouse* to address the question of what statements can provide direct evidence of discrimination.

Direct Evidence

Fakete v. Aetna, Inc., 308 F.3d 335 (3d Cir. 2002), provides perhaps the clearest guidance in this circuit for evaluating whether a statement constitutes direct evidence of discrimination.

In *Fakete*, the plaintiff worked for U.S. Healthcare as an audit consultant. U.S. Healthcare merged with Aetna, and at the time of the merger, the plaintiff was 54 years old and was the oldest audit consultant at U.S. Healthcare. According to the plaintiff, his new manager stated that "the new management … wouldn't be favorable to [the plaintiff] because they are looking for younger single people that will work unlimited hours and that [the plaintiff] wouldn't be happy there in the future."

A few months after the manager made that statement, the plaintiff received a written warning concerning his unexplained absences from the workplace. Shortly before the plaintiff's pension would have vested, the company fired him. The employer claimed that the reasons it fired the plaintiff were his violation of the terms of his warning, his falsification of travel expense reports and his failure to reimburse the company for personal phone calls.

The plaintiff filed a formal charge with the Equal Employment Opportunity Commission and received a right to sue letter. The plaintiff then sued Aetna, alleging that he was terminated and that he was denied a transfer request, both in violation of the Age Discrimination in Employment Act (ADEA). The District Court for the Eastern District of Pennsylvania entered summary judgment in favor of Aetna, and the plaintiff appealed.

The Third Circuit reversed the summary judgment and found that the plaintiff's claims were supported by evidence sufficient to survive summary judgment under a *Price Waterhouse* theory.

The appellate court reached that conclusion by first addressing the issue of what constitutes direct evidence. The court concluded that direct evidence means evidence sufficient to allow the jury to find that the decisionmakers placed substantial negative reliance on the plaintiff's age in reaching the relevant employment decision. Such evidence leads not only to a logical inference of bias, but also to a rational presumption that the person expressing bias acted on it when he made the challenged employment decision.

The court also noted that the term "direct evidence" is misleading in that certain circumstantial evidence may be sufficient if it can fairly be said to reflect directly the alleged unlawful basis for the adverse employment action. One type of evidence sufficient to shift the burden of persuasion under *Price Waterhouse* would be the statement of a person involved in the decisionmaking process that reflects a discriminatory or retaliatory animus of the type complained of in the suit.

Accordingly, based on that definition of direct evidence, the Third Circuit held that the employer's statement showed that the manager preferred "younger" employees and undertook to implement its preference by firing the plaintiff. The entire burden of persuasion therefore shifted to the employer to prove that its adverse employment action would have been justifiable under some legitimate ground, notwithstanding the unlawful consideration. This case therefore demonstrates the profound impact of even a single discriminatory remark made by an employer in a decisionmaking capacity.

While *Fakete* provides an example of an admissible discriminatory remark, the District of New Jersey's opinion in *Sunkett v. Misci*, 183 F. Supp. 2d 691 (D.N.J. 2002), which preceded *Fakete* by a few months, demonstrates that many such comments in the workplace will be barred as inadmissible stray remarks.

In *Sunkett*, the plaintiffs, who were employed as attorneys for the City of Camden, alleged discrimination and retaliation in violation of Title VII based on the City's failure to raise their salaries. In response to the defendants' motion for summary judgment, the plaintiffs contended that they had satisfied their burden of production through direct evidence of remarks demonstrating the defendants' racial animus.

The plaintiffs alleged that the city attorney made a comment that he was going to "change the color of the office." Moreover, the plaintiffs claimed that another white city attorney made a comment to a black female plaintiff that he thought she was single, since a number of other black mothers he had met were also unmarried. Further, the first assistant city attorney allegedly asked one of the plaintiffs to approach the Camden fire chief, who was African American, for an affidavit stating that he felt the chief would relate better to that plaintiff.

The court held that, even though offensive, these are classic "stray remarks." All were remote in time from the relevant adverse employment decisions. Furthermore, the comments indicated racial insensitivity rather than actual animus. Thus, the court found that the comments did not constitute direct evidence of defendants' hiring practices. In light of the plaintiffs' failure to carry their burden of production, the court entered summary judgment in favor of the employer on the race discrimination claims.

Beyond Words

Managers must exercise caution not only in the words they speak, but even in the nonverbal signals they give to their subordinates. Body language may be considered direct evidence of discrimination when considered in light of the surrounding circumstances in which the nonverbal statement is made.

Last year, in *McDevitt v. Bill Good Builders*, 175 N.J. 519 (2003), the Supreme Court addressed the issue of whether a supervisor's physical gesture

of assent in the face of a discriminatory statement was direct evidence sufficient to carry a plaintiff's burden of production, or an inadmissible stray remark.

In *McDevitt*, the plaintiff, who worked as a painter, was discharged at age 69. His employer told him he was being discharged because of the employer's need to reduce its workforce. The plaintiff brought an action against his employer under the ADEA, alleging that the termination of his employment was in reality motivated by his age.

The trial court granted the defendant's motion for summary judgment, and the Appellate Division affirmed. On certification, the Supreme Court agreed with the lower courts that the plaintiff failed to carry his burden of production under the *McDonnell Douglas* test applicable to a pretext case. Nonetheless, adopting the Third Circuit's analysis in *Fakete*, the Court found that there was an issue as to whether the plaintiff presented such direct evidence of discriminatory intent as would entitle him, under *Price Waterhouse*, to a shift of the burden of persuasion.

If the trial court were to find that the plaintiff presented such evidence, then the plaintiff's employer would be required to prove that it would have taken the adverse employment action even without consideration of the proscribed factor.

The plaintiff argued that he presented such direct evidence to the effect that the employer's president nodded his head in the affirmative when his secretary, answering an inquiry by another employee as to why plaintiff was being terminated, stated that the plaintiff was "too old." The plaintiff argued that the president's alleged nonverbal gesture of assent was an admissible adoptive admission by a party pursuant to *N.J.R.E.* 803(b)(2).

In order to determine whether the president's gesture constituted an adoptive admission, the Court remanded the case for a hearing to determine whether the president heard and understood the alleged statement about the reason for the plaintiff's termination, and whether the president nodded his head to convey agreement with that statement. The Court further explained that if the trial court were to find that the president had made an admissible adoptive admission, then the trial court would need to decide whether that admission constituted direct evidence of discriminatory intent under the *Price Waterhouse* standard.

Furthermore, the Court explained that in considering whether the president's gesture is direct evidence of discrimination or a mere stray remark, the trial court should consider the plaintiff's argument that the adoptive admission was made by the ultimate decisionmaker himself while executing the adverse employment action, that it bore directly on the motivation for the decision at issue and that it directly communicated proscribed animus as the reason for the plaintiff's termination. The Court concluded that if those assertions by plaintiff were credited, then the gesture would qualify as direct evidence.

Look Who's Talking

Recent decisions also emphasize that in order to be admissible as direct evidence of discrimination, the remark must be made by a decisionmaker involved in the decisionmaking process. Thus, the manager's position in the company hierarchy is a significant factor when evaluating the significance of the remark.

The District of New Jersey highlighted the importance of the manager's position in evaluating his remark in *DeSanto v. Rowan University*, 224 F.Supp.2d 819 (D.N.J. 2002). In *DeSanto*, the plaintiff, an older white male, was a temporary professor at the university. After applying unsuccessfully for four different teaching positions, the plaintiff filed suit against the university and the dean, alleging that they unlawfully discriminated against him in his employment on the basis of age, race, gender and national origin in violation of Title VII.

The defendants moved in limine to exclude certain evidence, including stray remarks allegedly made by the dean, who at the time of the remark had supervisory authority over teaching faculty, and by other upper-level administrators. The court denied the defendants' motion, holding that any discriminatory remark made by the dean would be relevant to the plaintiff's claims of discrimination, and further that any discriminatory statements made by other upper-level administrators might be relevant if that speaker were able to influence the hiring process.

Nonetheless, the court did warn that if the plaintiff were to fail to connect the "stray remarks" to a person who could have influenced the university's hiring decisions, then the stray remarks would have no legal significance and would be stricken.

In a scenario factually similar to *DeSanto*, the Appellate Division most recently tackled the issue of whether or not a stray remark is direct evidence in *Grasso v. West New York Board of Education*, 364 N.J. Super. 109 (App. Div. 2003). Like the federal court, the Appellate Division placed great weight on the speaker's role as a decisionmaker in concluding that the statement at issue was not a stray remark but direct evidence of discriminatory animus.

In *Grasso*, the plaintiff was a tenured teacher in the West New York schools with 15 years experience. Between July 1996 and June 1997, the plaintiff applied for 10 administrative and supervisory positions and was rejected every time.

The plaintiff filed suit against the board and various individuals, alleging that the defendants' failure to promote her was in violation of New Jersey Law Against Discrimination. At trial, the jury found that the board discriminated against the plaintiff on the basis of her gender by refusing to promote, and awarded damages.

The defendants appealed on the ground (among others) that the trial court erroneously allowed the jury to consider a stray remark. At trial, the assistant superintendent for personnel testified that he chose to hire a particular Hispanic male candidate for the position of high school assistant principal based on the principal's recommendation. Specifically, the assistant superintendent testified that he felt that the principal wanted an Hispanic male in that position.

The Appellate Division affirmed the trial court's decision to allow the jury to consider the principal's state-

ment. In reaching its decision, the court reasoned that the principal's remarks should not be considered stray because he participated in the selection process by interviewing the plaintiff and making his recommendations to the assistant superintendent.

In reaching that conclusion, the court also relied on other testimony by the assistant superintendent, wherein he stated that he and the superintendent of schools wanted to accommodate the principal because he would have to work directly with the person being hired. The assistant superintendent further stated that it would be problematic for a superintendent or an assistant superintendent to hire an assistant principal over the objection of the principal, and then attempt to hold the principal accountable if the relationship did not work out.

The court also considered the assistant superintendent's testimony to the effect that all recommendations for hiring go to the superintendent for final recommendation.

The court therefore held that the jury had sufficient evidence to infer that the defendants' promotion decision was probably tainted by the superintendent's recommendation, which was in turn affected by the principal's discriminatory preference. The court further explained that it is permissible for a jury to conclude that an evaluation at any level, if based on discriminatory considerations, could influence the decision-making process and thus allow discrimination to infect the ultimate decision.

Taken together, these decisions indicate that in determining whether an alleged discriminatory remark is admissible as direct evidence of discrimination or an inadmissible stray remark, courts will consider: (1) the decision-making status of the speaker; (2) the context in which the remark was made, including the temporal proximity of the remark to the relevant adverse employment action; and (3) whether the remark actually reflects discriminatory animus.

The prudent employer will take note that an isolated discriminatory comment by a decisionmaker in the course of the decision-making process may be enough not only to enable the plaintiff to get to the jury, but even to shift the entire burden of persuasion to the employer. ■