New York Law Journal

End of Summary Judgment on City Employment Discrimination Claims?

By Edward A. Brill and Harris M. Mufson

April 24, 2012

The Restoration Act of 2005 amended the New York City Human Rights Law (NYCHRL) to require that discrimination claims under the city law be held to a separate and more liberal standard than state and federal anti-discrimination laws. In the wake of the act, New York courts struggled to distinguish NYCHRL claims from their federal and state counterparts. In response, the Appellate Division, First Department, in Williams v. New York City Housing Authority took the opportunity to "construe" the act and the standard to be applied to claims under the NYCHRL.1

In an opinion by Justice Rolando Acosta, the First Department explained that the NYCHRL "explicitly requires an independent liberal construction in all circumstances" and that an analysis of NYCHRL claims "must be targeted to understanding and fulfilling what the statute characterizes as the city HRL's uniquely broad and remedial purposes, which go beyond those of counterpart State or federal civil rights laws."

Acosta, in Bennett v. Health Management Systems, recently took the opportunity to address the applicable burdens on motions for summary judgment on NYCHRL claims. In Bennett, Acosta articulates a standard that is considerably more permissive than the one applied to state and federal discrimination claims. Evidently vexed by his belief that Williams has been paid lip service by courts, Acosta emphasized that Williams and Bennett should not be simply "the new means by which an old status quo is continued."2 The decision, however, leaves a number of open questions, including how the Bennett standard will be interpreted by trial courts when assessing summary judgment motions under New York City law.3 In brief, the plaintiff in Bennett was a 47-year-old Caucasian who alleged that he had been terminated for age and race-related reasons. The defendant asserted that it terminated the plaintiff for poor job performance, including sleeping and consuming alcohol on the job.

'McDonnell Douglas' Analysis

Federal and state discrimination claims are analyzed under a burden-shifting articulated by the Supreme Court in McDonnell Douglas v. Green.4 The McDonnell Douglas burden-shifting approach initially requires the plaintiff make a prima facie showing of a: (1) membership in a protected class; (2) that an adverse employment action has been taken against the plaintiff; (3) that the plaintiff's job performance was satisfactory; and (4) that the adverse action occurred under circumstances giving rise to an inference of discrimination. If such evidence is adduced, the burden shifts to the defendant to articulate non-

discriminatory reasons for its actions. Assuming the defendant does so, the burden shifts back to the plaintiff to show that the defendant's reasons are pretext for discrimination.

While the plaintiff's burden at the pretext stage initially remained unsettled law in the wake of McDonnell Douglas, the New York Court of Appeals and the U.S. Court of Appeals for the Second Circuit clarified more than a decade ago that the plaintiff's burden is to show that: (1) the employer's asserted reason for the challenged action is false or unworthy of belief; and (2) more likely than not the employee's protected characteristic was the real reason.5 As Acosta explains in Bennett, the burden-shifting procedure was enacted to "recognize the imbalance between the information initially available to a plaintiff and the information possessed by a defendant."6

The McDonnell Douglas framework has been the subject of considerable judicial and academic criticism, and courts routinely skip directly to the pretext stage, essentially collapsing the "inference of discrimination" portion of the prima facie test with the plaintiff's burden to show pretext.7 Recently, in a concurring opinion, Judge Diane Wood of the U.S. Court of Appeals for the Seventh Circuit called attention to the "snarls and knots that the current methodologies used in discrimination cases of all kinds have inflicted on courts and litigants alike" and suggested that the McDonnell Douglas test be collapsed into one where the plaintiff is required to present evidence that: (1) he or she is in a protected class; (2) he or she suffered the requisite adverse action; and (3) a rational jury could conclude that the employer took the adverse action on account of the plaintiff's protected class.8

Notwithstanding the continual grumbling regarding the complexity of McDonnell Douglas, the framework has served as the bedrock of employment discrimination jurisprudence for the past four decades and it remains the mechanism by which courts assess discrimination claims on summary judgment.

The 'Bennett' Analysis

The First Department in Bennett elected not to depart from the McDonnell Douglas burden-shifting test altogether but rather cautions courts to "ordinarily avoid the unnecessary and sometimes confusing effort of going back to the question of whether a prima facie case has been made out in the first place" where a defendant has proffered a legitimate non-discriminatory reason for its actions.9 Acosta notes that if a court "were to tarry at all at the summary judgment stage on the question of whether a prima facie case has been made out, it would need to necessarily ask whether the initial facts as described by the plaintiff, if not otherwise explained, give rise to the McDonnell Douglas inference of discrimination."10

Under circumstances where a legitimate non-discriminatory reason is proffered by the defendant, however, Bennett instructs courts to ordinarily turn immediately to the pretext stage and address "the question of whether the defendant has sufficiently met its initial burden as the moving party of showing that there is no evidentiary route that could allow a jury to believe that discrimination played a role in the challenged action."11 There is nothing particularly earth-shattering about skipping the prima facie analysis and jumping straight to the pretext stage since the fourth prong of the McDonnell Douglas prima

facie case is substantially the same issue that is presented at the third stage of the analysis. Indeed, where the employer proffers a legitimate non-discriminatory reason for its action, the ultimate question is "whether, viewing the evidence in the light most favorable to the plaintiff, a reasonable trier of fact could conclude that race was a motivating factor in the decision to fire the plaintiff" and thus it makes "no difference whether the issue was considered as part of the prima facie case analysis or as the ultimate question on the motion."12

Acosta's articulation of the standard to be applied at the pretext stage, however, presents a striking departure from settled law and raises a host of questions about when an analysis of the prima facie stage is appropriate. As discussed above, for over a decade, New York courts have uniformly held that the plaintiff's burden at the pretext stage is to show both that the employer's reason for the challenged action is false and that discrimination was the real reason for the employer's action. Concerned that employers have a "tactical advantage" of being able to throw "numerous non-discriminatory justifications against the wall and seeing which stick,"13 Acosta articulates a new standard for NYCHRL claims requiring the plaintiff to merely show "some evidence" that "at least one of the reasons proffered by defendant is false, misleading, or incomplete."14

Acosta justifies the departure from established precedent because in his view "proceeding in this way reaffirms the principle that 'trial courts must be especially chary in handing out summary judgment in anti-discrimination cases, because in such cases the employer's intent is ordinarily at issue.'"15

Unresolved Questions

It remains to be seen how the Bennett decision will impact the resolution of NYCHRL claims on dispositive motions because it leaves a number of unresolved questions to be addressed by trial courts. First, because Acosta urges courts to proceed directly to the pretext stage when a defendant proffers a non-discriminatory reason for its actions, it is unclear when and how the plaintiff must demonstrate at least some evidence of discrimination to survive summary judgment.

Indeed, relying on Bennett, a court could conceivably deny summary judgment even where the plaintiff failed to demonstrate any evidence of discriminatory animus by skipping the prima facie stage and finding some evidence that an employer's reason for the adverse action was misleading or incomplete. Acosta's decision is unclear in this regard because in Bennett the employer proffered a legitimate reason for the plaintiff's termination (i.e., his poor work performance, poor attendance and lack of job focus). Acosta ultimately held that summary judgment was appropriate on Kenneth Bennett's age discrimination claims because the plaintiff failed to show any evidence questioning the legitimacy of the employer's reasons for his termination.

Instead of relying on the same rationale to dismiss the plaintiff's race discrimination claims, however, the court ruled that the race claims were properly dismissed because the plaintiff did not "produce any evidence that there were black coworkers who were similarly situated to plaintiff in terms of poor

performance or non-performance, let alone evidence that a similarly situated black coworker was treated more leniently, and he did not produce any of the innumerable other types of evidence that can point to race playing a role in his employer's decision-making."16

This seems no different than the analysis typically applied by courts at the "inference of discrimination" stage of the prima facie test or at the pretext stage when evaluating whether a plaintiff presented evidence that race was the real reason for the employer's adverse action. Thus, notwithstanding the broad language of the decision, the holding in Bennett appears to indicate that the plaintiff must demonstrate at least some evidence of discrimination to avoid summary judgment on his NYCHRL claims.

There are various other questions that courts will need to resolve after Bennett. For example, Acosta does not address what level of proof will be required to challenge the employer's legitimate non-discriminatory reason for its actions. It also remains uncertain what type of evidence will show that an employer's articulated reason is "misleading" or "incomplete." Would an employer's reason be "incomplete" if that employer terminated an employee for poor performance but misplaced one of the employee's performance evaluations? These are just some of the many questions that courts will wrestle with. While we await clarity from courts regarding Bennett's impact, employers should certainly be more thorough and careful than ever when articulating their reasons for taking adverse employment actions.

Edward A. Brill is a partner, and Harris M. Mufson is an associate, in the labor and employment law department at Proskauer Rose.