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3rd Circuit Punts on Issue of Testimony From Interested Witnesses

Jeffrey Campolongo Contact All Articles
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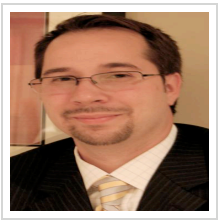
Jeffrey Campolongo

In a quiet, non-precedential opinion handed down Feb. 24, the 3rd U.S. Circuit Court of Appeals declined an opportunity to clarify what weight, if any, testimony from interested witnesses should receive in a motion for summary judgment. In doing so, however, the court sent a resounding message about what evidence is necessary to overcome a motion for summary judgment.

In *Snooks v. Duquesne Light Co.* , William Snooks alleged that he did not receive a promotion on the basis of his race. The employer argued that the promotion was given to a white female because she performed better than Snooks in the second interview, in large part because of an understanding of corporate policies and in particular drug and discipline policies, according to the opinion.

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In the district court, in response to Duquesne Light's motion for summary judgment, Snooks argued that the employer's proffered reasons were, in fact, a pretext for discrimination. As is well known in the employment law community, a plaintiff may defeat a motion for summary judgment by showing that the defendant's proffered legitimate, non-discriminatory reason for taking an adverse employment action is actually a pretext. Under long-standing 3rd Circuit precedent, illustrated in *Fuentes v. Perskie* , a plaintiff can show pretext to defeat a motion for summary judgment in one of two ways:

"[T]he plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action."

Employment discrimination strategy generally emphasizes finding evidence of invidious discrimination. Since actual evidence of a discriminatory motive is often not readily available, plaintiffs can still meet their burden under *Fuentes* by pointing to inconsistent statements and contradictory reasons for the employer's adverse decisions. But this aspect of the disjunctive test is often ignored and such arguments are sometimes not given much credence by the courts.

The district court considered the plaintiff's pretext arguments, and specifically noted the ability under *Fuentes* to show pretext through inconsistent statements, but determined that despite showing inconsistencies the plaintiff had failed to meet the requisite burden to defeat summary judgment. When the plaintiff pointed to inconsistencies in Duquesne Light's records, the court pointed to the employer's facts and assertions that were effective to counter plaintiff's individual assertions, without acknowledging that the employer had also provided inconsistent evidence. The plaintiff pointed to circumstances that could suggest the employer would be biased in favor of the employee

who ultimately received the sought after promotion, but the court deemed this to be mere speculation and refused to believe a jury could doubt the employer's testimony about what happened without direct evidence showing otherwise.

On appeal, the 3rd Circuit utilized the often-ignored first prong of the disjunctive pretext test from *Fuentes* in overturning the district court's granting of Duquesne Light's motion for summary judgment. Snooks provided enough evidence through the employer's inconsistent statements and actions to convince the court that a reasonable jury could disbelieve the employer's proffered reasons. While this in itself does not prove unlawful discrimination, it does suggest an available inference that the employer is being less than truthful. Significantly, the court took heed of the fact that Duquesne Light submitted a position statement to the Pennsylvania Human Relations Commission that was inconsistent with the notes and testimony of the employee decision-makers.

For example, the position statement contended that a significant reason for the employer's promotion decision was that the promoted employee had a better understanding of corporate policies than Snooks did. The position statement said that in the interview Snooks did not appear to have knowledge of a drug testing policy, yet the notes from the interview made clear that Snooks did in fact at least mention the policy in his interview.

This inconsistency was sufficient to shed doubt on how Duquesne Light actually made its decision. Snooks also provided evidence that suggested what may have actually influenced the employer's promotion decision. Just two days prior to the second interview, one of the primary decision-makers spent the entire workday with the employee who ultimately received the promotion, the opinion noted. While the court indicated that this occurrence did not necessarily suggest race discrimination (despite Duquesne Light's insistence that the promotion was not discussed that day) the court recognized that "the mere fact that McGill went on the ride along, knowing full well that he would be interviewing Stoehr two days later, could certainly raise a question in the mind of the jury of exactly why Stoehr was selected for the promotion."

It is most unfortunate that this is a non-precedential decision because plaintiffs are rarely able to get their hands on any documents or records that show an employer's discriminatory animus. Conflicting information and excuses are frequently offered by employers, which often suggest that the real reasons for their decisions are not being revealed. Courts sometimes read the *Fuentes* test as being conjunctive, requiring evidence of discrimination to accompany the evidence of inconsistent statements. This is a much higher burden than is actually required by *Fuentes* , and in *Snooks* the court clearly denied summary judgment based on the proper standard.

The court did not, however, make any attempt at clearing up another area of caselaw regarding evidence considered at summary judgment. In *Reeves v. Sanderson Plumbing Products Inc.* , the Supreme Court explained that on a motion for summary judgment the fact-finding role of the jury must be preserved. Thus, while uncontested and unimpeached evidence proffered by the moving party may be considered, evidence from interested witnesses should not be weighed by a court making a decision of law. The 3rd Circuit has previously explained this rule in *Hill v. City of Scranton* as follows: "The fact that [the plaintiffs] do not directly challenge [an interested witness' testimony] ... is irrelevant ...when evaluating a summary judgment motion, a court should not consider even uncontradicted testimony of an interested witness where that testimony supports the movant."

Adding confusion to what was believed to already be settled in the court, *Lauren W. v. DeFlaminis* was later decided, wherein the court stated it was free to consider evidence from individual defendants — clearly interested witnesses — despite being the moving party on summary judgment. The *Lauren W.* decision has caused much confusion about what testimony can be considered by the court at summary judgment.

In the *Snooks* case, the district court credited the uncontradicted testimony from "interested witnesses" — the notes and testimony of the individuals responsible for the promotion decision. The district court granted summary judgment based largely on Snooks' inability to directly disprove his employer's notes or recollection, which is precisely the type of testimony that the Supreme Court in *Reeves* intended the fact-finder to decide. The district court weighed the interested witnesses' testimony nonetheless, noting in a footnote that it viewed *Lauren W.* as having modified *Hill* — and thereby the Supreme Court's analysis in *Reeves* — and it was therefore allowed to consider this "uncontested" testimony.

The *Lauren W.* decision has caused a great deal of confusion and consternation as to what evidence the court is permitted to consider on a motion for summary judgment. It is for this reason that many employment lawyers were waiting (dare I say, hoping) that the somewhat conflicting decisions would be addressed by the 3rd Circuit in *Snooks* . In fact, plaintiff's counsel, employment attorney Samuel Cordes from Pittsburgh, spent a great deal of time in his 3rd Circuit brief focusing on this issue and, at oral argument, the panel seemed interested in the interplay between *Lauren W.* and *Reeves* . At one point, one member of the panel, Judge Theodore A. McKee, even asked Duquesne Light's counsel if affirming the district court would be dealing a 'mortal blow' to the *Fuentes* disjunctive test for pretext.

Nevertheless, the court did not even address the controversy at all. The court reversed the grant of summary judgment on the basis that a reasonable jury could conclude that the employer "did not act for the asserted reasons," never once mentioning the district court's reliance on *Lauren W.*

This at best seems to suggest that evidence from interested witnesses should not simply be presumed to be true at

the summary judgment stage. Without specifically addressing the issue or even acknowledging the existence of conflicting rulings, I would advocate that practitioners continue to rely on *Hill* and *Reeves* to argue that testimony of an interested witness should be discredited, simply because the witness is interested. At a minimum, the opinion in *Snooks* re-emphasizes the importance of a trial court in examining the entire record and not just separate pieces of the puzzle. •

Jefrey Campolongo *is the founder of the Law Office of Jeffrey Campolongo, a boutique firm focusing on employee rights and counseling aspiring and established entertainers. He can be reached at* ***jcamp@jcamplaw. com*** *or 215-592-9293.*

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