The Legal Intelligencer

Employment Law

Summary Judgment Can't Shield Employer in Discrimination Case

Jeffrey Campolongo, The Legal Intelligencer

March 28, 2014

Motions for summary judgment in federal court are oftentimes one of the most over-utilized tools in employment discrimination litigation. Over the years, this column has lamented the overuse of employer-based motions for summary judgment. In fact, one federal judge has even advocated for abolishing the use of summary judgment altogether in employment cases. (See "Time to Abolish Summary Judgment in Employment Law Cases?" published July 26, 2013, in The Legal.)

In the most recent installment of the summary judgment roulette wheel, a decision from the U.S. District Court for the Eastern District of Pennsylvania emphasizes the virtual exercise in futility that is the employer's motion for summary judgment. In the matter of *Henry v. Acme*, 2014 U.S. Dist. LEXIS 29437 (E.D. Pa. Feb. 25, 2014), the plaintiff, John Henry, filed suit against his former employer, Acme Markets Inc., alleging that he was unlawfully terminated based upon his age under the Age Discrimination in Employment Act (ADEA).

The opinion from the court recited the following facts: Henry worked for Acme since 1972, ascending to the position of store director in 1990 at the age of 34. Throughout the first decade of his employment as store director, his job performance "met or exceeded expectations," the opinion said. In 2003, Henry was transferred to the Acme store in Ogletown, Del., and was rated "below expectations" on his 2004 midyear review. According to the opinion, from 2000-06, Henry met expectations on all his year-end reviews, including his 2004 year-end review. In April 2006, Henry came under the supervision of a new district manager, Kent England. During an early walk-through of Henry's store, it was alleged that England told Henry "that he [England] was five years younger than plaintiff and already a district manager." England also made a comment at that time about the plaintiff's "years of experience," according to the opinion. In the following months, England rated Henry's performance "below expectations" in a 2006 midyear review, and ultimately stated that the plaintiff met expectations in the plaintiff's 2006 year-end review.

According to the court, in 2008 and 2009, England rated the plaintiff "below expectations" and placed him on a performance improvement plan (PIP). On April 30, 2009, England rated Henry "below expectations" in his 2009 year-end review and he ended up firing the plaintiff May 2, 2009.

The district court began its analysis of the case by reciting the appropriate standard for analyzing age discrimination cases. A plaintiff makes out a prima facie case of age discrimination under the ADEA by showing: (1) that he is over 40; (2) that he is qualified for the position in question; (3) that he suffered an adverse employment decision; and (4) that he was replaced by a sufficiently younger person to permit an inference of age discrimination. Acme argued that the plaintiff could not establish the fourth element because an employee older than him ultimately was hired for his position; however, the court rejected this argument because the evidence established that the plaintiff initially was replaced by an employee 10 years his junior. The court concluded that a 10-year age difference between Henry and his immediate, albeit temporary, replacement was sufficient to establish the fourth prong of the plaintiff's prima facie case (citing *Sempier v. Johnson & Higgins*, 45 F.3d 724, 729-30 (3d Cir. 1995), holding that a 10-year age difference between a discharged employee and his or her temporary replacement establishes a prima facie case).

Next, the district court analyzed the pretext prong of the case. Acme argued that the plaintiff could not show pretext for three reasons: (1) the plaintiff received one year-end and one midyear review rating him below expectations before England became his manager; (2) England documented numerous alleged deficiencies in the plaintiff's job performance; and (3) all nine store directors older than the plaintiff who were supervised by England met expectations on performance reviews in 2008 and 2009, when England rated the plaintiff below expectations.

Not surprisingly, Henry vigorously disputed each of these proffered arguments. In an effort to demonstrate the weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in Acme's proffered legitimate reasons, Henry claimed that Acme did not rate him below expectations on his 2000 year-end review for poor performance; rather, he claimed that the review was based on the fact that store remodeling costs were incorporated without adjustment into his sales numbers. In further support, the plaintiff cited his salary increase and bonus in 2000 as evidence that his performance was satisfactory. Furthermore, the court noted, Acme, as a policy, ignores below-expectations ratings on midyear reviews when the employee is rated "meets or exceeds expectations" at the end of the year, as the plaintiff was in 2004 and 2006.

With respect to the 2008 and 2009 performance ratings, Henry argued that they were based on "factual misstatements, exaggerations, and heightened scrutiny to create a pretextual case to support plaintiff's termination," the opinion said. The court noted that Henry received stock options reserved exclusively for "a select group of associates who play a significant role in the long-term success of our company" just two days before the "below expectations" rating. The plaintiff also presented evidence that England set his sales and profit numbers at an unrealistically high level to build a case supporting the plaintiff's termination. In support, Henry pointed to the fact that younger employees missed sales and profit targets but were rated higher, as well as the fact that two years after the plaintiff's termination, sales and profits targets were reduced by several million dollars. Finally, the court noted, regarding the nine store directors older than the plaintiff who were managed by England, the plaintiff claimed that England (1) had no reason to discriminate against them because they were on the cusp of retirement or (2) forced them into retirement. Of the nine store directors older than the plaintiff, the opinion noted that one was placed on disability leave, five retired shortly after the plaintiff was terminated and three other store directors over the age of 50 were terminated by England before 2011.

Without any further analysis, the district court wisely concluded that the conflicting declarations and records surrounding the circumstances of Henry's termination, coupled with Acme's proffered

nondiscriminatory reason for terminating him, made the issuance of summary judgment inappropriate. This case once again demonstrates the futile nature of trying to use summary judgment as a sword. The factual discrepancies and inconsistencies were so evident that the only proper way to adjudicate this dispute was through a trial, where a fact-finder could make credibility determinations and assess the believability of the explanations offered by the employer. This is a very good example of a trial court refusing to weigh in on the credibility of the proffered evidence. As the district courts have routinely been instructed by their reviewing appellate courts, it is not for the trial judge to usurp the function of the fact-finder. This is especially true in employment cases where the facts are often hotly disputed. While there is no guarantee that Henry will ultimately prevail at trial on these facts, the court has fulfilled its duty in allowing him to have his day in court.

Jeffrey Campolongo *is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters. The law office also counsels aspiring and established artists and entertainers regarding various legal issues arising in the entertainment and media industries.*
