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When Is Application of 'Sham Affidavit' Doctrine a Sham?

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The Legal Intelligencer September 27, 2013

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One of the more difficult issues a district court judge faces is whether to apply something known as the "sham affidavit" doctrine when reviewing a summary judgment motion under Federal Rule 56. For those unfamiliar with the sham affidavit doctrine, it has its federal roots in a case from 1969 captioned *Perma Research & Development v. Singer*, 410 F.2d 572, 577-78 (2d Cir. 1969). In summarizing the doctrine espoused in *Perma Research*, the U.S. Court of Appeals for the Third Circuit has stated: "If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact," as in *Jiminez v. All American Rathskeller*, 503 F. 3d 247, 252 (3d Cir. 2007) (citing *Perma Research*, 410 F.2d at 577-78).

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The *Jiminez* case explains that every circuit court of appeals since *Perma Research* has adopted some form of the sham affidavit doctrine, including our own Third Circuit in *Martin v. Merrell Dow Pharmaceuticals*, 851 F.2d 703, 706 (3d Cir.1988). Our court has further clarified that a sham affidavit is a contradictory affidavit that indicates only that the affiant cannot maintain a consistent story or is willing to offer a statement solely for the purpose of defeating summary judgment. A sham affidavit cannot raise a genuine issue of fact because it is merely a variance from earlier deposition testimony, and therefore no reasonable jury could rely on it to find for the nonmovant.

The doctrine itself is not without its critics. Some state courts have rejected the doctrine on grounds that the state counterparts to Rule 56 do not require courts to scrutinize affidavits the way Federal Rule 56 does. Other commentators criticize the doctrine on the basis that the sham affidavit doctrine empowers district courts to make credibility determinations and exercise "forbidden discretion," according to Michael Holley in "Making Credibility Determinations at Summary Judgment: How Judges Broaden Their Discretion While 'Playing by the Rules,'" published in the *Whittier Law Review* in 1999.

Nevertheless, the doctrine is alive and well in this circuit and was applied recently in a case where there was not even an affidavit submitted by the party to be repudiated as a "sham." In *Bracy v. Melmark*, E.D. Pa., Civ.A.No.

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12-3323 (Sept. 24, 2013), U.S. District Judge Petrese B. Tucker of the Eastern District of Pennsylvania was confronted with cross-motions for summary judgment in a case brought under the Family and Medical Leave Act (FMLA). According to the opinion, plaintiff Rochelle Bracy worked for defendant Melmark Inc. from January 3, 2011, to March 29, 2012, as a health services manager in Melmark's Adult Program. Melmark is a comprehensive provider of residential, educational, therapeutic and recreational services for children and adults with developmental disabilities.

Beginning in October 2011, Bracy sought FMLA leave to care for her father who was dying of dementia. At the time, Bracy did not have sufficient time with Melmark to qualify for leave under the FMLA, so she utilized a variety of holiday, sick leave and "prescheduled late ins" approved by Melmark until she was eligible for FMLA on February 1, 2012. Per the court's decision, Bracy provided Melmark with a form signed by her father's physician, which indicated that he suffered from advanced dementia, that she needed to work on an intermittent basis, and that her leave needs would be "episodic." Bracy also completed Melmark's own FMLA request form, indicating that she was seeking "intermittent" time off to care for her father. Ultimately, Bracy was approved for a block leave (i.e., continuous leave) starting February 2, 2012. That is where the parties' stories diverge.

According to Tucker's decision, Bracy did not want, nor request a block leave; she merely requested intermittent leave. Melmark, on the other hand, was not willing to provide anything other than a block leave under the FMLA. As a result of being placed on a block leave, Bracy was out of work from February 2, 2012, until March 26, 2012, when she opted to return to work early. The dispute before the court was whether Bracy's earlier request for intermittent FMLA leave, which occurred before she was eligible for FMLA, was sufficient to place the employer on notice that she desired intermittent leave after she became eligible for FMLA. Bracy argued that the employer improperly implemented her FMLA leave by placing her on block leave even though the documentation she provided specified that she was seeking intermittent leave. This argument was the thrust of Bracy's FMLA interference argument, which the court allowed to proceed to trial citing unresolved credibility determinations.

Ultimately, Bracy's employment with Melmark ended March 29, 2012, under circumstances that, the court said, "remain in dispute." Bracy's termination of employment became the thrust of her FMLA retaliation argument that the court ultimately dismissed. In evaluating the conflicting evidence as to how Bracy's employment ended, the court identified several factors in concluding that no reasonable juror could believe that Bracy was terminated, much less that the events surrounding her separation were causally related to her taking FMLA leave.

The key pieces of evidence, according to the opinion, were the fact that Bracy testified at her deposition that on the morning of March 29, 2012, she gathered some things from her office to take to the cottages on Melmark's campus and then went to take a cigarette break. It was while Bracy was allegedly outside smoking that she received an out-of-the-blue voicemail informing her that she needed to bring her keys to human resources, where Bracy then claimed that she was told by someone in human resources that she was "sorry it didn't work out." Bracy interpreted this to mean she was terminated. She subsequently applied for unemployment compensation and in doing so provided a written submission to the Pennsylvania Unemployment Compensation Board of Review, and testified at a hearing before an unemployment referee. In her submission and testimony, Bracy omitted the fact that she went outside to carry out her job functions by taking some items to the Melmark cottages. Bracy also did not mention at the hearing that someone from human resources told her, "sorry it didn't work out." It was these purported omissions that the court deemed "inconsistent" with her deposition testimony about what transpired March 29, 2012.

The court found it problematic that Bracy did not mention in her prior statements that she was taking items out to the cottages when she was abruptly "terminated." The court also noted that Bracy was asserting this fact, apparently for the first time, in her deposition testimony and that her contradictory deposition testimony is somewhat analogous to "sham affidavit" cases, where a plaintiff introduces a contradictory affidavit subsequent to his or her deposition testimony in an attempt to defeat a defendant's motion for summary judgment.

Interestingly, the court cited the *Hackerman v. Valley Fair*, 932 F.2d 239, 241 (3d Cir. 1991) and *Cleveland v. Policy Management Systems*, 526 U.S. 795, 806, 119 S. Ct. 1597, 1603, 143 L. Ed. 2d 966 (1999), cases for the proposition that "without a satisfactory explanation, a nonmovant's affidavit contradicts earlier deposition testimony, the district court may disregard the affidavit in determining whether a genuine issue of material fact exists." What is most alarming about this rationale is that there is no record that Bracy ever submitted any

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affidavit in support of, or in opposition to summary judgment, let alone one that is contradicted by earlier deposition testimony. It would appear the district court was attempting to highlight what it perceived to be an inconsistency in Bracy's earlier statements and testimony for unemployment benefits by pointing to an omission on Bracy's part. The court also criticized Bracy for not explaining why she omitted "such a material fact from both her prior statement to and sworn testimony before the unemployment board."

From a practitioner's perspective, this writer finds it hard to believe that an omission, such as the one here, rises to the level of a "material fact" such that it should be excluded from consideration under the sham affidavit doctrine. One could reasonably argue that the omission of such a "material fact" is precisely what makes the issue ripe for a fact-finder and should prevent the court from making a credibility determination. The sham affidavit doctrine is a common law procedural safeguard intended to prevent a party from creating genuine issues of fact to overcome summary judgment by speaking out of both sides of the mouth. The protection exists so that a witness will not change his or her story just to avoid having the case dismissed as a matter of law. With the present application of the sham affidavit doctrine being used to preclude prelitigation statements, or in this case, omissions, it would suggest a much broader interpretation than the case law supports.

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