Labor and Employment Law

Summary Judgment- What is the Standard Now?

Editor's note: this is the 17th N.H. Bar News article co-written by employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss-Ford (employer advocate). Here they discuss this fall's N.H. Supreme Court opinion, Burnap v. Somersworth, 2018-0624, which upheld the dismissal of an employment discrimination case on summary judgment.

By Nancy Richards-Stower and Debra Weiss-Ford

Nancy: So, summary judgment, the enemy of employment civil rights cases, roars back into our lives again, this time, under state law. Argh.

Deb: But, Nance, summary judgment is the most efficient way to sweep away weak cases.

Nancy: I'll stick with summary judgment is the enemy of civil rights cases. So, it was with some distress I read Burnap v. Somersworth.

Deb: Following an investigation and School Board hearing, Burnap was fired as the Dean of Students at Somersworth High School for alleged sexual harassment. She asserted that the investigation was biased and her termination was actually motivated by discrimination based on her sexual orientation. The supreme court upheld the superior court's summary judgment order in favor of the employer. Besides the defendant's victory, what's your concern?

Nancy: Well, it appears that the New Hampshire Supreme Court adopted a "pretext plus" standard for discrimination cases decided under the burden shifting framework of McDonnell Douglas Corp. v. Green (plaintiff puts on evidence of a prima facie case : she's a member of a protected class and suffered an adverse action; defendant puts on evidence that her termination was based on a non-discriminatory reason; then plaintiff must show that the employer's given reason is false, and is a pretext for discrimination)

Deb: For many years the federal circuits were divided between "pretext only" and "pretext plus" standards. In "pretext only" jurisdictions, once the plaintiff offered evidence that the motivation proffered by the employer for its action was a lie, she survived summary judgment (and could win at trial). In "pretext plus" jurisdictions, proving the employer's stated motivation was a sham (pretext) wasn't enough. If the employee showed that the employer's reason was total nonsense (pretext), she'd still lose, unless she offered additional evidence (the "plus") that discrimination was the real reason.

Nancy: Right, until 2000, when along came the U.S. Supreme Court's decision in Reeves v. Sanderson Plumbing. (While Reeves was a post-trial Rule 50 motion for judgment as a matter of law, the standard for deciding summary judgment motions is the same, and Reeves informed summary judgment law.) Reeves held that the evidence setting forth a prima facie case of discrimination along with the rejection of the employer's evidence of its motivation as a lie (pretext) can be enough to overcome summary judgment. That is, under Reeves, once there is evidence, which, if believed, would show that the employer's stated reason was a sham, summary judgment can be avoided.

Deb: But, the totality of the plaintiff's proffered evidence must provide some basis for the conclusion that the employer's motivation was illegal discrimination.

Nancy: Burnap says that "the plaintiff must do more than dispute the employer's stated justification; she must "elucidate specific facts which would enable a jury to find that the reason given was not only a sham, but a sham intended to cover up the employer's real motive": here, sexual orientation discrimination." But Reeves held that after a jury believes an employee's evidence that the employer had lied, "discrimination may well be the most likely alternative," especially when the evidence failed to reveal an alternative non-discriminatory reason (like, "I didn't reject you because of your age; I hired young Ben, instead, because he's my cousin.") While Reeves didn't instruct that plaintiff should win at trial in every case where plaintiff offers evidence to contradict the employer's reason, it did allow at the summary judgment stage, when all inferences are to be made in favor of the non-moving party, she could survive without having to prove the lie was motivated by discriminatory animus.

Deb: For example?

Nancy: Say my client is an excellent coder and has successfully coded 100 new games in the last year. Then she complains that she is being sexually harassed and is fired. She sues, alleging retaliation. The employer's non-discriminatory reason is that she was a lousy coder. Well, she has asserted in her prima facie case of retaliation that she was a good coder, had complained about sexual harassment and was fired soon after. Thus, by proffering some evidence that she was a good coder, she has disputed the "lousy coder" pretext. That should be enough to survive summary judgment. She should not have to prove that the reason the employer asserted she was a lousy coder was to cover up its actual, retaliatory motive.

Deb: I agree that this language in Burnap may lead to some confusion: Of course, the plaintiff must do more than dispute the employer's stated justification; she must "elucidate specific facts which would enable a jury to find that the reason given was not only a sham, but a sham intended to cover up the employer's real motive." (Emphasis added)

Nancy: Deb, that quote is from a federal case that predated Reeves by a full decade (*Medina- Munoz v. R.J. Reynolds Tobacco Co*., 896 F.2d 5, 9 (1st Cir. 1990)! It sure looks like "the plus" in the "pretext-plus" world I thought Reeves knocked out in 2000. Also, what about the axiom, reiterated in Reeves, that the court "must disregard all evidence favorable to the moving party that the jury is not required to believe"?

Deb: Nance, you've railed against summary judgment for decades.

Nancy: Well, you can't see fidgety fingers, rolling eyes, sweaty foreheads or hostile stares on a paper affidavit drafted by counsel. Absent video footage, cross examination is the best way to prove mendacity. You can't cross examine an affidavit. Or, as in the case of the Somersworth School Board members, their nine affidavits.

Deb: I know we disagree, but I think there were insufficient facts in the record for a jury to determine that the employer fired the employee based on her sexual orientation and used sexual harassment as a pretext. The Court was just throwing out a case that never should have been brought.