Is a plaintiff's perception of discrimination sufficient for liability to attach?

By Sonia L. Skinner

The case law summarized below indicates that the answer to the question posed by the title of this article is, no. It should be noted that statutory protection is available to a plaintiff who alleges that his/her employer presumes him/her to be disabled. In all other cases, various courts have held that a plaintiff alleging discrimination must have evidence in addition to his or her subjective belief of the existence of discriminatory animus. The following is a summary of some of the cases that illustrate how courts have dealt with claims of discrimination buttressed solely by the plaintiff's subjective belief.

In the cases that follow, none of the plaintiffs presented direct evidence of discrimination (a rather Herculean task); instead, they relied on circumstantial evidence to prove their respective cases. Plaintiffs relying on circumstantial evidence of discrimination must follow the burden shifting framework set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). *McDonnell Douglas* provides that a plaintiff: (1) bears the burden of establishing a *prima facie* case of discrimination; (2) the burden of production then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment action; and (3) once the defendant has met its burden, the presumption of discrimination disappears and the plaintiff must establish that the defendant's asserted reason for the adverse action is not the real reason, but is a pretext for discrimination. *Clark v. Tisch,* No. 86 C 9527, 1991 WL 235235, 11 (N.D. Ill. Oct. 29, 1991) (internal citations omitted).

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Race discrimination

In *Clark,* the plaintiff alleged that the postal service failed to promote him because he was African-American and over 40 years old. Mr. Clark alleged that his employer's actions constituted violations of Title VII of the Civil Rights Act of 1964, 49 U.S.C. § 2000e, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* Clark had worked for the postal service for thirty two years and applied for the position of Regional Recruitment Specialist. He was interviewed but was not selected for the position. He believed that his previous experience as a recruiter qualified him for the position. He concluded that since he had worked in recruiting for 10 years unlike the other candidates, the only reason he was not recommended for the job was either his race, his age or both. *Clark,* 1991 WL 235235, at 3. The trial court directed that "[t]he factual inquiry in a race discrimination case is whether the defendant intentionally discriminated against the plaintiff. That is to say, did the defendant in this case intentionally treat Clark less favorably than the other candidates because of his race?" *Id.* at 12. The parties agreed to a bench trial.

During the bench trial, Clark testified that at the time of the interview, he did not feel he was the victim of discrimination. *Id.* at 6. Members of the review committee testified that an applicant's performance on the interview was very important and that it was rated 95 percent of the committee's determination. *Id.* at 4. Three members of the review committee made the following contemporaneous notations about Clark's interview performance: "[H]e seemed to have little idea as to how to set up a regional program"; "[P]lanning to handle a region job may not be real strong"; and, "[N]eeds to do more work in expansion of answers to overall issues, i.e. career paths, reorganization." *Id.* at 5. Additionally, the position was determined to be "much broader in scope" than the position Clark held previously and was a management level position. *Id.* In contrast, the committee members were unanimous in testifying that the successful candidate gave strong, comprehensive answers to all their questions. *Id.* at 6.

After hearing all the testimony, the court concluded in its Findings of Fact and Conclusions of Law that "[Mr.] Clark failed to obtain the job because he performed poorly at his interview, failing to convince the committee members that he possessed the managerial skills and organizational vision they were looking for in this new position." *Id.* at 12. The court did not assign much weight to Clark's perception of discrimination: "… even a perception of race discrimination, no matter how widespread … does not mean that racial discrimination actually occurred in the case of plaintiff Clark." *Id.* at 9.

In *Austin v. Progressive RSC, Inc.,* 265 Fed.Appx. 836 (11th Cir. 2008), Monticello Austin sued his employer, alleging that it discriminated against him on the basis of his race when it failed to promote him to the position of client server operations analyst III ("CSOA"). He filed suit alleging claims of discrimination under 42 U.S.C. § 1981 and the Florida Civil Rights Act, Fla. Stat. Ann. §§ 760.01–760.11. Austin alleged that when he was hired for the CSOA II position, he was told that he would be promoted to a CSOA III position within a year. He concluded that Progressive's failure to promote him, coupled with his being the only African-American in his unit, proved that his race was a determining factor in that decision. The court allowed Progressive's motion for summary judgment, after which Austin filed a timely notice of appeal.

Austin had the burden of "establish[ing] a *prima facie* case of discriminatory failure to promote by showing that[:] '[]he is a member of a protected class; (2) []he was qualified and applied for the promotion; (3) []he was rejected despite [his] qualifications; and (4) other equally or less qualified employees who were not members of the protected class were promoted.'" *Id.* at 844 (quoting *Wilson v. B/E Aerospace, Inc.,* 376 F.3d 1079, 1089 (11th Cir. 2004)).

The parties did not dispute that "a promotion from CSOA II to CSOA III required an employee to demonstrate to the satisfaction of his or her manager consistent performance of level III work in the course of daily duties." *Id.* at 838. Austin testified that his technical knowledge was a level III or IV "because he believed it," but he could not give any specific examples. *Id.* at 841. He also testified that he had a "gut feeling" that Progressive had failed to promote him due to race discrimination, though he lacked specific proof. *Id.* The defendant proffered evidence that Austin was not qualified for the CSOA III position. Javier Vinces, Austin's manager, testified that though Austin's performance evaluations indicated that he 'met expectations,' he had not consistently met core objectives. *Id.* at 840. Vinces also testified that Austin's transfer to another facility was cancelled because he lacked the ability to support the facility on his own. *Id.* Vinces explained that "he had created 'good' and 'bad' memos to document significant actions of team members and that Austin had more "bad" memos than any other team member and also had nearly five times as many 'bad' memos as 'good' ones. Furthermore, Austin had been placed under increased scrutiny for a period of time because of customer complaints." *Id.* Additionally, the summary judgment record showed that "from 1998 through the time Austin filed his claims [2005], no employee at Riverview [the site where Austin worked] has been designated CSOA III." *Id.* at 839. Progressive asserted that Austin had failed to establish that he was qualified for the position or that similarly situated employees had been promoted to that position. In affirming the grant of summary judgment, the appellate court concluded, "the only evidence presented by Austin to demonstrate that he was qualified for promotion consisted of his own opinion, which is insufficient without more." *Id.* at 845.

Gender discrimination

In *Cody v. Gold Kist, Inc.*, 276 Fed. App'x 906, (11th Cir. 2008), the plaintiffs, four current employees of the defendant, filed suit against it, alleging gender discrimination in violation of Title VII, 42 U.S.C. § 2000e *et seq.* The plaintiffs alleged failure to promote and disparate pay claims against Gold Kist. The plaintiffs' claims arose out of findings compiled in a task force report released by Gold Kist. The report reviewed and compiled the problems identified by Gold Kist employees, the potential causes of these problems and recommended solutions. The plaintiffs argued at trial that the report constituted conclusive proof of discrimination. Gold Kist moved for summary judgment, which was granted. The trial court concluded that the report was not conclusive proof of discrimination but instead constituted circumstantial evidence of discrimination which could be used to support plaintiffs' individual claims under the *McDonnell Douglas* framework. The plaintiffs filed a timely appeal.

The Eleventh Circuit, after reviewing the trial testimony, observed that the plaintiffs did not rebut Gold Kist's assertion that "[t]he task force's findings were a list of problems identified by employees, their potential causes, recommended solutions and a timetable for implementing those solutions." *Id.* at 907. It affirmed the trial court's grant of the defendant's summary judgment motion because it concluded that "the [r]eport does not rise to the level of an admission of discrimination; rather, it constitutes evidence of employee perceptions of gender-related problems." *Id.*

Reverse race discrimination

In *Lawrence v. Univ. of Tex. Med. Branch at Galveston*, 163 F.3d 309 (5th Cir. 1999), the plaintiff, Kathy Lawrence, a Caucasian, sued her employer, alleging that she was not promoted due to reverse discrimination. Lawrence was a nurse in the Radiology Department and had held that position for several years. The Radiology Department expanded and a position was created for a nursing supervisor. Lawrence applied for the position and was interviewed, but was not selected. Since Lawrence felt entitled to the position, she filed a grievance and requested, but did not receive, a hearing. She then filed suit in state court alleging breach of contract, intentional infliction of emotional distress, due process violations and employment discrimination. Once her employer removed the action to federal court, she

amended her complaint to allege race discrimination pursuant to 42 U.S.C. §§ 1981, 1983 and 2000d. The defendant responded that Lawrence was not offered the nursing supervisor position because she was not the most qualified candidate. The court granted the defense motion for summary judgment, after which Lawrence appealed.

The Fifth Circuit Court of Appeals observed "[i]n this employment discrimination case our focus is on whether a genuine issue exists regarding whether the defendant intentionally discriminated against the plaintiff. It is therefore necessary for Lawrence to present evidence — not just speculation and conjecture — that the defendants discriminated against her on the basis of her race." *Lawrence,* 163 F.3d at 312. After reviewing the record, the court concluded that Lawrence had failed to raise a genuine issue of fact that the defendant's proffered reason for its action was pretext. *Id.* at 313. The court provided perspective when it opined "… Lawrence's subjective belief that she was not selected for the new nursing supervisor position based upon race or age is … insufficient to create an inference of the defendants' discriminatory intent. Indeed, 'a subjective belief of discrimination, however genuine, [may not] be the basis of judicial relief." *Id.* (quoting *Elliott v. Group Med. & Surgical Serv.*, 714 F.2d 556, 567 (5th Cir. 1983)).

Disability discrimination

In *Davis v. Sailormen, Inc.*, 281 Fed App'x 958 (11th Cir. 2008), Danita Davis sued Sailormen Inc., a franchisee of Popeyes, under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.,* alleging that because one of its managers regarded her as disabled, she was denied a job. Davis applied for the position of cook at the Merritt Island Popeyes. At birth, Davis' right hand did not have a thumb and her right arm is shorter and smaller than her left arm. During the interview for the cook position, Davis alleged that the manager stated that he was unsure whether he could hire her because he did not think she could handle the lifting component of the position. Davis did not get the job. "To prevail on a perception theory of disability discrimination, [Ms.] Davis must show: '(1) that the perceived disability involves a major life activity; and (2) that the perceived disability is substantially limiting and significant." *Id.* at 960 (quoting *Rossbach v. City of Miami,* 371 F.3d 1354, 1360 (11th Cir. 2004)). Major life activities are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. § 1630.2(i). Sailormen Inc. moved for summary judgment and the motion was granted.

On appeal, the Eleventh Circuit understood but rejected Davis' contentions stating that even if the tasks associated with the cook position of maneuvering, scrubbing, heavy lifting, etc., are considered major life activities; at the time [the interviewer] made the comment, he was referring to the tasks associated with the cook job for which Davis had applied and not with her ability to perform these tasks in daily life. *Davis,* 281 Fed App'x at 960. The court determined that Ms. Davis failed to meet her burden of showing that the defendant considered her "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes" *Id.* at 960, *see* 29 C.F.R. § 1630.2(j)(3)(i) and affirmed the trial court's ruling.

Age discrimination

In *Elliott v. Group Med. & Surgical Serv.,* 714 F.2d 556 (5th Cir. 1983), the plaintiffs, six former employees over the age of 40, sued their former employer, alleging that it had discriminated against them on the basis of their age when it terminated their employment under the guise of a management reorganization and replaced each of them with younger employees. The plaintiffs filed suit under the ADEA. The defendant countered that the plaintiffs, all executives, were discharged due to a corporate reorganization that was designed to increase management efficiency. At trial, the jury returned a verdict in favor of the plaintiffs. The defendant appealed.

On appeal, the Fifth Circuit acknowledged "[i]n age discrimination cases the relevant inquiry is whether the plaintiff has produced evidence from which a trier of fact might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Id.* at 562. In reviewing the sufficiency of the plaintiffs' proof, the court noted that in discrimination cases, "the plaintiff retains the burden of persuasion on the whole case." *Id.* at 564 (quoting *Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248 (1981)). The defendant contended that the evidence was insufficient to support the jury verdict.

After reviewing the evidence and testimony, the appellate court concluded "we have recognized that generalized testimony by an employee regarding his subjective belief that his discharge was the result of age discrimination is insufficient to make an issue for the jury in the face of proof showing an adequate nondiscriminatory reason for his discharge." *See Houser v. Sears, Roebuck & Co.,* 627 F.2d 756 (5th Cir. 1980). The appellate court acknowledged that "when [each plaintiff] was questioned directly concerning the company's stated reasons for his dismissal, none seriously disputed either his awareness of or the objective *truth* of the company's stated ground of dissatisfaction with him, maintaining only that it was inadequate to warrant his termination." *Elliott,* 714 F.2d at 566 (emphasis in original). In light of the plaintiffs' trial testimony, the appellate court reversed the jury verdict and remanded the matter for entry of judgment consistent with its findings.

Discrimination due to erroneous presumption of plaintiff's membership in protected class

In *Butler v. Potter,* 345 F.Supp.2d 844 (E.D. Tenn. 2004), the plaintiff, Jesse Butler, a Caucasian male, filed a complaint with the EEOC against the postmaster general of the U.S. Postal Service, alleging that he was the victim of national origin and sex discrimination. Butler alleged that, as a mail carrier, he was not selected for certain positions that became

available during his recovery from heart surgery, though he admits that the employees selected had more seniority. He further alleges that when he returned to work, he requested a truck or light duty as an accommodation to his continued recovery and instead was given the most difficult route. Butler alleged that his employer perceived him to be of either Arabic or Indian descent. He filed a second complaint in which he alleged race discrimination under Title VII, 42 U.S.C. § 2000e, retaliation, disability discrimination and a failure to accommodate his disability under the Rehabilitation Act, 29 U.S.C. § 791. "In order to prove a *prima facie* case of disability discrimination, the plaintiff must show that he is disabled, that is, that he (1) had a physical or mental impairment which substantially limits one or more major life activities, (2) had a record of such impairment, or (3) was regarded as having such an impairment." *Id.* at 852 (quoting *Timm v. Wright State Univ.*, 375 F.3d 418, 423 (6th Cir. 2004)). Butler alleged that he suffered from a major depressive disorder that affected certain major life activities, including his ability to concentrate on his job. He also alleged that his employer perceived him to be disabled. The postmaster general moved for summary judgment on all of Butler's claims. The court granted summary judgment on the disability claim because the postmaster general did not perceive him to be disabled, as required under the Rehabilitation Act. *Id.* at 852.

When ruling on Butler's race discrimination claim, the court observed: "Title VII protects those persons that belong to a protected class … and says nothing about protection of persons who are *perceived* to belong to a protected class." *Id.* at 850 (emphasis in original) (internal citation omitted). The court granted the defendant's motion for summary judgment on the claims of perceived race or national origin and observed "[n]either party has cited any controlling authority which would permit a claim for perceived race and/or national origin discrimination and this Court is unaware of any such precedent." *Id.*

Butler's final claim was for retaliatory harassment, alleging that his employer discriminated against him after he filed complaints with the Equal Employment Opportunity Commission. As a plaintiff alleging retaliatory harassment, Butler had the burden to prove "(1) that he engaged in activity protected by Title VII; (2) that the exercise of protected rights was known to the defendant; (3) that the defendant thereafter took adverse employment action against the plaintiff; or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment. *Id.* at 853 (quoting *Akers v. Alvey,* 338 F.3d 491, 497 (6th Cir. 2003)). The court refused to dismiss Butler's retaliatory harassment claim because while the defendant asserted that he could not make out a *prima facie* case, it failed to proffer a legitimate non-discriminatory reason for its actions.

Conclusion

The results summarized in the foregoing cases illustrate that plaintiffs who file discrimination claims should support their presumption of discrimination with objective facts and subsequently establish a fact issue that the defendant's proffered reason for the adverse employment action is a pretext for discrimination. A putative plaintiff's subjective opinion may be heartfelt, but will not suffice. The Fifth Circuit Court of Appeals encapsulated the prevailing opinion about a discrimination plaintiff's presumptions when it declared that "a subjective belief of discrimination, however genuine, [may not] be the basis of judicial relief." *Lawrence,* 163 F.3d at 313 (quoting *Elliott*, 714 F.2d at 567).

It should be noted that the foregoing rulings have implications outside of the employment arena as discrimination claims arise in many contexts, including housing, education and air travel.