The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2017
PHILADELPHIA, WEDNESDAY, AUGUST 9, 2017 VOL 256 • NO. 27 An ALM Publication

EMPLOYMENT LAW

Third Circuit's Take on 'Same Hire, Same Fire' Defense

BY SID STEINBERG
Special to the Legal

When the same individual hires an employee and shortly thereafter fires him, it makes intuitive sense that discrimination almost certainly did not motivate the termination. After all, why would an employer hire an employee in a protected category and then use the protected category as a factor in the subsequent termination? The U.S. Court of Appeals for the Third Circuit, however, has consistently rejected what is often referred to as the "same hire, same fire" defense, as precluding a finding of discriminatory animus, finding it to be simply "evidence like any other." The most recent test of this defense was in the case of *McMullin v. Evangelical Services for the Aging*, No. 2:16-cv-06660 (E.D. Pa. Aug. 2).

HIRED AT 63, FIRED AT 64

DeWayne McMullin was hired by Evangelical Services for the Aging, d/b/a "Wesley Enhanced Living" to serve as Wesley's CFO in March 2014. He was 63 years old at the time. Wesley's CEO, Jeff Petty, was a decision-maker in McMullin's hiring. Fourteen months later, in May 2015, Petty fired McMullin, claiming that he made errors in financial reports, financial models and cash sheets. Petty told McMullin that he was being fired "because it was not working out." He also sent an email to Wesley employees saying that McMullin had "decided to leave WEL effective immediately." Wesley eventually filled the CFO position with a 52-year-old.

During the course of McMullin's employment, he requested time off for "routine doctor appointments" on five occasions. McMullin never advised Petty that he suffered from a heart condition, but did reference in one email, that he was seeing a cardiologist and that he had a pacemaker.

After his termination, McMullin brought suit against Wesley claiming age and disability discrimination. After discovery closed, Wesley moved for summary judgment on both discrimination claims.

SID STEINBERG *is a principal and chair of Post & Schell's employment and employee relations and labor practice groups. Steinberg's practice involves virtually all aspects of employee relations, including litigation experience defending employers against employment discrimination in federal and state courts. He also represents employers before federal, state and local administrative agencies, and regularly advises employers in matters including employee discipline, labor relations, and the creation or revision of employee handbooks. He can be reached at ssteinberg@postschell.com.*

PRIMA FACIE AGE CHALLENGE

Wesley initially challenged whether McMullin had established a prima facie case of age discrimination—specifically whether the circumstances surrounding the termination could give rise to an inference of discrimination. Not only did Petty both hire and fire McMullin at ages 63 and 64 respectively, but Petty was 58 years old at the time of McMullin's termination.

Nevertheless, the court found there to be an inference of discrimination based primarily on contradictions in Petty's testimony. Specifically, Petty testified that two subordinate employees

had expressed frustration to him about McMullin's performance. The subordinates, however, both denied having made "official complaints" about McMullin during the course of his employment. One of the subordinates, however, testified that she had complained to other senior managers about McMullin.

Furthermore, McMullin claimed that Petty's public explanation for McMullin's departure (that he had "decided to leave") was evidence that Petty was seeking to conceal that he had fired McMullin for a discriminatory reason. Finally, because McMullin was replaced by an employee 10 years his junior, the court found that a jury could infer that Wesley had tried to work with an older employee and "later decided to go with a younger one because it was 'not working out.'"

PRIMA FACIE DISABILITY CHALLENGE

With respect to McMullin's claim of disability discrimination, the court found that, because McMullin was unable to show that his heart condition had substantially limited one or more major life activities during his employment, he was not "disabled" under the ADA as a matter of law. However, the court found that McMullin was able to establish that he was "regarded as" disabled because Petty had been "advised that McMullin was regularly seeing a cardiologist and had a pacemaker." McMullin also testified that he had heard Petty express frustration at having to pay increased health cost for employees. While Wesley argued that there was no evidence that linked Petty's termination decision to McMullin's cardiology appointments, the court found that Petty's contradictory reasons for the termination were sufficient to establish a prima facie case.

Inasmuch as the court found there to be evidence of the prima facie case based upon shifting explanations for the termination, the same evidence served to establish pre-text as a matter of law. Moreover, the court noted that the last email criticizing McMullin's performance was in February 2015—almost three months before McMullin's termination in May.

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ANALYSIS

A number of appellate courts have adopted what seems to be the common-sense argument that an employer would not hire a 63-year-old and then terminate him a year later because he was too old. The Third Circuit found, however, in *Waldron v. SL Industries*, 56 F.3d 491, n.6 (3d. Cir. 1995), that "where ... the hirer and firer are the same and the discharge occurred soon after the plaintiff was hired, the defendant may, of course, argue to the fact finder that it should not find discrimination. But this is simply evidence like any other and should not be accorded any presumptive value."

Of greater note is the *McMullin* court's use of what would normally be considered to be pretext evidence in establishing the prima facie case. Specifically, other than the fact that McMullin was replaced by an employee 10 years his junior, there appeared to be little-to-no evidence that Petty terminated McMullin because he was too old. Rather, the court appeared to accept the fact that Petty offered contradictory explanations for the termination as evidence that age may have played a role in the termination decision. There appears to be, at best, a tenuous link between evidence of Petty's shifting explanations to age or disability animus.

Employers, should once again, be direct and, most of all, truthful when explaining an employee's departure. When an employee is terminated for poor performance, unilaterally using a euphemism such as "we made a mutual decision," may subsequently be evidence of pretext—undermining an otherwise legitimate decision. •