BOTH DIRECT AND CIRCUMSTANTIAL EVIDENCE OF DISCRIMINATION

ARE SUFFICIENT TO ESTABLISH LIABILITY AGAINST AN EMPLOYER

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"Some circumstantial evidence is very strong, as when you find a trout in the milk."
~Henry David Thoreau

All law enforcement officers know the difference between direct and circumstantial evidence in the context of criminal law. These two types of evidence follow similar patterns in civil law as well. Yet, many law enforcement officers wrongfully believe that only direct evidence of discrimination is sufficient to bring a wrongful discharge or failure to promote case against their employer. However, as Thoreau recognized, circumstantial evidence is often just a strong as direct evidence, and is alone sufficient to prove employment discrimination under controlling New Jersey law.

The essential purpose of New Jersey's Law Against Discrimination, N.J.S.A. 10:5-1, *et seq.* (the "LAD") is the "eradication of the cancer of discrimination." *Fuchilla v. Layman,* 109 N.J. 319, 334 (1988) *(quoting Jackson v. Concord Co.,* 54 N.J. 113, 124 (1969). The LAD is intended to prohibit discrimination in all aspects of the employment relationship, including terminations and forced retirements. *Alexander v. Seton Hall University,* 204 N.J. 219 (2010). Accordingly, courts in this State must broadly and liberally interpret the LAD in accordance with that overarching purpose. N.J.S.A. 10-5-3; Anderson v. Exxon Co., U.S.A., 89 N.J. 483, 495 (1982).

The determination of whether a plaintiff has established a *prima facie* case of discrimination is a question of law solely within the discretion of the trial judge. A *prima facie* case means "any evidence including any favorable inference to be drawn therefrom which could sustain a judgment in plaintiff's favor." R. 4:37-2(b), *Comment* 2.

The evidentiary burden at the initial stage of a case brought under the LAD is "rather modest: it is to demonstrate to the court that plaintiff's factual scenario is compatible with discriminatory intent-i.e., that discrimination *could* be a reason for the employer's action." *Zive v. Stanley Roberts, Inc.,* 182 N.J. 436, 447-48 (2005) (describing burden of establishing a prima facie case as "not onerous"); (describing *prima facie* case as "relatively simple"); (describing *prima facie* case as "easily made out") (writing "the standard for presenting a *[p]rima facie* case cannot be too great lest rampant discrimination go unchecked.")

The "consistent reaffirmance of the plaintiff's slight evidentiary burden acknowledges that requiring greater proof would generally prevent a plaintiff from accessing the tools, i.e., evidence of the employer's motivation, necessary to even begin to assemble a case. Such a result would not be consistent with "the complex evidentiary edifice constructed by the Supreme Court, and [would] impose on plaintiff the very burden that *McDonnell Douglas* sought to avoid-that of uncovering a smoking gun." Zive, *supra.*

Direct Evidence of Discrimination. To establish a *prima facie* case of "direct" discrimination under the LAD, a plaintiff only needs to prove that he or she:

(1) Was a member of a protected class (such as race, ethnicity, disability, gender, age or sexual preference);

(2) Was qualified for the job they performed; and

(3) Despite being qualified, suffered an adverse employment action (such as being terminated, demoted, denied promotion or forced to retire),

(4) In which their race, ethnicity, disability, gender, age, sexual preference, etc. was a contributing factor, thereby giving rise to an inference of discrimination.

Arenas v. L'Oreal USA Products, Inc., 790 F.Supp.2d 730 (D.N.J. 2011).

Thus, to establish a meritorious case under the LAD, claimants are not required to prove that their race, gender, age, etc. was the *sole* factor in their employer's decision to terminate, demote or deny them promotion, etc. Rather, under the LAD, plaintiffs are only required to prove that their race, ethnicity, gender, age, sexual preference, etc. played a *contributing* role in the adverse employment decision, even in cases involving direct evidence of discrimination. *Id.*

Circumstantial Evidence of Discrimination. In *Zive,* the New Jersey Supreme Court distinguished between the different standards applicable to "direct" discrimination cases, as opposed to "circumstantial" cases. *Zive* at 450. Discrimination cases, by their nature, usually rely on the credibility of the party who committed the adverse-employment act (*e.g.* termination, demotion, failure to promote, etc.) because their personal,

and often hidden, motivation and intent were involved in their decision. *Parker v. Dornbierer,* 140 N.J.Super. 185, 189 (App. Div. 1976)(recognizing that discrimination is not usually practiced openly and intent must be found by examining what was done and said in circumstances of the entire transaction.) There are rarely "smoking-gun" documents that materialize during discovery in discrimination cases. *Zive, supra,* at 446-47.

"What makes an employer's personnel action unlawful is the employer's intent… Employment discrimination cases thus suffer from the difficulty that inheres in all state-of-mind cases-the difficulty of proving discriminatory intent through direct evidence, which is often unavailable… All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult… There will seldom be eyewitness' testimony as to the employer's mental processes… To be sure, there are occasionally cases involving the proverbial smoking gun. However, our legal scheme against discrimination would be little more than a toothless tiger if the courts were to require such direct evidence of discrimination… Even an employer who knowingly discriminates on the basis of [protected status] may leave no written records revealing the forbidden motive and may communicate it orally to no one." [Internal citations and quotations omitted.] *Id.*

Further, sophisticated employers like state, county and local governments, who are often represented by either or both in-house counsel and outside attorneys in connection with their personnel decisions, are usually savvy enough to keep blatantly derogatory and discriminatory remarks out of documents and e-mails when they decide to terminate or demote employees in violation of the LAD.

Therefore, the New Jersey Supreme Court has held that discrimination under the LAD can be established through "circumstantial evidence 'of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude." *Fleming v. Corr. Healthcare Solutions, Inc.,* 164 N.J. 90, 101 (2000).

In a case of circumstantial discrimination, "[t]he appropriate fourth element of a plaintiff's prima facie case requires a showing that the challenged employment decision (i.e.,…wrongful discharge) took place under circumstances that give rise to an inference of unlawful discrimination." *Williams v. Pemberton Tp. Pub. Schs.,* 323 N.J.Super. 490, 502 (App. Div. 1999). This "formulation permits a plaintiff to satisfy the fourth element in a variety of ways." *Id., citing* Chertkova v. Connecticut Gen. Life Ins. Co., 92 F.3d 81, 91 (2nd Cir. 1996) ("The circumstances that give rise to an inference of discriminatory motive include actions or remarks made by decisionmakers… that could be viewed as reflecting a discriminatory animus,…preferential treatment given to employees outside the protected class, and, in a corporate downsizing, the systematic transfer of a discharged employee's duties to other employees…") (internal citations omitted).

Because of the specific nature of their duties, law enforcement officers know that direct evidence of intent or motive is often difficult to establish. Of course, it's great when the perpetrator of a violent crime posts comments on a social media website about their hatred for their eventual, intended victim. Or, in the case of financial crime, when the perpetrator engages in e-mail exchanges with co-conspirators in which their fraud is discussed in detail. However, as law enforcement officers know very well, many criminal cases are not that straightforward and obvious.

Yet, all law enforcement officers also know how to look for and establish circumstantial evidence of intent or motive as part of their job duties. This is a significant occupational advantage that law enforcement officers have over other types of workers who lack this specific investigative training, and one which they should fully utilize in furtherance of their own protection against employment discrimination and a hostile work environment.

As an attorney who represents law enforcement officers in wrongful termination, demotion and failure to promote cases under the LAD, I advise my clients to start the process of collecting and documenting evidence of both direct and circumstantial discrimination and harassment against them in the same manner that they would investigate and develop such evidence in a criminal case.

Thus, it is important for New Jersey law enforcement officers who believe that they have been wrongfully terminated, demoted or denied promotion in violation of the LAD to do for themselves what they do on a daily basis for members of the public. They should document, record and collect evidence of discrimination and/or harassment in a thorough and formal manner. In many cases, this can take several months, if not years, to fully collect and establish, much like a criminal "sting" operation that takes time to fully develop before it is ripe for action. However, as in such criminal investigations, this painstaking preparation will ultimately help a law enforcement officer to meet their burden of successfully proving discrimination in a civil action under the LAD.

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