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**SUMMARY JUDGMENT FROM THE PLAINTIFF'S PERSPECTIVE:
FINDING A NEEDLE IN A HAYSTACK**

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Introduction

In the context of employment discrimination lawsuits, statistics don't lie: plaintiffs in employment cases fare extremely poorly in federal courts. In a 2001 study, two Cornell University law professors found that only 30% of the 7,575 employment discrimination cases that went to trial over a nine year period resulted in plaintiffs' verdicts, as compared to an average plaintiff win rate of 43% in all civil trials. Moreover, federal appellate courts reversed verdicts favorable to plaintiffs in 44% of the 266 cases that losing defendant-employers appealed, compared with an average reversal rate of 33% for all 2,278 defendants who appealed. Furthermore, of the 1,000 plaintiffs who lost at trial and appealed, only 5.8% won on appeal, compared to a 12% success rate for the 5,100 plaintiffs who appealed on all cases. Only prisoner habeas corpus plaintiffs fared worse!¹

¹ "U.S. Courts Are Tough on Job-Bias Suits," The Wall Street Journal, July 16, 2001, p A2.

In light of these daunting numbers, many plaintiffs' attorneys wonder why they should bother bringing discrimination cases at all, other than those in which there is powerful and irrefutable direct evidence of discrimination. Discrimination cases as cannon fodder is not an appealing concept for advocates. The natural question that arises is whether discrimination is not as prevalent as the volume of discrimination cases would indicate, or that in spite of any actual discrimination, the difficulty in proving cases overwhelms the litigation process, to the exclusion of whether discrimination itself exists.

Perhaps the "slam dunk" cases all settle before discrimination lawsuits are filed and only the "dogs" make it to court, thereby explaining the immense difficulty plaintiffs have in winning. Perhaps judges are jaded by the overwhelming number of discrimination cases on their dockets, and thus discount the possibility that so many people can be the victims of discrimination. Perhaps judges accept the common refrain sounded by employers that courts are not to sit as "super personnel" departments. Or, perhaps courts are giving good discrimination cases short shrift because of the lack of direct proof, yet ignoring otherwise strong circumstantial proof of discrimination.

The question then, in light of the odds plaintiffs face in prevailing on their discrimination claims, is how to spot those "good cases," i.e., the proverbial ones in the "haystack." Clearly, cases with direct evidence of discriminatory comments

or behavior are the easy ones. The harder ones are those in which there is only circumstantial proof of discrimination. These are the cases where plaintiffs often run out of luck, with the courts unwilling to credit evidence that the employer is fabricating its reason for the adverse employment action. These cases, however, should get a second and more vigorous look before they are left for the dustbin of failed employment lawsuits.

Most employees won't have the kind of direct, resounding evidence that will win over even the most skeptical of audiences. Most employers, especially large companies with extensive human resources staff and access to training by outside counsel, do not blatantly discriminate. The discrimination is subtler, often in the form of glass-ceilings, coded comments or performance reviews that promise only a bleak future for the employee. Discrimination nonetheless exists, and major companies pay substantial sums to settle cases, as proven by Morgan Stanley's July 12, 2004 \$54 million settlement of a sex discrimination lawsuit with the EEOC (see July 12, 2004 EEOC Press Release (<http://www.eeoc.gov/press/7-12-04.html>) "EEOC And Morgan Stanley Announce Settlement Of Sex Discrimination Lawsuit") and Deutsche Bank's multi-million dollar settlement of a sex discrimination claim. Gambale v. Deutsche Bank AG, Docket No. 03-7621 (2d Cir, August 25, 2004)).

Thus, the absence of direct evidence does not mean the absence of discrimination, and courts should adjust to this reality and not, almost as a default, accept the most innocent explanation for otherwise illegal conduct.

The Basic Standard for Summary Judgment

If one were to read just U.S. Supreme Court cases, one might conclude that summary judgment should be an infrequently used device. The many appellate court decisions, however, show that summary judgment is a typical and regularly used tool to dismiss employment discrimination cases.

Appellate courts are supposed to review *de novo* a district court's grant of summary judgment in an employment discrimination case. Byrnie v. Town of Cromwell et al., 243 F.3d 93 (2d Cir., 2001). In deciding a summary judgment motion, the court must resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment (typically the plaintiff). Cifra v. G.E. Co., 252 F.3d 205, 216 (2d Cir. 2001). Circumstantial evidence may be used to prove discrimination claims, because "the question facing triers of fact in discrimination cases is both sensitive and difficult" and because "[t]here will seldom be eyewitness testimony as to the employer's mental process." Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 2105 (2000). Moreover, "where intent and state of mind are in dispute, summary judgment is ordinarily inappropriate.... Thus, a trial court should exercise caution

when granting summary judgment to an employer where...its intent is a genuine factual issue.” Carlton v. Mystic Transp., Inc., 202 F.3d 129, 134 (2d Cir.), cert. denied, 120 S.Ct. 2718 (2000). (citation omitted) Summary judgment is particularly disfavored in discrimination cases because “a trial court must be cautious about granting summary judgment to an employer when ... its intent is at issue.” Gallo v. Prudential Residential Servs., Ltd., 22 F.3d 1219, 1224 (2d Cir. 1994).

The burden-shifting framework for evaluating discrimination claims is familiar. Plaintiffs must first prove a *prima facie* case of discrimination by satisfying the *de minimis* burden of establishing that: (1) they are members of a protected class; (2) they were qualified for their job;² (3) they suffered an adverse employment action; and (4) such action arose under circumstances supporting an inference of discrimination.³ See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); O’Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311-312

² Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, (2d Cir. 2001), cert. denied, 112 S. Ct. 348 (2001) (holding that lower court erred in overstating employee’s burden of proving a *prima facie* case by requiring her to show that her job performance was satisfactory and stating that “especially where discharge is at issue and the employer has already hired the employee, the inference of minimal qualification is not difficult to draw.”) (citation omitted).

³ Danzer v. Norden Sys., Inc., 151 F.3d 50, 56 (2d Cir. 1998) (“The proposition that people in a protected category cannot discriminate against their fellow class members is patently untenable.”); Stanojev v. Ebasco Services, Inc., 643 F.2d 914, 921 (2d Cir. 1981)(one way to show the existence of age discrimination is to present evidence of a “youth movement” or evidence that managers have a “preference for younger employees”)

(1996)(employer's preference for "substantially younger" employees may raise an inference of age discrimination).

Once a plaintiff establishes a prima facie case of discrimination, a rebuttable presumption of discrimination arises. Carlton, 202 F.3d at 134. This is a burden of production only, involves no credibility assessment and is "minimal." Reeves, 120 S.Ct. at 2106; St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993).

The burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for the termination. See, e.g., Reeves 120 S.Ct. at 2105. If the employer offers via admissible evidence a justification for its action, if believed by a reasonable trier of fact, then the presumption disappears and the sole remaining issue is "discrimination *vel non*." Byrnie, 243 F.32 at 101-02; St. Mary Honor Ctr., 509 U.S. at 510-11 (if the employer articulates a non-discriminatory reason for its employment action, the presumption of discrimination raised by the prima facie case "simply drops out of the picture.").

If an employer articulates a justification for its action, then the burden shifts back to the plaintiff to offer proof that would allow a rational fact-finder to conclude that the proffered reason was not the true reason for the discharge, and that an illegal factor, such as age, race, sex or disability was at least one of the

motivating factors. St. Mary Honor Ctr., 509 U.S. at 507-08.⁴ At the summary judgment stage, plaintiffs need not prove pretext, but need show only that triable issues of material fact exist as to whether defendant's reasons for discharging him are false or pretextual. Dister v. Continental Group, Inc., 859 F.2d 1108, 1113 (2d Cir. 1988).

In making this determination, it "is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." Reeves, 120 S.Ct. at 2108.

Pretext may be shown "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Dister, 859 F.2d at 1113. "[O]nly occasionally will a *prima facie* case plus pretext fall short of the burden a plaintiff carries to reach a jury on the ultimate question of discrimination." Zimmerman v. Associates First Capital Corp., 251 F.3d 376, 382 (2d Cir. 2001). See also Stratton v. Department for the Aging, 132 F.3d 869, 880-

⁴ Justice Ginsberg, in her concurring opinion in Reeves, noted that "the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced" evidence of a *prima facie* case and evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false. Id. at 2112. Justice Ginsburg stated that the only exception to this rule was if the employer could demonstrate "conclusively" that discrimination could not have been its motivation. Id. She opined, however, that such a demonstration would be "uncommon" and "atypical." Id.

81 (2d Cir. 1997)(where a defendant does not contend that its employment decision, although pretextual, is based on a non-discriminatory reason such as “back-scratching, log-rolling, horse trading, institutional politics, envy, nepotism, or spite,” it is appropriate and reasonable to conclude that the pretextual reason is a cover for illegal discrimination).⁵ See Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 51 (2d Cir. 1998)(inconsistent application of company disciplinary policy sufficient for jury to find that employer’s defense was pretext for discrimination); Carlton, 202 F.3d at 137 (“evidence of inconsistency in [company’s] handling of supposedly underperforming employees” can establish existence of disputed issues of fact regarding pretext).

The Court in Reeves held that an employer would be entitled to judgment as a matter of law where the record “conclusively revealed” a non-discriminatory reason, or if the plaintiff created only a “weak” issue of fact as to whether the employer’s reason was untrue and there was “abundant and uncontroverted independent evidence” that there was no discrimination. Id at 2109. The Court thus concluded that whether judgment as a matter of law is appropriate in any particular case depends on a variety of factors, such as the strength of the prima

⁵ Stratton, 132 F.3d at 879 n. 6 (plaintiff had a strong record and was inexplicably treated in a negative fashion as soon as younger supervisor took over; the Court noted “[a]ctions taken by an employer that disadvantage an employee for no logical reason constitute strong evidence of an intent to discriminate.”).

facie case, the probative value of the proof that the employer's explanation is false and any other evidence that supports the employer's case. Id.⁶

One issue that recurs in discrimination cases is the question of whether the employer treated similarly situated employees better than the plaintiff, thereby undermining a claim of discrimination. This argument, while superficially appealing, is nonetheless beside the point. "The fundamental issue in every discrimination case is whether plaintiffs themselves were fired at least in part because of their age, regardless of whether other employees suffered discrimination or not." Golia v. The Leslie Fay Company, Inc., 01 Civ. 1111

⁶ Typically, such as in an age discrimination case, the employer's liability depends on whether the plaintiffs' age "actually played a role in the employer's decision making process and had a determinative influence on the outcome." Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). Of course, a plaintiff need not prove that "age was the only or even the principal factor in the adverse employment action, but only that age was one of the motivating factors in the decision." Carlton, 202 F.3d at 135. As the Second Circuit noted in Carlton, 202 F.3d at 134:

Plainly, the purpose of the ADEA is to prohibit discrimination in employment on account of age. As Judge Learned Hand explained, "statutes should be construed ... with some imagination of the purposes which lie behind them...." Hence, it is important for a court when reviewing this kind of case to bear in mind the findings Congress made at the time of the ADEA's enactment. Among those findings was that older workers are disadvantaged in retaining employment and regaining it after being discharged, and that unemployment among older workers, relative to younger ones, was high. (citations omitted)

(GEL), 2003 WL 21878788, * 5 (S.D.N.Y., August 7, 2003). Thus, even if every other person in the protected class does not suffer an adverse job action, that fact “is hardly conclusive with respect to motivations behind *plaintiffs’* firing, and therefore cannot in itself definitively prove that age did not play a part in the decisions to terminate plaintiffs.” Id., citing, Graham v. Long Island R.R., 230 F.3d 34, 43-44 (2d Cir. 2000)(“Since Title VII’s principal focus is on protecting individuals, rather than a protected class as a whole, an employer may not escape liability for discriminating against a given employee on the basis of race simply because it can prove it treated other members of the employee’s group favorably.”); Price Waterhouse v. Hopkins, 490 U.S. 228, 241-42 (1989)(plurality opinion)(holding that the “critical inquiry” in discrimination cases is whether the forbidden characteristic “was a factor in the employment decision at the moment it was made”).

Stray Comments

Employers and courts have come to rely heavily on the “stray comments” doctrine to defeat discrimination claims. Stray comments are what appear to be statements reflecting a discriminatory animus, but which are nonetheless discounted for a number of reasons, such as the fact that they are not made by the decision-maker, or are remote to the time of termination, or otherwise infrequent and appear unconnected to the challenged employment decision.

Statements made by a decision-maker are not considered stray, however, where they indicate that an illegal factor, such as youth, was a played a part in the company's makeup of its sales force. Kirsch v. Fleet St., Ltd., 148 F.3d 149, 162-63 (2d Cir. 1998). See also Fuller v. Gannett Co., 1989 WL 146761, 1989 U.S. Dist. LEXIS 14485, at *15 (S.D.N.Y. 1989) (“[W]hether disputed oral and written statements in question comprise a ‘smoking gun’ evidencing policy of age discrimination or are wholly innocuous is largely a questions of credibility, an issue properly left for trial.”)

In addition, “[w]hen ... other indicia of discrimination are properly presented, the remarks can no longer be deemed ‘stray,’ and the jury has a right to conclude that they bear a more ominous significance.” Danzer v. Norden Sys., Inc., 151 F.3d 50, 56 (2d Cir. 1998); See Browning v. President Riverboat Casino-Missouri, Inc., 139 F.3d 631, 635 (8th Cir. 1997) (more than stray remark where supervisor stated – about an employee he ultimately fired – “that white boy better learn who he’s messing with, he better get his act together”).

Plaintiffs may rely on even “stray remarks” as circumstantial proof of discrimination, because they "may indeed persuade the factfinder that the plaintiff has carried his or her ultimate burden of persuasion." Ostrowski v. Atlantic Mutual Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992); Price Waterhouse, 490 U.S. at 251 (“[r]emarks at work that are based on sex stereotypes do not inevitably prove that

gender played a part in a particular employment decision ... [although] stereotyped remarks can certainly be *evidence* that gender played a part”(emphasis in original).

Same Actor Inference

Employers often invoke the “same actor” inference in order to defeat discrimination claims on summary judgment, and age discrimination claims in particular. The rationale behind the doctrine is “When the same actor hires a person already within the protected class, and then later fires that same person it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire.” Carlton, 202 F.3d at 137-38. The inference is stronger (i.e., no discrimination) when the termination occurs within a relatively short time (a few days to a two years) of the hiring. Id. On the other hand, the “inference is less compelling when a significant period of time elapses between the hiring and firing.” Id. at 138. In Carlton, the Court rejected the inference where seven years had elapsed between the plaintiff’s hiring and firing.