

OPENING STATEMENT

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Past issues of *Cases & Points* have contained articles on the status of the law in a wide variety of topics including: employment litigation (Volume II, Issue 3), the effect of the "open and obvious" defense in bodily injury litigations (Volume V, Issue 1), the "serious injury" threshold in automobile liability actions in New York (Volume III, Issue 3), and the defense of "spoliation of evidence" (Volume III, Issue 4).

This issue of *Cases & Points* will update our readers on recent developments in those areas of the law.

Employment Practices Liability: Evidence of Employment Discrimination – The Impact of *Desert Palace* in the Second Circuit

By Stacey D. Finley

In 2003, the Supreme Court unanimously held that a party may prove an adverse employment action was motivated by permissible and impermissible factors ("mixed motives") *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003) solely through the use of circumstantial evidence. Until then, the overwhelming majority of Courts held that "direct evidence" of discrimination was necessary for a plaintiff to take advantage of the "mixed-motive" standard provided in the Civil Rights Act of 1991.

History of Employment Discrimination Pre-*Desert Palace*

Under Title VII of the Civil Rights Act of 1964, an adverse employment action is one where an employee believes he was discriminated against based on his race, color, religion, sex or national origin. This action can be proven in two ways. One is direct evidence of intentional discrimination and the other is through indirect evidence of intentional discrimination.

A plaintiff can make its *prima facie* case with either direct or circumstantial evidence of the defendant's discriminatory actions. The burden then shifts to the defendant to establish a legitimate non-discrimination reason for the employment practice. If the defendant meets that burden, the burden shifts back to the plaintiff to prove that the reason given by defendant is a pretext for discrimination. *McDonnell-Douglas Corp. v. Green*, 441 U.S. 794 (1973).

A single motive case is one where only one

dominant factor caused an adverse employment action. Single motive cases are typically analyzed under the *McDonnell-Douglas* framework. However, a mixed-motive case is one where evidence exists that the employer had both a legitimate, non-discriminatory reason for the action as well as an unlawful discriminatory reason for the action. This was first discussed in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In this case the Court held that if the plaintiff proved by direct evidence that a discriminatory factor played a role in the action, then the burden shifted to the employer. However, the Court also concluded that the employer could avoid all liability if it could prove that it would have made the same decision even if it had not allowed the discriminatory motivation to play a role. In other words, a defendant employer could avoid all liability, even under Title VII, if it could establish an affirmative defense that the same action would have been taken despite the discrimination in the workplace.

In response to the Court's decision, Congress amended Title VII in 1991, eliminating an employer's ability to escape liability, by stating that an unlawful employment practice is established when race, color, religion etc., was a motivating factor even though other factors also motivated the practice. The newly codified act, however, did not address the issue of what kind of evidence would be required to prove an unlawful employment practice. Therefore a majority of circuits continued to hold fast to the opinion in *Price-Waterhouse*, which required direct evidence in a mixed-motive case.

The *Desert Palace* Decision

Catharina Costa, was a warehouse worker at the *Desert Palace* hotel and casino who brought suit against her employers asserting gender and sex

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discrimination. Ms. Costa had received several reprimands and had a long history of complaints against her regarding her coworkers. Eventually, Ms. Costa was terminated due to a physical altercation with another employee.

Plaintiff lacked any direct evidence that her termination was motivated by her gender. She requested, and was given, a mixed motive jury instruction. The other employee was a male and was only suspended. The jury found in her favor and awarded her \$350,000 plus attorneys' fees and costs. Defendants appealed and the 9th Circuit vacated the decision based on the fact that since she had not produced any direct evidence of discrimination a mixed-motive jury instruction was incorrect.

In an *en banc* rehearing before the 9th Circuit, the court ruled seven to four that the instructions given were in fact correct and that direct evidence is not needed in any mixed-motive cases. The defendant appealed to the Supreme Court. The Supreme Court held that the evidentiary obstacles listed in *Price Waterhouse* did not apply to the Title VII. Therefore plaintiffs may rely solely on circumstantial evidence in a mixed-motive case.

Post-Desert Palace in the Second Circuit

The Second Circuit Court of Appeals has given little guidance regarding the *Desert Palace* decision. The cases discussed below are some of the most recent decisions in the 2nd Circuit regarding employment discrimination claims.

- *Jones V. NYC Health and Hospital Corp.*, 2004 WL 1303647 (2nd Cir. N.Y. 2004) . In this case, the plaintiff filed suit based on race and gender discrimination and alleged that she suffered retaliation for complaining about the discrimination. Summary judgment was granted to her employer on the race claim and the retaliation claims, however a jury trial was granted on the gender claim. Plaintiff requested a mixed- motive jury charge, which was denied by the court. The jury found in favor of the defendants. The Court of Appeals held that in employment discrimination cases a mixed-motive charge is proper where a plaintiff presents sufficient evidence for a reasonable jury to conclude by a preponderance of the evidence that race, color religion, sex or origin was a motivating factor. They held that the lower court properly rejected her charge because it was in many respects an incorrect statement of the law.
- *Bujnicki v. American Paving and Excavating*, 2004 WL 1071674 (W.D.N.Y. 2004). Plaintiff filed a complaint under Title VII of the Civil Rights Act alleging discrimination and that she was hired to do one particular job while the defendants made her do many other jobs. Defendants disputed her claims. Defendants moved for summary judgment on all the claims. Here the court held that it is well settled that Title VII claims are analyzed under the burden shifting analysis of *McDonnell Douglas*. The court determined that plaintiff met the *prima facie* burden and whether the defendants had set forth a legitimate non-discriminatory reason for their actions turns on disputed material issues of fact, therefore summary judgment was not possible. Plaintiff's intentional infliction of emotional distress claim was dismissed; however the remainder of her case was not subject to summary judgment .

- *Woodman v. WWOR-TV, Inc.*, 293 F.Supp.2d 381 (S.D.N.Y. 2003). The court subjected plaintiff's claim to the *McDonnell Douglas* analysis, requiring plaintiff to first make a *prima facie* case of discrimination. However the court did address the *Desert Palace* case holding that cases brought under this theory could be proven with direct or circumstantial evidence. The Court held that even under this more sympathetic scheme, plaintiff could not establish that an illegitimate consideration was used in the decision to terminate her .

Conclusion

What is clear from these 2nd Circuit cases is that it is hard to distinguish between a single motive case and a mixed-motive case and difficult to predict which law will be applied. Does the *Desert Palace* decision make *McDonnell Douglas* obsolete? Or does *McDonnell Douglas* still exist but only in terms of a single motive case? Further Court rulings will be required to clarify what kind of evidence is going to be needed to prove a discrimination case whether it be single or mixed motive. Until that happens, uncertainty will continue to exist..

Recent Court Decisions Affecting the "Open and Obvious" Defense in Bodily Injury Liability

By: Gail J. McNally

Until recently, the various Departments of the Appellate Division had treated the effect of the "open and obvious" defense differently. In the First Department, the open and obvious defense did not present the defendant with a basis for a summary judgment. However, in the Second Department, that same defense did present the defendants with a basis for summary judgment. (See *Cases & Points*, Volume V, Issue 1.)

However, within the past few months the Appellate Divisions in the First and Second Departments have issued rulings which, in effect, eliminate this defense as a basis for a defendant to obtain summary judgment.

In *DiVietro v. Gould Palisades Corp.*, 4 A.D.3d 324, 2004 N.Y. Slip Op. 00489, 771 N.Y.S.2d 527, (decided February 2, 2004), the plaintiff alleged that she slipped and fell on rock or gravel as she stepped from a stairway to a walkway that was under construction. The plaintiff was aware of the alleged dangerous condition of the walkway prior to her fall. The defendants moved for summary judgment, relying on the doctrine of open and obvious.

The Appellate Division, Second Department held that where a dangerous condition exists on property, the fact that the condition was open and obvious will relieve the landowner from a duty to warn of the condition. It will not, however, relieve the landowner of the burden of demonstrating that "he or she exercised reasonable care under the circumstances to remedy the condition and make the property safe". Therefore, a question of fact existed as to whether the defendants exercised reasonable care to secure the construction site, precluding summary judgment. That the condition was open and obvious merely created an issue as to the plaintiff's comparative negligence.

In *Centeno v. Regine's Originals, Inc.*, 5 A.D.3d 210, 2004 N.Y. Slip Op. 01691, 773 N.Y.S.2d 62, (decided March 16, 2004), the plaintiff tripped and fell over a clothing rack base in a clothing store. The plaintiff alleged that the base of the rack was covered by clothing that had fallen off the rack.

The defendants moved for summary judgment arguing that the clothing rack was an open and obvious condition, readily observable. The defendants further argued that as the clothing rack was open, obvious and readily observable they had no duty to monitor the condition.

The Appellate Division, First Department held that there is no bright line test for determining what is open and obvious. The test is whether any observer reasonably using his or her senses would see the condition. Since this test incorporates a reasonableness standard, it is fact specific and usually presents a question for resolution by the trier of fact. Further, in any event the degree to which a dangerous condition is open and obvious goes to the issue of comparative fault.

The third case, *Westbrook v. WR Activities-Cabrera Markets*, 773 N.Y.S.2d 38, 2004 N.Y. Slip Op. 01517, (decided March 19, 2004), involves a plaintiff who tripped and fell over a cardboard box left in the aisle of a supermarket. Plaintiff alleged that as she turned in to the aisle, she fell forward across a box which was just off the corner near the middle of the aisle. Plaintiff did not see the box prior to her fall. The box dimensions were 2 ½ feet long by 1½ feet wide and 10-12 inches tall. Defendants moved for summary judgment arguing that the box over which plaintiff fell did not constitute a dangerous condition as a matter of law, and did not give rise to a duty to warn as it was open, obvious and readily observable.

The Appellate Division, First Department reversed the lower court's decision, dismissing the matter, holding that it was error to determine as a matter of law that the box was an open and obvious condition based upon its placement, and further that even if the box was open and obvious as a matter of law, that merely eliminates the property owner's duty to warn, but does not eliminate the broader duty to maintain the premises in a reasonably safe condition.

The open and obvious nature of a hazard may obviate a claim that the property owner violated a duty to warn of, or place barriers to protect against, dangers on the premises, but it does not eliminate a claim that the presence of the hazardous condition constituted a violation of the property owner's duty to maintain the premises in a reasonably safe condition.

These three cases, looked at as a whole have, in good part, eliminated the use of the doctrine of open and obvious as a basis for summary judgment. Based upon these cases, the open and obvious defense can only be used in a situation in which the defendants have shown that there is no question of fact as to their maintenance of the property in a reasonably safe condition. Even with that, the open and obvious defense may only be applied to show plaintiff's own comparative negligence for failing to see what there is to be seen.

Recent Developments in "Serious Injury" Case Law

• Physician affidavit fails to account for subsequent accident as the cause of plaintiff's injuries.

In *Desamour v. NYC Transit Auth.*, 777 N.Y.S.2d 706 (decided May, 2004), the Second Department affirmed a grant of summary judgment to the defendant where the affirmation submitted by the plaintiff's physicians in opposition to defendant's motion failed to adequately account for the plaintiff's subsequent motor vehicle accident as the cause of her alleged current condition. The Court found that the reports of the physicians were conclusory as to the effect of the second accident, failed to quantify the plaintiff's limitation and range of motion and merely noted the existence of disc bulges.

• Defendant's burden with respect to plaintiff's 90/180 claim.

The question of what a defendant must show in order to put plaintiff to her proof of serious injury under the 90/180 day rule was answered by Justice Kramer of the Supreme Court, Kings County in *Nembhard v. Delatorre*.

There, Justice Kramer granted defendant's motion for summary judgment on threshold. Plaintiff then moved to reargue the decision. In adhering to his original decision upon reargument, Justice Kramer found that defendant established a *prima facie* case that plaintiff's injuries were not serious through the affidavit of her physician who examined her and concluded that she had a normal neurological examination. The burden then shifted to the plaintiff to come forward with sufficient evidence to overcome defendant's motion. Although plaintiff argued that she had missed over 90/180 days of work as a result of her injuries, her absence from work was not substantiated with competent evidence of a doctor's statements of the medical necessity for her absence and thus, failed to establish that a triable issue of fact existed.

• Inability to exercise was found to raise "serious injury" issue of fact.

In a decision of the Civil Court, Queens County, Judge Markey decided that plaintiff's claim that as a result of injuries sustained in an automobile accident, he had lost his customary recreational activities, including weightlifting, created a question of fact as to whether plaintiff had sustained a "serious injury".

Insurance Law § 5102(d) requires that a plaintiff miss "substantially all" of his customary daily activities for 90 out of the 180 days following the accident. In *Panchmia v. Tauber*, 775 N.Y.S.2d 490, (decided April 12, 2004), Judge Markey concluded that plaintiff's inability to exercise and lost recreational activities were "substantially all" of his customary daily activities and thus, were potentially compensable. Accordingly, he found that there was a question of fact sufficient to defeat defendant's summary judgment motion.

• Chiropractor's Report, Three Years After the Accident, Is Insufficient to Raise an Issue of Fact

In *Curujo v. Doshi*, Judge Hinds-Radix, Civil Court, Kings County, granted defendant's summary judgment finding that the affidavit of a chiropractor who saw the plaintiff for the first time three

years after the accident was insufficient, by itself, to defeat a motion for summary judgment on the serious injury threshold.

The Judge found that where a plaintiff is unable to produce a report from a physician who treated the plaintiff shortly after an accident, as opposed to years following the accident, and where the examination "treatment" was specifically for the purpose of providing a report to defeat a threshold motion, was insufficient, as a matter of law.

For further information on these or any other "serious injury" cases, please contact Tina Fugazzi or e-mail tfugazzi@agfjlaw.com.

- **SPOILIATION OF EVIDENCE AS A CAUSE OF ACTION**

In a previous issue of *Cases & Points* (Volume III, Issue 4), we reported on the case of *Fada Industries* wherein the dissenting opinion by Justice Andrias of the Appellate Division, First Department, implied that a cause of action against a third-party for disposing of evidence could exist.

Recently, New York's Court of Appeals has held that negligent, careless or reckless (as opposed to intentional) destruction of evidence would not give rise to a cause of action against the spoliating party.

In *Met Life Auto & Home v. Joe Basil Chevrolet, Inc.*, 1 N.Y. 3rd 478, 775 N.Y.S.2d 754 (decided February 24, 2004) a car had been damaged in a fire that allegedly started while the car was in a garage. The fire also extensively damaged an attached residence. MetLife, the homeowner insurer of the residence that was damaged paid and sought to inspect defendant's vehicle. Defendant verbally agreed. Plaintiff and several others alleged by plaintiff to have been at fault could jointly inspect the vehicle. However, before the inspection took place, the defendant disassembled and disposed of the vehicle.

The subrogating insurer of the homeowner sued the defendant for damages it suffered by being unable to examine the car.

In rejecting the existence of such a cause of action, Judge Smith, writing for the Court noted the important difference between that case and one where a person destroys evidence during the course of a pending litigation. When that person is a party in the litigation, CPLR 3126 authorizes sanctions, including damages. When the person destroying the evidence is a thirdparty who has been served with a subpoena, the remedy is contempt, with damages being a permissible assessment by the Court. However, where, as in the *MetLife* case, no litigation was pending and there was no judicial process served, no cause of action could be brought against the defendant.

The lesson to counsel in such a situation, is to promptly file a motion with the Court for pre-action discovery. Once such an Order has been entered and served, the party who destroys evidence could be held liable for damages as a result.

For more information on this case or other spoliation issues, contact mgorelick@agfjlaw.com.

- **AGFJ DEVELOPMENTS**

- AGFJ is pleased to welcome Stefanie Cardarelli and Marissa Carpentiere as associates.

Stefanie is a graduate of St. John's University and Pace University Law School. She is an experienced defense litigator with experience in appellate practice.

Marissa is a graduate of St. John's University and Seton Hall Law School. She comes to us with significant experience in the defense of labor law, premises liability and automobile liability cases.

- In June, 2004 Dan Friedman presented "How to Avoid Being Impeached by your Claim File", at the Loss Executives Conference in Portland, Maine. For more information on the program, or copies of Dan's presentation, please contact dfriedman@agfjlaw.com

- Tina Fugazzi has been on a roll. She has been successful in obtaining summary judgment on behalf of AGFJ's clients in several different kinds of cases:

Nanton-Moses v. Rafiq, et al., Sup. Ct. Kings Co., motion for summary judgment granted on the issue of liability in an automobile accident. Co-defendant failed to come forth with any arguments to establish a question of fact existed as to our client's lack of negligence when co-defendant struck us in the rear. (Decided on 6/28/04.)

Rivera v. Alex Figliola Contracting Inc., et. al., Sup. Ct., New York Co., motion for summary judgment granted. Plaintiff failed to establish that our client, Alex Figliola, did any paving work in the area where she claimed to have fallen on improperly placed asphalt which created an alleged dangerous condition. (Decided on 3/30/04).

Perez-Chicon v. NYCTA and Washington Heights Arcade, et. al., Sup.Ct., New York Co., motion for summary judgment granted. Tenant, who was responsible for maintaining the location (a below ground shopping arcade) had no notice of alleged dangerous condition (construction debris) on subway staircase. (Decided on 2/19/04). For more information on these decisions, contact tfugazzi@agfjlaw.com

- **PUBLIC EDUCATION SERVICE**

It is our policy to appear as speakers at seminars, business and professional meetings, as well as before industry groups. In addition, whenever possible we attempt to fulfill requests for articles from industry publications. We will also make presentations on a variety of legal issues to claim and risk management departments. For further information, please contact Michael Gorelick at (212) 422-1200.

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