

THE DAILY RECORDER

June 4, 2009

“Me Too” Evidence in Discrimination Cases

By: Jennifer Brown Shaw and Matt Norfleet

The California Court of Appeal’s recent decision in Johnson v. United Cerebral Palsy/Spastic Children’s Foundation of Los Angeles and Ventura Counties may change the way courts rule on evidence in discrimination cases. The court found admissible as proof of discrimination other employees’ testimony about discrimination against them. Such “me too” evidence therefore may be admissible to bootstrap the plaintiff’s own claim.

Shifting Burdens

By now, employers and their lawyers are familiar with the “burden-shifting” analysis applied to discrimination cases. First approved by the U.S. Supreme Court in McDonnell-Douglas v. Green, in 1973, courts apply it when considering whether to grant employers’ motions for summary judgment or let the case proceed to trial. The plaintiff first makes out a “prima facie case.” The elements vary based on the type of claim. In a case alleging failure to hire or promote, for example, the plaintiff must allege she is a member of a protected category, is qualified for a job, applied for the job and rejected, and the job remains vacant or was awarded to a person outside the same protected category.

In discharge cases, the employee must show she was in a protected group, performing adequately, was fired, and the employer treated other “similarly situated” employees

outside the protected category more favorably. For example, a pregnant employee may establish a prima facie case by showing she was fired, allegedly for falsifying time cards, but non-pregnant employees who committed a similar violation were not.

If the plaintiff makes out a prima facie case, the court shifts the burden of production to the employer, who must provide a legitimate business reason for its action. If the employer does so, then the plaintiff will lose the case unless he or she can show that the employer’s explanation is a “pretext” for discrimination. The courts require specific and substantial evidence demonstrating that the legitimate reason is both untrue and a “cover-up” for an illegal reason – that is, discrimination.

Evidence of Pretext

There are a number of ways employees try to defeat a summary judgment motion with evidence that the employer’s legitimate business reason for the workplace decision is not legitimate. For example, the plaintiff may show the court that the employer’s reason changed over time, suggesting that discrimination was the “real” reason. The plaintiff also may dispute the employer’s stated reason with admissible evidence that the employer simply “got it wrong.” But the courts say that merely showing the employer’s reason was unwise, or even

incorrect, is not enough to survive a motion for summary judgment.

Employees may also attempt to demonstrate that the employer’s management treated others in the same protected group less favorably, too. Employment lawyers call such evidence about the treatment of other employees “me too,” evidence. Such testimony may show the court that the plaintiff was not alone in her perception of mistreatment. But such evidence presents a number of problems as well. Should each witness’ unique circumstances be the subject of a mini-trial over whether they indeed suffered discrimination? And can the plaintiff prove she was a victim of mistreatment by showing that her manager mistreated individuals other than the plaintiff herself? Finally, is it sufficient proof of illegal motive merely to show only that another employee in a protected group suffered from a negative action, when the plaintiff herself cannot succeed on her own claim with such a minimal showing?

“Me Too” and the Johnson Decision

In April, the California Court of Appeal reversed a decision from the Los Angeles Superior Court which had excluded “me too” evidence in an employment case. In Johnson v. United Cerebral Palsy/Spastic Children’s Foundation of Los Angeles and Ventura Counties, Johnson claimed she was fired immediately after taking sick leave related to a pregnancy. The

employer explained that she Johnson was fired because she falsified a timesheet by claiming she worked at a client's home when that was not the case.

Johnson offered several pieces of evidence to prove that her termination was a pretext for discrimination. This included attempting to establish that the employer's conclusion she was not present at the client's home was incorrect. Johnson showed that the defendant's investigator spoke to a witness who said she met a counselor named "Renee" at the client's home on the day in question, and that Johnson was the only counselor named Renee who worked for the defendant.

The court explained that no single factor offered by the employee was "substantial" enough to overcome the employer's non-discriminatory justification. However, taken together, the facts that the termination happened one day after she returned from sick leave, that the investigation appeared to be incorrect, and that the employer gave only vague reasons for the termination at the time, amounted to substantial evidence that the alleged falsification of the timesheet was a pretext for discrimination.

But Johnson also offered "me too" declarations from other employees who believed they were subject to discrimination, but who had not sued the employer. One employee said she attended a meeting with the managers involved in the case during which they discussed their desire to fire a pregnant employee because "they were worried about being liable in case she was injured, but they could not do that because it was illegal." They then discussed what reasons they could use to fire the employee, instead. (Of course, this is the very definition of "pretext"

for discrimination.) Another employee provided a declaration stating that one of the managers fired her and told her it was because she was pregnant. A co-worker similarly said she was fired within a couple of weeks of revealing that she was pregnant, but no reason was given. Another employee gave a declaration saying that she was aware of employees who were cited for timecard discrepancies but not fired for such conduct.

The Superior Court ruled that these statements were inadmissible. The Evidence Code protects parties to a lawsuit from the other party's claims that the opposing party is a bad person, unless there is some relationship to the issues in the case. Additionally, even if true and related to the case, evidence of prior conduct can be excluded by the court if the "probative value does not outweigh the prejudice." For example, if an employee is terminated for missing work, and the reason he missed work is because he was in jail on charges of beating up his wife, a court might admit evidence that the employee was not at work and maybe even that he was in jail, but exclude the reason for the arrest as more prejudicial than probative. The same principle can apply if employees try to prove their supervisors are simply rude, demanding jerks to merely demonize the management rather than prove their own cases.

The Court of Appeal took a different view of the situation. The court ruled that the "me too" testimony was per se admissible (that is, automatically admissible) and constituted substantial evidence that the employer's offered explanation for Johnson's termination was a pretext for discrimination. The court explained that such evidence was admissible as an exception to the usual rule

against inadmissible evidence of "bad character" because evidence of Johnson's managers' prior treatment of pregnant women showed intent, or "discriminatory animus." The evidence that the employer did not fire other employees found to have falsified timecards also showed that similarly-situated employees were treated less favorably than the pregnant plaintiff.

The court also noted that evidence of character defects like hostility towards pregnant women would usually be kept out of court because of the risk of prejudicing the jury, but "because it is so easy to concoct a plausible reason for ... firing ... a worker who is not superlative" an employee had to have the opportunity to "to prove discrimination indirectly."

The U.S. Supreme Court's View of "Me Too" Evidence

The Court of Appeal's decision in Johnson went a step further than the U.S. Supreme Court in its Sprint/United Management Co. v. Mendelsohn, decision, issued last year. There, five employees who had not sued offered testimony that the same company discriminated against them because of their age. However, none of the other employees worked in the same business unit as the plaintiff. Also, none of the witnesses reported hearing discriminatory remarks from the managers who supervised the employee who sued. They simply claimed they were over 40 and had also lost their jobs.

The Supreme Court stepped in to decide "whether, in an employment discrimination action, the Federal Rules of Evidence require admission of testimony by nonparties alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff."

Ultimately, the Supreme Court reversed the Court of Appeals, holding that “me too” evidence is neither admissible nor inadmissible per se, but that the trial court must determine on a case-by-case basis whether it is relevant, and whether the potential prejudice to the employer will overcome the relevance.

Of course, the Supreme Court’s decision is not binding on California courts. Therefore, unless the California Supreme Court depublishes the decision or accepts review, Johnson will control the admissibility of “me too” evidence in California cases.

Conclusion

Some members of the plaintiff’s bar may celebrate Johnson. However, only admissible evidence can defeat a motion for summary judgment, or come in at trial. Therefore, even “me too” evidence must be supported by adequate foundation and must not be based on inadmissible hearsay.

Johnson also featured rather compelling “me too” evidence, essentially admissions of discrimination. The mere fact that employees are terminated or disciplined is a part of doing business, and will not be admissible just to show that the employer is a heartless terminator of employees. However, when managers make comments to employees that the

reasons for their terminations are discriminatory, or even discuss among themselves the best excuses to cover for discriminatory practices, the courts will allow that evidence to come in.

The evidence in Johnson, if true, demonstrates poor personnel practices at best, and discriminatory treatment at worst. Employers must continue to secure managers’ commitment to their non-discrimination policies. Training management regarding how to make and communicate personnel decisions lawfully will cut down on “me too” evidence by reducing circumstances under which employees may form the belief they experienced discrimination even though they chose not to sue.

Reprinted by permission of The Daily Recorder.



jshaw@shawvalenza.com

Jennifer Brown Shaw is a partner at Shaw Valenza LLP. Her practice includes providing regular advice and counsel to private and public sector employers. She also develops and presents seminars on legal issues in the workplace for management and non-supervisory employees.



300 Montgomery Street, Suite 788
San Francisco, California 94104
Tel: (415) 983-5960
Fax: (415) 983-5963

520 Capitol Mall, Suite 630
Sacramento, California 95814
Tel: (916) 326-5150
Fax: (916) 497-0708

www.shawvalenza.com