TOP 10 WAYS PLAINTIFFS TRY TO PROVE PRETEXT IN DISCRIMINATION AND RETALIATION CASES

Mark J. Oberti & Ed Sullivan
Oberti Sullivan LLP
723 Main Street, Suite 340
Houston, Texas 77002
(713) 401-3555
mark@osattorneys.com
ed@osattorneys.com

Linda O. Headley
Littler Mendelson PC
1301 McKinney Street
Suite 1900
Houston, Texas 77010
(713) 951-9400
lheadley@littler.com

Joseph Y. Ahmad
AZA
1221 McKinney Street
Suite 2500
Houston, Texas 77010
(713) 655-1101
joeahmad@azalaw.com

AHMAD
ZAVITSANOS
ANAIPAKOS
ALAVI
MENSING
AZA
Tough Name. Tougher Opponent.

Disclaimer

Every case is fact specific and must be judged on the totality of circumstances as reflected in the record.

Thus, just because a plaintiff has proof of one or more of the things mentioned in this presentation is not a guarantee that his or her case should or will survive summary judgment on issue of pretext.

Remember what the ultimate question is in a discrimination/retaliation case.

Indeed, for each case cited in this presentation, there are other cases distinguishing them on the specific facts of that case, and finding that summary judgment was warranted.

But, this webcast is still valuable. We promise ☺

1. Inaccurate Statements In EEOC Position Statements May Be Proof Of Pretext:

Miller v. Raytheon Co., 716 F.3d 138 (5th Cir. 2013). Affirming a seven-figure jury verdict in an age discrimination case partially because "[a]t trial, Miller presented undisputed evidence that Raytheon made erroneous statements in its EEOC position statement."

See also Burton v. Freescale Semiconductor, Inc., 798 F.3d 222, 239-40 (5th Cir. 2015) (holding that a jury may view "erroneous statements in [an] EEOC position statement" as "circumstantial evidence of discrimination."); *McInnis v. Alamo Comm. College Dist.*, 207 F.3d 276, 283 (5th Cir. 2000) (reversing summary judgment that had been entered for the employer in a discrimination case partially because the employer's report to the EEOC "contained false statements . . . .").

2. Lack of Documentation May Be Proof Of Pretext:

Laxton v. Gap Inc., 333 F.3d 572 (5th Cir. 2003). The Gap fired a manager allegedly based in part on employee complaints. "Yet, at trial, [The] Gap produced no contemporaneous written documentation of any employee complaints, despite testimony that the corporation abides by rigorous record-keeping policies."

Based in part of this evidence, the Fifth Circuit affirmed a jury verdict in the plaintiff's favor in a pregnancy discrimination case.

2. Lack of Documentation (Continued)

Under the law, when an employer's stated motivation for an adverse employment decision involves the employee's job performance, but there is no supporting documentation of the sort that should exist if the employee really was a poor performer, then a jury may reasonably infer pretext.

See Walther v. Lone Star Gas Co., 952 F.2d 119, 124 (5th Cir. 1992); *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1465 (5th Cir. 1989) ("where the only evidence of intent is oral testimony, a jury could always choose to discredit it.").

2. Lack of Documentation (Continued)

Burton v. Freescale Semiconductor, Inc., 798 F.3d 222 (5th Cir. 2015):

"Here, as in *Laxton* and *Evans,* we face a lack of contemporaneous documentation coupled with evidence that such documentation should exist. As in *Evans,* such documentation was created after Burton came within the protections of the ADA and after the termination decision. Under the circumstances, this is additional circumstantial evidence of pretext."

2. Lack of Documentation (Continued)

New Fifth Circuit case reversing summary judgment in a TCHRA pregnancy discrimination claim states:

When, as here, a motion for summary judgment is premised almost entirely on the basis of depositions, declarations, and affidavits, a court must resist the urge to resolve the dispute—especially when, as here, it does not even have the complete depositions. Instead, the finder of fact should resolve the dispute at trial.

Heinsohn v. Carabin & Shaw, P.C., No. 15-50300, 2016 WL 4011160, at *14 (5th Cir. July 26, 2016).

Though unpublished, this case could substantially impact summary judgment practice in discrimination cases for years to come.

3. Failure to Investigate Under Highly Suspicious Circumstances May Be Proof Of Pretext:

Ion v. Chevron, 731 F.3d 379 (5th Cir. 2013). "Chevron's failure to conduct even the most cursory investigation, confront Ion about Peel's statements, or seek a second opinion under the FMLA calls into doubt Chevron's reasonable reliance and good faith on Peel's statements, and, at the very least, creates a fact issue as to whether it would have terminated Ion despite its retaliatory motive."

* Note: there are many cases saying that merely a sloppy or no investigation is not proof of pretext. Thus, the additional "highly suspicious circumstances" are critical to this argument.

3. Failure to Investigate Under Highly Suspicious Circumstances May Be Proof Of Pretext (cont'd):

See also Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 589-90 (5th Cir. 1998), *rehearing en banc granted, opinion vacated*, 169 F.3d 215 (5th Cir. 1999), *and opinion reinstated on rehearing*, 182 F.3d 333 (5th Cir. 1999). Affirming discrimination verdict for the plaintiff, and observing that:

"When Gipson told Deffenbaugh that she was terminated for "shopping on the clock", she explained that the VCR had been purchased by Williams, not her; and that Gipson could verify this by asking a fellow employee who had seen Williams make the purchase. Deffenbaugh testified that Gipson told her that his "mind [was] made up." He did not interview possible witnesses to the sale, even after Williams approached him and told him that he had made the purchase; did not interview the cashier; and did not check to see if there was a videotape of the incident. . . . Gipson failed to investigate, even when confronted by Williams' corroboration of Deffenbaugh's version of events."

3. Failure to Investigate Under Highly Suspicious Circumstances May Be Proof Of Pretext:

In *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 308 (5th Cir. 2004), an HR manager investigated the plaintiff for altering time-cards. She found that he had done so. Therefore, "without further investigation," the plaintiff was fired. *Id.* Rachid sued for age discrimination, claiming that his time card "alterations" were merely his good faith attempts to correctly submit payroll by deleting incorrect and inflated time entries. In reversing a summary judgment that had been entered for the employer, the Fifth Circuit found it suspicious that the employer "did not make any investigation to determine whether those deletions [by Rachid] were accurate." *Id.* at 314 n. 13.

4. Discriminatory Comments May Be Proof Of Pretext:

A. As Direct Evidence: In order for comments in the workplace to provide sufficient direct evidence of discrimination by themselves, they must be 1) related to the protected class of persons of which the plaintiff is a member; 2) proximate in time to the termination; 3) made by an individual with authority over the employment decision at issue (but note cat's paw); and 4) related to the employment decision at issue. *See Reed v. Neopost USA, Inc.*, 701 F.3d 434 (5th Cir. 2012).

B. But, As Additional Circumstantial Evidence: When offered in conjunction with other circumstantial evidence, to be probative they must merely: (1) show discriminatory animus; (2) on the part of a person that is either primarily responsible for the challenged employment action or by a person with influence or leverage over the relevant decisionmaker. *Goudeau v. National Oilwell Varco, L.P.*, 793 F.3d 470 (5th Cir. 2015).

5. An Employer's Shifting Explanations May Be Proof Of Pretext:

Burrell v. Dr. Pepper/Seven Up Bottling Grp, Inc., 482 F.3d 408 (5th Cir. 2007).

See also Nasti v. CIBA Specialty Chem. Corp., 492 F.3d 589, 594 (5th Cir. 2007) ("A court may infer pretext where a defendant has provided inconsistent or conflicting explanations for its conduct."); *Burrell v. Dr. Pepper/Seven Up Bottling Grp, Inc.*, 482 F.3d 408 (5th Cir. 2007) (shifting explanations can be evidence of pretext); *Gee v. Principi*, 289 F.3d 342 (5th Cir. 2002) (same); *Aust v. Conroe Indep. Sch. Dist.*, 153 S.W.3d 222 (Tex. App.–Beaumont 2004, no pet.) (shifting explanations given by the employer for its decision to terminate the plaintiff established a fact issue over whether its decision was motivated by unlawful discrimination); *cf. Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 235-36 (5th Cir. 2015) (reversing summary judgment for employer in discrimination case where two company witnesses gave different and shifting reasons for the decision to terminate the plaintiff).

6. A Given Reason For An Employment Decision That Is So Subjective It Is Essentially Meaningless May Get A Plaintiff To The Jury:

Patrick v. Ridge, 394 F.3d 311 (5th Cir. 2004). In *Patrick*, the Fifth Circuit found that "a hiring official's subjective belief than an individual would not 'fit in' or was 'not sufficiently suited' for a job is at least as consistent with discriminatory intent as it is with nondiscriminatory intent . . . ." *Id.* at 318.

7. Statistics May *Assist* In Proving Pretext

Miller v. Raytheon Co., 716 F.3d 138, 144 (5th Cir. 2013). Affirming jury verdict in an age discrimination case and relying in part of the fact that "[i]t is also undisputed that 77% of the employees laid off in supply chain management were at least 48 years old."

See also *Decorte v. Jordan*, 497 F.3d 433, 439 (5th Cir. 2007) (affirming jury verdict for the plaintiffs in a discrimination case, and stating, "Plaintiffs presented statistical data from which the jury could have further based its finding that race was a motivating factor in Jordan's staffing decisions.") (citing *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1137 (5th Cir. 1983) ("An employee may use statistics to show that an employer's justification for a discriminatory act is pretext."); *Walther v. Lone Star Gas Co.*, 977 F.2d 161, 162 (5th Cir. 1992) ("We have recognized that gross statistical disparities ... may be probative of discriminatory intent, motive or purpose").

8. If The Employer's Given Reason For Termination Is Factually False, That May Prove Pretext:

Haire v. Board of Sup'rs of La. State Univ. Agricultural & Mech. Coll., 719 F.3d 356, 365 n. 10 (5th Cir. 2013). In *Haire*, the court reversed summary judgment for the employer in a discrimination case, and held that, "[e]vidence demonstrating that the employer's explanation is false or unworthy of credence . . . is likely to support an inference of discrimination *even without further evidence of defendant's true motive*.") (italics in original).

9. Sometimes, Courts Find That A Failure to Follow Company Policies May Prove Pretext:

Smith v. Xerox Corp., 371 Fed. Appx. 514 (5th Cir. Mar. 2010).

Affirming jury verdict in a retaliation claim in part because, "Xerox's policies generally state that counseling and coaching of employees should occur prior to the issuance of formal warning letters, yet Xerox offered no documentation supporting Jankowski's claim that he counseled Smith before placing her on probation."

9. Sometimes, Courts Find That A Failure to Follow Company Policies May Prove Pretext (cont'd)

See also Tyler v. Unocal Oil Co. of Cal., 304 F.3d 379, 396 (5th Cir. 2002), affirming jury verdict in an age discrimination case arising out of a RIF, and stating:

An employer's conscious, unexplained departure from its usual polices and procedures when conducting a RIF may in appropriate circumstances support an inference of age discrimination if the plaintiff establishes some nexus between employment actions and the plaintiff's age.

9. Sometimes, Courts Find That A Failure to Follow Company Policies May Prove Pretext (cont'd)

In *Southwestern Bell Tel. Co. v. Garza*, 58 S.W.3d 214, 229 (Tex. App. – Corpus Christi 2001), *aff'd in part, rev'd as to punitive damages*, 164 S.W.3d 607 (Tex. 2004), the court of appeals affirmed a verdict for the plaintiff of more than one million dollars, and stated that "[t]he jury heard evidence relating to Southwestern Bell's inexplicable failure to adhere to its own documented policies."

10. Proof That Other Employees Who Committed A Nearly Identical Act Of Misconduct Were Given Lesser Discipline Under Nearly Identical Circumstances May Prove Pretext:

Miller v. Illinois Dept. of Transp., 643 F.3d 190 (7th Cir. 2011)(reversing summary judgment in a retaliation case, and stating):

"In reviewing the evidence, we cannot second-guess IDOT's employment decisions to the extent that they were innocently unwise or unfair. But Miller has presented sufficient evidence from which a finder of fact could genuinely call into question IDOT's honesty. Miller presented evidence that Maurizio himself had had a genuinely violent workplace outburst but was not terminated, and yet Miller was terminated for a much milder comment on his first day back at work. . . . The question must be decided at trial rather than on summary judgment."

10. Proof That Other Employees Who Committed A Nearly Identical Act Of Misconduct Were Given Lesser Discipline Under Nearly Identical Circumstances May Prove Pretext (cont'd)

See also Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 589-90 (5th Cir. 1998), *rehearing en banc granted, opinion vacated*, 169 F.3d 215 (5th Cir. 1999), *and opinion reinstated on rehearing*, 182 F.3d 333 (5th Cir. 1999):

"Moreover, even if Deffenbaugh was technically "shopping on the clock", the evidence was sufficient for a reasonable jury to find that it was not the motivating reason for Wal-Mart firing her. For example, Deffenbaugh testified that she observed other employees buying items at the end of their shifts without being disciplined, and had never heard of anyone else being terminated from Wal-Mart for "shopping on the clock.'"

10. Proof That Other Employees Who Committed A Nearly Identical Act Of Misconduct Were Given Lesser Discipline Under Nearly Identical Circumstances May Prove Pretext (cont'd)

Wheat v. Fla. Par. Juvenile Justice Comm'n, 811 F.3d 702 (5th Cir. 2016):

Wheat, a juvenile detention office, attempted to assault a juvenile and to "whip that bitches' ass." *Id*. at 705. She was fired. She sued for retaliation, and lost in the district court on summary judgment.

The Fifth Circuit reversed summary judgment on her retaliation claim, finding sufficient evidence of pretext from evidence Wheat presented of situations "in which she, and other employees as well, were physically excessive toward juveniles but not discharged." *Id*. at 710.

The fact that her prior excessive force (for which she was not fired) occurred before her protected activity allowed Wheat to use her own prior situation as a comparator to prove pretext.

The Court concluded, "[t]hus, in sum, the record before us indicates that the Commission has discharged some employees for excessive force, but not others. This mixed record constitutes substantial evidence of a genuine issue of material fact as to whether Wheat's discharge would have occurred "but for" exercising her protected rights."

Bonus: Proof of a Rushed Paper Trail May Give Rise To An Inference of Pretext

Burton v. Freescale Semiconductor, Inc., 798 F.3d 222 (5th Cir. 2015):

In *Goudeau*, a recent age discrimination case, we reversed a grant of summary judgment in favor of a defendant-employer where, among other things, the employer had neglected its own disciplinary policy. *See* 793 F.3d at 476–77. We then then identified "evidence bear[ing] more directly on pretext than a failure to follow steps in a progressive discipline policy"—the plaintiff's contention "that the employer manufactured steps in the disciplinary policy by issuing written warnings to paper his file after it had decided to fire him." *Id*. In *Laxton*, we found evidence of discrimination sufficient where "the jury may have reasonably concluded that [Gap supervisors] solicited and exaggerated complaints from Laxton's assistant managers, issued a Written Warning and a Final Written Warning," and made "an effort to compile a laundry list of violations to justify a predetermined decision to terminate *Laxton*." 333 F.3d at 582.

Bonus: Proof of a Rushed Paper Trail May Give Rise To An Inference of Pretext

Burton v. Freescale Semiconductor, Inc., 798 F.3d 222 (5th Cir. 2015):

Indeed, the inference of pretext is stronger here than it was in *Laxton* and *Goudeau.* Here, (1) the defendants' e-mails show direct solicitation of belated "documentation" from Burton's supervisors, (2) there is evidence that Freescale had previously been lackadaisical about recording and reporting Burton's alleged deficiencies, and (3) the negative reports generated by the defendants were incorporated into a misleading "communication plan" regarding Burton's release.

TOP 10 WAYS PLAINTIFFS TRY TO PROVE PRETEXT IN DISCRIMINATION AND RETALIATION CASES

Mark J. Oberti & Ed Sullivan
Oberti Sullivan LLP
723 Main Street, Suite 340
Houston, Texas 77002
(713) 401-3555
mark@osattorneys.com
ed@osattorneys.com

Linda O. Headley
Littler Mendelson PC
1301 McKinney Street
Suite 1900
Houston, Texas 77010
(713) 951-9400
lheadley@littler.com

Joseph Y. Ahmad
AZA
1221 McKinney Street
Suite 2500
Houston, Texas 77010
(713) 655-1101
joeahmad@azalaw.com