No. 25365 -- Charles E. Smith and Annette Smith v. Sears, Roebuck and Co. and Gregory Bond

Starcher, Chief Justice, dissenting:

I disagree with the majority's decision to affirm the summary judgment entered in favor of the defendants, and so I respectfully dissent. Specifically, I do not agree with the majority's conclusion that the plaintiff failed to make a sufficient *prima facie* showing on an essential element of his age discrimination claim.

We have adopted a three-step "burden shifting" method of analyzing proof in discrimination cases. First, the plaintiff must make out a *prima facie* case of discrimination, by introducing evidence to suggest that an adverse employment decision was triggered by a consideration of improper factors such as age. Second, in response, the employer bears the burden of showing the employment decision was the result of a legitimate, non-discriminatory reason. Last, to be successful in his or her claim, the plaintiff must introduce evidence that the employer's proffered reason is a pretext rather than the true reason for the adverse employment decision.

We discussed this burden-shifting analysis in detail in *Skaggs v. Elk Run Coal Co.*, 198 W.Va. 51, 479 S.E.2d 561 (1996), where we stated:

> In a claim of intentional discrimination against a qualified individual with a disability, we apply a burden-shifting framework similar to that adopted in *McDonnell Douglas* [*Corp v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)], *Barefoot* [*v. Sundale Nursing Home*, 193 W.Va. 475, 457 S.E.2d 152 (1993)], and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407

> (1993). *See Morris* [*Mem. Convalescent Nursing Home, Inc. v. West Va. Human Rights Comm'n*,], 189 W.Va. [314] at 317-18, 431 S.E.2d [353] at 357 [(1993)]. This method of proof permits a plaintiff to establish his or her prima facie case, which is in essence a rebuttable presumption of discrimination. *See Texas Dept. of Community Affairs v. Burdine* 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207, 216 (1981); *Barefoot,* 193 W.Va. at 487 n. 20, 457 S.E.2d at 164 n. 20. The burden of production then shifts to the employer to come forward with a legitimate, nondiscriminatory reason for its actions. In the unlikely event that the employer at this juncture remains silent, the unrebutted presumption compels the court to enter judgment for the plaintiff. *Burdine,* 450 U.S. at 254, 101 S.Ct. at 1091, 67 L.Ed.2d at 216; W.Va.R.Evid. 301. But once the employer meets this burden of production, the presumption raised by the prima facie case is rebutted, and the "inquiry proceeds to a new level of specificity." *Burdine,* 450 U.S. at 255, 101 S.Ct. at 1094-95, 67 L.Ed.2d at 216. The *Barefoot/McDonnell Douglas* framework and its attendant burdens and presumption cease to be relevant at that point, and the onus is once again on the employee to prove that the proffered legitimate reason is a mere pretext rather than the true reason for the challenged employment action. *See Hicks,* 509 U.S. at 507-08, 113 S.Ct. at 2747, 125 L.Ed.2d at 416.

198 W.Va. at 71-72, 479 S.E.2d at 581-82.[1]

---

[1]As we stated in *Barefoot v. Sundale Nursing Home*, 193 W.Va. 475, 457 S.E.2d 152 (1993), this three-step analysis is not a "minuet for ordering the proof at trial. Rather, it provides a framework for analyzing the evidence and facilitating a trial court's rulings on motions to dismiss and for directed verdicts." 193 W.Va. at 483 n. 10, 457 S.E.2d at 160 n. 10.

The *Barefoot/McDonnell Douglas* framework places the burden first on the plaintiff to establish his *prima facie* case of discrimination. In Syllabus Point 3 of *Conway* we defined the elements of a *prima facie* case for age discrimination as follows:

> In order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, W.Va. Code 5-11-1 *et seq.* (1979), the plaintiff must offer proof of the following:
>
> (1) That the plaintiff is a member of a protected class.
>
> (2) That the employer made an adverse decision concerning the plaintiff.
>
> (3) But for the plaintiff's protected status, the adverse decision would not have been made.

Conway v. Eastern Associated Coal Corp., 178 W.Va. 164, 358 S.E.2d 423 (1986).

The majority in the instant case correctly determined that the plaintiff satisfied the first two elements of his *prima facie* claim, as required by *Conway*. The plaintiff is obviously a member of a protected class and he suffered form an adverse employment decision. However, I disagree with the majority's holding that the plaintiff failed to provide evidence sufficient to create a question of material fact concerning the third, "but for" element, set forth in *Conway.*

We have held that "the 'but for' test of discriminatory motive in [*Conway*], is merely a threshold inquiry, requiring only that a plaintiff show an inference of discrimination." Syllabus Point 2, *Barefoot v. Sundale Nursing Home,* 193 W.Va. 475, 457 S.E.2d 152 (1995).

To support the third element of his *prima facie* claim of discrimination, the plaintiff first demonstrated that he was replaced by a younger employee -- notably, one who was ineligible for benefits.

Second, the plaintiff submitted the affidavit of Martha Major, an employee of Sears. Martha Major stated in her affidavit that:

> While I was employed in the appliance department, I observed that Sears appeared to be engaging in practices that forced out older, higher paid employees who then were replaced by younger employees who earned far less.
>
> Sears put these practices into effect by, among others, reducing commissions on appliances sold, in some cases up to fifty percent; reducing individual work hours; and, in general, making it very difficult for the senior employees to earn at the levels they previously enjoyed, forcing them to retire or find other employment.

Third, the plaintiff submitted the affidavit of Lawrence Summers, another Sears employee, who stated that:

> Based on my first hand experience working at Sears in Charleston, West Virginia, in the appliance department, it is my opinion that Sears was systematically forcing out older, higher paid employees in favor of younger, lower paid employees.

Both affidavits support the plaintiff's claim that Sears was engaged in employment practices that discriminated against Sears' older employees.

Both of these affidavits provide circumstantial evidence supporting the plaintiff's case. Circumstantial evidence can be just as reliable and powerful as direct evidence in a discrimination case.[2]

[2] In a discussion of direct evidence versus circumstantial evidence in a discrimination case, we stated:

> We also emphatically reject the position that the burden shifts only when the plaintiff has established illicit motive through direct evidence, and we do so for several reasons. First, whether the plaintiff's proof is by direct or circumstantial evidence, or both, has nothing to do with the strength of her case; rather, the plaintiff's ability to produce direct evidence is completely accidental. Second, neither form of proof is necessarily more reliable than the other. Circumstantial evidence can be powerful, and direct evidence limp, and vice versa. Third, the direct-circumstantial distinction overlooks what the jury's role is in disparate treatment cases. Essentially, the jury is charged with the duty of recreating what in fact happened and whether the facts that did happen included intentional discrimination. Thus, if the jury reads the facts and concludes that the employee has proved that a discriminatory motive entered into the employer's decision, it should not matter whether that conclusion was induced by direct or circumstantial evidence. Fourth, we are not convinced that the direct-circumstantial distinction is a viable or meaningful one. Obviously, several of the federal circuits have had a great deal of difficulty with it, and there are substantial authorities who conclude that there is no such thing as direct evidence "that involves neither a logical nor an inferential process." 1A John H. Wigmore, *Evidence In Trials At Common Law* § 26 at 959-60 (Peter Tillers ed.1983) (quoted in Zimmer, *supra*, at 614).

Skaggs, 198 W.Va. at 76, 479 S.E.2d at 586 (citations omitted).

The plaintiff further supported his *prima facie* discrimination claim with powerful evidence tending to show that Sears' articulated reasons for firing the plaintiff were pretextual.

We have stated that "[i]n disparate treatment cases[3] under the West Virginia Human Rights Act, W.Va. Code, 5-11-9 (1992), proof of pretext can by itself sustain a conclusion that the defendant engaged in unlawful discrimination." Syllabus Point 5, in part, *Skaggs v. Elk Run Coal Co., Inc.*, 198 W.Va. 51, 479 S.E.2d 561 (1996). In other words, "[i]f the plaintiff has submitted credible evidence of the *McDonnell Douglas/Barefoot* prima facie case and enough evidence of pretext to create a question of fact, then the case should go to the jury. Pretext can be shown through either circumstantial or direct evidence." 198 W.Va. at 77, 479 S.E.2d at 587.

To demonstrate pretext, a plaintiff must demonstrate that "the employer did not act as it did because of its offered explanation." *Skaggs*, 198 W.Va. at 74, 479 S.E.2d at 584. The plaintiff in the instant case provided very substantial evidence of pretext sufficient to create a question of fact as to what Sears' real motive was for discharging the plaintiff.

Sears asserted that the plaintiff was dismissed from his employment because the plaintiff was involved in an altercation with a fellow employee. Sears' assertion that the plaintiff was dismissed for a non-discriminatory reason thus met the

[3]The term "'[d]isparate treatment' refers to cases in which a discriminatory motive produces an adverse employment action against the plaintiff." *Skaggs*, 198 W.Va. at 74,

burden placed on Sears by the burden-shifting framework of *Barefoot/McDonnell Douglas.*

To rebut Sears' assertion, the plaintiff provided a transcript of a telephone conversation that the plaintiff had with Mr. Blackburn,[4] and an affidavit from Mr. Jennings Womack, a retired Sears employee.

Mr. Womack had been employed by Sears for 35 years prior to his retirement. Mr. Womack managed several Sears stores, served as Director of Personnel for the North Central Zone, and served as the Assistant Zone Manager for the North Central Zone.

---

479 S.E.2d at 584.

[4]This telephone conversation was discussed more fully in the majority opinion.

Sears' Regional Manager asked Mr. Womack to assist in the investigation of the altercation between Smith and Mr. Patton. Following this investigation, Mr. Womack came to the conclusion that the Plaintiff had committed no offense "which gave Sears just cause to fire him." Mr. Womack stated that he was under the impression that other Sears employees, who had conducted the investigation in this matter, had agreed that Mr. Patton's account of the incident was not credible.[5]

---

[5]The pertinent part of Mr. Womack's affidavit is as follows:

> 9. Based on information provided, to me and my own conversations with the persons involved, I concluded, and was under the distinct impression that Mr. Denny, Mr. McMahon and Carl Blackburn, Director of Human Resources, agreed with me, that Mr. Smith had not committed an offense which gave Sears just cause to fire him. Instead, I concluded in my mind and was under the distinct impression that Mr. McMahon, Mr. Blackburn and Mr. Denny also concurred that Mr. Patton's account of the incident was not credible.
>
> 10. Disregarding this voiced opinion, Gregory Bond, Store Manager, nevertheless charged Charles E. Smith with willful misconduct and

fired him along with Ora L. Patton.

11. I had advised Mr. McMahon and Mr. Deny that, in my opinion, the worst option would be to release Mr. Smith because there was no evidence that Mr. Smith had engaged in any willful misconduct or committed any serious offense and that firing Mr. Smith would place Sears in an untenable position. Nevertheless, Mr. Bond's decision was confirmed even though all parties, in my opinion, believed that Mr. Smith was an innocent victim.

The affidavit of Mr. Womack and the transcript of the telephone conversation with Carl Blackburn tended to show that the Sears employees who conducted the investigation determined that the plaintiff was innocent. This evidence thus tended to show that Sears' articulated reason -- the plaintiff's alleged misconduct -- was a pretext.

This evidence of pretext -- combined with the plaintiff's age, the replacement by a younger employee, and the alleged climate of other age-discriminatory actions -- surely created a question of material fact regarding Sears' motive for terminating the plaintiff.

It is painfully obvious that the plaintiff met his *prima facie* burden placed on him by *Barefoot/McDonnell Douglas.* This case should have been submitted to a jury for final resolution. Therefore, I respectfully dissent.

I am authorized to state that Justice McGraw joins me in this dissent.