Case & Statute Comments

Younger is Not Enough

Knight v. Avon Products, Inc., 438 Mass. 413 (2003)

In a number of cases decided by the Supreme Judicial Court over the past few years,[1] a discrimination plaintiff tried a case successfully, convinced a jury that discrimination had occurred, and obtained substantial compensatory damages, only to have the jury verdict overturned on appeal because of a judicially imposed nuance in the law not previously articulated in Massachusetts. *Knight v. Avon Products, Inc*.[2] was such a case. Tried exclusively as an age discrimination claim, the case prompts the question whether discrimination plaintiffs should try their cases under several different theories, both novel and "safe," lest a glitch in the jury instructions or a new variation on an old standard ultimately prove fatal to their case on appeal. *Knight* also raises the specter that the three-stage order of proof method, originally described by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*,[3] and later adopted in Massachusetts by the Supreme Judicial Court in *Wheelock College v. Massachusetts Commission Against Discrimination*,[4] for the purpose of assisting plaintiffs in proving discrimination by indirect means, has now so supplanted other types of indirect proof of facts and has become so narrowed as to become an insurmountable hurdle to prevailing on appeal. Finally, the case provokes some consideration as to whether or not an "age-plus" theory might be advanced in the appropriate case.

The facts of the *Knight* case, as with many discrimination cases that proceed to trial, had a number of conflicting facts subject to interpretation. The plaintiff was 43 to 44 years old when she began working for Avon as a district sales manager, Northampton District, in 1993.[5] The Supreme Judicial Court determined that the facts most favorable to the plaintiff warranted the jury in finding the following. Before her hire, plaintiff disclosed to her direct supervisor and to the human services manager the existence of two cosmetics stores she owned and operated — one in Pittsfield, where the plaintiff lived, and the other in Lenox. Plaintiff and Avon agreed that upon her hire by Avon, she would close the Lenox store and turn the operation of her Pittsfield store over to her daughter. In 1994, plaintiff's direct supervisor was replaced. The new division sales manager also was made aware of, and expressed no reservations about, plaintiff's ownership of the Pittsfield store. Plaintiff's performance evaluations were all positive. After only a year of employment at Avon, she was recognized for her achievement in increasing sales by admission to the company's Circle of Excellence.[6]

Starting in the fall of 1994 plaintiff began experiencing medical problems, including chest pain and later, a thyroid condition, which she made known to Avon. After a meeting in the spring of 1995, plaintiff's new supervisor asked the plaintiff to run both the Pittsfield and Northampton districts on a temporary basis because the district sales manager for Pittsfield

1. *See* Lipchitz v. Raytheon Co., 434 Mass. 493, 494-95, 502-04 (2001). In *Lipchitz* the Supreme Judicial Court vacated the jury award and ordered a new trial, holding that the trial judge should have instructed the jury that, in addition to proving pretext, plaintiff had to prove the elements of "discriminatory animus" and that discrimination was "a determinative cause" of the adverse employment action in an indirect proof case. *See also* Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 117-19 (2000). The trial judge in *Abramian* correctly followed existing law by giving a jury instruction based upon the "pretext only" formula articulated in Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 443, 444-45 (1995) ("a plaintiff who has established a prima facie case and persuaded the trier of fact that the employer's articulated justification is not true but a pretext is entitled to judgment"). The Supreme Judicial Court held on appeal that it did not mean to state that plaintiff only has to prove pretext to prevail, vacated the judgment and awarded a new trial to Harvard College. The court reasoned that the so-called "pretext only" instruction was erroneous and the proper instruction henceforth was that the jury could infer, but was not required to find, discrimination upon a determination of pretext.

2. 438 Mass. 413 (2003).

3. 411 U.S. 792 (1973).

4. 371 Mass. 130 (1976).

5. 438 Mass. at 418 (2003). The decision mentions that the plaintiff was 46 years old on June 16, 1995, when her employment was terminated, but plaintiff's birthdate and hence her exact age at the time of her hire in October 1993 was not established in the decision.

6. 438 Mass. at 415-16.

was "not doing her job." The supervisor also asked plaintiff if she was interested in the district sales manager position for the Pittsfield district (closer to the plaintiff's home). It was not clear from the record whether plaintiff expressed interest in the Pittsfield position at this point.[7] Shortly after the spring meeting, plaintiff was introduced to a 24-year-old college graduate, hired to be a district sales manager.[8] Avon asked plaintiff to train her. In June of 1995, plaintiff was assigned to the Pittsfield district and the 24-year-old college graduate, after being trained by the plaintiff, was assigned to the Northampton district, plaintiff's previous territory.[9] According to the court, plaintiff had admitted that she wished to work in Pittsfield because of its proximity to her home and eventually accepted the assignment.[10]

Six weeks later, plaintiff's employment was terminated. Plaintiff was 46 years old at the time of her discharge. As grounds for the termination, the supervisor explained that Avon's chief executive officer had received an anonymous letter complaining about plaintiff's store and particularly the fact that the store sold Mary Kay cosmetics. The plaintiff was shocked, informing the supervisor that everyone at Avon, including the supervisor, knew about the store. The supervisor denied prior knowledge of the store's existence. [11] There was evidence, however, that plaintiff previously had given the supervisor a gift, which she identified as an item sold in her Pittsfield store, and the supervisor promised to visit the store in the future.[12] There was no evidence produced at trial that plaintiff in fact carried Mary Kay cosmetics,[13] although there was evidence proffered by Avon that plaintiff sold other competitive products at the store.[14]

After notice of her termination, plaintiff and her superiors engaged in a series of phone calls in which plaintiff apparently offered to close the store or allow Avon to use the site as a training center or meeting center. The human services manager responded by calling the plaintiff "naïve." Negotiations ceased soon thereafter. A 43-year-old sales representative, whom the supervisor earlier had stated was unqualified for the district manager position, became the interim, and then the permanent, Pittsfield district sales manager. The 24-year-old college graduate remained as district sales manager of the Northampton district.[15]

When charging the jury, the trial judge explained the three-stage order of proof articulated *in McDonnell Douglas* and *Wheelock College* and further refined by the Appeals Court as pertaining to age discrimination.[16] He described for the jury the four elements of a prima facie case of age discrimination. Establishment of a prima facie case through indirect evidence requires that plaintiff demonstrate (1) she was over the age of 40, (2) she performed her job at an acceptable level, (3) she was terminated and (4) she was replaced by a similarly or less qualified younger person.[17] Avon requested a jury instruction, which was denied by the trial judge, that the replacement be "substantially younger."[18] In response to special questions, the jury found that the plaintiff had established her prima facie case against plaintiff.[19]

At the second stage of proof, the employer may rebut the presumption of discrimination created by the prima facie case by articulating a legitimate, nondiscriminatory reason for the termination. Articulating a legitimate business reason for the adverse employment action is essentially a burden of production. Once the employer meets this burden, which is "not onerous," the plaintiff may submit evidence that the articulated reason is not the real reason, but instead is a pretext from which the jury may infer, but is not compelled to find, discrimination.[20] Again, in response to special questions, the jury found that Avon's proffered reason, *i.e.*, the discovery of the plaintiff's store, was untrue and constituted a pretext for age discrimination.[21]

On appeal, Avon argued that it was entitled to judgment as a matter of law for two reasons.[22] First, the company contended that plaintiff was required to prove that her replacement was "substantially younger." Second, Avon argued that the judge should have granted its motion for judgment notwithstanding the verdict because plaintiff's own evidence of pretext established that the "real reason" for the termination was Avon's concern about plaintiff's poor health, which was not discriminatory "in the context of an age discrimination claim."[23]

7. *Id.* at 416-17.

8. *Id.* at 417.

9. *Id.*

10. *Id.*

11. 438 Mass. at 417-18.

12. *Id.* at 415.

13. *Id.* at 417 n.3.

14. *Id.* at 418.

15. *Id.*

16. 438 Mass. at 420, citing Mitchell v. TAC Tech. Servs. Inc., 50 Mass. App. Ct. 90, 92 (2000); Tardanico v. Aetna Life & Cas. Co., 41 Mass. App. Ct. 443, 447 n.4 (1996).

17. 438 Mass. at 420-21.

18. *Id.* at 421.

19. *Id.*

20. *Id.* at 420 n.4.

21. *Id.* at 421.

22. 438 Mass. at 419-21. Avon moved for a directed verdict both at the end of the plaintiff's case and at the close of the evidence and further moved for a judgment notwithstanding the verdict.

23. *Id.* at 421.

In drawing its conclusion that the verdict should be reversed and judgment entered for Avon, the Supreme Judicial Court dismissed as irrelevant a number of Appeals Court decisions[24] concerning the fourth element of a prima facie case of age discrimination, *i.e.*, that the plaintiff be replaced with a less or similarly qualified younger person, to its present inquiry as to whether the replacement must be "substantially younger." Relying heavily on the United States Supreme Court's opinion in *O'Connor v. Consolidated Coin Caterers Corp.*,[25] which, the court acknowledged, did not establish the size of the age differential, the court adopted, as part of the plaintiff's burden of proof of the fourth element of her prima facie age discrimination case, an enhanced obligation to prove the replacement employee was "substantially younger." Reasoning that age is a "relative term," the court concluded where the age difference between the plaintiff and her replacement is "so insubstantial as to be meaningless," the case should not be submitted to the jury because there could be no inference that discrimination occurred.[26] The court then established a "bright-line" standard: "an age disparity of less than five years, by itself, is too insignificant to support a prima facie case of age discrimination."[27] Later, the court explained that the plaintiff could overcome this now-enhanced burden by providing other evidence that "age was a determinative cause in the termination."[28] Finally, the court applied its newly enhanced burden of proof to the facts, and found that plaintiff had not offered any "other evidence" of age discrimination. Even the evidence that the supervisor previously described the 43-year-old replacement as "unqualified" for the job did not, according to the court, permit the inference that Avon, motivated by discriminatory animus, plotted to transfer plaintiff to Pittsfield and replace her with a 24-year-old in Northampton.[29] The court refused to apply its enhanced burden of proof prospectively only.[30]

Although it perhaps was within its province to do so, the Supreme Judicial Court, having just imposed in Massachusetts an enhanced burden in an age discrimination case, with only a narrow escape hatch, then proceeded to act as a thirteenth super juror, determining that the plaintiff's "other evidence" that "age was a determinative cause in the termination" was lacking, notwithstanding the jury's finding that Avon acted with discriminatory intent. How could the plaintiff have avoided this result? Perhaps the answer lies with the evidence the court did not address after it concluded that plaintiff failed to prove her prima facie case.

Conspicuously missing from the Supreme Judicial Court's opinion is any in-depth discussion of the "pretext" evidence that plaintiff presented at trial — that Avon's real reason for firing her was its concern about the status of her health, not sudden discovery of her ownership of a store selling other lines of cosmetic products. Avon had advanced, as its second basis of appeal, that the "real reason" for the termination decision as presented by the plaintiff — her health — is nondiscriminatory in the context of an age discrimination case.[31] But is that really so? An employee's advancing age, accompanied by poor health, could well lead an employer to choose a healthier (and slightly younger) replacement. An older employee who suffers from cardiac related symptoms and a thyroid condition could be perceived as "old" whereas her healthier, even slightly younger counterpart, would not. Just two years before its decision in *Knight*, the Supreme Judicial Court recognized, in *Lipchitz v. Raytheon Co.*, "[e]mployment decisions that are made because of stereotypical thinking about a protected characteristic or members of a protected class, whether conscious or unconscious, are actionable under G.L. 151B."[32] The jury in *Knight* might well have determined that stereotypical thinking about older employees with health problems played a determinative role in Avon's decision to terminate the plaintiff's employment.

The *Knight* case begs the question whether the three-stage order of proof in indirect discrimination cases, with its initial four-prong burden for establishing a prima facie case (to which a fifth element, "substantially younger," has now been added in age-bias cases), is an appropriate standard for a "stereotypical thinking" type of discrimination case. The court previously acknowledged in *Lipchitz* that the analytical

24. Waite v. Goal Sys Intern., Inc., 55 Mass. App. Ct. 700 (2002); Powers v. H. B. Smith Co. Inc., 42 Mass. App. Ct. 657 (1997); Tardanico v. Aetna Life & Cas. Co., 41 Mass. App. Ct. 443 (1996).

25. 438 Mass. at 423-25 citing O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311-12 (1996).

26. 438 Mass. at 424-25.

27. *Id.* at 425. The Massachusetts Commission against Discrimination submitted an amicus brief, arguing that the fourth element could be satisfied with a showing that "plaintiff was replaced by someone 'with qualifications similar to the plaintiff's, regardless of age." *Id.* at 425 n. 8. It is not clear whether the MCAD will continue to support this standard in light of the *Knight* decision.

28. *Id.* at 425-26.

29. *Id.* at 426.

30. *Id.* at 427 n.10.

31. 438 Mass. at 421. The court, after determining that plaintiff did not fulfill her obligation to prove her replacement was "substantially younger" and, further that the supervisor's lie about the qualification of plaintiff's successor was not sufficient "other evidence" that age played a determinative factor in the termination, deemed it "unnecessary to decide the other issues raised by the parties." *Id.* at 427.

32. *Lipchitz*, 434 Mass. at 504.

framework of *McDonnell Douglas* and its state-court progeny, while useful at the summary judgment stage, could not be translated appropriately into a jury instruction. It admonished trial judges to veer away from burden-shifting directives and, instead, to "craft instructions that will focus the jury's attention on the ultimate issues of harm, discriminatory animus and causation. . . ."[33] Perhaps a reevaluation of the utility of the *McDonnell Douglas* framework as a grid for all discrimination cases based upon circumstantial evidence is not far behind.

Alternatively, it may be time to introduce an "age plus" theory of liability. In the sex discrimination context, where analogous theories have been advanced, "sex plus" or "gender plus" discrimination occurs "when a person is subjected to disparate treatment based not only on her sex, but on her sex considered in conjunction with a second characteristic."[34] To prevail in a "sex plus" case, plaintiff has to prove a subclass of women were treated less favorably as compared to the corresponding subclass of men.[35] Applied to age-based discrimination, a plaintiff would have to prove a subclass of older workers were treated less favorably than the subclass of younger workers. The plaintiff in *Knight* may have been able to prove that younger workers with health problems fared better than she, or argued, in the alternative, that she was a victim of disability or perceived disability discrimination, *i.e.*, that because of her health problems, she was perceived to be substantially older than the woman who eventually replaced her, notwithstanding an age differential of less than five years.[36] It is hard to tell from the decision or the appellate briefs whether the requisite evidence would have been available to the plaintiff. Even if such evidence had been proffered or if the plaintiff pursued an "age-plus" theory, given the court's propensity for refining jury instructions and burdens of proof, it is equally hard to predict what would have happened to the case on appeal.

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33. *Id.* at 508.

34. Martinez v. N.B.C. Inc., 49 F. Supp. 2d 305, 310 (S.D.N.Y. 1999).

35. Coleman v. B-G Maint. Mgmt. of Colorado, Inc., 108 F.3d 1199, 1204 (10th Cir. 1997).

36. The courts tend to analyze "gender plus" cases like mathematical calculations, canceling out common characteristics on either side of the equation. *See, e.g.*, *Coleman v. B-G Maintenance Management of Colorado, Inc.*, 108 F.3d at 1204. Thus, if plaintiff were to argue that she was treated differently than her 43-year-old counterpart, under the analysis described by the Tenth Circuit in *Coleman*, for instance, the court would cancel out age on each side of the equation and treat the case solely as a disability-bias case. This is a narrow approach to "age-plus" or "gender plus" because it ignores the cumulative effect of the plaintiff having two characteristics that adversely affect employees.