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'Lipchitz' Marks Shift In Proving Bias Claims

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The Supreme Judicial Court recently issued a decision that has far-reaching ramifications for employment discrimination cases.

Its decision in *Lipchitz v. Raytheon Company* is significant because it refocuses jury instructions on the elements in a discrimination case.

The plaintiff, Dr. Martha C. Lipchitz, sued her employer of 20 years, Raytheon Corp. in Andover, claiming that she was denied a promotion to the position of corporate medical director because of her gender.

A Middlesex Superior Court jury returned a verdict for Dr. Lipchitz and awarded her \$500,000 in compensatory damages.

In its decision, the SJC found that the trial judge's failure to instruct the jury that it must find a discriminatory motive, intention or state of mind — and that the discrimination caused the decision not to promote the plaintiff — was erroneous and prejudicial to the defendant. *Lipchitz v. Raytheon Company*, 434 Mass. 493 (2001), 2001 WL 760634, at *7 (Mass. 2001).

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The SJC's suggested instructions will provide a more coherent guide to juries grappling with the issues in discrimination cases. *Lipchitz*, 2001 WL 760634, at *8.

The ramifications of the *Lipchitz* decision lie in the SJC's recommendation that trial judges revise their instructions to juries on the necessary elements that the plaintiff must prove as set forth in G.L.c. 151B.

The court likens proof in employment discrimination cases to proof in negligence cases by shifting the focus from the *McDonnell Douglas* burden-shifting paradigm, to proof that discriminatory animus was the determinative cause of the adverse employment action. *Id.* at *6, n.19.

The court states that the standard in employment discrimination cases ultimately becomes that "the plaintiff must prove by a preponderance of the credible evidence that the defendant's discriminatory animus contributed significantly to [the adverse job] action, that it was [a] material and important ingredient in causing it to happen." *Id.*

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Circumstantial vs. Direct Evidence

In this politically correct time and place, most discrimination cases are based on circumstantial (i.e., indirect) evidence, as opposed to direct evidence, in which the employer says, "You're too old, you're fired" or "We don't want a woman in that position."

The burden of proof for the plaintiff in which the evidence is circumstantial has preoccupied courts for decades. *Wheelock College v. Massachusetts Comm'n Against Discrimination*, 371 Mass. 130 (1976).

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in circumstantial cases set forth by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Wheelock College recognized the tremendous hurdle that discrimination plaintiffs faced when evidence of discrimination could rarely be established through direct evidence and acknowledged that this hardship should not preclude an employee from seeking redress. *Wheelock College*, 371 Mass. 137-38.

A closer look at the decision hints that the SJC is sending a message that jury instructions in employment discrimination cases should focus on the elements in order to focus the jury on the harm and its causation.

Accordingly, Massachusetts courts have followed the three-stage, order-of-proof method set forth in *McDonnell Douglas Corp.* by allowing plaintiff employees to prove unlawful discrimination through indirect evidence. *Abramian v. President & Fellows of Harvard College*, 432 Mass. 107, 116 (2000).

The analytical *McDonnell Douglas* paradigm requires the plaintiff employee to prove a prima facie case of discrimination by demonstrating that: (1) he/she is a member of a protected class as defined by G.L.c. 151B, §1; (2) he/she performed the job at an acceptable level; (3) he/she suffered an adverse job action; and (4) his/her employer sought to fill the plaintiff's position by hiring another individual, with similar or poorer qualifications, who was not in the protected class. *Blare v. Husky Injection Molding Systems Boston, Inc.*, 419 Mass. 437, 441 (1995).

Demonstrating a prima facie case creates a rebuttable presumption of discrimination on the part of the plaintiff employee. The employer can burst the presumption

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by providing a lawful business reason for the adverse employment decision and producing credible evidence that the reason provided is legitimate. *Abramian*, 432 Mass. at 116.

If the employer fails to produce a lawful, nondiscriminatory reason for the decision, then the employee plaintiff is entitled to judgment. *Abramian*, 432 Mass. at 117.

However, employers are always successful in articulating a lawful reason for the employment decision, and the case proceeds to trial. The plaintiff employee must prove that the employer's "lawful business reason" is the shroud, or the politically correct reason, for the discrimination.

The law requires the jury to first find the existence of a shroud, and if removed, that discrimination exists as a determinative (not sole) factor for the adverse job action.

At the third stage, the plaintiff employee can prevail by persuading the jury that the employer's stated reasons for the adverse decision were not the real reasons. *Blare*, 419 Mass. at 443.

Massachusetts and federal law have recently converged by virtue of the *Abramian* and *Sanderson v. Reeves Plumbing*, 530 U.S. 133 (2000), cases insofar as they now permit a jury to infer both discrimination and causation if at least one reason given by the employer is not the real reason.

Thus, the fight at trial is usually over whether the plaintiff has shown "pretext," i.e., that the reason given for the employer's decision is not really why the employer acted the way it did.

Unveiling A Shroud

In circumstantial cases, *Lipchitz* reiterates that Massachusetts requires plaintiff employees to show that the employer's ostensibly lawful reason for the adverse employment decision is false (i.e., the existence of a shroud). *Lipchitz*, 2001 WL 760634, at *4.

If the employee successfully persuades the jury that the employer's articulated reason is false, then the jury may, *but need not* (emphasis added), infer that the employer is concealing discriminatory intent, motive or state of mind. *Id.*; see also *Abramian*, 432 Mass. at 117-18.

Allowing, but not mandating, the jury to infer discriminatory intent based on the plaintiff's showing that the employer's stated reason was false "strikes the proper balance by holding the plaintiff to her ultimate burden without requiring her to produce direct evidence of discriminatory animus, a form of evidence that, we recognize, rarely exists." *Lipchitz*, 2001 WL 760634, at *4.

The jury instructions in *Lipchitz* were given before the SJC decided *Abramian*. *Id.* at *5, n.15. *Abramian* clarified that demonstrating the falsity of an employer's purported reason allowed a permissive in-

ference, not an entitlement to recovery for illegal discrimination under G.L.c. 151B. *Abramian*, 432 Mass. at 117 (stating literal application of *Blare* improperly compels plaintiff verdict).

Mandating a jury to render a verdict for the plaintiff upon plaintiff's showing of pretext "stripped the jury of its fact-finding role." The SJC ruled that the trial court gave such an erroneous jury instruction in *Lipchitz*, setting the stage for the SJC to vacate the plaintiff's judgment and remand the case to the Superior Court for a new trial. *Lipchitz*, 2001 WL 760634, at *7.

The *Lipchitz* trial court instructed the jury, "[i]n this [the third] stage, the burden is on the plaintiff to prove by a fair preponderance of the evidence that the reasons given by the defendant were not the real reasons for failing to promote her ... but were a pretext for gender discrimination. Under the laws of the Commonwealth, the plaintiff may satisfy the plaintiff's burden by proving that the employer's articulated reason or reasons was not the real reason or reasons for the hiring decision." *Id.* at *4, n.11.

The SJC concluded that such an instruction turned "pretext" into an element of the plaintiff's claim and failed to instruct the jury that *Lipchitz* must prove that Raytheon's discriminatory animus was the basis for its adverse employment decision. *Id.* at *5.

The court explains that the instruction was erroneous because it based Raytheon's liability upon a finding of "pretext," which is not an element of the claim, and allowed the plaintiff to bypass the essential elements of discriminatory intent, motive, state of mind and causation. *Lipchitz*, 2001 WL 760634, at *7.

The court found that the *Lipchitz* jury instruction mandated a plaintiff verdict if the jury found by a preponderance of the evidence that the business reasons given by Raytheon were not the real reasons for its failure to promote her, and the jury's only other job was to assess the plaintiff's damages. *Id.* at *5.

The court found the instruction highly prejudicial because it incorrectly made pretext an element of the case, providing that "if *Lipchitz* proved that Raytheon had lied, she had prevailed in the litigation." *Id.* at *7.

If the employer lied about the real reason, but the real reason was that the plaintiff had bad breath, for example, then no unlawful discrimination existed.

Determinative Factor

The SJC recommends turning away from the *McDonnell Douglas* burden-shifting paradigm, developed to determine whether not summary judgment is appropriate, in favor of the basic elements of a discrimination case: membership in a pro-

TECTED CLASS, HARM, DISCRIMINATORY ANIMUS AND CAUSATION. *Lipchitz*, 2001 WL 760634, at *5-7.

Generally, the first two elements — membership in a protected class and harm — are undisputed. The three-stage order of proof was developed to assist plaintiffs in proving discriminatory conduct and causation with indirect evidence by permitting the jury to infer these elements upon proof of pretext. *Id.* at *5.

However, it was never intended to replace the employee's burden of proving intent and causation. *Id.* In other words, the jury's permissible inference does not excuse plaintiffs from proving that the employer's discriminatory animus was the *determinative factor* in the adverse employment decision.

The SJC has refocused the inquiry at trial to the more familiar "but-for" causation. *Lipchitz*, 2001 WL 760634, at *7.

Upon *Lipchitz*'s demonstration of a pretext (the existence and removal of the shroud) for Raytheon's decision, the jury must analyze the evidence presented by Raytheon of several reasons for its decision, to determine whether the discriminatory animus was the determining cause of its decision not to promote her. *Id.* at *7.

To meet her burden, *Lipchitz* did not have to disprove every stated reason offered by Raytheon for its decision not to promote her. *Id.* Discriminatory animus can be proved by showing intent, motive or state of mind. State of mind may be proven by showing subconscious stereotyping. *Id.* at *5, n.16.

The SJC emphasized that most of the issues for the *McDonnell Douglas* paradigm have been resolved at trial. *Lipchitz*, 2001 WL 760634, at *7. Therefore, trial judges should develop jury instructions focusing on the elements of a discrimination claim. *Id.* at *8.

Though "pretext" and burden shifting are appropriate as "analytical framework" for judges considering summary judgment, they are inappropriate and confusing to a jury because they divert the jury from the real issues of harm, discriminatory animus and causation. *Id.*

A closer look at the decision hints that the SJC is sending a message that jury instructions in employment discrimination cases should focus on the elements in order to focus the jury on the harm and its causation.

Perhaps the following instruction in *Lipchitz* would have sufficed: "If you find by a preponderance of the credible evidence that Raytheon had discriminatory intent, motive, or state of mind against Dr. *Lipchitz* because of her gender, and that this was a *determinative factor* in its decision not to appoint her to the position of acting Corporate Medical Director at Raytheon, then you *must* render a verdict for Dr. *Lipchitz*." 