

## CLIENT ALERT: SJC Rules in Employment Discrimination Case a Plaintiff Need Only Show the Reason for Discharge was Untrue to Survive Summary Judgment

On February 29, 2016, the Massachusetts Supreme Judicial Court (“SJC”) issued a significant ruling regarding the burden of plaintiffs claiming discrimination at the summary judgment stage of litigation. Specifically, the SJC’s ruling clarifies what evidence an employee is required to present in order to refute an employer’s proffered legitimate, non-discriminatory reason for taking any particular adverse employment action.

In the case, *Bulwer v. Mount Auburn Hospital, et al.*, 473 Mass. 672 (2016), plaintiff, a black man from Belize, brought suit alleging that he had been discriminated against when he was terminated from Mount Auburn Hospital’s residency program after only one year. Dr. Bulwer also alleged a breach of contract claim based on the renewable medical resident agreement he signed prior to joining the program, which contained a non-discrimination clause. In his lawsuit, Dr. Bulwer named not only the hospital, but the Director of Internal Medicine, the Chair of the hospital’s Clinical Confidence Committee, and his assigned mentor, as defendants.

Dr. Bulwer alleged that during his first and only year in the residency program, he received a series of performance evaluations, which demonstrated a mixture of feedback in that some of his evaluators found his performance satisfactory and at times commendable, while others were deeply critical. One such evaluator found Dr. Bulwer’s performance so deficient she recommended he be expelled from the program. Dr. Bulwer further alleged that this same physician publicly berated the plaintiff and spoke negatively about him to other residents. Following these reviews, the hospital convened a Clinical Confidence Committee (“CCC”) to discuss Dr. Bulwer’s evaluations, and ultimately determined that it would not renew his contract due to concerns about his ability to “analyze complex information, his inability to build effective therapeutic relationships, and his difficulty presenting information to other members of his teams.” In the weeks following, Dr. Bulwer sought to appeal this determination through an ad hoc committee, however, the ad hoc committee ultimately affirmed the CCC’s determination “because of serious additional concerns for patient safety that had arisen...” over the course of its review of the matter.

In arguing that plaintiff’s discrimination and breach of contract claims were properly dismissed by the Superior Court (ruling on a summary judgment motion), defendants contended that plaintiff was required to present evidence which demonstrated that not only were the hospital’s reasons for termination false, but that it also intended to discriminate against him. In a unanimous opinion, the SJC found that the defendants’ position overstated the plaintiff’s burden, holding that Massachusetts has long been a “pretext only” jurisdiction where “the plaintiff need only present evidence from which a reasonable jury could infer that the [defendants’] facially proper reasons given for its action against him were not the real reason for that action.” The Court went on further that while the plaintiff bears the burden of producing evidence of pretext, the defendants, as the moving parties, still “ha[ve] the

burden of affirmatively demonstrating the absence of a genuine issue of material fact on every relevant issue, even if [they] would not have the burden on an issue if the case were to go to trial.”

In applying its holding, the SJC found that a jury could infer from the evidence that the hospital’s stated reasons for terminating plaintiff were not the real reasons. In particular, the SJC noted the: (1) positive evaluations the plaintiff received which were inconsistent with the hospital’s reasons for termination; (2) evidence that other similarly situated employees had been given opportunities to remediate or repeat rotations; (3) evidence that Caucasian doctors with performance deficiencies were not subject to immediate discipline; (4) comments made by the plaintiff’s evaluators, which taken with other evidence of disparate or unfair treatment, could be interpreted as racial bias; and (5) defendants’ departure from their procedural policy regarding terminations. Though the defendants argued that their criticisms of the plaintiff reflected “professional judgment,” the SJC found that such a determination was improper at summary judgment, and better suited for a “fact finder after weighing the circumstantial evidence and assessing the credibility of the witnesses.” Accordingly, the SJC vacated the judgment dismissing the plaintiff’s discrimination and breach of contract claims.

There is no dispute that *Bulwer* clearly sets the bar low for employees bringing discrimination suits against their employers, in that now it is possible that even “subconscious bias” may be enough for a case to get to trial. In other words, if a plaintiff can demonstrate an employment decision was unintentionally based on a protected class, such as race, gender, or age, because of the decision-maker’s unconscious biases, that could be enough to establish a discrimination claim. Practically, *Bulwer* demonstrates that employers must not only be diligent in following internal procedures and policies when issuing discipline to employees, but also precise in providing employees explanations for such actions.

*Desiree Y. Murphy is an attorney at Morgan, Brown & Joy, LLP. He may be reached at 617-523-6666 or at [dmurphy@morganbrown.com](mailto:dmurphy@morganbrown.com). Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.*

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