Mixed Motive Discharge in Employment Discrimination: Analysis of a Jury Charge

by John DeGeeter

A RECENT CASE IN THE 331st District Court of Travis County, Texas raised the issue as to what the proper jury instruction should be in an employment discrimination case when the termination was motivated by both discriminatory and non-discriminatory reasons. *Aaron v. Centre First Management Corp.*[1] involved a termination of the plaintiff for reasons related to her pregnancy. Ms. Aaron became pregnant while employed as an apartment manager for the defendant. During the course of her employment, animosities existed between Aaron and a less experienced supervisor. On November 21, 1989, Aaron suffered a miscarriage. Later that day, she was fired by Centre First Management Corporation.

Sex discrimination is prohibited by the Texas Human Rights Act. Section 5.01 of the Act provides that "it is an unlawful employment practice for an employer to fail or refuse to hire or to discharge an individual or otherwise to discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment because of race, color, disability, religion, sex, national origin, or age."[2] Section 1.04(c) of the Act defines "because of sex" or "on the basis of sex" to include discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."[3]

In order to establish a discriminatory motive for the termination, the *Aaron* jury was instructed as follows:

> Do you find from a preponderance of the evidence that the plaintiff's pregnancy, pregnancy related medical condition, or the fact that she might become pregnant again was a motivating factor in defendant's decision to terminate her on November 21, 1989?
>
> Answer "yes" or "no."
>
> You are instructed that, to be a motivating factor in defendant's decision to terminate plaintiff, plaintiff's pregnancy, pregnancy-related medical condition, or the fact that she might become pregnant again need not have been the sole motivation or the primary motivation for defendant's decision to terminate her. It is sufficient that plaintiff's pregnancy, pregnancy related medical condition, or the fact that she might become pregnant again played a part in the decision.[4]

Analogizing to age discrimination cases and discriminatory treatment under Title VII of the Civil Rights Acts of 1964, this instruction appears to be an accurate statement of the law. In a discriminatory termination case where the employer offers what would be a legitimate reason for the firing merely as a pretext for illegitimate reasons, the plaintiff must first make a prima facie case showing that discrimination was involved in the termination decision.[5]

In its 1988 decision, *Bienkowski v. American Airlines*,[6] the Fifth Circuit established the following requirements for a prima facie age discrimination case:

1) the plaintiff was discharged;
2) the plaintiff was qualified for the position;
3) the plaintiff was in the protected class at the time of her discharge; and
4) the plaintiff was replaced by someone outside the protected class, or
5) by someone younger, or
6) otherwise show that she was discharged because of age.[7]

After a plaintiff makes a prima facie case of employment discrimination, the burden of production shifts to the defendant to offer a legitimate non-discriminatory basis for the termination. If the defendant meets this burden, the plaintiff then must prove by a prepon-

derance of the evidence that the legitimate reasons offered by the defendant were a mere pretext for discrimination in order to win his case.[8]

But the issue becomes more complex when the employer offers a legitimate, non-pretextual reason for the firing. In such situations, the *Bienkowski*-type instructions could be given, thereby creating a rebuttable presumption of discrimination. When the employer offers a legitimate reason for the termination, however, this presumption is destroyed and the plaintiff still bears the burden of proving that an illegitimate factor was present when the employer made the termination decision. Therefore, the *Bienkowski* model instruction is of little use when the employer has a legitimate, non-pretextual reason for the termination.

The *Aaron* instruction therefore advances beyond the *Bienkowski* test and appropriately requires that the jury find, from a preponderance of the evidence, that Aaron's pregnancy condition was a motivating factor in her termination. The instruction also correctly points out that the illegitimate factor does not have to be the primary or sole motivation in the termination decision.[9]

Once a plaintiff has established that discrimination was a motivating factor in the termination, the burden of persuasion shifts to the defendant to show that a legitimate reason for the termination existed at the time the termination decision was made.[10] The *Aaron* jury was therefore instructed as to the possibility of the existence of an affirmative defense as follows:

> Do you find from a preponderance of the evidence that defendant would have terminated plaintiff anyway on November 21, 1989 regardless of her pregnancy, pregnancy-related medical condition, or the fact that she might become pregnant again?
>
> Answer "yes" or "no."[11]

It is important to note that a legitimate reason for termination will be an affirmative defense only if it existed and was part of the decision process at the time the termination decision was made: "An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision."[12] The instruction given to the jury accurately captures the law by instructing the jury to determine whether the Centre First Management Corporation would have terminated Aaron on the same date despite the presence of any illegitimate reasons for doing so. Consequently, it is possible that a termination could occur, in part, for illegitimate reasons, but that the existence of a legitimate reason which was contemplated by the employer at the time of the termination decision would preclude employer liability.

Therefore, both Title VII and the Texas Human Rights Act (by analogy) condemn employment decisions made on the basis of an illegitimate reason, even if it is not the sole motivating factor, but also protect an employer's freedom of choice.[13] ❖

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ENDNOTES

[1] *Aaron v. Centre First Management Corp.*, No. 494,076 (331st Dist. Ct., Travis County, Tex. 1993)

[2] Tex. Rev. Civ. Stat. Ann. art. 5221K (Vernon Supp. 1992).

[3] *See id.*

[4] Jury Instruction, *Aaron*, (No. 494,076).

[5] *Adams v. Valley Federal Credit Union*, 848 S.W.2d 182 (Tex. App. — Corpus Christi 1992).

[6] *Bienkowski v. American Airlines*, 851 F.2d 1503, 1505 (5th Cir. 1988).

[7] *Id.* at 1505

[8] *Adams*, 848 S.W.2d at 182.

[9] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989).

[10] *Id.* at 252.

[11] Jury Instruction, *Aaron* (No. 494,076).

[12] *Price Waterhouse*, 490 U.S. at 252.

[13] *Id.* at 242.