THIRD CIRCUIT LAW ON SUMMARY JUDGMENT IN THE AREA OF EMPLOYMENT DISCRIMINATION

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Historically, courts have not favored the use of summary judgment in cases where motive and intent played an important role. As the United States Court of Appeals for the Third Circuit observed in *Bronze Shields, Inc. v. New Jersey Department of Civil Service*,[1] because it is difficult to establish proof of intent in employment discrimination claims, courts must be very cautious in granting summary judgment.[2]

In 1986, however, the United States Supreme Court signaled a break from the historical reluctance to grant summary judgment in cases involving questions of intent.[3] Three decisions by the Supreme Court, *Anderson v. Liberty Lobby, Inc.*,[4] *Celotex Corp. v. Catrett*,[5] and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[6] determined that "summary judgment [could] be less of a pretrial dismissal motion and more of a kind of trial itself, a bench trial on paper."[7] In *Anderson*, the Court overturned a circuit court's decision that had reversed summary judgment for the defendants in a libel action. In *Celotex*, a case decided in the same term as *Anderson*, the Court stated that "[s]ummary judgment procedure

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1 667 F.2d 1074 (3d Cir. 1981), *cert. denied*, 458 U.S. 1122 (1982).

2 *Id.* at 1087 (citations omitted). *See also* Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979) (proof of "actual malice," in a libel action, "does not readily lend itself to summary disposition"); Jansonius, *The Role of Summary Judgment in Employment Discrimination Litigation*, 4 THE LAB. LAW. 747, 755-59 (1988) (discussing the inappropriateness of summary judgment in employment discrimination cases where intent and motive play leading roles).

3 *See* Jansonius, *supra* note 2, at 762-71.

4 477 U.S. 242 (1986).

5 477 U.S. 317 (1986).

6 475 U.S. 574 (1986).

7 Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183, 184 (1987). The broad trend resulting from these Supreme Court decisions was "to encourage the lower courts toward a new and liberal granting of motions for summary judgment in appropriate cases, even in situations where prior Supreme Court language had discouraged summary judgment." *Id.*

is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' "[8] Finally, in *Matsushita*, the Court stated that in order to survive a motion for summary judgment if the factual context renders the plaintiffs' claim implausible, the plaintiffs "must come forward with more persuasive evidence to support their claim than would otherwise be necessary."[9]

This article will examine to what extent the Third Circuit has adopted this change in approach toward summary judgment. As will become evident, Third Circuit courts have not been uniform in their application of the Supreme Court's more receptive attitude toward the use of summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

I. General Law on Summary Judgment

In general, summary judgment is appropriate where the record fails to establish a genuine issue as to any material fact.[10] The materiality of a fact is determined with reference to the substantive law applied in a given situation:[11] "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[12] For a dispute over a material fact to be "genuine," "the evidence [must be] such that a reasonable jury could return a verdict for the nonmoving party."[13] In reviewing the evidence, a court should resolve all justifiable inferences from the record in favor of the party opposing the motion:[14] "The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict."[15]

In employment discrimination cases, where the plaintiff alleges disparate treatment,[16] the substantive law against which the

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8 *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1.).

9 *Matsushita*, 475 U.S. at 587.

10 Fed. R. Civ. P. 56(c).

11 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

12 *Id.*

13 *Id.*

14 *Id.* at 255 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970)). *See also* United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.").

15 *Anderson*, 477 U.S. at 256.

16 This article focuses upon cases involving disparate treatment claims and does

record is to be judged in addressing a motion for summary judgment is generally the burden-shifting scheme set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*[17] and *Texas Department of Community Affairs v. Burdine*.[18] If a plaintiff who alleges disparate treatment cannot produce direct evidence of discrimination, he or she may establish, by indirect means, a prima facie case of discrimination.[19] The establishment of a prima facie case raises an inference of discrimination that can be rebutted if the employer articulates a legitimate nondiscriminatory reason for its allegedly discriminatory conduct.[20] Should the employer articulate such a reason, the plaintiff must then prove that the proffered reason was merely a pretext for the employer's allegedly unlawful discriminatory conduct.[21] The ultimate burden of proof, therefore, remains at all times with the plaintiff.[22]

Summary judgment must be entered "against a party who fails to . . . establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[23] In the Third Circuit, a defendant in an employment discrimination action may demonstrate that summary judgment is appropriate in either of two ways: by showing that "the plaintiff is unable to establish a prima facie case of discrimina-

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not address summary judgment standards under the disparate impact analysis. *See, e.g.*, Reilly v. Prudential Property and Casualty Ins. Co., 653 F. Supp. 725, 732-33 (D.N.J. 1987) (employers can be found to have violated either Title VII or the ADEA, even if they apply a facially neutral rule, if the result of such rule has a disparate impact on a protected class).

17 411 U.S. 792 (1973).

18 450 U.S. 248 (1981).

19 *Id.* at 252-54; *McDonnell Douglas Corp.*, 411 U.S. at 802; Bruno v. W.B. Saunders Co., 882 F.2d 760, 764 (3d Cir. 1989). A plaintiff can generally establish a prima facie case by showing (1) that he is a member of a protected class; (2) that he was qualified for the job sought or was performing satisfactorily in the job held; (3) that, despite his qualifications, he was denied the job sought, discharged from the job held or otherwise treated unfavorably, and (4) that others who were similarly situated were treated more favorably. *McDonnell Douglas Corp.*, 411 U.S. at 802 (footnote omitted); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 897 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987).

20 The employer cannot, however, rebut the inference of discrimination by merely asserting that its decision was not based on an unlawful classification. Instead, the employer must proffer a legitimate explanation for the employment decision. *See* Porta v. Rollins Envtl. Servs. (NJ), Inc., 654 F. Supp. 1275, 1283 (D.N.J. 1987), *aff'd*, 845 F.2d 1014 (3d Cir. 1988).

21 *Burdine*, 450 U.S. at 252-56 (1981); *McDonnell Douglas Corp.*, 411 U.S. at 802-05; *Bruno*, 882 F.2d at 764 (quoting Sorba v. Pennsylvania Drilling Co., 821 F.2d 200, 202 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 730 (1988)).

22 *Burdine*, 450 U.S. at 253.

23 Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

tion;" or, by introducing evidence of a nondiscriminatory reason for the action complained of, and showing that the plaintiff cannot produce sufficient evidence that the proffered reason was a pretext for unlawful discrimination.[24]

In opposing a motion for summary judgment, a plaintiff who has no direct evidence of discriminatory motive[25] must tailor his reply in a fashion that responds directly to the basis asserted in the employer's motion. If the employer's motion is based on an assertion that the plaintiff has failed to produce evidence to support every element of a prima facie case, then the plaintiff must present further facts to buttress his or her claim in order to avoid summary judgment.[26]

If, on the other hand, the employer has articulated a legitimate reason for the allegedly discriminatory action as the basis for summary judgment, the plaintiff must present specific evidence showing that the employer's proffered reason is unworthy of credence.[27] This showing of pretext can be achieved by introducing evidence of inconsistencies and implausibilities in the employer's articulated justification that could reasonably support an inference in favor of the plaintiff.[28] In rebutting the employer's proffered reasoning, a plaintiff may use the same evidence that

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[24] Jalil v. Avdel Corp., 873 F.2d 701, 707 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 725 (1990); Spangle v. Valley Forge Sewer Auth., 839 F.2d 171, 173 (3d Cir. 1988) (citing Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987)).

[25] It would seem fundamental that an employer could rarely obtain summary judgment against a plaintiff who had direct evidence of a discriminatory motive; the weight to attribute to that direct evidence would necessarily be a question of fact for trial. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (Supreme Court stated that "*McDonnell Douglas* [burden shifting] test is inapplicable where the plaintiff presents direct evidence of discrimination"). *See also* Gatlin v. Jewel Food Stores, 699 F. Supp. 1266, 1268 (N.D. Ill. 1988) (where the court held that summary judgment is inappropriate in a discrimination case under 42 U.S.C. § 1981, where a plaintiff produces direct evidence of discriminatory intent and the employer denies that evidence because the resolution of the issue "turns on the credibility of witnesses—something not properly determined via summary judgment").

[26] *See Celotex*, 477 U.S. at 324-26; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986). Note that in Weldon v. Kraft, Inc., 896 F.2d 793 (3d Cir. 1990), the Third Circuit Court of Appeals expressed a reluctance to include subjective job qualifications as part of a plaintiff's burden in establishing a prima facie case. The court stated that "while objective job qualifications should be considered in evaluating the plaintiff's prima facie case, the question of whether an employee possesses a subjective quality, such as leadership or management skill, is better left to the [pretext] stage of *McDonnell Douglas* analysis." *Id.* at 798.

[27] *See Chipollini*, 814 F.2d at 900. The Third Circuit's view on this, however, is not universally shared. *See infra* notes 73-83 and accompanying text.

[28] *Chipollini*, 814 F.2d at 900.

was used to establish his prima facie case.[29]

The mere possibility that the factfinder might disbelieve the employer's stated justification, however, is not sufficient to preclude summary judgment. The ultimate burden for a plaintiff in opposing a motion for summary judgment is to introduce enough evidence to permit a judge or jury reasonably to conclude that the employer's proffered reasoning is pretextual.[30]

II. Summary Judgment Decisions In The Third Circuit

A. *Cases In Which Summary Judgment Was Affirmed*

Because a prima facie case is routinely established in most employment discrimination actions, that part of a plaintiff's case is not often the focus of disagreement on a motion for summary judgment.[31] The Third Circuit addressed this issue, however, in *Spangle v. Valley Forge Sewer Authority*,[32] when it affirmed the district court's entry of summary judgment in favor of the employer on the ground that the plaintiff "had failed to produce enough evidence in support of his prima facie case."[33]

The plaintiff in *Spangle* sued his employer under the Age Discrimination in Employment Act (ADEA) claiming that he had been constructively discharged when the supervisory and managerial aspects of his job were transferred to a new position that commanded a higher salary. The plaintiff, believing that he was fully qualified to assume the new position, resigned when he was not offered the job, alleging that his work situation had become

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[29] Jalil v. Avdel Corp., 873 F.2d 701, 709 n.6 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 725 (1990).

[30] *See* Chauhan v. M. Alfieri Co., Inc., 897 F.2d 123, 128 (3d Cir. 1990). In opposition to a motion for summary judgment in a case analyzed under the *McDonnell Douglas* framework, the court in *Chauhan* stated:

> [T]he plaintiff cannot rely solely on a potential finding that the defendant's explanation is implausible. The fact that a judge or a jury might disbelieve the defendant's asserted nondiscriminatory reason is not enough, by itself, to preclude summary judgment. Rather, the plaintiff must be able to adduce evidence, whether direct or circumstantial, from which a reasonable jury could conclude that the defendant's explanation is incredible.

Id.

[31] *See* Healy v. New York Life Ins. Co., 860 F.2d 1209, 1214 n.1 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 2449 (1989). A plaintiff must, however, adequately support a claim of unlawful discrimination: "A mere assertion of discrimination unsupported by any facts is not sufficient to shift the burden to the employer to justify termination." Reilly v. Prudential Property and Casualty Ins. Co., 653 F. Supp. 725, 730 (D.N.J. 1987).

[32] 839 F.2d 171 (3d Cir. 1988).

[33] *Id.* at 173.

"intolerable." The Third Circuit noted, however, that the plaintiff's performance evaluations reflected his unsatisfactory managerial and supervisory abilities. The court stated that "[w]ithout proof of his qualification to perform his supervisory duties, neither the fact that [the plaintiff] may reasonably have found it intolerable to be relieved of them nor the fact that the duties were assumed by a considerably younger person is enough to raise an inference of age discrimination."[34]

Notwithstanding *Spangle*, the discussion of summary judgment in Third Circuit employment discrimination cases more often focuses upon "the defendant's articulated legitimate business reasons and the plaintiff's evidence of pretext."[35] In reviewing the parties' motions for summary judgment, a trial court is permitted a certain degree of latitude in resolving the conflicting evidence before it. In stating that only "justifiable" inferences need be drawn in favor of the nonmovant, the Supreme Court has implied that trial courts may weigh the facts before them and disregard those facts and inferences that are not reasonable.[36]

For example, in *Healy v. New York Life Insurance Co.*,[37] the plaintiff, an employee with the defendant for twenty-five years and vice president of the defendant's marketing department, was discharged at age fifty-six as part of a company-wide workforce reduction. The plaintiff alleged age discrimination under the ADEA, stating that he had received generally favorable (and sometimes excellent) performance reviews both as marketing vice president and in his earlier positions at the company. The employer countered by emphasizing the various shortcomings in the plaintiff's managerial ability as listed in his performance evaluations. The employer also noted that the plaintiff had performed unsatisfactorily in a recent major project and that the performance of the plaintiff's replacement was superior to that of the plaintiff.

On appeal, the United States Court of Appeals for the Third Circuit affirmed summary judgment in favor of the employer. The court distinguished its earlier opinion in *Chipollini v. Spencer Gifts, Inc.*,[38] which held that where the plaintiff challenges the defendant's proffered reason for its conduct, "the issue of pretext

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34 *Id.* at 174.

35 *Healy*, 860 F.2d at 1214 n.1.

36 *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

37 860 F.2d 1209 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 2449 (1989).

38 814 F.2d 893 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987). For a discussion of the decision in *Chipollini*, see *infra* notes 54-56, and accompanying text.

turns on [the employer's] credibility and is not appropriate for resolution on a summary judgment motion."[39] The court in *Healy* concluded that "despite the breadth of the language in *Chipollini*, discrimination cases are inherently fact-bound. Certainly *Chipollini* does not stand for the proposition that summary judgment is *never* available in discrimination actions."[40]

In reaching its determination in *Healy*, the court clearly weighed the available facts and inferences that could be drawn therefrom in order to conclude that the employer had not discriminated against the plaintiff because of his age.[41]

Similarly in *Fowle v. C & C Cola*,[42] the Third Circuit affirmed summary judgment against an executive who asserted an age discrimination claim after his job was eliminated when the company sold his division. The plaintiff argued that he should have been offered another position that was available in a different division. This position was eventually filled by a younger man. The employer responded that the plaintiff did not possess the leadership and management skills necessary to qualify for the position. Specifically, the employer stated that the plaintiff was not regarded as a potential replacement for the division president, which was considered to be a requirement for the job.

The plaintiff in *Fowle* countered this proffered reason with evidence that the division president eventually relaxed the requirement that the person seeking the job be qualified to replace the division president. The court rejected the plaintiff's contention, stating that "[a]t most this [relaxation of job requirements] suggests an evolution of the position's specifications between the time [the plaintiff] was told he would not be considered for the job and the time [the younger man] was hired."[43] In *Fowle*, as in *Healy*, the Third Circuit affirmed summary judgment by resolving competing inferences in favor of the employer.

Interestingly, both *Fowle* and *Healy* involved plaintiffs who were discharged from high-level management or executive positions. In such circumstances, courts within the Third Circuit seem willing to permit employers greater latitude in employment decisions. Moreover, the courts are more likely to affirm a finding that a plaintiff's factual contentions are insufficient to raise a

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39 *Healy*, 860 F.2d at 1219 (quoting *Chipollini*, 814 F.2d 893, 901 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 2449 (1989)).

40 *Id.* (emphasis in original).

41 *Id.* at 1215-17.

42 868 F.2d 59 (3d Cir. 1989).

43 *Id.* at 66.

genuine issue of material fact. In this regard, the court in *Healy* stated:

> The legitimacy of the employer's proffered business justification will be affected both by the duties and responsibilities of the employee's position and the nature of the justification. Concomitantly, the significance of variations among an individual's personnel evaluations may well depend upon the nature of the employee's responsibilities; a more exacting standard of performance may have to be applied to positions of greater responsibility.[44]

Another situation in which the Third Circuit has been willing to apply the liberalized standard for summary judgment was exemplified in *Hankins v. Temple University*.[45] In *Hankins*, the plaintiff, a black female physician, was terminated from her position in a fellowship program because the University determined that her performance in the program was inadequate. The plaintiff sued under Title VI, Title VII, and 42 U.S.C. § 1981, alleging sex and race discrimination, and the district court granted summary judgment in favor of the University. The Third Circuit Court of Appeals affirmed, stating that the plaintiff had failed to prove that the University's proffered reason was pretextual. The court concluded that "[u]niversity faculties . . . must have the widest discretion in making judgments as to the academic performance of their students."[46]

In addition to instances where the employment decision involves a high-level management employee or an evaluation of an individual's academic performance, courts within the Third Circuit

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[44] Healy v. New York Life Ins. Co., 860 F.2d 1209, 1214 (3d Cir. 1988).

[45] 829 F.2d 437 (3d Cir. 1987).

[46] *Id.* at 443. Similarly, in Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980), the Third Circuit stated that courts

> should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.

Id. at 548. The court in *Kunda* also stated, however, that courts may not impose additional requirements of proof on Title VII plaintiffs solely because the relevant employment decision was "made within the confines of an academic institution." *Id.* at 545. *Cf.* Hishon v. King & Spalding, 467 U.S. 69 (1984) (Title VII applies to a law firm's decision whether to offer a partnership share to an associate); Pyo v. Stockton State College, 603 F. Supp. 1278 (D.N.J. 1985) (district court denied the employer's motion for summary judgment seeking order striking the plaintiff's request for an award of tenure as a possible remedy in her Title VII action).

have also granted summary judgment in favor of the employer where the employee simply fails to present sufficient evidence to rebut the employer's articulated reason for the employment decision. In *Turner v. Schering-Plough Corp.*,[47] for example, the plaintiff had received excellent performance reviews during his lengthy term of employment with the defendant. When the plaintiff's department was moved into a new division within the corporation, however, the plaintiff's new supervisor found the plaintiff's work to be unsatisfactory. The supervisor demoted the plaintiff to a position that was eliminated three years later as part of a general reorganization of the division. The plaintiff, who was fifty-five years old when his job was eliminated, sued for age discrimination, challenging his demotion, the subsequent elimination of his new job and the employer's failure to offer him another job within the company.[48] The district court entered summary judgment in favor of the employer.[49]

On appeal, the Third Circuit affirmed the summary judgment with respect to two of the three acts[50] that the plaintiff had claimed were discriminatory. The Third Circuit rejected the plaintiff's argument that his demotion was based on age discrimination, holding that the sudden drop in the evaluation of the plaintiff's performance when a younger person assumed the job of the plaintiff's supervisor was not enough to raise a material issue of fact as to whether performance was the true reason for the plaintiff's demotion. This is especially so, according to the court, when the new supervisor had "specific, substantial, and undisputed" documentation of plaintiff's performance deficiencies.[51]

The court in *Turner* also rejected the plaintiff's argument that the company had no appropriate justification for eliminating the plaintiff's job. The court considered as insufficient to avoid summary judgment the employer's admission that the plaintiff's age had been discussed at three meetings with the employer's legal counsel. The Third Circuit concluded that "there is simply no evidence that this reorganization was a massive subterfuge for age discrimination against the plaintiff.[52]

Consistent with the 1986 Supreme Court decisions in *Anderson*,

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47 901 F.2d 335 (3d Cir. 1990).

48 *Id.* at 377-38.

49 *Id.* at 337.

50 *Id.* at 348. The Third Circuit reversed the summary judgment on the plaintiff's claim that the employer should have offered him another job within the company. *See infra* notes 66-67 and accompanying text.

51 901 F.2d at 344.

52 *Id.* at 345.

Celotex, and *Matsushita*, the Third Circuit has permitted district courts to exercise a certain degree of discretion in weighing the evidence in the record on a motion for summary judgment. This exercise of discretion has resulted in summary judgment being granted in favor of employers in cases[53] that, prior to 1986, would likely have gone to trial on the strength of a disputed issue of fact.

B. Cases In Which Summary Judgment Was Reversed

Despite the several decisions affirming summary judgment against employment discrimination plaintiffs, the Third Circuit has not hesitated to reverse summary judgment in instances where, in its view, a trial is warranted.

In *Chipollini v. Spencer Gifts, Inc.*,[54] for example, the Third Circuit reversed a motion for summary judgment entered in favor of the employer on an ADEA claim. The plaintiff was discharged at age fifty-eight from his position as the employer's construction manager. The employer stated that the plaintiff had been fired for a number of reasons, including (1) his declining performance ratings; (2) his uncooperative attitude; (3) his alleged reduced ability to travel due to a health condition; (4) his unsatisfactory performance as the employer's "energy warden," and (5) the employer's need to reduce construction management personnel.

The Third Circuit in *Chipollini* reversed the entry of summary judgment, declaring that "[t]he district court erred in weighing competing inferences and in resolving disputed facts."[55] According to the court of appeals, the district court "overlooked evidence contained in affidavits, interrogatories and depositions which can be read as challenging the defendant's factual support with respect to its proffered reasons for discharge."[56] Specifically, the plaintiff's affidavits contradicted the employer's asserted concern over the plaintiff's health, and denied that he ever had been assigned the job of "energy warden."

In addition to recognizing that the plaintiff's affidavits challenged the employer's proffered reasons for the discharge, the court noted that the employer had written highly favorable recommendations for the plaintiff following his termination. This combination of evidence, according to the court, rendered summary judgment inappropriate.

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53 *See supra* notes 37-52 and accompanying text.

54 814 F.2d 893 (3d Cir. 1987), *cert. denied*, 483 U.S. 1052 (1987).

55 *Id.* at 900.

56 *Id.*

The Third Circuit applied a similar rationale in *Siegel v. Alpha Wire Corp.*,[57] to reverse a summary judgment that had been entered in favor of an employer. In *Siegel*, the plaintiff was dismissed at age sixty-three from her position as Senior Buyer. Her duties were assumed by two other employees, a twenty-nine-year-old with no experience in purchasing and a forty-year-old with a college degree in marketing. Upon her discharge, the plaintiff was told that she was being dismissed because the corporation's president wished to upgrade the position of Senior Buyer. However, at his deposition the corporation's president stated that he had fired the plaintiff because he had lost confidence in her ability and her loyalty to the company. The plaintiff sued under the ADEA and the district court entered summary judgment in favor of the employer.

Despite admitting that "[t]his case is a close one . . ." the Third Circuit reversed, stating:

> If a jury were to credit [the plaintiff's] evidence that [the corporation president] more than once used the phrase "old dogs won't hunt," this, along with the fact that she had received good evaluations from [her supervisor] and that [the corporation president] articulated the reasons now alleged to be his motivation for firing [the plaintiff] only after she filed suit, could support a verdict in her favor. This is all that need be determined for [the plaintiff] to withstand the defendant's motion for summary judgment."[58]

The Third Circuit noted that, as in *Chipollini*, the district court improperly resolved issues that should have been left for a jury's determination. The district court erred, for example, in (1) dismissing the relevance of the plaintiff's allegations that the corporation president had used the phrase "old dogs won't hunt" in reference to senior employees who had been associated with previous management, and (2) determining that the initial reason stated for the plaintiff's dismissal was not inconsistent with the reason proffered during discovery.[59]

Using the same rationale as in both *Chipollini* and *Siegel*, the Third Circuit in *Weldon v. Kraft, Inc.*,[60] reversed a grant of summary judgment because "the district court weighed the competing testimony and resolved factual issues that should have been left for an-

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57 894 F.2d 50 (3d Cir. 1990).

58 *Id.* at 55.

59 *Id.*

60 896 F.2d 793 (3d Cir. 1990).

other day."[61] The plaintiff is *Weldon* sued his employer under Title VII and 42 U.S.C. § 1981 after he was discharged allegedly as a result of race discrimination. The district court held that the plaintiff's "self-interested assertions" concerning discrimination could not rebut the employer's proffered reasons for the discharge. The employer had stated that the plaintiff's job performance had been unsatisfactory and that the plaintiff had failed to produce adequate medical documentation to explain a one-month absence from work.[62]

In reversing summary judgment, the Third Circuit relied on the strength of the plaintiff's deposition testimony that: (1) his poor performance evaluations had been the result of his assignment to one of Kraft's most demanding supervisors, who the plaintiff alleged had a history of problems in dealing with minority employees; (2) he subsequently had been assigned to another supervisor who lacked experience in both training and in working with black employees; (3) other black employees had experienced difficulties similar to his, and; (4) a white employee would not have been required to produce medical documentation for the one-month absence.[63]

The Third Circuit stated that "[i]f a factfinder were to credit [the plaintiff's] testimony regarding the harshness of the treatment he and other blacks received" and the plaintiff's statistical evidence that minorities constituted nearly thirty-eight percent of the persons who had been involuntarily terminated at Kraft between 1985 and 1988, then the court "could conclude that the performance evaluations were unfair and that [the employer's] explanations were pretextual."[64]

The Third Circuit in *Weldon* explained that at the summary judgment stage, "the only question before the district court was whether the evidence established a reasonable inference that [the employer] did not discharge [the plaintiff] for the reasons asserted."[65] The court stated that the plaintiff's uncorroborated deposition testimony was sufficient to raise an issue of fact that would preclude summary judgment.[66]

In *Turner v. Schering-Plough Corp.*,[67] the Third Circuit partially reversed an award of summary judgment on an age discrimination

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61 896 F.2d at 799.
62 *Id.*. at 798.
63 *Id.* at 799.
64 *Id.*
65 *Id.* at 800
66 *Id.*
67 901 F.2d 335 (3d. Cir. 1990). *See supra* notes 47-51 and accompanying text.

claim where the plaintiff had been first demoted from a previous position and then discharged when his new job was eliminated as part of a corporation-wide reorganization. The court held that a trial was warranted on the plaintiff's claim that the company should have located another job for him when his position was eliminated. In so holding, the Third Circuit noted that the plaintiff's performance in his new job had been reevaluated as "very good" and that he had attended courses to remedy some of the deficiencies that had led to his demotion. The court held that "a rational jury could conclude that given [the plaintiff's] extensive experience with the company in responsible positions, his dedication to his career, and his marked improvement in performance over the preceding two and one-half years, [the employer's] alleged reason for not offering him [another job] is pretextual."[68]

On at least two occasions, the Third Circuit Court of Appeals has declared that the timing of a discharge may, in itself, be enough to permit an employee to go to trial on an employment discrimination claim. For example, in *Jalil v. Avdel Corp.*,[69] the court of appeals reversed summary judgment on the plaintiff's retaliatory discharge claim because the plaintiff had been discharged only two days after the employer received notice that the plaintiff had filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) against the employer.[70] Likewise, in *White v. Westinghouse Electric Co.*,[71] the Third Circuit Court of Appeals reversed summary judgment entered against the plaintiff on a claim of age discrimination because the plaintiff had been dismissed pursuant to a work force reduction only three months before his retirement benefits would have been increased.[72]

The Third Circuit has also reversed summary judgment solely on the strength of the plaintiff's statements concerning the em-

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68 901 F.2d at 346.

69 873 F.2d 701 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 725 (1990). It should be noted that the opinion in *Jalil* states that

> [s]ummary judgment is inappropriate . . . if the plaintiff establishes a prima facie case and counters the defendant's proffered explanation with evidence raising a factual issue regarding the employer's true motivation for discharge. *When the defendant's intent has been called into question, the matter is within the sole province of the factfinder.*

Id. at 707 (emphasis added).

70 To establish a prima facie case of retaliatory discharge, a plaintiff must show "(1) that he engaged in a protected activity; (2) that he was discharged subsequent to or contemporaneously with such activity; and (3) that a causal link exists between the activity and the discharge." *Id.* at 708 (citations omitted).

71 862 F.2d 56 (3d Cir. 1988).

72 *Id.* at 62. *See also infra* notes 69-70 and accompanying text.

ployer's alleged discriminatory conduct. For example, in *Jackson v. University of Pittsburgh*,[73] the plaintiff was discharged from his job as an attorney in the University's legal department. He sued under Title VII, as well as under 42 U.S.C. § 1981 and Pennsylvania state law, complaining that his termination had been racially motivated. The University satisfied its burden of articulating a legitimate nondiscriminatory reason for the termination by producing evidence that the plaintiff "was simply a poor performer . . . ."[74] The district court entered summary judgment in favor of the University, finding "no evidence of racial animus," but noting "abundant instances of unsatisfactory work performance" by the plaintiff that reasonably might have justified his dismissal.[75]

The Third Circuit reversed, relying mainly on the plaintiff's statements at his deposition, where he stated that he had never been told that his work was unsatisfactory and that the supervisor who had fired him had told others that he "would ruin and destroy" the plaintiff's reputation as an attorney. This evidence, according to the appellate court, "suffice[d] to support an inference that [the supervisor] orchestrated a campaign to get rid of [the plaintiff] because he [was] black."[76] In reversing summary judgment, the court stated that "[t]here is simply no rule of law that provides that a discrimination plaintiff may not testify in his or her own behalf, or that such testimony, standing alone, can never make out a case of discrimination that will survive a motion for summary judgment."[77]

Similarly, in *Levendos v. Stern Entertainment, Inc.*,[78] the Third Circuit Court of Appeals held that the plaintiff could withstand a motion for summary judgment solely on the strength of her affidavit. The affidavit in *Levendos* asserted that the plaintiff had been constructively discharged because she was female. Moreover, it included references to various instances where she had been harassed by her supervisors because of her sex.[79]

These cases, however, should not be read to imply that a plaintiff can withstand a motion for summary judgment merely by making allegations, however implausible, that the employer has engaged in

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[73] 826 F.2d 230 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 732 (1988).

[74] *Id.* at 234.

[75] *Id.*

[76] *Id.* The Court also noted the plaintiff's testimony that he had not been responsible for some of the assignments that he allegedly had mishandled and that he had been treated "less favorably than his white colleagues . . . ." *Id.* at 234-35.

[77] *Id.* at 236.

[78] 860 F.2d at 1227 (3d Cir. 1988).

[79] *Id.* at 1231 n.7.

discriminatory conduct. As previously stated, district courts are permitted certain latitude when weighing the credibility of the evidence in the record. If a court determines that a plaintiff's assertions are insufficient to support a jury verdict in the face of contrary evidence, then summary judgment may properly be entered. Additionally, if the plaintiff's statements are simply not believeable, they need not be credited and summary judgment may be entered.[80]

III. ANALYSIS

The 1986 Supreme Court cases have displaced the traditional standard of denying summary judgment if a court has "the slightest doubt" as to the motion's propriety.[81] Despite Third Circuit courts' frequent citations to the Supreme Court decisions that adopted a more liberal stance toward the entry of summary judgment, the Third Circuit has unevenly applied this liberal standard to the cases before it.

In *Radwan v. Beecham Laboratories*,[82] for instance, the Third Circuit reversed a summary judgment on a claim of wrongful discharge in violation of New Jersey public policy in a fact situation where it would seem unlikely that a reasonable jury could have found for the plaintiff, as is demanded by the Supreme Court's summary judgment standard. The Third Circuit stated that a jury could infer from the allegations that the employer had terminated the plaintiff's employment in retaliation for the plaintiff's refusal, three years earlier, to assist in the termination of a shop steward's job. The court reversed the summary judgment despite the lack of evidence directly linking the discharge to this earlier event and despite evidence suggesting that the person who recommended the plaintiff's dismissal had no knowledge of the previous incident. Furthermore, the plaintiff had been given substantial notice of his discharge and continued to receive salary and benefits for six months after he was terminated.[83]

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80 *See* Childress, *supra* note 7, at 186-87, 192.

81 *See id.* at 193. Reflecting this traditional standard, the Third Circuit Court of Appeals stated in an earlier case that if there was "any evidence in the record from any source from which a reasonable inference in the [nonmovant's] favor [could] be drawn, the moving party simply [could not] obtain a summary judgment . . . ." *In re* Japanese Elec. Prods., 723 F.2d 238, 258 (3d Cir. 1983), *rev'd sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

82 850 F.2d 147 (3d Cir. 1988).

83 *Id.* at 151-52. Although the court of appeals reversed the summary judgment, it admitted that the "benevolent procedure" followed in discharging the plaintiff was "indicative of a motive other than retaliation for [the plaintiff's earlier] conduct . . . ." *Id.* at 152.

On the other hand, Third Circuit courts have, in some instances, been less hesitant to employ the relaxed summary judgment standard. The opinions in *Fowle*[84] and *Healy*,[85] for example, can be seen as resolving conflicting inferences in favor of the employer who was moving for summary judgment rather than in favor of the plaintiff, as is generally required on a motion for summary judgment. This, of course, is contrary to the general rule, but nevertheless is appropriate when the court has concluded that the inferences favoring the plaintiff are so weak as to be unjustifiable.

The Third Circuit's reluctance to fully embrace the liberalized standard enunciated by the Supreme Court has led the court, on occasion, to contradict itself in its reasoning, often reciting identical facts in support of opposing conclusions. For example, in *Jackson v. University of Pittsburgh*,[86] one of the reasons relied upon by the court in support of reversing summary judgment in the employer's favor was that the plaintiff testified in deposition that he had never received any complaints about his work as an attorney prior to being discharged. According to the court, the absence of prior complaints concerning the plaintiff's job performance, as well as other allegations by the plaintiff, called into question the employer's assertion that the plaintiff had been performing poorly.[87]

In *Healy*, on the other hand, the Third Circuit Court of Appeals affirmed a summary judgment in favor of the employer despite the plaintiff's contention that he never had been informed that his job performance was inadequate. The court in *Healy* stated that although it sympathized with the plaintiff, who had been unaware of the need to improve his performance, "from a legal perspective managers are not compelled to convey their dissatisfaction to employees."[88] The difference between the two cases, and what ultimately might have determined their outcomes, is that the plaintiff in *Healy* was a high-level executive, whereas the plaintiff in *Jackson* was simply one of a number of staff attorneys at the University of Pittsburgh. As previously stated, in employment discrimination cases the Third Circuit seems to defer to employers' decisions to a greater extent when

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84 *See supra* notes 42-43 and accompanying text (discussing *Fowle*).

85 *See supra* notes 35, 39-41, 44 and accompanying text (discussing *Healy*).

86 826 F.2d 230 (3d Cir. 1987), *cert. denied*, 484 U.S. 1020 (1988).

87 *Id.* at 234.

88 Healy v. New York Life Ins. Co., 860 F.2d 1209, 1216 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 2449 (1989).

the employment decision involves persons occupying executive positions of great responsibility.

In addition to inconsistencies in summary judgment law within the Third Circuit, there exists a conflict between the state of summary judgment law in the Third Circuit and that of other circuits.[89] The most serious example of this disagreement concerns whether a plaintiff may avoid summary judgment merely by calling into question the employer's proffered justification, without actually presenting evidence that a discriminatory intent motivated the employer's action.

In *Sorba v. Pennsylvania Drilling Co.*,[90] the Third Circuit Court of Appeals held that simply questioning the credibility of the employer's justification is enough to defeat a motion for summary judgment.[91] In fact, the court in *Sorba* stated:

> The jury must only assess the employer's credibility with respect to its proffered reason. The jury need only decide whether the employer dismissed [the plaintiff] because of [the employer's proffered reason] . . . . If not, it is more likely than not that the employer based his decision on an impermissible consideration such as age.[92]

However, the Third Circuit's view that "[a] defendant [who] is less than honest in proffering its reason for discharge risks an unnecessary age discrimination verdict,"[93] is not universally shared. In *Johnson v. University of Wisconsin-Milwaukee*,[94] the Seventh Circuit stated that when a defendant articulates a legitimate nondiscriminatory reason for its employment action, the plaintiff must show not only that the proffered reason was pretextual, but also that it was a pretext for discrimination.[95] The court held that merely showing that the defendant's true reason for its action was not the proffered reason but, rather, another nondiscriminatory reason, fails to establish that the defendant acted with discriminatory intent.[96]

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89 For a comprehensive study of the various approaches within the circuits to summary judgment in the age discrimination area, see BNA Special Report, *Age Discrimination: A Legal and Practical Guide for Employers*, at 277-91 (1989).

90 821 F.2d 200 (3d Cir. 1987).

91 *Id.* at 205. *See also* Turner v. Schering-Plough Corp., 901 F.2d 335 (3d. Cir. 1990).

92 821 F.2d at 200 (citation omitted).

93 Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3d Cir. 1987).

94 783 F.2d 59 (7th Cir. 1986).

95 783 F.2d at 63-64.

96 *Id. See also* Graham v. Renbrook School, 692 F. Supp. 102, 107 n.7 (D. Conn. 1988), dismissing as dicta the language in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981), that mere disbelief of the defendant's explanation may be sufficient to establish pretext. The district court in *Graham* cited the

A recent opinion by the United States Court of Appeals for the Seventh Circuit adopted what seems to be a sensible middle ground between the *Sorba* and *Bienkowski* viewpoints. In *Palucki v. Sears, Roebuck & Co.*,[97] Judge Posner stated that the plaintiff's presentation of evidence contrary to the employer's proffered explanation does not automatically defeat summary judgment and secure the plaintiff's right to a trial. The court of appeals emphasized that "[t]he district court must still make a judgment as to whether the evidence, interpreted favorably to the plaintiff, could persuade a reasonable jury that the employer had discriminated against the plaintiff."[98]

Interestingly, despite the Third Circuit's pronouncements in *Sorba* and *Chipollini*, the standard set forth in *Palucki* seems similar to that applied by the Third Circuit in *Healy* and *Fowle*. Moreover, the analysis in *Palucki* more closely conforms with the 1986 Supreme Court opinions on summary judgment than does the standard in *Sorba* and *Chipollini*.

IV. CONCLUSION

In short, the Third Circuit employs the Supreme Court's recently adopted liberal standard toward the entry of summary judgment mainly in situations involving high-level executives where courts are more inclined to permit employers great latitude in their employment decisions. In other instances, the Third Circuit often recites the summary judgment standard enunciated in the 1986 Supreme Court decisions, but then proceeds to apply what can be seen as a more stringent standard permitting summary judgment only in limited circumstances.

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dissent in *Chipollini*, 814 F.2d at 903-04, where Circuit Judge Hunter stated that if the plaintiff shows pretext by facts that are not material to the ultimate issue of discriminatory motivation, then summary judgment still may properly be granted.

97 879 F.2d 1568 (7th Cir. 1989).

98 *Id.* at 1570. In Smith v. BJ's Wholesale Club, 51 Fair Empl. Prac. Cas. (BNA) 1233 (N.D. Ill. 1989), however, the district court denied the employer's motion for summary judgment in a discriminatory discharge action based upon race. The district court stated that

> [t]o show pretext, the plaintiff merely needs to demonstrate that the reason offered by the employer is not the real reason. At this stage of the case, the plaintiff is not required to offer any additional evidence that race played a part in the employer's decisionmaking—the *prima facie* case has already created such an inference. . . . At the pretext stage, [the plaintiff] need only show that the [employer's proffered reason] was not the *real* reason he was fired.

Id. at 1237.