North Carolina Lawyers Weekly **http://nclawyersweekly.com**

New RaceBias Trial Ordered Over Imprecise Instruction

by Ertel Berry,

Published: September 10th, 2001

A Cabarrus machinist's discrimination suit must be retried because a judge instructed that his firing had to be "on account of" race, the Appeals Court held Sept. 4.

The jury ruled for the employer at a 1999 trial. The appeals panel reversed.

The plaintiff, who was African-American, only had to prove that race was a "determinative factor" in his termination, the court said.

"The term 'on account of,' without a modifier, even when read in the context of the overall charge, could have been misconstrued by the jury to require that race be the sole decisional factor in the employment decision," the opinion states.

The case is *Brewer v. Cabarrus Plastics, Inc.* (North Carolina Lawyers Weekly No. 1-07-1273, 11 pages). Emergency Recall Judge Donald Smith wrote the decision, with Judge Loretta Biggs concurring.

Judge Ralph Walker dissented, saying the jury instruction was okay even though the magic words "determinative factor' weren't used.

Charlotte attorney Julie Fosbinder, a lawyer for the plaintiff, took issue with that view.

"To get the instruction right, the court must make sure it conveys to the jury the idea that the plaintiff can prevail even if factors other than race motivated the employer's decision," said Fosbinder.

"Most people's employment history can provide employers with some performance problem to use against them in a discrimination case," she said. "You have to tell jurors that's okay if race was still the primary motivation for the termination."

Charlotte attorney Richard Vinroot said his client intended to follow up on Judge Walker's dissent at the Supreme Court.

"We fully intend to appeal and will do so promptly," he said.

Facts

In 1989, the plaintiff began working for a company that manufactured molded plastic parts. In November 1990, he filed a complaint with the EEOC claiming that he was being cut out of overtime opportunities because of his race. Those charges eventually resulted in a $200 settlement.

A year later the plaintiff was fired and replaced with a white employee. He sued, saying the employer discriminated against him based on race and fired him in retaliation for the EEOC complaint. Those actions violated 42 U.S.C. Sect. 1981 and the North Carolina Equal Employment Practices Act, he alleged.

The employer said the firing and the EEOC complaint weren't connected. Poor performance was the basis for the job action, it argued. The evidence: The plaintiff had received three written disciplinary warnings in the 15 months leading up to his termination.

The first trial in 1996 resulted in a directed verdict for the employer. That was overturned by the Appeals Court (see Sept. 28, 1998 Lawyers Weekly).

At the second trial in 1999, jurors were instructed that the plaintiff had to show "that the defendant terminated the plaintiff's employment on account of his race or on account of his filing

discrimination charges with the Equal Employment Opportunity Com-mission."

The plaintiff objected, saying the charge suggested the employer should prevail if it had a separate lawful reason for firing him. He proposed an alternative instruction that "race or retaliation was a determinative factor" in the employer's action.

The trial court rejected the plaintiff's proposed instruction, and the jury came back with a verdict for the employer. The plaintiff appealed again.

The Appeals Court reversed and ordered another trial.

Judge Smith said the plaintiff's discrimination claim was based on circumstantial evidence, including racial epithets, that showed the employer's explanation for the termination was a pretext.

"The dispositive question in a pretext case should be whether race or retaliation 'was a determinative factor in the adverse employment decision,'" wrote Judge Smith, quoting a 1995 Fourth Circuit case, *Fuller v. Phipps*, 67 F.3rd 1137.

According to a U.S. Supreme Court decision, "determinative factor" means that the protected trait actually motivated the employer's decision, said the court.

Under those cases, the trial court's instruction in *Brewer* was erroneous, said Judge Smith.

The trial judge's instruction, even in context, suggested the plaintiff had to show race was the sole reason for the employer's job action. That misstated the law, said the court.

Judge Walker dissented, saying the trial court's instruction was sufficient.

Other cases have upheld instructions that required plaintiffs to show they were fired "because of" race, or would have kept their jobs "but for" the fact of their race, according to Judge Walker.

The trial judge's language was similar to those phrases and simply restated the "determinative factor" test, he said.

Complete URL: **http://nclawyersweekly.com/2001/09/10/new-racebias-trial-ordered-over-imprecise-instruction/**