

***LANE POWELL WINS VICTORY FOR EMPLOYERS: WASHINGTON SUPREME COURT SETS STANDARD FOR CLAIMS TO REACH JURIES, PRESERVES ABILITY TO DISMISS MARGINAL CLAIMS BEFORE TRIAL***

Issuing what may be the most significant decision for employers in the past three years, the Washington Supreme Court yesterday clarified the standard that a plaintiff employee must meet in order for his or her state law discrimination claim to reach a jury. The case is entitled *Hill v. BCTI*, No. 23219-II (Wash. S. Ct. May 17, 2001) and in it the Court ruled that, to avoid dismissal, an employee plaintiff must present some evidence that the employer's adverse decision was motivated by discriminatory animus.

Hill was a 53-year-old recruiter in BCTI's Tacoma-Lacey office. She was interested in a transfer to a different office. BCTI offered evidence to show that Hill had contacted the manager at the office she hoped to transfer to and discussed possible salary and benefits, a move that was in violation of a policy that employees were not allowed to discuss their compensation with other employees. When asked, Hill denied that she had had such conversations. She was fired and replaced by two people, one of whom was less than 40 years old. She sued alleging race, age and disability discrimination. Hill claimed she had shown evidence that her employer's stated reason for her discharge - dishonesty and violation of company policy - was merely a pretext for discrimination. The trial judge dismissed the disability discrimination claim on the employer's motion for directed verdict, but allowed the race and age claims to go forward. The jury rejected the race discrimination claim, but found the employer had discriminated against Hill on the basis of age.

The Court of Appeals overturned the jury verdict because the employee had offered no evidence that age discrimination was at least one of the real reasons for her discharge, holding that the "pretext plus" standard required actual evidence of discrimination in order to reach a jury with a discrimination claim. On appeal to the Washington Supreme Court, Hill argued for a "pretext only" standard - that is, a rule that plaintiffs can reach a jury with nothing more than evidence that the employer's stated reason for its adverse action was not worthy of belief. Opposing that argument, Lane Powell attorneys Michael B. King (co-chair of the firm's appellate practice group) and June Jackson, on behalf of BCTI, urged the Court to follow a middle ground "hybrid pretext" analysis, which would hold plaintiffs in discrimination cases to the same standard of proof as plaintiffs in other types of cases. The analysis urged on behalf of BCTI was consistent with the recent United States Supreme Court decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), and the Washington Supreme Court's decision in *Hill v. BCTI* now resolves the debate over the proper standard for cases under the Washington Law Against Discrimination.

In the *Hill* case, the Supreme Court agreed with BCTI and held that plaintiffs must present some evidence that the employer was motivated by discriminatory animus. In its treatment of the age discrimination claim, the Court made one other significant ruling, holding that where an employee is both hired and fired by the same decision maker within a short period of time, it creates an inference that the firing was not discriminatory. Thus, in *Hill's* case, the Supreme

Court ruled that she was unable to create an issue for the jury, when her only evidence was: (a) a prima facie case (i.e., that she was discharged from employment, was between 40 and 70 years of age, was doing satisfactory work, and was replaced by a younger person), and (b) her suggestion that the employer was not telling the truth about why it discharged her. The Supreme Court stated: “While Hill’s testimony raised a question of fact regarding BCTI’s explanation for firing her, its probative value in establishing Hill’s claim of age discrimination proved minimal.”

Turning to her disability discrimination claim, the Supreme Court addressed Hill’s claim that BCTI failed to accommodate her when it denied her transfer request. Hill had sought the transfer because a shorter commute might expose her to less smog and help her asthma. However, at trial, Hill’s medical expert conceded that the requested transfer was not “medically necessary.” The Supreme Court held: “Washington law does not require employers to provide disabled persons with medically unnecessary accommodations. . . . Since the record contains insufficient evidence to make out even a prima facie case of failure to reasonably accommodate a disability, the trial court was correct to adjudicate Hill’s disability discrimination claim as a matter of law.”

### **What this Means for Employers**

The Washington Supreme Court has, both historically and recently, been very protective of the rights of employees. This decision sets a reasonable standard which is fair to employers and employees alike. While the rejection of “pretext plus” allows plaintiffs to argue inferences from evidence of false statements about the reasons for adverse actions, plaintiffs will not be entitled to receive jury instructions that state that disbelief of the employer’s legitimate, nondiscriminatory reasons compels a finding of illegal discrimination. The “hybrid pretext” rule, argued by BCTI and adopted by the Washington Supreme Court, gives employers a fighting chance of getting groundless discrimination cases dismissed as a matter of law.

Following *Reeves* and *Hill*, employees claiming discrimination must meet normal burdens of establishing a genuine issue of material fact regarding the employer’s alleged discriminatory motive for its adverse action. Under both *Reeves* (from the federal perspective) and *Hill* (from the state perspective), employers should protect themselves by giving consistent, nonevasive and truthful reasons for their actions. “Kindness” or inconsistency with regard to explanations for employer decisionmaking can still be misinterpreted and argued by plaintiffs as an attempt to hide a discriminatory motive.

As always, employers with questions about discrimination claims should seek legal advice.

*Because of the changing nature of this area of the law and the importance of individual facts, this information is not meant to provide legal opinions and is not a substitute for the advice of legal counsel.*

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