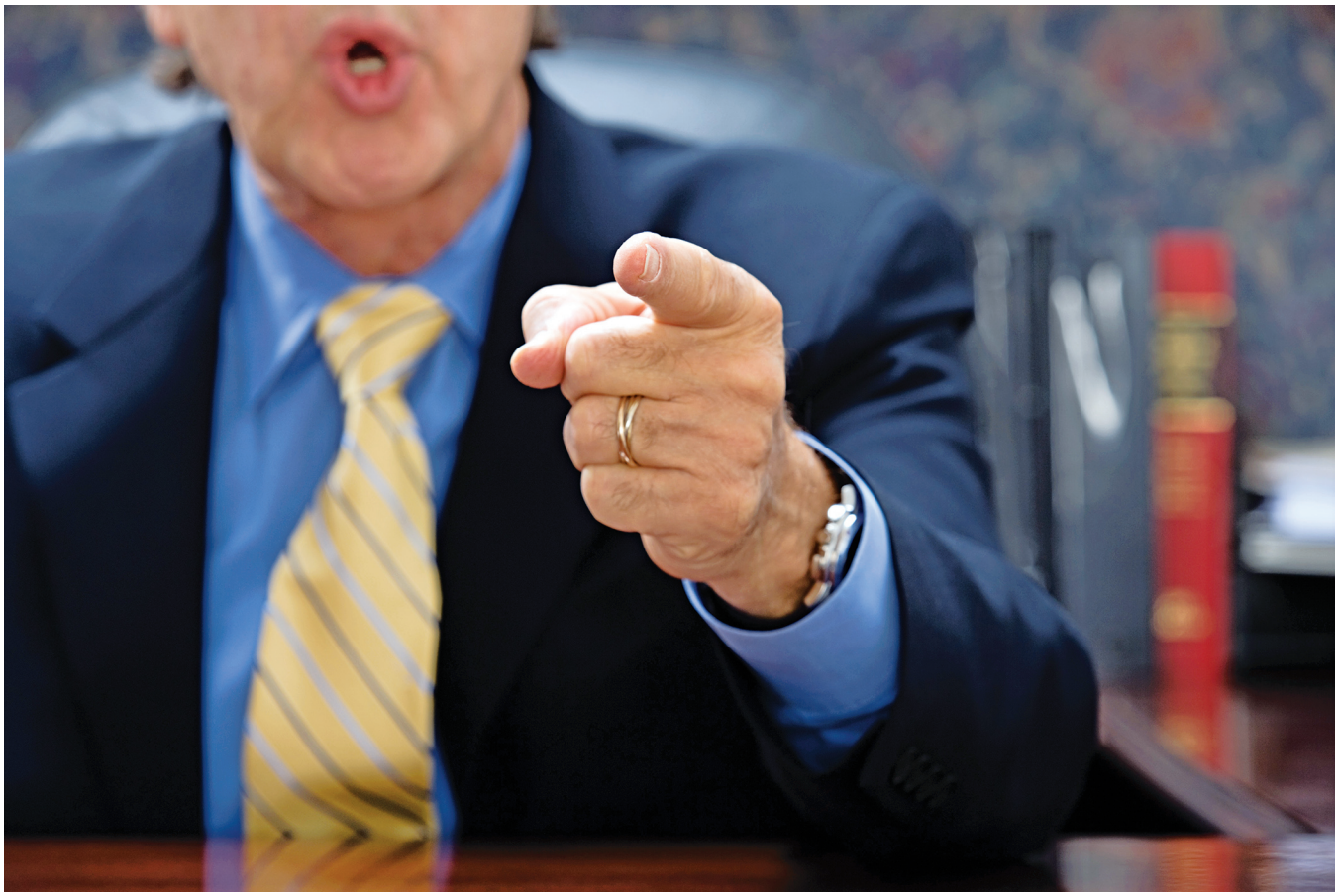

TERMINATION MOTIVATION

Proving discrimination and retaliation in employment law cases.

BY ROBERT W. SCHMIDT

Even with "at-will" employment in Texas, state and federal laws—including discrimination and retaliation statutes—prohibit employers from terminating or taking other negative actions against an employee for certain illegal reasons. In almost all employment cases, a central issue is: How does the employee show that the employer acted with an illegal motivation?

"There's no employment case here! Nobody at the employer *ever even said a word* about the employee's (race, age, disability, or other protected characteristic or activity)!" This sentiment is often heard from employers, co-workers, and occasionally experienced attorneys, albeit those who have not practiced much in the area of employment law. Workplace discrimination and retaliation cases rarely involve overt, "direct evidence" showing that the employee was fired, demoted, or otherwise treated badly because of his or her race or another legally prohibited reason. As the 5th Circuit observed more than 30 years ago:

> Today, employers, and their supervisors, who might choose to discriminate on the basis of race have become, as a result of twenty years of Title VII litigation, too sophisticated to use racial epithets or to leave glaring tracks if an employee is being discharged for race-related reasons. Instead, the motive is veiled behind apparently neutral remarks about business necessity, an employee's inadequate performance, attitude and the like.[1]

The same is even truer today.

If there are no racist, sexist, ageist, retaliatory, or other statements suggesting a motive, how can an employee prove that the employer acted because of an illegal reason? The short answer: circumstantial evidence. The U.S. Supreme Court has repeatedly affirmed the usefulness of circumstantial evidence in employment cases, noting that "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence. The adequacy

of circumstantial evidence also extends beyond civil cases; we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required."[2]

LEGITIMATE AND ILLEGAL REASONS

In almost all employment cases, an employee can win even if there are legitimate reasons for the employment action.[3] The Texas and 5th Circuit employment pattern jury charges for discrimination and retaliation specifically explain to jurors there can be more than one reason for an employment decision and the plaintiff does not have to prove that illegal discrimination or retaliation was the only reason for the employer's actions.[4] Even in certain employment cases where an employee must show the action would not have happened "but for" their protected characteristic or activity, the employee can still win even if there were multiple legitimate reasons for the action.[5]

FALSE, PRETEXTUAL EXPLANATIONS

One of the principal ways an employee can establish an illegal motivation is by offering evidence that the employer's claimed, legitimate explanation for an employment action is not true, but rather a "pretext" for discrimination.[6] The Supreme Court explained this principle well in *Reeves v. Sanderson Plumbing Products, Inc.* in 2000:

> The fact-finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may … suffice to show intentional discrimination. Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact-finder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt. Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.[7]

Thus, employees can and do win in employment discrimination and retaliation cases by presenting evidence that the employer's claimed nondiscriminatory or nonretaliatory reason for an employment action was only a pretext—that is, a false, weak, or noncredible reason advanced to hide the real reason.[8] Even where the employer's claimed reason for an action may have some basis in fact, courts and juries have found in favor of employees where the reasons offered are trivial, overblown, or simply don't make sense.[9]

LACK OF DOCUMENTATION

Lack of documentation supporting an employment decision can be used to show that the employer's justification for the employment decision is not believable. In numerous cases, courts have found pretext where there was no contemporaneous documentation of the employee's alleged performance problems where the employer has a policy or practice of documenting performance issues.[10]

BOLSTERING AFTER THE FACT

Employees may also show that an employment decision was motivated by an illegal reason when the employer attempts to justify the decision with documentation and reasons "after the fact." For example, an employer cannot justify its employment action based on reasons uncovered after the decision was made or on conduct that took place after the decision was made.[11] Moreover, evidence of an employer's attempt to create a paper trail after a decision has already been made may support an inference of pretext."[12]

SHIFTING EXPLANATIONS

Shifting or inconsistent explanations for an employment action may be evidence the employer's reasons are false or pretextual. For example, where an employer offers one reason for a termination in an unemployment benefits hearing or an Equal Employment Opportunity Commission investigation, but then later offers a different explanation, a court may find the employer's reason is "suspect because it has not remained the same."[13] Shifting, changing, or inconsistent explanations during litigation, such as in responses to interrogatories or in deposition testimony, may also support the conclusion that the employer is "dissembling" to cover up an illegal motive.[14] For example, in *Burton v. Freescale Semiconductor, Inc.,* the supervisor who made the termination decision first testified he did not know if the employee's unauthorized internet usage was one of the reasons for the termination.[15] As the deposition progressed, the supervisor's memory was "refreshed" and he recalled that it was "the final straw."[16] The supervisor's testimony was also inconsistent with another employee's deposition testimony.[17] Based on this record, the court found that a jury could conclude the employer's witnesses lacked credibility and the reasons offered were pretextual.[18]

NO REASON OR A VAGUE REASON

While it sometimes is said that an employer may terminate an employee for a good reason, bad reason, or no reason at all[19] most employment cases focus on the employer's justification for the action. While employers are free to terminate an employee for no reason or a vague, subjective reason, doing so likely means that only the trier of fact can decide whether the employer's actions were a pretext for illegal discrimination or retaliation by weighing the employer's credibility.[20] For example, courts have ruled in favor of employees on summary judgment where an employer simply claimed the employee was "not sufficiently suited" for a position or cannot offer examples of performance deficiencies.[21]

FAILURE TO FOLLOW POLICIES

An employer's failure to follow its own policies or normal practices may be evidence of pretext. For example, when an

employer has a disciplinary system that involves warnings, failure to follow that system may give rise to inferences of pretext.[22] Even if a progressive disciplinary policy is not mandatory, an inference of pretext may still be raised by the failure to follow a policy that specifically stated it should be followed in most circumstances.[23]

INCONSISTENT TREATMENT

Failure to treat similarly situated employees the same way under like situations can be compelling circumstantial evidence of discrimination. Evidence that an employer terminated an employee for allegedly violating a policy, but only gave a verbal reprimand to another similarly situated employee who had violated the same policy, is circumstantial evidence the termination was made based on an illegal motive.[24] While Texas and 5th Circuit courts generally only give weight to comparisons of nearly identical circumstances, the circumstances do not have to be identical.[25]

OTHER DISCRIMINATION AND STATISTICS

Evidence of discrimination or retaliation against other employees may be highly probative of an employer's motivation.[26] Similarly, a plaintiff may show pretext by using statistical evidence of a discriminatory employment policy, such as where payroll records demonstrated a trend toward a much younger workforce after the plaintiff's termination.[27]

SUSPECT TIMING

Close timing can also be evidence of an illegal motive, for example, if an employer terminates an employee shortly after he or she made a complaint of discrimination or a whistleblower report.[28] Suspect timing may also show pretext where an employer takes an action shortly after discovering a protected trait, such as a disability or pregnancy.[29] Timing can be used to contradict a claim of poor performance, for example, if an employee received a positive employment review just two months before being terminated for poor performance.[30]

NO "GLARING TRACKS" NECESSARY

Occasionally, an employer may make comments that reveal an illegal motive. Such comments are "direct evidence" if they were made by a person with authority over the employment decision, proximate in time to the action, and concern the decision.[31] Or, they may simply be additional circumstantial evidence if they show discriminatory bias and are made by a person with influence over the decision, such as a supervisor referring to an employee as an "old fart" who wears "old man clothes."[32] Comments like these are the exception, however, and they are simply not necessary for an employee to prevail on summary judgment and win in court.[33] Courts and jurors recognize that discrimination and retaliation still occur, and they don't need "glaring tracks" to spot it. Rather, many types of evidence—most often circumstantial—are used to examine the employer's and employee's credibility and determine the employer's true motivations. **TBJ**

NOTES

1. *Barnes v. Yellow Freight Sys., Inc.*, 778 F.2d 1096, 1101 (5th Cir. 1985); *See also United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983) (acknowledging that discrimination cases present difficult issues for the trier of fact, as "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes"); *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 634 (Tex. 2012) (recognizing that "motives are often more covert than overt, making direct evidence of forbidden animus hard to come by").
2. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (citations omitted).
3. But *see Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733, 734-735 (Tex. 1985) (exception to at-will employment if employee terminated for sole reason of refusal to perform illegal act).
4. Fifth Circuit Pattern Jury Charges 11.1, 11.5 (2014); Texas Pattern Jury Charge 107.6, 107.9 (2014).
5. *Torres v. City of San Antonio*, No. 04-15-00664-CV, 2016 Tex. App. LEXIS 12907 (Tex. App.—San Antonio 2016); *Leal v. McHugh*, 731 F.3d 405, 415 (5th Cir. 2013); *Tex. Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 636 (Tex. 1995).
6. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143 (2000).
7. *Id.* at 147 (internal quotation marks and citations omitted).
8. *See, e.g., Heinsohn v. Carabin & Shaw, P.C.*, 832 F.3d 224, 237 (5th Cir. 2016); *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 481-82 (Tex. 2001); *Gonzalez v. Champion Techs., Inc.*, 384 S.W.3d 462, 474–76 (Tex. App.—Houston [14th Dist.] 2012, no pet.).
9. *See, e.g., Young v. UPS*, 135 S. Ct. 1338, 1356 (2015) (Alito, J., concurring) ("Of course, when an employer claims to have made a decision for a reason that does not seem to make sense, a factfinder may infer that the employer's asserted reason for its action is a pretext for unlawful discrimination."); *Laxton v. Gap Inc.*, 333 F.3d 572, 580 (5th Cir. 2003); *Boehms v. Crowell*, 139 F.3d 452, 458 (5th Cir. 1998).
10. *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 239-40 (5th Cir. 2015); *Laxton*, 333 F.3d at 580; *Evans v. City of Houston*, 246 F.3d 344, 355-56 (5th Cir. 2001).
11. *Burton*, 798 F.3d at 232.
12. *Id.* at 236; *Goudeau v. Nat'l Oilwell Varco, L.P.*, 793 F.3d 470, 477 (5th Cir. 2015).
13. *Burrell v. Dr Pepper/Seven Up Bottling Group, Inc.*, 482 F.3d 408, 412-16 (5th Cir. 2007); *Bowen v. El Paso Elec. Co.*, 49 S.W.3d 902, 910-11 (Tex. App.—El Paso 2001, pet. denied).
14. *Burton*, 798 F.3d at 235-36; *Bosque v. Starr Cnty.*, 630 F. App'x 300 (5th Cir. 2015) (per curium); *Gee v. Principi*, 289 F.3d 342, 347-48 (5th Cir. 2002).
15. *Burton*, 798 F.3d at 235.
16. *Id.*
17. *Id.*
18. *Id. See also Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam) (court may not improperly weigh evidence and resolve disputed issues or testimony in favor of summary judgment movant).
19. *See, e.g., Montgomery County Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998) (employment may be terminated "for good cause, bad cause, or no cause at all").
20. *Medina v. Ramsey Steel Co.*, 238 F.3d 674, 681-82 (5th Cir. 2001).
21. *Bosque*, 630 F. App'x at 304; *Alvarado v. Texas Rangers*, 492 F.3d 605 (5th Cir. 2007); *Patrick v. Ridge*, 394 F.3d 311, 316 (5th Cir. 2004).
22. *Goudeau*, 793 F.3d at 477.
23. *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 354 n. 29 (5th Cir. 2005).
24. *Wal-Mart Stores, Inc. v. Amos*, 79 S.W.3d 178, 183 (Tex. App.—Texarkana 2002, no pet.). *See also Clemons v. Texas Concrete Materials, Ltd.*, No. 07-09-0034-CV, 2010 WL 4105662, 2010 Tex. App. LEXIS 8394 (Tex. App.—Amarillo Oct. 19, 2010, no pet.) (no other employees had ever been discharged for violation of radio policy and plaintiff's termination was exception to progressive discipline rule); *E.E.O.C. v. Chevron Phillips Chemical Co., LP*, 570 F.3d 606, 623-624 (5th Cir. 2009).
25. *Lee v. Kan. City S. Ry. Co.*, 574 F.3d 253, 261 (5th Cir. 2009).
26. *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106 (5th Cir. 1995).
27. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805, 93 S. Ct. 1817, 1825 (1973); *Clemons*, 2010 Tex. App. LEXIS 8394 at *23.
28. *Mooney v. Lafayette County Sch. Dist.*, 538 Fed. Appx. 447, 454 (5th Cir. 2013); *Rogers v. City of Fort Worth*, 89 S.W.3d 265, 281 (Tex. App.—Fort Worth 2002, no pet.).
29. *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011, 1019-1021 (8th Cir. 2005).
30. *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 224 (5th Cir. 2000).
31. *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996).
32. *Goudeau*, 793 F.3d at 475-76.
33. Numerous courts have recognized that because employment cases involve questions of motive, intent, and credibility, summary judgment is rarely appropriate. *See, e.g., Fierros v. Tex. Dep't of Health*, 274 F.3d 187, 190-91 (5th Cir. 2001) ("The Supreme Court recently emphasized the paramount role that juries play in Title VII cases, stressing that in evaluating summary judgment evidence, courts must refrain from the making of 'credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts,' which 'are jury functions, not those of a judge.'"); *Thornbrough v. Columbus & Greenville R. Co.*, 760 F.2d 633, 640 (5th Cir. 1985).

ROBERT W. SCHMIDT

is an attorney with Crews Law Firm in Austin, representing employees in discrimination and retaliation litigation. He is a past chair of the Austin Bar Association Labor & Employment Law Section, a board member of the Texas Employment Lawyers Association, a graduate of the Trial Lawyers College, and a frequent speaker on employment law.