A Revival Of Summary Judgment For Employers

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Many courts, including the United States Supreme Court, have recommended summary judgment as the appropriate mechanism for disposing of meritless employment discrimination claims.[1] Even so, courts have shown some reluctance to grant these motions, on the theory that discriminatory intent is a matter best determined at trial. There is no such reluctance in New York State, where the summary judgment rule is alive and well. In 2004, New York's highest court issued a decision emphasizing the availability of summary judgment for employers.[2] Since then, courts have consistently dismissed cases, and trial has been avoided, where the employee cannot refute his or her poor performance, show a tangible adverse job action or come forward with discriminatory remarks that are continuous or pervasive.

The Court Of Appeals' Decision

In *Forrest v. Jewish Guild for the Blind*, the Court of Appeals granted summary judgment for the employer and dismissed claims of employment discrimination, hostile work environment and retaliation. The plaintiff in that case had been employed as a case worker for a nonprofit organization that provides services for the visually impaired. She alleged that her supervisors directed racial epithets at her on three occasions over the course of the nine years that she worked there, and that she was mistreated and ultimately discharged because she is African-American and she had filed grievances. The employer produced a letter that the plaintiff wrote in which she resigned her position and expressed gratitude to the employer for the opportunity to use her talents and grow personally and professionally. The employer also showed that the plaintiff failed to make a complaint of racial harassment and that she had received written warnings for poor job performance, including leaving blind patients unattended and disregarding state-mandated record-keeping requirements.

The Court of Appeals was persuaded by this showing. In granting summary judgment, the Court carefully scrutinized the record and concluded that none of the plaintiff's differences with her employer were race-based. The Court found it highly relevant that the alleged racial epithets were uncorroborated, and thus the isolated occurrence of even the most offensive racial slur was insufficient to give rise to an actionable claim. The Court also concluded that the plaintiff failed to demonstrate any causal relationship between the alleged use of racial epithets and her purported discharge years later. Finally, the Court found that the purported mistreatment during the course of her employment – "the snatching of a pad from her hands, the patting of a seat in an allegedly humiliating way, the shouting at her in a meeting, the circling of her name on a time sheet, [and] the rolling of eyes when she spoke" – did not rise to the level of adverse employment action.[3]

The Court of Appeals pointed out that "it is simply not the law that every dispute that arises between people of different races constitutes employment discrimination, or that every wrongful act perpetrated in the course of such a dispute is committed because of race."[4] The Court further instructed that "it does no favor to the litigants, or to the law, or to the rigorous enforcement of genuine discrimination claims" to allow a baseless case to go to trial.[5] Accordingly, *Forrest* sends the message that a meritless discrimination claim, like any other type of meritless claim, is subject to summary judgment.

Failure To Refute Performance Deficiencies

Just weeks after *Forrest* was decided, a trial court in Queens picked up on this message and granted summary judgment to another healthcare facility.[6] The plaintiff there, a 61-year-old Haitian nurse, alleged that her employment had been terminated on account of her age and national origin. The plaintiff claimed that a supervisor had referred to her as "an old nurse's assistant," that she was one of the oldest nurses in the facility, that an 18-year-old LPN was hired a few weeks after her discharge and that the employer had fired other Haitian employees.[7] Relying on *Forrest*, the Court rejected all of these facts as unrelated to the plaintiff's discharge and insufficient to warrant a trial. Rather, the Court accepted the employer's explanation – which the plaintiff could not dispute – that she had failed to administer medication to a comatose patient in a timely fashion, thus threatening the patient's health and welfare.

Summary judgment was also granted to an employer who presented evidence of an employee's chronic lateness, absenteeism and failure to call into the job site, despite repeated admonitions.[8] Even accepting that the plaintiff may have been "unfairly singled out to punch a time clock or that disparaging remarks were made about him,"[9] the Court concluded that these facts, while offensive, did not negate the employer's evidence that the plaintiff's poor job performance was, in fact, the legitimate, nondiscriminatory reason for his discharge. The Court looked to *Forrest* and held that conclusory allegations of discrimination will not carry a case to trial in the face of documented performance issues.

Forrest was cited again as the legal basis for granting summary judgment to a hospital in a case in which one of its psychiatrists claimed that he was constructively discharged because of his age and national origin.[10] The Court found it compelling that the plaintiff refused to comply with department-wide productivity standards and record-keeping requirements despite frequent requests and warnings, and that he produced only "isolated statements," which did not show any unlawful animus.[11] The Court concluded that it was the plaintiff's own performance issues and his refusal to improve, rather than any discriminatory conduct by his employer, that created the work environment that led him to resign.

Forrest extended its reach beyond New York when a Michigan appellate court granted summary judgment on claims under the New York Human Rights Law.[12] The Court accepted the employer's showing that plagiarism, not race discrimination, was the reason for terminating the plaintiff's employment. Moreover, the Court found it appropriate to grant summary judgment prior to the completion of discovery because the legitimate reason for the plaintiff's discharge was so sound that permitting further discovery would have been "tantamount to allowing an impermissible fishing expedition."[13]

The theme that has emerged from *Forrest* and its progeny is that courts are unreceptive to claims by employees seeking to mask their own performance deficiencies with allegations of discrimination. Indeed, one court stated this directly and pointed out that the plaintiff was simply seeking to blame others, "rather than recognize her errors in judgment and accept responsibility for her own acts or omissions."[14]

Failure To Show Adverse Employment Action

Since *Forrest*, courts have also scrutinized what constitutes an adverse employment action.

In a religious discrimination case, summary judgment was granted where the employer's actions did not materially alter the terms and conditions of the plaintiff's employment.[15] The employee alleged that he was removed from a project team, his responsibilities were altered and he received a negative performance review. The Court held that this was insufficient to constitute an adverse job action in light of undisputed facts that the employee "retained his work space, title, job hours and salary and continued to perform functions consistent with his job title."[16]

Likewise, a court would not afford a trial where an employee complained that his office had been taken away from him, that he did not have a "consistent private location" to perform his job, and that he was forced to meet with patients in public areas.[17] *Forrest*, thus, has been applied to require evidence of a material change in working conditions that is "more disruptive than a mere inconvenience or an alteration of job responsibilities."[18]

The Requirement Of Persistent Harassment

Hostile work environment, including sexual harassment, is the one type of discrimination that employers have encountered difficulty disposing of without a trial in the year following *Forrest*. In denying summary judgment, however, lower courts have consistently subscribed to *Forrest*'s requirement that discriminatory comments and acts be chronic and persistent to constitute a hostile work environment.

Consistent with *Forrest*, a court dismissed a sexual harassment claim based on a single isolated comment about a prostitute.[19] However, the Court permitted the plaintiff to proceed to trial on the basis of repeated disparaging remarks that were allegedly made about her religion, Islam. The Court emphasized that the remarks were "more than insulting and insensitive," and "occurred more than a few isolated times," significantly increasing after September 11, 2001.[20]

Similarly, a trial was ordered where the employee presented evidence of repeated offensive, lewd and demeaning comments and touching, including inappropriate rubbing and grabbing as well as racial epithets.[21] The same was true in a case in which an employee claimed that she had been subjected to numerous sexually explicit comments, including that the alleged harasser made "actual requests that [she] engage in sexual activity with him," "regularly would touch his genital area in front of her," "grabbed her buttocks" and "regularly showed her pornographic materials."[22]

Such treatment clearly rises to a level far beyond that in *Forrest*, and it is not surprising that trials would be permitted in these cases. This is particularly so where there is evidence that the employer knew about the conduct but did not stop it. In one case, for example, the employer allegedly told the plaintiff to "calm down" and "toughen up" rather than taking remedial action.[23] *Forrest* plainly was not intended to, and will not, shield employers from trials in these circumstances.

The Future Of Employment Discrimination Cases

Forrest and the ensuing cases serve to remind employers and employees alike that trials are reserved for employment discrimination cases in which there is a *genuine* issue of material fact. It is simply not enough for an employee to allege a few isolated remarks in the face of evidence of the employee's own performance deficiencies. Nor is a trial warranted where the employee complains of actions that do not materially alter the terms and conditions of employment. *Forrest* empowers courts to dismiss such discrimination cases on summary judgment, and enables them to focus their limited resources on those cases that may have merit and deserve a full and fair resolution at trial.

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1 Swierkiewicz v. Sorema, N.A., *534 U.S. 506, 514 (2002) (noting that "claims lacking merit may be dealt with through summary judgment under Rule 56")*
2 Forrest v. Jewish Guild For The Blind, *3 N.Y.3d 295 (2004)*
3 Id. *at 307*
4 Id. *at 298*
5 Id. *at 314*
6 Charles v. Highland Care Ctr., Inc., *2004 N.Y. Slip Op. 51413U, 2004 Misc. LEXIS 2244 (Sup. Ct. Queens County 2004)*
7 Id. *at *10*
8 Dickerson v. Health Mgmt. Corp. Of America, *2005 N.Y. App. Div. LEXIS 8801 (1st Dept. Aug. 25, 2005)*
9 Id. *at *5*
10 Ayromlooi v. St. Luke's-Roosevelt Hosp. Ctr., *2005 N.Y. Slip. Op. 51419U, 2005 Misc. LEXIS 1919 (Sup. Ct. N.Y. County July 18, 2005)*
11 Id. *at *15*
12 Patterson v. Gen. Motors Corp., *2005 Mich. App. LEXIS 1211 (Ct. App. May 17, 2005)*
13 Id. *at *5*
14 Charles, *2004 Misc. LEXIS 2244, at *7*
15 Messinger v. Girl Scouts Of The U.S.A., *16 A.D.3d 314 (1st Dept. 2005)*
16 Id. *at 315*
17 Ayromlooi, *2005 N.Y. Misc. LEXIS 1919, at *4*
18 Id. *at *12-13, citing* Galabya v. New York City Bd. Of Educ., *202 F.3d 636, 640 (2d Cir. 2000)*
19 Kaptan v. Danchig, *19 A.D.3d 456 (2d Dept. 2005)*
20 Id. *at 457.*
21 Thomas v. Tam Equities, Inc., *2005 N.Y. Slip. Op. 50145U, N.Y. Misc. LEXIS 232 (Sup. Ct. Queens County Feb. 3, 2005)*
22 Concord Limousine Inc. v. Orezzoli, *2005 Slip. Op. 50758U, 2005 WL 1224972 at *2 (Sup. Ct. Kings County May 20, 2005)*
23 Thomas, *2005 N.Y. Misc. LEXIS at *5*

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