

# LITCHFORD & CHRISTOPHER

PROFESSIONAL ASSOCIATION

*Attorneys and Counselors at Law*

## LEGAL NEWS FOR CLIENTS

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## **SUPREME COURT RULING EASES DISCRIMINATION PLAINTIFFS' EVIDENTIARY BURDENS**

In cases in which a plaintiff is relying on circumstantial evidence to prove that certain action taken or affecting him or her is based on some sort of unlawful discrimination, the plaintiff must first establish a prima facie case of discrimination. If he or she does so, then the defendant must articulate legitimate, non-discriminatory reasons for the challenged action. If the defendant satisfies this burden of coming forward with these reasons, then the plaintiff must prove that the legitimate, non-discriminatory reasons are merely a pretext for intentional discrimination. In a 1993 case styled *St. Mary's Honor Center v. Hicks*, the U.S. Supreme Court explained that rejection of a defendant's proffered legitimate, non-discriminatory reasons is not enough to require the entry of a judgment as a matter of law for the plaintiff. The language the Court used in trying to explain the correct test to evaluate the evidence, however, led to substantial confusion among the various lower courts and inconsistent rulings. Some courts held that a plaintiff could satisfy his or her ultimate burden of proof by demonstrating that the defendant's reasons were a pretext for discrimination and not worthy of belief. Nothing more was required. Other courts, though – the so-called “pretext-plus” courts – required a plaintiff to prove some additional evidence of discrimination in addition to disproving the defendant's proffered legitimate, non-discriminatory reasons.

Earlier this year, the Supreme Court clarified the confusion in the case of *Reeves v. Sanderson Plumbing Products, Inc.* The Court held in that case that a plaintiff's prima facie case, combined with sufficient evidence to find that a defendant's asserted justifications are false, may permit the jury to conclude that the defendant unlawfully discriminated against the plaintiff. In other words, the Supreme Court rejected the “pretext-plus” approach. It is now clear, therefore, that rejection of a defendant's explanations for the challenged conduct, without more, may permit the fact finder to conclude unlawful discrimination.

Nonetheless, the Supreme Court also determined in *Reeves* that there may be some situations in which a defendant may still be entitled to a judgment as a matter of law even where a plaintiff otherwise shows the defendant's explanations should be rejected. According to the Court, those situations will arise where the record in the case conclusively reveals a non-discriminatory reason (other than ones asserted by the defendant) for the defendant's action or decision, or if the plaintiff creates only a weak issue of fact as to whether the defendant's reasons are untrue and there is “abundant and uncontroverted” independent evidence that no discrimination occurred. In this regard, a court should consider several factors, including the strength of the plaintiff's prima facie case, the probative value of the proof that the defendant's explanation is false, and any other evidence that supports the defendant's case. Overall, this appears to be a heavy burden on defendants seeking entry of a summary judgment or a judgment as a matter of law in a discrimination case, and likely means that it will be easier for discrimination plaintiffs to get cases to juries.

**THE ELEVENTH CIRCUIT PROVIDES ADDITIONAL GUIDANCE  
AS TO WHAT COSTS MAY BE TAXED AND RECOVERED  
BY A PARTY WHO PREVAILS IN LITIGATION**

The general rule in both state and federal court is that a party who prevails in a lawsuit is entitled to have taxed against his or her opponent and recover certain kinds of costs that have been incurred in the litigation. In federal cases, by statute, a prevailing party may recover: (1) fees of the clerk and marshal; (2) fees of the court reporter for all or any part of a transcript necessarily obtained for use in the case; (3) fees for witnesses; (4) fees for copies of papers necessarily obtained for use in the case; (5) certain docket fees; and (6) compensation of court appointed experts and interpreters, and costs of special interpretation services. In *United States Equal Employment Opportunity Commission v. W&O, Inc.*, the Eleventh Circuit Court of Appeals provided additional guidance as to whether certain kinds of costs may be taxed by a prevailing party in federal court litigation.

In this case, the EEOC prevailed on claims under the Pregnancy Discrimination Act brought on behalf of a class of employees of W&O, Inc. At the conclusion of the case, the trial court awarded costs to the EEOC. On appeal, the court was faced with questions concerning the taxation and award of several categories of those costs. The appellate court held that the costs of depositions of three defense witnesses were properly taxable, even though the depositions were not used by the plaintiff at the summary judgment phase of the case and at trial, the plaintiff who took the depositions successfully moved the trial court to have the testimony of all three witnesses excluded from the case. In reaching this conclusion, the court relied on the fact that the depositions were related to an issue in the case when they were taken. Next, the court held that the costs associated with the deposition of a party or party-in-interest were taxable if the deposition was reasonably necessary and obtained for use in the case and not merely for the convenience of counsel. Third, the court determined that the costs incurred for charts and exhibits used at trial were not taxable, even if necessarily obtained for use in the case, because there was no statutory authority for the taxation of those costs. Fourth, the Eleventh Circuit held that fees of private process servers were taxable as long as those fees did not exceed the statutory fees authorized for fees of the marshal for service of process in federal cases.

**ARBITRATION PROVISIONS MUST BE EXPRESSLY STATED OR  
SPECIFICALLY INCORPORATED IN CONTRACTS TO BE ENFORCEABLE**

In *Hymowitz v. Delcrest Building Corp.*, the parties were involved in a dispute concerning a sales agreement. The builder, Delcrest, filed a motion to compel the parties to arbitrate their dispute. The trial court granted the motion because the parties' agreement for sale referenced a third party warranty insurance agreement obtained by the builder, which contained an arbitration provision. The sales agreement, however, did not specifically incorporate that arbitration provision or contain any other arbitration provision. For this reason, Florida's Fourth District Court of Appeals ruled that there was no legal basis upon which the trial court could have ordered arbitration, and it reversed the trial court's decision.

## **PYRAMIDING INFERENCES ARE INSUFFICIENT TO ESTABLISH A CLAIM**

Fundamentally, every lawsuit should be based on evidence made up of facts, not speculation. Nevertheless, there are times when cases are brought and prosecuted based on the latter, not the former. A Florida appeals court believed *Lester's Diner II, Inc. v. Gilliam* to be one of those times. There, Ms. Gilliam was following a restaurant's host to a seat when she slipped and fell on her back. She sued, alleging that the restaurant negligently maintained machinery that leaked oil onto the floor and caused her to fall, and that the restaurant knew or should have known of this dangerous condition and warned her of it.

The case went to trial. At trial, Ms. Gilliam claimed she followed the restaurant's host through an area utilized by servers and away from customer tables and booths. She also claimed that after she fell, she saw a man with a tool kit working on a piece of machinery, and she noticed some sort of very light oily substance such as WD40 on her hands and clothes. After her fall, she noticed a server and the host wiping up the floor with paper towels. At trial, the restaurant's owner testified that a workman serviced the refrigeration and air conditioning that day, but the compressors that were worked on were located on the roof. Moreover, the workman had only a tool belt, no oil, with him.

After Ms. Gilliam presented her case, the restaurant moved the court to direct a verdict in its favor on the grounds that Ms. Gilliam failed to put forth any proof concerning the substance on the floor, how it got there, or how long it had been there. The trial court denied this motion, and the jury returned a verdict in favor of Ms. Gilliam. On appeal, the Fourth District Court of Appeals reversed the denial of the motion for a directed verdict and directed that instead, judgment be entered in favor of the restaurant. In reaching its decision, the appellate court found that Ms. Gilliam simply failed to prove her case because the evidence she relied upon was guesswork based on the stacking of inference upon inference. The court relied on *Soriano v. B&B Cash Grocery Stores, Inc.*, 757 So.2d 514 (Fla. 4th DCA), *rev. granted*, 744 So.2d 456 (Fla. 1999), for the proposition that an inference of the existence of an essential fact to be drawn from circumstantial evidence cannot be made the basis of a further inference, unless the initial inference was established to the exclusion of any other reasonable inference. Here, the court determined that only through conjecture and pyramiding inferences could there be a conclusion that the substance on the floor was in fact WD40 and was left there by a workman or employee.

## **AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE**

Effective December 1, 2000, amendments to some of the federal rules of civil procedure and the federal rules of evidence took effect. The amended rules govern in all cases commenced after December 1 and, to the extent it may be just and practicable, all cases that are pending as of that date. Some of the amendments are technical in nature; others, more substantive. There are three amendments to the civil procedure rules, in particular, with which you should be familiar because these particular amendments will have some tangible impact on your federal court cases.

*The scope of discovery.* The discovery process is supposed to be self-executing by the parties without the need for judicial involvement. Nevertheless, in practice, the discovery process, including the litigation of discovery disputes, may be the most expensive and cumbersome part of any federal court lawsuit. For some time now, the scope of discovery under Federal Rule of Civil Procedure 26 has included all information, not privileged, that is “relevant to the subject matter involved in the pending litigation.” This is an extremely broad standard that has at times encouraged gamesmanship and abuse. Under newly amended Rule 26, a party may discover only information, not privileged, that is “relevant to the claim or defense of any party.” (For good cause shown, though, the court may broaden discovery in a particular situation to the subject matter of the case.) Essential purposes of narrowing the scope of discovery include involving the court more actively in regulating and managing the discovery process and signaling to parties that they generally have no right to obtain discovery to develop new claims or defenses that are not already identified in the pleadings. Whether the effect of the amendment will be to keep discovery confined or to increase costs by providing parties with even more opportunities to make discovery motions remains to be seen.

*Depositions.* Increased judicial involvement in discovery may also be a result of an amendment to Federal Rule of Civil Procedure 30, which deals with depositions upon oral examination. Before the December 1 amendments, that rule limited parties to no more than ten depositions in the case absent leave of court. As amended, the rule now imposes limits on the length of those depositions. Unless authorized by the court or stipulated by the parties, a deposition is now limited to one day of seven hours. The amended rule goes on to provide that this time limit may be extended if needed “for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.”

*Sanctions.* Federal Rule of Civil Procedure 37 provides courts with a variety of possible sanctions that they may use for the violation of discovery rules or orders. One subpart of Rule 37 provides that a party who, without substantial justification, fails to make certain required disclosures of core case information at the beginning of the lawsuit or fails to make certain required expert witness disclosures cannot use the non-disclosed evidence unless the failure to make the disclosures is harmless. The exclusion sanction has now been extended by the recent amendments to include the failure of a party to amend a prior response to a discovery request if amendment was required by the terms of other discovery rules.

## **SUMMER N. BOYD JOINS LITCHFORD & CHRISTOPHER**

Litchford & Christopher is pleased to announce that Summer N. Boyd has recently become associated with the firm. Summer was born and raised in Jacksonville, Florida. She received her Bachelor of Science degree in 1997 and her law degree in 2000 from the University of Florida. In law school, Summer was on the staff of the Journal of Law and Public Policy. She is a member of The Florida Bar, the Orange County Bar Association, and the Orange County Bar Association’s labor and employment law committee.

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