In The Supreme Court of New Jersey

Docket No.: 66,968

STEVEN WINTERS, Plaintiff-Respondent, v. NORTH HUDSON REGIONAL FIRE AND RESCUE, JEFFREY C. WELZ, MICHAEL J. DEORIO, AND BRION McELDOWNEY, Defendants-Movants.	ON MOTION FOR LEAVE TO APPEAL FROM AN INTERLOCUTORY ORDER OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NOS.: A-45/46/47-10 **Civil Action** **Sat Below:** **Hon. Stephen Skillman, J.A.D.** **Hon. William P. Gilroy, J.A.D.** **Hon. Marie Simonelli, J.A.D.**

AMICUS CURIAE BRIEF OF EMPLOYERS ASSOCIATION OF NEW JERSEY

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PRELIMINARY STATEMENT

Because this case raises complex issues concerning New Jersey's Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 to -14, the Court invited additional briefing from the Employers Association of New Jersey ("EANJ")[1] and others to address several issues, including:

> Does it make a difference to the analysis whether this matter is characterized as a pretext case under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93, S. Ct. 1817, 36 L. Ed. 2d 668 (1973), or as a mixed-motive case under Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989).

Though the analysis employed by the Court will differ depending upon how the case is characterized, this difference is academic because the outcome will be identical under either standard of review. Indeed, EANJ submits that the comprehensive factual findings of the Office of Administrative Law—as affirmed by the Civil Service Commission and the Appellate Division—are controlling and dispositive of the underlying CEPA claim.

Those facts confirm that Respondent Steven Winters ("Winters") was properly suspended and terminated due to his egregious and undisputed misconduct. If, therefore, his CEPA

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[1] As a non-profit organization comprised of more than 1,000 employers within New Jersey and dedicated exclusively to helping employers make responsible employment decisions through education, informed discussion, and training, the Employers Association of New Jersey ("EANJ") appreciates the Court's invitation to submit this amicus curiae brief.

claim is characterized as a "pretext" case, Winters cannot prove that his employer's legitimate reasons for these actions are pretextual and that the true reason was unlawful retaliation. Likewise, if Winters proffers evidence that his otherwise proper suspension and termination were impermissibly motivated by retaliation (which is missing from this record), Winters cannot survive summary judgment under a "mixed-motive" analysis because his employer has proved by a preponderance of the evidence that it would have acted the same regardless of any improper motive.

This identical outcome answers the fourth question asked by the Court: "What damages can plaintiff claim in the CEPA case given the outcome before the Civil Service Commission?" Based upon the administrative findings, Winters can recover no damages.

Statement Of Relevant Facts

On September 28, 2005, Winters' employer served Winters with a Preliminary Notice of Disciplinary Action ("PNDA") seeking, among other things, to suspend him from employment for 60 days due to conduct unbecoming a public employee. See Winters v. N. Hudson Reg'l Fire & Rescue, No. A-1117-09T3 (App. Div. Aug. 30, 2010) ("Winters I") (slip op. at 5-6).

Winters inexplicably waived his right to a disciplinary hearing. Id. at 6. On December 5, 2005, he was served with a Final Notice of Disciplinary Action ("FNDA") and suspended from employment for 60 days. Ibid.

Nearly one year later, on November 30, 2006, the employer served Winters with a PNDA seeking his removal from employment and charging him with ten counts of misconduct related to abuse of sick leave, including working a second job while on paid sick leave. Id. at 10.

Once again, Winters failed to appear for his administrative hearing on the charges. Ibid. On January 2, 2007, the employer served Winters with an FNDA, sustaining all charges and removing him from employment, effective November 30, 2006. Ibid.

Winters appealed, and the Office of Administrative Law ("OAL") conducted a hearing on the contested case, during which all parties filed motions and cross-motions for summary decision. In re Winters, OAL Dkt. No. CSV 03786-07 (Feb. 5, 2008) ("Winters II") (slip op. at 1-2). On February 5, 2008, the OAL held that it was "undisputed that Winters was employed by Old Bridge and Long Branch while on sick leave with [the employer,]" and it recommended Winters' removal from employment. Id. at 11.

The Civil Service Commission ("Commission") upheld the OAL's determination on October 10, 2008. In re Winters, N. Hudson Reg'l Fire & Rescue, CSC Docket No. 2007-2857 (Sept. 10, 2008) ("Winters III")(slip op. at 1). In doing so, the Commission found:

> it is undisputed by the appellant that he worked for Old Bridge and Long Branch while he was out on paid sick leave. . . . [which] constitutes conduct unbecoming a public employee.

. . . .

> [I]t is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history.
>
> . . . .
>
> As detailed above, working in other positions while being out on paid sick leave from a public employer is egregious conduct in that it is a serious misuse of paid sick time and public resources. Clearly, this conduct has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services. Moreover, working in another paid position while out on paid sick leave from a public employer violates the implicit standard of good behavior which devolves upon one who stands in the public eye. In these trying fiscal times, such conduct is clearly inappropriate and egregious and warrants the appellant's removal.

Id. at 7-8 (internal quotation marks and citations omitted).

The Appellate Division upheld the Commission's affirmance of the OAL's ruling:

> Because we agree that the facts leading to appellant's disciplinary action by working for two separate public employers while on paid sick leave from the NHRFR constitutes egregious misconduct by a public employee, we find no reason to interfere with the Commission's sanction of removal.

In re Winters, N. Hudson Reg'l Fire & Rescue, No. A-1518-08T1 (App. Div. Sept. 28, 2010) (slip op. at 15).

Legal Argument

Point I

The Characterization Of This Matter As A "Pretext" Or "Mixed-Motive" Case Will Require Different Analyses, Though The Findings Of The OAL, Commission, And Appellate Division Lead To The Identical Outcome.

A. Winters Cannot Defeat Summary Judgment If The McDonnell-Douglas Standard Is Applied.

Because CEPA is a fair labor statute, the burden-shifting analysis applicable under Title VII of the federal Civil Rights Act of 1964, as amended ("Title VII"), and the New Jersey Law Against Discrimination ("LAD") is commonly applied to retaliation claims under CEPA. See, generally, Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003); Massarano v. N.J. Transit, 400 N.J. Super. 474, 492 (App. Div. 2008); Kolb v. Burns, 320 N.J. Super. 467, 479 (App. Div. 1999); Klein v. Univ. of Med. & Dentistry of N.J., 377 N.J. Super. 28, 38 (App. Div.), certif. denied, 185 N.J. 39 (2005). This analytical framework "has been most cogently presented in the United States Supreme Court's seminal decision in McDonnell Douglas." Myers v. AT & T, 380 N.J. Super. 443, 452 (App. Div. 2005), certif. den. 186 N.J. 244 (2006)(citation omitted). The McDonnell Douglas analysis, therefore, is "the principal method for proving discrimination claims in general." Myers, 380 N.J. Super. at 453.

Assuming Winters makes out a prima facie case under CEPA,[2] the burden then shifts to his employer to articulate a legitimate, non-retaliatory reason for his suspension and discharge. See McDonnell Douglas, 411 U.S. at 802. That burden is met by the introduction of evidence which, if taken as true, permits the conclusion that unlawful retaliation was not the cause of the adverse actions. See Fuentes v. Perskie, 32 F. 3d 759, 763 (3d Cir. 1994); Greenberg v. Camden County Vocational Technical Sch., 310 N.J. Super. 189, 199 (App. Div. 1998).

Here, Winters' employer met its burden by articulating a legitimate, non-retaliatory reason for its employment decisions, as stated by the OAL and Commission. See Winters II, OAL Dkt. No. CSV 03786-07 (slip op. at 14); Winters III, CSC Docket No. 2007-2857 (slip op. at 7-8). The presumption of retaliation, therefore, disappeared. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-43, 120 S. Ct. 2097, 2106, 147 L. Ed. 2d 105 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-511, 113 S. Ct. 2742, 2749, 125 L. Ed. 2d 407 (1993).

Winters, however, was afforded one last opportunity "to

[2] To establish a prima facie case, an employee must demonstrate that: (1) the employee reasonably believes the employer's conduct violated either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) the employee performed a whistle-blowing activity described in CEPA; (3) the employer took adverse employment action against the employee; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action. See Dzwonar, 177 N.J. at 462.

prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for [retaliation]." Tex. Dept. of Comty. Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093, 67 L. Ed. 2d 207 (1981); see also St. Mary's Honor Ctr., 509 U.S. at 510 n.3. The record, however, is devoid of such evidence.

First, Winters was suspended only after he "waived a disciplinary hearing" and was terminated only after he "failed to appear for the administrative hearing on the charges." See Winters I, No. A-1117-09T3 (slip op. at 6, 10). Winters can, therefore, only disprove his employer's legitimate, non-retaliatory actions by first demonstrating that the intervening disciplinary and administrative hearings afforded by the employer—which Winters refused to attend—were a mere "cat's paw" of the employer. See generally McKenna v. City of Philadelphia, ___ F. 3d ___ (3d Cir. 2011) (citing Staub v. Proctor Hosp., ___ U.S. ___, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011)) (unbiased disciplinary review hearing can sever causal connection between supervisor's retaliatory animus and ultimate adverse employment decisions concerning employee). This record does not suggest that the disciplinary or administrative hearings offered to Winters would have merely "rubber-stamped" the decisions of his employer.

Second, the OAL, Commission, and Appellate Division independently verified the facts supporting Winters' suspension

and discharge. See, e.g., Winters II, OAL Dkt. No. CSV 03786-07 (slip op. at 11). Indeed, it was "undisputed" that Winters violated the prohibition against outside employment while on sick leave and that such a violation is an immediately terminable offense. Ibid. The record contains nothing to suggest that this unquestionable reason for Winters' discharge is untrue and points to no "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence, and hence infer that the employer did not act for [the asserted] non-[retaliatory] reasons." Kolb, 320 N.J. Super. at 478 (quoting Fuentes v. Perskie, 32 F. 3d 759, 765 (3d Cir. 1994)).

If the matter is characterized as a pretext case, summary judgment in favor of the employer is inescapable under the McDonell Douglas analysis.

B. Winters Cannot Defeat Summary Judgment If The Price Waterhouse Standard Is Applied.

A plaintiff asserting a CEPA retaliation claim can also proceed under a mixed-motive theory. See Fleming v. Corr. Healthcare Solutions, Inc., 164 N.J. 90, 100 (2000). In a mixed-motive case, "if a plaintiff [can] demonstrate that an impermissible or discriminatory reason was a motivating factor for the adverse employment decision, the burden . . . shift[s] to the employer to prove that it would have made the same decision

even without the unlawful motive." Myers, 380 N.J. Super. at 457 (citing Price Waterhouse, 490 U.S. at 244-45). Though the analysis of the case at bar differs under this standard, the outcome remains the same.

1. Winters has offered no direct evidence of retaliation.

Winters can only avail himself of the mixed-motive analysis if he is able to produce "direct evidence" of discrimination. See Price Waterhouse, 490 U.S. at 276 (O'Connor, J., concurring); see also, e.g., Fakete v. Aetna, Inc., 308 F. 3d 335, 338 n.2 (3d Cir. 2002). In Desert Palace v. Costa, the U.S. Supreme Court clarified that "direct evidence" means "sufficient evidence for a reasonable jury to conclude, by preponderance of the evidence, that [retaliation] was a motivating factor for any employment practice." 539 U.S. 90, 101, 123 S. Ct. 2148, 2155, 156 L. Ed. 2d 84 (2003) (citation omitted); accord Fakete, 308 F. 3d at 338 ("Direct evidence" means evidence sufficient to allow the jury to find that the decision makers placed substantial negative reliance on [bias] in reaching their decision." (citation omitted)); see also Myers, 380 N.J. Super. at 458 ("At a bare minimum, a plaintiff seeking to advance a mixed-motive case will have to adduce circumstantial evidence 'of conduct or statements by persons involved in the decision making process that may be viewed as directly reflecting the alleged discriminatory attitude.'") (quoting Fleming, 164 N.J. at 101. The need for such

direct evidence of wrongdoing is required to preserve the important "balance between employee rights and employer prerogatives." Price Waterhouse, 490 U.S. at 239.

If the mixed-motive analysis is applied here, the record confirms that Winters, again, cannot defeat summary judgment. Winters has presented no evidence of conduct or statements by persons directly involved in the decision-making process that reflect a retaliatory motive. See McDevitt v. Bill Good Builders, Inc., 175 N.J. 519, 528 (2003). At best, Winters demonstrated that the movants "attack[ed his] credibility in the press" and "attempt[ed] to demote plaintiff for speaking at a management meeting." Winters I, No. A-1117-09T3, (slip op. at 24). That proof falls far short of satisfying the standard of direct evidence of a causal connection between the decision maker and the alleged retaliatory motive necessary in a mixed-motive case. See, e.g., Myers, 380 N.J. Super. at 462-63 (plaintiff satisfied burden under mixed-motive analysis through proof supervisor admitted that "the comparative performance of the two employees was based in part on the fact that plaintiff had been treated for cancer"; that supervisor "was instrumental in the decision to downgrade [plaintiff's] performance appraisal, that the members of the round table group were aware of the upcoming RIF and of the significance of the appraisals, and that ultimately while other selection criteria could have been used,

the appraisal was the sole basis for her termination and Kirby's retention."). Absent similar evidence from Winters, his claim is unsustainable under a mixed-motive analysis.

2. Winters' employer has shown that it would have made the same decisions regardless of any improper motive.

Even if, arguendo, Winters satisfied his initial burden of proof under a mixed-motive analysis, his employer can avoid all liability if it can demonstrate "that, even if it had not taken [retaliation] into account, it would have come to the same decision regarding a particular person." Price Waterhouse, 490 U.S. at 242. See also id. 490 U.S. at 258 (holding that "when a plaintiff . . . proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account").

Here, the facts as determined by the OAL, Commission, and Appellate Division make clear that Winters' employer would have made the same decisions—a 60-day suspension and termination—standing alone and without regard to any retaliatory motive. See ibid. Indeed, the "egregious" nature of Winters' "misconduct" confirms that his employer had ample independent reasons to terminate Winters' employment. Winters I, No. A-1117-09T3 (slip op. at 7). Indeed, Winters cannot use the possibility of an

alternate, unlawful motive as a shield for the loss of his employment due to serious and uncontested malfeasance. To hold otherwise turns a blind eye to Winters' undisputed misconduct, thus "destroy[ing] public respect . . . and confidence" in his employer. Winters III, CSC Docket No. 2007-2857 (slip op. at 9). Because the facts articulated in Winters' administrative proceeding and appeals prove that Winters' employer's "legitimate reason, standing alone, would have induced it to make the same decision," the employer also prevails under a mixed-motive theory. See Price Waterhouse, 490 U.S. at 258.

POINT II

The OAL Decision, As Affirmed By The Commission And The Appellate Division, Bars Winters From Recovering Any Damages.

Application of either the McDonnell Douglas or Price Waterhouse analysis to this matter is academic because the same outcome—no recovery for Winters—results under either theory. Under the former analysis, the absence of proof of pretext warrants dismissal of Winters' CEPA claim. Under the latter, Winters' employer's proof that it would have made the same decisions regardless of improper motive provides it with a total defense to liability. See Brown v. J. Kaz, Inc., 581 F. 3d 175, 182 n.5 (3d Cir. 2009)(finding that the Civil Rights Act of 1991's mixed-motive amendments are not "applicable to section 1981 actions [and, t]herefore, Price Waterhouse, and not the 1991

amendments to Title VII, controls the instant case, and [defendant] has a complete defense to liability if it would have made the same decision without consideration of [plaintiff's] race"); see also O'Brien v. Telcordia Techs., Inc., 420 N.J. Super. 256, 270 (App. Div. 2011) (deferring "a decision on the thorny issue of the continued viability of the use of a Price Waterhouse mixed-motive analysis in light of the United States Supreme Court's decision in Gross in an age discrimination case instituted pursuant to the NJLAD.").[3]

POINT III

EANJ Urges The Court To Consider A Unified Framework For Analyzing CEPA Cases At The Summary Judgment Stage.

Having addressed the issues identified by the Court, EANJ takes the opportunity to invite the Court to establish a unified summary judgment standard under CEPA to further guide litigants

[3] When enacting the Civil Rights Act of 1991, Congress codified Price Waterhouse's analysis but modified the manner in which an employer could avoid liability when there were both permissible and impermissible reasons for its decision. Under the Act, the employer's permissible reason serves as an affirmative defense that "restricts the remedies available to a plaintiff . . . [to] include only declaratory relief, certain types of injunctive relief, and attorney's fees and costs." Desert Palace, 539 U.S. at 94, 123 S. Ct. at 2151, 156 L. Ed. 2d 84 (citing 42 U.S.C. §2000e-5(g)(2)(B)). However, the Civil Rights Act of 1991's affirmative defense only applies to Title VII claims and was not extended by Congress or the courts to apply to any other statute, including CEPA. See generally Gross v. FBL Fin. Servs., Inc., ___ U.S. ___, 129 S.Ct. 2343, 2349, 172 L.Ed.2d 649 (2009)(Title VII amendments cannot be grafted onto other statutes because "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally.").

and the courts. In Desert Palace v. Costa, the U.S. Supreme Court invited just such an approach to resolve the need for both the pretext and mixed-motive analyses.

That case synthesized the summary judgment analyses under McDonnell Douglas and Price Waterhouse by holding that, under either framework, the plaintiff must present at least circumstantial evidence that the employer's decision was more likely than not motivated by discrimination and/or retaliation. Under either framework, the employer must articulate a legitimate reason for its decision. Desert Palace, 539 U.S. at 99-102, 123 S. Ct. at 2154-55, 156 L. Ed. 2d 84. Justice Thomas further clarified that no distinction exists between "circumstantial" and "direct" evidence at the summary judgment stage: "The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" Desert Palace, 539 U.S. at 100, 123 S. Ct. at 2154, 156 L. Ed. 2d 84 (quoting Rogers v. Mo. Pac. R. Co., 352 U.S. 500, 508 n.17, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957)).

After Desert Palace, the summary judgment landscape in employment discrimination cases fractured. The Eighth and Eleventh Circuits, for example, still apply the McDonnell Douglas burden-shifting framework to the summary judgment analysis of mixed-motive claims. See Griffith v. City of Des Moines, 387 F.

3d 733, 736 (8th Cir. 2004) ("Desert Palace had no impact on prior Eighth Circuit summary judgment decisions."); Cooper v. S. Co., 390 F. 3d 695, 725 n. 17 (11th Cir. 2004), overruled on other grounds, Ash v. Tyson Foods, Inc., 546 U.S. 454, 457 (2003) (rejecting argument that "the McDonnell Douglas burden-shifting analysis . . . was radically revised by the Supreme Court in Desert Palace" and noting that "after Desert Palace was decided, this Court has continued to apply the McDonnell Douglas analysis in non-mixed-motive cases" (citation omitted)).

The Fifth Circuit, by contrast, adopts a "modified McDonnell Douglas" approach, under which a plaintiff in a mixed-motive case can rebut the defendant's legitimate non-discriminatory reason not only through evidence of pretext—the traditional McDonnell Douglas burden—but also with evidence that the defendant's proffered reason is only one of the reasons for its conduct—the mixed-motive alternative. Machinchick v. PB Power, Inc., 398 F. 3d 345, 352 (5th Cir. 2005) (citation omitted).

The Fourth, Ninth, and the District of Columbia Circuits adopt a middle ground between these two positions. There, a mixed-motive plaintiff may avoid a motion for summary judgment by proceeding either under the "pretext framework" of the traditional McDonnell Douglas analysis or by "presenting direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor" motivated

the employment decision. Diamond v. Colonial Life & Accident Ins. Co., 416 F. 3d 310, 318 (4th Cir. 2005); see also McGinest v. GTE Serv. Corp., 360 F. 3d 1103, 1122 (9th Cir. 2004) (finding that a mixed-motive plaintiff "may proceed by using the McDonnell Douglas framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated" the employment decision); Fogg v. Gonzales, 492 F. 3d 447, 451 and 451 n.7 (D.C. Cir. 2007) (indicating that "a plaintiff can establish an unlawful employment practice by showing that discrimination or retaliation played a 'motivating part' or was a 'substantial factor' in the employment decision'" but noting that a "plaintiff may also, of course, use evidence of pretext and the McDonnell Douglas framework to prove a mixed-motive case" (internal quotation marks and citation omitted).

The Sixth Circuit holds that the McDonnell Douglas burden-shifting framework does not apply to the summary judgment analysis of mixed-motive claims. For a plaintiff to survive a summary judgment motion in a mixed-motive case, sufficient evidence must be produced that bias was a motivating factor for the employer's decision. See White v. Baxter Healthcare Corp., 533 F. 3d 381, 396 n.8 (6th Cir. 2008), cert. denied, 129 S. Ct. 2380 (2009).

Finally, the Third Circuit stopped short of expressly rejecting application of McDonnell Douglas in mixed-motive cases. It states that the framework "does not apply in a mixed-motive case in the way it does in a pretext case because the issue in a mixed-motive case is not whether discrimination played the dispositive role but merely whether it played 'a motivating part' in an employment decision." Makky v. Chertoff, 541 F. 3d 205, 214-15 (3d Cir. 2008) (citation omitted). The Third Circuit, however, did not address whether each element of the McDonnell Douglas analysis must be satisfied because the issue at bar was whether a plaintiff pursuing a mixed-motive theory must demonstrate her objective qualification for the job in question. Id. at 215. The court answered this limited inquiry in the affirmative, holding that a mixed-motive plaintiff fails to establish a prima facie case of Title VII discrimination if unchallenged objective evidence exists that she did not meet minimal qualifications for the job. Ibid.

In short, the state of summary judgment jurisprudence in employment discrimination cases is perplexing to both litigants and courts. Yet in denying certiorari in White v. Baxter Healthcare Corp., the U.S. Supreme Court left the door open for a unified approach to emerge. See White, 533 F. 3d 381 (6th Cir. 2008). In view of the U.S. Supreme Court's tacit encouragement

of adaptation, EANJ respectfully urges the Court to create an approach to CEPA to reconcile the conflict.

The sine qua non of the CEPA claim is proof of a causal connection between the alleged whistle-blowing and the adverse employment action. See Dzwonar, 177 N.J. at 462. A plaintiff must show that she was the target of a retaliatory act "because of" engaging in whistle-blowing activity; see also N.J.S.A. 34:19-3 ("The employer shall not take any retaliatory action against an employee because the employee [blows the whistle.]" (emphasis added)). At the very least, the plaintiff must present evidence "of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting" retaliation. See McDevitt, 175 N.J. at 528 (citation omitted). Absent such a showing, judgment should be entered in favor of the employer.

If, however, the plaintiff demonstrates by a preponderance of the evidence that such a causal connection exits—that the employer engaged in a retaliatory act because the employee blew the whistle—the employer would be entitled to present evidence that there was no connection between its decision and whistle-blowing. This can be done by showing that the decision was guided by legitimate, non-retaliatory reasons, or by showing that the same decision would have been made even if retaliation played a part.

At the summary judgment stage, dismissal of the plaintiff's CEPA claim would be proper if there are no inconsistencies or implausibilities concerning the employer's decision or no disputed material fact regarding the employer's reason(s)—even if retaliatory motive played a part. If a disputed material fact is proven, summary judgment would be denied and a jury would decide whether the employer's action was taken because the employee engaged in whistle-blowing.

According to Desert Palace, there is no difference between circumstantial and direct evidence. Accordingly, there is no need to use the burden shifting artifice. At the same time, Price Waterhouse makes clear that an employer's decision can be motivated by both permissible and impermissible reasons. Yet a plaintiff still has the burden of showing that the employer's actions were taken "because of" her whistle-blowing. If the employer would have taken the same action if retaliation had played no role in the employment decision, then the action was not taken because the employee blew the whistle. This straightforward framework directly places the emphasis of the CEPA case at the summary judgment stage where it belongs, squarely on the statutory text.

CONCLUSION

A different analysis must be utilized depending upon the characterization of this matter as a pretext or mixed-motive case. The end result, however, remains the same.

Desert Palace, moreover, harmonizes the evidentiary standards in pretext/mixed-motive cases, making it unnecessary to use the burden-shifting framework of McDonnell Douglas in CEPA cases.

Respectfully submitted,

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