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Success Through Documented Failure

By Raquel S. Lord, Esq.

Though New Jersey employers are all too familiar with the myriad exceptions to the at-will doctrine, in a recent decision, the United States Court of Appeals for the Third Circuit provided some words of comfort for employers concerned about terminating an employee for performance reasons for fear of being the subject of a lawsuit: where "an employee consistently under-performs in a skill-set fairly designated as critical to his job," the employee will be unable to demonstrate that his termination was pretextual merely by demonstrating better performance in other areas. In *McDonnaugh v. Teva Specialty Pharmaceuticals, LLC*, No. 22-3462, 2012 U.S. App. LEXIS 15423 (July 26, 2012), finding that the plaintiff had failed to meet his burden to demonstrate that his termination was a pretext for racial discrimination, the Third Circuit affirmed the District Court's grant of summary judgment in favor of Teva Specialty Pharmaceuticals and dismissal of plaintiff's claims in their entirety.

The Facts

Plaintiff Lloyd McDonnaugh, an African American, began employment as an Overlay Sales Representative with Teva Specialty Pharmaceuticals ("Teva") on August 21, 2006. At the time, he had six years' experience in the industry. McDonnaugh's primary responsibility at Teva was marketing an asthma inhaler and an asthma medication. Initially, McDonnaugh reported to Regional Sales Manager Randy Simmons, who was also African American. *McDonnaugh v. Teva Specialty Pharmaceuticals, LLC*, No. 09-5566, 2011 U.S. Dist. LEXIS 98638, *2-3 (September 1, 2011).

McDonnaugh received monthly performance evaluations, known as Field Contact Reviews ("FCR"), which were given after a manager accompanied him on sales calls (known as "ride-alongs"), as well as bi-annual reviews. In 2006 and 2007, Simmons was critical of McDonnaugh's performance, in particular his sales style and territory management. Specifically, Simmons noted McDonnaugh's "one-sided sales style, which included excessive dialogue without utilizing probing questions to discover the needs of each physician." His overall partial-year rating in 2006 was "meets expectations." In 2007, Simmons lowered McDonnaugh's overall rating to "mostly meets expectations" in every category, except "integrity and ethical conduct," in which he gave McDonnaugh a "meets expectations" rating. *Id.* at *3-4.

In November 2007, Simmons was promoted, and Jaylene Penrod, a Caucasian, became McDonnaugh's direct supervisor. In March 2008, in her first FCR for McDonnaugh, Penrod reported that McDonnaugh lacked a "concise and strong sales message, failed to use probing questions and used excessive one-sided dialogue." Further, his sales results for his

asthma medication in the first quarter were lower than the regional, area and national averages, while his inhaler sales were at or slightly below the regional, area and national averages. *Id.* at *4-5.

McDonnaugh's performance ratings slipped even further in 2008. After a ride-along in June 2008, Penrod rated McDonnaugh's selling skills "below expectations." After another ride-along two months later, Penrod again rated his selling skills "below expectations," and his ratings in another category, territory analysis and planning, dropped from "meets expectations" to "mostly meets expectations." McDonnaugh's overall rating for his 2008 Mid-Year Review was "below expectations," with Penrod specifically noting deficiencies in McDonnaugh's selling and territory management skills. *Id.* at *5. Penrod arranged ride-alongs for McDonnaugh with other Teva managers, each of whom also found McDonnaugh's sales abilities "below par." *Id.* at *6.

In November 2008, McDonnaugh was put on a Performance Management Plan ("PMP"). The PMP gave him 90 days to improve in certain specified areas. Under Teva's policy, a 90-day PMP meant that there would be "ongoing evaluation" and "an evaluation of overall progress." As reflected by his FCRs for December 2008 and January 2009, McDonnaugh's performance in the categories specified in the PMP continued to be sub-standard. Following his January 2009 ride-along, McDonnaugh was terminated effective January 23, 2009, 73 days into the 90-day period. *Id.* at *7-8.

The District Court Grants Summary Judgment in Favor of Teva

Following his termination, McDonnaugh filed suit against Teva in the United States District Court for the Eastern District of Pennsylvania, alleging that he was unlawfully terminated based on his race, in violation of Title VII of the Civil Rights Act of 1963 and the Civil Rights Act of 1991. *Id.* at *1. Teva moved for summary judgment, arguing that McDonnaugh was unable to meet the fourth prong of a *prima facie* case of race discrimination -- that is, he could not demonstrate that he suffered an adverse employment action under circumstances that give rise to an inference of discrimination. *Id.* at *12.

In discussing the fourth prong generally, the District Court noted that the focus is "whether the employer is treating some people less favorably than others because of their race, color, religion, sex or national origin." *Id.* (citation omitted). McDonnaugh contended that he could satisfy this burden because he was "similarly situated" to two Caucasian co-workers who were treated more favorably. The Court noted, however, that the two individuals McDonnaugh pointed to were not similarly situated "in all relevant respects" -- one was new to the pharmaceutical industry, as compared to McDonnaugh who had six years of experience, and, although he initially struggled with selling skills and territory analysis/planning, he ultimately improved. *Id.* at *13-14. The other individual was also not similarly situated because she completed fewer sales calls, and her performance issues were unrelated to selling or territory management. *Id.* at *15.

The District Court proceeded to discuss the burden-shifting analysis it would undertake if McDonnaugh had made a *prima facie* case of race discrimination. It found that, even if McDonnaugh had established a *prima facie* case, he failed to demonstrate that Teva's proffered reason for the termination was pretextual. The Court rejected McDonnaugh's argument that his objective sales performance demonstrated pretext, as Teva could still have found McDonnaugh legitimately deficient in other specific performance categories. *Id.* at *23-26. The Court similarly rejected McDonnaugh's claim that a termination 73 days into a 90-day PMP suggested pretext, as nothing in the PMP constituted a guarantee of continued employment. *Id.* at *26-27. Finally, in response to

McDonnaugh's argument that the nine representatives who worked under Simmons were never placed on PMPs or terminated, the Court noted that Simmons had the same concerns as did Penrod regarding McDonnaugh's one-sided sales techniques and territory management issues. *Id.* at * 27. The Court dismissed McDonnaugh's claims in their entirety and entered summary judgment in favor of Teva.

The Third Circuit Affirms

McDonnaugh appealed the District Court's grant of summary judgment to Teva. Unlike the District Court, the Third Circuit found that McDonnaugh met the fourth prong of a *prima facie* race discrimination case by demonstrating that he was replaced by a Caucasian individual. *McDonnaugh v. Teva Specialty Pharmaceuticals, LLC*, No. 11-3462, 2012 U.S. App. LEXIS 15423 (July 26, 2012). This evidence, the Court stated, showed an adverse action giving rise to an inference of unlawful discrimination. *Id.* at *4 (citation omitted). However, the Court agreed that McDonnaugh failed to meet his subsequent burden to show that his termination was pretextual.

The Court noted there was "no dispute that, starting in 2007 before Penrod supervised him, McDonnaugh never met the company's performance expectations in the area of sales skills, a skill that all agree was central to his job." *Id.* at *5. The Court further disagreed with McDonnaugh's argument that his satisfactory ratings in categories other than sales skills and territory management provide evidence of pretextual termination. It emphasized that it is "within the employer's domain and discretion to determine both the skills sets, and the level of competence necessary to fulfill the requirements of a particular position of employment. Where, as here, an employee consistently under-performs in a skill-set fairly designated as critical to his job, the employee cannot preclude summary judgment on the issue of pretext merely by showing better or satisfactory performance in other skill-sets." *Id.* at *5-6. Finally, the Court rejected McDonnaugh's contention that his termination prior to the end of the 90-day PMP period undermined Teva's proffered reason. In putting McDonnaugh on a PMP, Teva put McDonnaugh on notice of its intention to monitor him closely for the 90 days, but gave no guarantee that McDonnaugh would continue to be employed through the end of that time period, "particularly where substandard conduct showed no improvement." *Id.* at *6.

Lessons from *McDonnaugh*

Although the outcomes of discrimination cases are extremely fact-specific, well-documented performance deficiencies continue to be a legitimate, non-discriminatory reason to put an employee on a performance improvement plan and to terminate an employee if improvement does not occur. Employers should take care to document performance issues, especially in critical areas, and routinely discuss such issues with the employee. As in *McDonnaugh*, this documentation will become critical evidence should the employee bring a claim alleging that he was terminated for an unlawful, discriminatory reason. In this case, based upon the quality and consistency of the documentation, the employer was able to prevail on a summary judgment motion, underscoring the value of proper documentation.