

violation of the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1988). Defendants moved for summary judgment. The Court was called upon to apply the Supreme Court's framework for allocating burdens of production and persuasion in discrimination suits, as set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). After considering divergent views on this subject, this Court denied the motion for summary judgment.

The Court is now compelled to revisit that decision in order to take account of an intervening opinion by the First Circuit Court of Appeals, Mesnick v. General Electric Co., 950 F.2d 816 (1st Cir. 1991).

II. DISCUSSION

A. The Standard in the First Circuit

The First Circuit has long struggled with the difficulties of applying the McDonnell Douglas burden-shifting framework to summary judgment motions. The Circuit Court's various approaches to this problem in recent years seem to reflect less a continuous evolution of a standard than a series of differing viewpoints that randomly dominate depending upon which judges make up a particular panel. See, e.g., Connell v. Bank of Boston, 924 F.2d 1169, 1175, 1180-81, 1182-83 (1st Cir.), cert. denied, 111 S. Ct. 2828 (1991); Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9-10 (1st Cir. 1990); Menard v. First Sec. Serv. Corp., 848 F.2d 281, 287 (1st Cir. 1988).

The recent opinions from the First Circuit do not clear up the confusion. The prevailing standard in this Circuit is both difficult to discern and continually changing. The law is unsettled, and there is no reason to believe that the Circuit's most recent decision is the last word. Nonetheless, Mesnick provides the standard that the First Circuit would most likely apply to this case. Accordingly, this Court must reconcile its decision in Gannon with the recent pronouncements in Mesnick.

In Mesnick, the First Circuit returned to "the much traveled but little understood intersection between Rule 56 of the Civil Rules and the burden-shifting framework for discrimination cases" established in McDonnell Douglas. Mesnick, slip op. at 2. The Circuit Court noted initially that the McDonnell Douglas framework must submit to the requirements of Rule 56. Id. at 12. This Court relied on the same premise in Gannon, 777 F. Supp. at 169. The Mesnick panel then explained:

If the plaintiff has made out his prima facie case, and the employer has not offered a legitimate, nondiscriminatory reason to justify the adverse employment action, then the inference of discrimination created by the prima facie case persists, and the employer's attempt to secure summary judgment should be rebuffed.

Mesnick, slip op. at 12. This Court followed the same rule in Gannon, 777 F. Supp. at 170 ("the prima facie case 'raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors'" (quoting Burdine, 450 U.S. at 254)).

The Court of Appeals next addressed the plaintiff's burden at summary judgment after the defendant has stated a legitimate, nondiscriminatory reason for the adverse employment action, stating:

When the struggle has progressed to the third and final phase of burden-shifting, however, then the McDonnell Douglas framework falls by the wayside. . . . [S]o long as the employer's proffered reason is facially adequate to constitute a legitimate, nondiscriminatory justification for the employer's actions, the trial court's focus in deciding a Rule 56 motion must be on the ultimate question, not on the artificial striations of the burden-shifting framework.

Mesnick, slip op. at 12-13. This statement is consistent with this Court's reasoning in Gannon, 777 F. Supp. at 169 ("The McDonnell Douglas system for allocating burdens and presumptions offers a handy way to conceptualize the proof of a discrimination claim, but it does not mesh well with the actual practice of litigation").

Gannon and Mesnick diverge only in their final steps. In Gannon, 777 F. Supp. at 170, this Court reached the stark conclusion that the plaintiff's production of a prima facie case alone suffices to defeat a defendant's summary judgment motion. In contrast, Mesnick reiterated the First Circuit's position that "where the first two steps of the McDonnell Douglas pavane have been satisfactorily choreographed, a plaintiff must offer some minimally sufficient evidence, direct or indirect, both of pretext and the employer's discriminatory animus to prevail in the face of a properly drawn Rule 56 motion." Mesnick, slip op. at 13.

The standard announced in Gannon is indeed different from that of Mesnick, but only slightly. All agree that a plaintiff survives a summary judgment motion only by producing evidence that supports a reasonable inference of the defendant's discriminatory intent. Mesnick and Gannon simply have different conceptions of what evidence suffices to justify this inference. In the Mesnick panel's view, the plaintiff does not raise an inference of discriminatory animus until he produces a prima facie case plus at least some other specific evidence of the employer's discriminatory intent. See Mesnick, slip op. at 11. In this Court's opinion, however, "[a] bare-bones prima facie case, even if supported by no other evidence, permits the trier of fact to infer discriminatory animus." Gannon, 777 F. Supp. at 170.

This Court has additional reasons for allowing a mere prima facie case to proceed to trial. Only at trial can the triers of fact observe the demeanor of witnesses and evaluate their credibility. See 1963 Advisory Committee's note to Fed. R. Civ. P. 56(e). If the defendant's explanation of the reasons for the plaintiff's demotion, under the jury's watchful eyes and the stress of cross examination, seems discredited and unbelievable, then the jury may rightfully find discriminatory intent. See MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1059 (8th Cir. 1988). This is especially so in this case. Defendants' articulation of a nondiscriminatory reason for plaintiff's

demotion turns on the credibility of one man -- plaintiff's superior at the Power Company.

This Court can also suggest good jurisprudential reasons not to use the Mesnick standard -- the First Circuit's position might change again with its next opinion on the topic, and Mesnick is arguably inconsistent with Supreme Court pronouncements -- but there is no need for such defiance. Without abandoning the Gannon standard, this Court believes that the plaintiff here has also met the standards set forth in Mesnick.

B. The Plaintiff Passes the Mesnick Test

The parties have entered the third phase of the McDonnell Douglas framework, and so this Court's focus "must be on the ultimate question, not on the artificial striations of the burden-shifting framework." Mesnick, slip op. at 13. Ultimately, in order to survive the summary judgment motion, the plaintiff "need only present evidence from which a jury might return a verdict in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). The trial judge has wide discretion under Mesnick to determine whether the plaintiff's evidence is sufficient to support a jury verdict. "[T]he quantum necessary to survive a pretrial Rule 56 motion," the First Circuit instructs, "is not susceptible to formulaic quantification. The determination must be made case by case" Mesnick, slip op. at 14. In Thornbrough v. Columbus & Greenville Railroad Co., 760 F.2d 633, 645 n.19 (5th Cir. 1985), the Fifth Circuit stated that production of a prima facie case precludes summary judgment

against the plaintiff. As that court explained, "The problem . . . is that there is no bright line demarcating when a 'genuine issue of fact' degenerates into an 'attenuated possibility.' . . . [A]lthough the plaintiff's odds of prevailing may not be high, we are not prepared to say that they are so minute that proceeding with the case would be pointless." Id.

This discretion is emphasized by the posture common to most of the First Circuit's cases interpreting both McDonnell Douglas and Rule 56. The First Circuit routinely affirms lower court decisions granting summary judgment when plaintiffs can present little more than a prima facie case. See, e.g., Mesnick; Villaneuva v. Wellesley College, 930 F.2d 124 (1st Cir.), cert. denied, 112 S. Ct. 181 (1991); Connell, 924 F.2d 1169; Medina-Munoz, 896 F.2d 5; Schuler v. Polaroid Corp., 848 F.2d 276 (1st Cir. 1988); Menard, 848 F.2d 281; Dea v. Look, 810 F.2d 12 (1st Cir. 1987). But this Court can locate no case in which the First Circuit reversed a district court decision denying summary judgment when the plaintiff presented only a prima facie case. The district court's judgment that a nonmovant's evidence justifies a jury trial is entitled to great deference.

In the Gannon opinion, this Court did not present all the facts relevant to the plaintiff's case. Because the Court concluded that a prima facie case is legally sufficient to defeat a defendant's summary judgment motion, the Court recited only the

minimal facts supporting the plaintiff's prima facie case.¹ These additional facts make summary judgment against the plaintiff inappropriate even under Mesnick's more demanding standard.

Beyond the plaintiff's prima facie case, the plaintiff's statement of disputed material facts provides two additional factual bases for inferring that his superior, a Power Company officer, intended to demote the plaintiff because of his age. First, the corporate defendants identified the plaintiff by his age for invitation to a retirement planning seminar. And second, those corporate defendants are charged with the knowledge that the plaintiff's retirement benefits would maximize when the plaintiff reached age 62 in 1993, raising the clear possibility that he might well retire then. If the plaintiff had remained plant manager at Narragansett, his possible retirement in 1993 would come at an extremely unfortunate time for his employer, midway through a renovation project at his power plant in 1993. One could draw the inference that plaintiff's superior demoted him to Power Company's plant in Massachusetts to avoid this eventuality. In addition, plaintiff's statement of disputed facts identifies much evidence that he was performing his job

¹ Presenting the additional factors favoring the plaintiff would have weakened the Court's legal conclusion. If the Court had set forth the facts in addition to the prima facie case, readers of Gannon might conclude that the opinion's primary statement -- that a mere prima facie case is sufficient to defeat a defendant's summary judgment motion -- was only dicta.

well when he was demoted, also raising an inference that the transfer occurred because of age.

On the basis of these facts, this Court concludes that its decision to deny the motion for summary judgment is fundamentally sound. See Biggins v. Hazen Paper Co., No. 91-1591, 1992 WL 1569 (1st Cir. Jan. 8, 1992), slip op. at 14. No doubt the plaintiff's case is tenuous, but it meets the requirements of Mesnick. This Court believes strongly that the jury should hear the witnesses and see them cross-examined in order to determine where the truth is to be found in this case.

C. Defendant New England Power Service Company

The Court agrees with the defendants, however, that the Service Company is entitled to summary judgment in this case. The plaintiff has produced no evidence that he worked for the Service Company or that said defendant was involved in the decision to demote him. Narragansett was the plaintiff's employer, and his superior at the Power Company demoted the plaintiff to the Power Company's plant in Massachusetts; thus those defendants are not entitled to summary judgment. If the plaintiff prevails in this case, he may only be able to secure complete relief if both Narragansett and the Power Company are defendants in this case.

D. Certification under 28 U.S.C. § 1292(b)

Certification of the questions presented in this opinion is not appropriate at this late stage in the litigation. An immediate appeal of the earlier order would not "materially

advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (1988). This case will be scheduled for this Court's May 1992 jury trial calendar. An interlocutory appeal to the First Circuit would surely cause delay well beyond that time in the resolution of this matter. In any event, this Court believes that the Circuit Court would, in all likelihood, decline to decide this case without the benefit of a full trial to provide a factual record for review.

III. CONCLUSION AND ORDER

Accordingly, the defendants' motion for reconsideration is denied except that summary judgment will be entered for defendant New England Power Service Company, but only when the trial is concluded. The defendants' motion for certification of an interlocutory appeal to the First Circuit Court of Appeals is denied.

It is so ordered.



Ronald R. Lagueux
United States District Judge
February 18, 1992