

CLIENT ALERT

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“Same Actor” Inference Nears Universal Acceptance Among Circuit Courts

In a recent decision, *Antonio v. The Sygma Network, Inc.*, the U.S. Court of Appeals for the Tenth Circuit recognized that it “makes little sense” to conclude that decision makers who hire a member of a protected group engage in unlawful discrimination when they fire the employee a short time later. Accordingly, the court held that an employer is entitled to a “strong inference” that its stated reason for terminating an employee under such circumstances is not a pretext for discrimination. The Tenth Circuit’s adoption of this “same actor” inference brings the circuit courts to almost-unanimous agreement on this principle.

The Facts

The plaintiff, Gladys Antonio, was a black woman from Zimbabwe. In 2000, she applied for a position as an accountant with the Sygma Network, Inc. She was interviewed by a team of Sygma employees who all agreed that Sygma should hire her. Included among the members of the team was Dena Johnson, an accounting supervisor.

Antonio accepted a job offer and worked for Sygma from July to December 2000, when her work visa expired. She obtained permanent resident status and, in March 2001, Sygma rehired her. The decision to rehire Antonio was approved by a personnel committee consisting of Johnson and the rest of the original interview team, as well as one additional Sygma employee.

In late March 2001, Johnson told Antonio that she had offensive body odor and speculated that it was attributable to her “culture.” Antonio complained about the remark to a human resources representative, indicating that she “felt very harassed” and

“alienated.” The human resources representative responded by notifying Johnson’s supervisor and counseling Johnson “on being more aware of sensitivities to that area of race, national origin, or any other areas of discrimination.” After Antonio complained, Johnson was “cold” toward her and did not speak with her for several weeks.

Nonetheless, in July 2001, Antonio received a positive annual performance appraisal from Johnson. Johnson rated Antonio’s overall performance as “equal to or somewhat better than the standard for the position.” Meanwhile, in her self-appraisal, Antonio noted that Johnson “has been an excellent source of training and assistance.” Antonio further wrote, “[t]here is no limit to the amount of help and clarification that [Johnson] is willing to provide, and as a result I have learned a great deal from her.”

In December 2001, Antonio went on vacation to Zimbabwe. She was scheduled to return to work on December 31, which was the beginning of a typically busy week for the accounting department. Antonio was unable to leave Zimbabwe as scheduled, however, because of a “problem” with her husband’s “immigration papers.” Antonio telephoned Johnson regarding the problem on December 29 and 31, and promised to provide her with additional updates. Due to faulty international telephone service, however, Antonio was not able to reach Johnson again.

On January 4, 2002, the members of the personnel committee, including Johnson, met and decided that Antonio’s failure to keep in contact with Sygma after December 31 constituted job abandonment. As a result, Sygma mailed Antonio a letter notifying her that “[d]ue to the fact that we have not heard from you in the last 4 days we are considering your position abandoned and your lack of communication a resignation

from your position.” Antonio learned of her termination when she returned to the United States on January 11. Approximately one month later, Sygma hired a white, U.S.-born applicant to fill Antonio’s position.

The District Court

After exhausting her administrative remedies, Antonio filed an action against Sygma in federal district court in Colorado. Antonio’s lawsuit against Sygma included national origin and race discrimination claims under 42 U.S.C. § 1981 and Title VII.

The district dismissed Antonio’s claims on summary judgment. With regard to Antonio’s claim that the termination of her employment was discriminatory, the court held that Antonio’s failure to return to work as scheduled was a legitimate, non-discriminatory and non-pretextual reason for deeming her to have abandoned her job. Antonio appealed the district court’s decision.

The Tenth Circuit

The Tenth Circuit analyzed Antonio’s 42 U.S.C. § 1981 and Title VII claims pursuant to the U.S. Supreme Court’s *McDonnell Douglas* decision. Under this analysis, if a plaintiff is able to establish a *prima facie* case of discrimination, the burden shifts to the defendant to demonstrate a non-discriminatory reason for the action. If the defendant satisfies this requirement, the burden then shifts back to the plaintiff to prove that the defendant’s proffered reason is pretextual.

Sygma did not dispute that Antonio could establish a *prima facie* case of discrimination, given that she belonged to a protected class, she was qualified for her job, she was terminated, and the job was not eliminated. Instead, Sygma argued that it had fired Antonio for a legitimate, non-discriminatory reason: job abandonment.

Antonio contended that this reason was a pretext intended to conceal Sygma’s true, discriminatory motive. The Tenth Circuit disagreed. Before considering the substance of Antonio’s contention, however, the court explained that there was a “strong inference” that Sygma’s stated reason was not pretextual. The court based this inference upon the fact that “[m]ost of the same individuals – including Johnson – who decided to terminate Antonio for job abandonment had also hired her twice, fully aware of her race and national origin.” The court explained that it “makes little sense to deduce that these individuals terminated Antonio roughly ten months later because of her race and/or national origin.”

According to the court, this “same actor inference” has been recognized, “in varying degrees,” by “nearly every circuit.” In support of this assertion, the Tenth Circuit cited cases from every circuit court except the U.S. Court of Appeals for the District of Columbia Circuit.

Joining its “sister circuits,” the Tenth Circuit held that where an “employee was hired and fired by the same person within a relatively short time span,” there is a “strong inference that the employer’s stated reason for acting against the employee is not pretextual.” The court emphasized, however, that a plaintiff is still entitled to “present countervailing evidence of pretext,” and explained that the principle “gives rise to an inference, rather than a presumption, that no discriminatory animus motivated the employer’s actions.”

The court then considered the substance of Antonio’s argument that Sygma’s stated reason for terminating her employment was pretextual, but concluded that the evidence was insufficient to “dispel this inference.” The court affirmed summary judgment for Sygma.

Conclusion

The same actor inference is a logical principle that has justifiably gained widespread acceptance among the circuit courts. Easy to overlook in the Tenth Circuit’s *Antonio* decision, however, is the qualification that the same actor inference has been recognized by nearly every circuit court “*in varying degrees*” (emphasis added).

Thus, for example, the Third Circuit, in a case cited by the *Antonio* court, *Waldron v. SL Industries, Inc.*, has only stated in a footnote that an employer “may of course argue to the factfinder” that, based upon the same actor principle, “it should not find discrimination.” It is unclear whether the Third Circuit would follow the Tenth Circuit’s lead and actually affirm the denial of summary judgment in reliance upon a “strong inference.” Ideally, the same actor principle will not only gain universal recognition by the courts, but they will apply it in the same manner as did the Tenth Circuit.

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For further Employment & Labor information, please contact:

David W. Garland, Co-Chair
Employment & Labor
973-643-6390
dgarland@sillscummis.com

Lester Aron, Co-Chair
Employment & Labor
973-643-5795
laron@sillscummis.com

New Jersey

One Riverfront Plaza
Newark, NJ 07102
Tel: 973-643-7000
Fax: 973-643-6500

www.sillscummis.com

New York

30 Rockefeller Plaza
New York, NY 10112
Tel: 212-643-7000
Fax: 212-643-6500