

March 2005

At Lindabury, we have a comprehensive Employment Law Practice. Our Employment Litigation attorneys handle hundreds of cases annually, representing company management clients at all levels of dispute resolution.

We also provide Employment Law Advice and Counsel. We firmly believe that the proper implementation of a comprehensive set of policies and procedures that cover training, documentation, interviews and investigations is essential for containing employment litigation costs and creating a long-term positive work environment.

New Jersey Office
P. O. Box 2369
53 Cardinal Drive
Westfield, NJ 07091
908-233-6800
Fax 908-233-5078
info@lindabury.com

New York Office
Suite 2300
26 Broadway
New York, NY 10004
212-742-3390
Fax 212-269-5016
info@lindabury.com

www.lindabury.com

Supreme Court's *Zive* Ruling Eases Plaintiff's Burden in *Prima Facie* Cases of Discrimination

By John F. Goemaat

Need for proof that employee met the employer's legitimate performance expectations shifted

The Supreme Court of New Jersey has issued an opinion easing the initial burden of a plaintiff in proving that the termination of his/her employment was in violation of the New Jersey Law Against Discrimination (LAD).

In *Zive v. Stanley Roberts, Inc.*, No. A-82 (Feb. 24, 2005) the Court re-examined a plaintiff's burden in proving a *prima facie* case of discrimination under the McDonnell Douglas test and its progeny. More particularly, the Court prescribed the limit of plaintiff's initial burden in presenting evidence that "he was performing his job at a level that met his employer's legitimate expectations."

Performance of the job at a level that meets the employer's legitimate expectations is the second of the four elements of the indirect method of presenting evidence of a *prima facie* case of discriminatory termination. The first element is that the plaintiff is a member of a group protected by the LAD. The last two are that the plaintiff was terminated and that the employer sought someone to perform the same work.

Thus, in most discharge cases the second element of the *prima facie* case—that the employee met the employer's legitimate expectations—is the only element that could cause the plaintiff difficulty in his/her burden of proof. The *Zive* opinion was apparently written to relieve much of that difficulty. (cont'd ►)



John F. Goemaat provides advice and counsel to company management in labor and employment law matters. He is a former corporate counsel with Lucent Technologies. He can be contacted at jgoemaat@lindabury.com.



Mr. Zive was the head of a sales organization that had, admittedly, failed to meet the annual sales objective. At the end of the year, he suffered a debilitating stroke with noticeable side effects. Shortly thereafter, he was terminated and sought to prove that the termination was because of his disability, using the indirect method.

The Court held that the facts—that he had significant experience in sales, that he had worked for the employer for eight years, and that he had been actively engaged in the management of his sales organization—were sufficient evidence that he met the employer’s legitimate expectations. The Court further held that the failure to meet current sales objectives, and any other current performance inadequacies, could be raised at a later point in the burden shifting process as part of the employer’s proof of its legitimate reasons for termination. The plaintiff’s *prima facie* case, therefore, need not address the most likely reason for termination—that he/she was not meeting the legitimate expectations of the employer.

The Court stated that its opinion should not result in more unnecessary jury trials of LAD claims for plaintiffs who were

simply unable to perform adequately. Nevertheless, the easing of the only meaningful burden plaintiffs bear in a termination case will allow them to prove more easily a *prima facie* case of discrimination and could likely result in the grant of fewer summary judgments in favor of employers.

Therefore, employers will have to strongly press what the Court has also affirmed in its opinion that “plaintiff does not qualify for a jury trial unless he or she can ‘point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer’s articulated legitimate reasons; or (2) believe an invidious discriminatory reason was more likely...’”



The material in this Employment Alert is for information purposes only and is not intended as legal advice. If you have any questions concerning this Alert, please contact John F. Goemaat (jgoemaat@lindabury.com) or John H. Schmidt, Jr. (jschmidt@lindabury.com). For biographical information on our attorneys, see our web site at www.lindabury.com.

