

**LAW AGAINST DISCRIMINATION;**  
Teacher Raises a Pretext Issue Through Statistics Comparing Treatment by Age of  
Candidate

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SECTION: DECISIONS; State Courts; Pg. 27

**BODY:**

**GREENBERG v. CAMDEN COUNTY VOCATIONAL AND TECHNICAL SCHOOLS**, Appellate Division, A-5755-96T5, May 6, 1998, approved for publication May 6, 1998. By Conley, J. Also on panel: Wallace and Carchman. Appealed from Fratto, J., Law Division, Camden County. (22 pages).

Facts-on-Call Order Number 4064

Based on a 48-year-old teacher's qualifications and on her evidence of the treatment of other teachers, a reasonable juror could conclude that the reason a school gave for its decision not to rehire her was a pretext for discrimination.

Evelyne Greenberg was born in 1946. She had a Bachelor's degree from the University of Miami in English, with a minor in Spanish. She also had a Masters in bilingual cultural studies from Marywood College. In addition, she had teaching certificates for Pennsylvania and New Jersey. Greenberg taught for several schools from February 1986 to June 1991.

Camden County Vocational and Technical Schools hired Greenberg on January 11, 1993. Greenberg was hired as a non-tenured high school English teacher for the Pennsauken campus.

Greenberg's written performance evaluations were positive. Greenberg also received four "memos of concern" from the school principal for improperly filling out the sign in/out log and absence forms and for submitting verification sheets late. Nevertheless, the school rehired Greenberg for 1993-94.

Greenberg's evaluations for 1993-94 were generally positive. She received four more memos of concern regarding the log sheets and absence forms and another memo relating to untimely verification sheets. She was rehired for 1994-95.

During 1994-95, Greenberg received four written performance evaluations. The only negative on the first evaluation was for "the required elements of her lesson plan." However, Greenberg maintained that the school acknowledged that she did individualized lesson plans that corrected the deficiency.

The second evaluation criticized her for not reading an entire play before she presented it to her class. Greenberg explained that she had read the summary and teaching recommendations in the teacher's guide. In addition, the evaluator claimed that students stood up and put on their jackets before the bell. Greenberg responded that only one student put on his jacket and that the evaluator had already stood up and donned his jacket.

The third evaluation found deficiencies in Greenberg's preparation because she did not place a "daily instructional objective" in her lesson plan and did not record the page numbers that she would be covering. She also did not give the evaluator a copy of the text. She was found to be marginally acceptable in "follow-up" because she had been on notice that her lesson plan entries "were brief." However, the evaluator noted that she led a "good discussion" that "involved all students."

In the fourth evaluation, the only negative aspect concerned Greenberg's chewing of gum during the evaluation. Greenberg did not receive any memos of concern, but she did receive a letter of concern that listed the unsatisfactory aspects of her evaluations and the memos of concern that she had received.

Greenberg was not rehired and did not receive tenure. She sued the schools in the Law Division, alleging that the decision not to rehire her violated the Law Against Discrimination, N.J.S.A. 10:5-1, et seq.

The Law Division granted summary judgment against Greenberg. The Law Division ruled that "the issue of qualification is an issue that is to be determined" by the defendant, which had determined that Greenberg's administrative deficiencies made her unqualified to be rehired. Greenberg appealed, and the Appellate Division reversed.

The Appellate Division noted that Greenberg offered two kinds of evidence. She produced statistics that purported to show a pattern of excluding women older than 45. She also compared her record to that of other teachers to indicate that the younger teachers who were granted tenure had at least as many deficiencies as the older women who did not receive tenure.

The Appellate Division reviewed the procedural steps in an action under the LAD. The plaintiff must show that a prohibited consideration "had a determinative influence on the outcome" of the decision-making process.

Proof involves a three-step process. First, the plaintiff must meet the burden of establishing a prima facie case by a preponderance of the evidence. Pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), Greenberg's prima facie case had to demonstrate (1) that she is a member of a protected class, (2) that she was qualified, (3) that she was denied reappointment or tenure, and (4) that others with similar or inferior qualifications were reappointed or given tenure.

Second, the employer has the burden of rebutting the presumption of discrimination. The employer may satisfy the burden by showing that the action was reasonable or by presenting a legitimate, nondiscriminatory reason for the action. The employer meets the burden by producing admissible evidence that raises an issue of fact.

Third, the employee has the burden of showing that the reason given by the employer is either a pretext to conceal discrimination or not the real reason for the employment action. The employee satisfies the burden by persuading the court that "a discriminatory reason more likely motivated the employer" or that the employer's reason should not be believed.

The Appellate Division pointed out that in this third stage an employee can defeat an employer's motion for summary judgment by raising suspicions about the employer's reason. The employee can demonstrate flaws in the reason that make a reasonable fact-finder consider the reason unbelievable. The employee also can point out "inconsistencies and implausibilities" in the reason that imply that the employer "did not act for non-discriminatory reasons," even if the employee cannot prove that the employer acted for discriminatory reasons.

The appeals court observed that Greenberg had established the first, third, and fourth prongs of the prima facie case. She was 48, she was not rehired, and younger teachers were rehired and granted tenure. The appeals court noted that six of the nine teachers evaluated for tenure at the Pennsauken campus received tenure, but several of the six had administrative deficiencies similar to Greenberg's.

The appeals court determined that the "critical dispute" concerned the second prong: Greenberg's qualifications. The defendant claimed that the 15 deficiencies in Greenberg's evaluations were "more than ample reason, when viewed in their totality and in the context of the Defendant's discretion," to deny her tenure. Nonetheless, the Appellate Division ruled that the defendant's argument and the motion judge's comment referred to the second step of the case instead of to the second prong of the prima facie case.

Viewing the record most favorably for Greenberg, the appeals court determined that Greenberg's degrees, teaching certificates, and experience indicated that she was qualified. The appeals court added that her evaluations were positive "overall." She was rehired after each of the first two years, and she met the minimum qualifications for tenure. Accordingly, she had presented a prima facie case.

Therefore, the case moved to the second stage. The defendant had to show a legitimate, nondiscriminatory reason for not rehiring Greenberg. The appeals court indicated that "the noted deficiencies facially appear" to satisfy the burden, especially given the defendant's discretion in tenure decisions.

Greenberg argued that she had presented enough evidence to withstand a summary judgment motion. She maintained that her evaluations and the memos of concern did not show that her future performance would be unacceptable. Moreover, she received no

memos in her third year. Additionally, younger teachers who were rehired had as many memos, some involving more serious problems. In contrast, the oldest teacher considered, who was 52, was not rehired despite "an almost perfect record."

The Appellate Division indicated that evidence that suggests that an employer is not giving the whole story, prefers younger employees, behaves inconsistently, or acts contradictorily "has been sufficient to rebut a defendant's legitimate, nondiscriminatory reason for adverse employment action."

The appeals court agreed with Greenberg that "younger teachers with similar deficiencies were retained." For instance, a 39-year-old teacher received eight memos of concern for infractions such as forgetting to attend a meeting with the principal, incorrectly filling out an absence form, forgetting to sign the in/out log, allowing students to play cards during school, not providing a list of students outside of class when a fire alarm sounded, and arriving late for class.

The appeals court added that Greenberg's statistics indicated that no female teacher older than 45 had been rehired during the preceding five years. However, all the younger teachers had been rehired. The appeals court noted that the odds of such an occurrence were almost 5,000 to 1.

The appeals court conceded that "statistics can be read differently." Nevertheless, viewing Greenberg's evidence as a whole and giving her all the favorable inferences, the Appellate Division concluded that it was not impossible for a reasonable juror to find that the defendant had offered only pretexts for not rehiring Greenberg.

For appellant: Alan II. Schorr. For respondent: Charles W. Dortch, Jr. (Summers, Council, George & Dortch).

LANGUAGE: ENGLISH

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