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Second Circuit Makes Key Holdings Involving Proof Requirements in Individual Discrimination Cases and Litigation Hold Requirements

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Recently, in *Chin v. Port Authority of New York & New Jersey*, 2012 U.S. App. LEXIS 14088 (2d Cir. July 10, 2012), the United States Court of Appeals for the Second Circuit made two key holdings involving proof requirements in individual discrimination cases and litigation hold requirements.

First, the Second Circuit held that private plaintiffs may not use the pattern or practice method of proving discrimination outside the class action context. Unlike most discrimination cases where the ultimate burden of proof is always with the plaintiff and the plaintiff must present a *prima facie* case of discrimination, under a pattern or practice method of proof the plaintiff is only required to prove the existence of an employer's discriminatory policy and then the burden of proof shifts to the employer to demonstrate that it did not discriminate against the plaintiff pursuant to that policy.

Second, the court addressed the consequences of an employer's failure to issue a litigation hold to preserve evidence once it was on notice of potential litigation. Rejecting a high-profile New York federal district court decision (which held that a party's failure to issue a written litigation hold constituted gross negligence *per se*), the Second Circuit held that a "case by case" approach to the failure to produce evidence must be applied and affirmed the trial court's refusal to issue an adverse inference instruction – despite an admitted loss of evidence.

Factual Background

In *Chin*, 11 Asian-American police officers who worked for the Port Authority of New York and New Jersey claimed that the Port Authority violated Title VII by failing to promote them due to their race. They did not bring their case as a class action. The plaintiffs asserted three theories of liability for discrimination: individual disparate treatment, pattern-or-practice disparate treatment, and disparate impact. After a nine-day trial, the jury unanimously found the Port Authority liable for discrimination against seven of the plaintiffs under all three theories.

At trial, 22 fact witnesses testified, including all 11 of the plaintiffs who testified about their personal backgrounds, education, experiences as police officers, attendance and disciplinary records, awards and commendations, and performance evaluations. Six chiefs, one former superintendent, the superintendent at the time of trial, and three other Port Authority managers testified regarding the Port Authority's promotional procedure. Each side also presented a

statistical expert and a damages expert.

The plaintiffs presented a statistical expert who testified about two analyses that, in his view, demonstrated a high probability that Asian Americans had been discriminated against in the Port Authority's promotion process:

- In his first study, plaintiffs' statistical expert compared the percentage of white police officers who held a supervisory position (out of all white police officers) with the percentage of Asian Americans who held a supervisory position (out of all Asian-American police officers), using an industry-standard test known as the "Fisher Exact Test" to opine whether disparities were due to chance; and
- In his second study, plaintiffs' statistical expert compared the promotion rate for whites who were on the eligible lists to the promotion rate for Asian Americans who were on the eligible lists, again using the Fisher Exact Test to opine whether disparities were due to chance.

On appeal, the Port Authority argued, among other things,[1] that the pattern-or-practice disparate treatment theory should not have been submitted to the jury in this private, non-class action.

One of the plaintiffs who did not prevail at trial, Howard Chin, alleged on appeal, among other things,[2] that he was entitled to a new trial because the trial court denied plaintiffs' request for an adverse inference instruction even though the Port Authority destroyed certain promotional records and failed to institute a litigation hold upon receiving notice of the plaintiffs' EEOC charge.

The Second Circuit held that the district court should not have permitted non-class action, private plaintiffs to use a pattern or practice method of proof to establish their claims of discriminatory denial of promotion. Yet, the court affirmed the jury's verdict that the Port Authority was liable to the seven plaintiffs who prevailed at trial under both individual disparate treatment and disparate impact theories.[3] The Second Circuit explained that it was permissible for the district court to allow the plaintiffs to use statistical evidence of a policy of discrimination to demonstrate the Port Authority's liability in their individual disparate treatment and disparate impact claims; however, the court emphasized that the prevailing plaintiffs had to, and did, demonstrate each required element of their disparate treatment and disparate impact claims.[4]

The Pattern or Practice Method of Proof Is Unavailable to Non-Class Action Private Plaintiffs

The U.S. Supreme Court originated the pattern or practice method of proof in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976) – a class action alleging discriminatory hiring practices. The Court explained the pattern or practice method of proof by stating that once the class action plaintiffs "carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the [employer] . . ., the burden [was] upon [the employer] to prove that individuals who reappl[ied] were not in fact victims of previous hiring discrimination."[5] The Court used the phrase "pattern and practice" to describe the common question of fact to be litigated by class plaintiffs (*i.e.*, whether the employer had a discriminatory hiring policy).[6] In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360-62 (1997), the Supreme Court applied the same pattern or practice method of proof used in the class action in *Franks* to a discrimination claim brought by the government seeking injunctive relief. Consequently, the pattern or practice method of proof is also known as the "*Teamsters* method of proof."

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1 The Port Authority also questioned the trial court's application of the "continuing violation" doctrine. The Second Circuit agreed and concluded that the trial court erred by applying the "continuing violation" doctrine to the plaintiffs' disparate impact theory claim, and vacated back pay for four of the plaintiffs whose jury awards corresponded with hypothetical promotion dates beyond the limitations period, the injunctive relief for three of the same plaintiffs, and the award of compensatory damages for all seven prevailing plaintiffs, as well as remanded the case for a new trial on damages as to all seven prevailing plaintiffs and for reconsideration of equitable relief to the extent such relief was premised on failures to promote occurring outside the limitation period.

2 *Chin* and several of the other plaintiffs also alleged on appeal that the district court erred by excluding the testimony of an industrial psychologist/expert who specializes in analyzing the reliability and validity of employee-selection procedures. This expert had prepared a report opining on the effectiveness of the Port Authority's promotion process and whether it included safeguards to prevent bias and discrimination. The Second Circuit held that the district court did not abuse its discretion in concluding that it lacked evidence that this expert's testimony was based on established principles and methods and that, in any event, her testimony would not have provided assistance to the trier of fact beyond that afforded by the arguments of counsel, as required by Federal Rule of Evidence 702.

3 *Chin*, 2012 U.S. App. LEXIS 14088, at *69.

4 *Chin*, 2012 U.S. App. LEXIS 14088, at **34-46. Such evidence included, *inter alia*, statistical evidence demonstrating both disparate impact and disparate treatment, and evidence that the plaintiffs were better qualified for promotion than several white officers, which the court stated that in conjunction with the statistical evidence was "sufficient for a reasonable jury to conclude that the Port Authority intentionally discriminated against the plaintiffs."

5 *Franks*, 424 U.S. at 772.

6 *Id.* at 773

In *Chin*, the Second Circuit refused to extend the "*Teamsters*" or "pattern or practice" method of proof to private, non-class discrimination actions. The court explained that shifting the burden of proof to the employer once the employee showed a policy of discrimination "would conflict with the Supreme Court's oft-repeated holding in the context of disparate-treatment, private non-class litigation that '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'"[7] The court explained that evidence of a policy of discrimination can help a plaintiff demonstrate the employer's liability in his or her individual case, but emphasized that a private, non-class plaintiff could not use the "*Teamsters*" or "pattern or practice" method of proof to establish each required element of his or her discrimination claim.[8] The court noted that all other federal appellate courts that had previously considered this issue – including the Fourth, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits – have found that "the pattern-or-practice method of proof is not available to private, non-class plaintiffs."[9]

The Employer's Failure to Issue a Litigation Hold Did Not Warrant Spoliation Sanctions

During discovery, the plaintiffs learned that the Port Authority had not implemented a document retention policy and that, as a result, at least 32 promotion folders used to make promotion decisions during the relevant time period (August 1999 to August 2002) had been destroyed. Appellant Howard Chin asserted that, pursuant to *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC*, 685 F. Supp. 2d 456, 464-65 (S.D.N.Y. 2010),[10] the district court should have subjected the Port Authority to discovery sanctions in the form of an adverse inference instruction to the jury because the Port Authority's failure to issue a litigation hold to prevent the destruction of documents constituted gross negligence *per se*.[11]

The Port Authority did not dispute that, upon receiving notice of the filing of the plaintiffs' EEOC charge, it had an obligation to preserve the promotion folders, or that it failed to do so. It argued, however, that the district court did not abuse its discretion in denying an adverse inference instruction based upon that conduct. The Second Circuit agreed, and "reject[ed] the notion that a failure to issue a 'litigation hold' constitutes gross negligence *per se*." Instead, the Second Circuit held "the better approach is to consider [the failure to adopt good preservation practices] as one factor in the determination of whether discovery sanctions should issue,"[12] citing *Orbit Comm'ns, Inc. v. Numberx*

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7 *Chin*, 2012 U.S. App. LEXIS 14088, at *29 (*quoting Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

8 *Chin*, 2012 U.S. App. LEXIS 14088, at *29.

9 *Id.* at *30. *See Semsroth v. City of Wichita*, 304 F. App'x 707, 715 (10th Cir. 2008); *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 967-69 (11th Cir. 2008); *Bacon v. Honda of Am. Mfg.*, 370 F.3d 565, 575 (6th Cir. 2004); *Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 355-56 (5th Cir. 2001); *Gilty v. Vill. of Oak Park*, 919 F.2d 1247, 1252 (7th Cir. 1990); *Lowery v. Circuit City Stores, Inc.,* 158 F.3d 742, 761 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999). In addition, nearly every New York district court that had previously addressed this issue held that private plaintiffs may not use the pattern or practice method of proving discrimination outside the class action context. See, e.g., *Cummings v. Brookhaven Sci. Assocs., LLC,* 2011 U.S. Dist. LEXIS 146388, at **37-38 (E.D.N.Y. Dec. 20, 2011); *Henderson v. City of New York,* 2011 U.S. Dist. LEXIS 78451, at *13 (E.D.N.Y. July 20, 2011); *Houston v. Manheim-New York,* 2010 U.S. Dist. LEXIS 142076, at **5-6 (S.D.N.Y. July 7, 2010), *report and rec. adopted,* 2011 U.S. Dist. LEXIS 27066 (S.D.N.Y. Mar. 15, 2011); *United States v. City of New York,* 631 F. Supp. 2d 419, 427 (S.D.N.Y. 2009).

10 In *Pension Committee*, Judge Scheindlin ordered spoliation sanctions in the form of an adverse inference instruction against 13 plaintiffs for failing to comply with "contemporary" e-Discovery standards, including the "well established" duty to issue a written litigation hold once a duty to preserve has been triggered, reasoning:

> In an era where a vast amount of electronic information is available for review, discovery in certain cases has become increasingly complex and expensive. Courts cannot and do not expect that any party can meet a standard of perfection. Nonetheless, the courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected. As discussed six years ago in the Zubulake opinions, when this does not happen, the integrity of the judicial process is harmed and the courts are required to fashion a remedy. Once again, I have been compelled to closely review the discovery efforts of parties in a litigation, and once again have found that those efforts were flawed. As famously noted, "[t]hose who cannot remember the past are condemned to repeat it." By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records - paper or electronic - and to search in the right places for those records, will inevitably result in the spoliation of evidence. . . .
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> After a discovery duty is well established, the failure to adhere to contemporary standards can be considered gross negligence. Thus, after the final relevant Zubulake opinion in July 2004, the following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold . . . .

685 F. Supp. 2d at 461-62, 471.

11 *Chin*, 2012 U.S. App. LEXIS 14088, at *68.

12 *Id.*

Corp., 271 F.R.D. 429, 441 (S.D.N.Y. 2010).[13]

The Second Circuit also reasoned that, even if it assumed *arguendo* that the Port Authority was grossly negligent and that the destroyed documents were relevant, the Second Circuit has "repeatedly held that a 'case-by-case approach to the failure to produce relevant evidence,' at the discretion of the district court, is appropriate,"[14] thus the district court was permitted, but not required, to give an adverse inference instruction based upon such conduct.

Implications and Recommendations for Employers

- The *Chin* holding is important because, even in multiple-plaintiff cases, private, non-class plaintiffs bringing federal discrimination claims in the Second Circuit will continue to carry the ultimate burden of proof, even if they show the existence of a policy of discrimination. Each plaintiff must prove all of the elements of a disparate treatment claim. This should make it somewhat more difficult for such plaintiffs to prevail in a case based on an alleged discriminatory policy. However, it is not a panacea. It is notable that the Second Circuit upheld the portion of the jury's verdict that was premised on individual disparate treatment and disparate impact theories, notwithstanding its finding that the district court applied the wrong standard of proof.
- In the Second Circuit, the failure to institute a litigation hold does not warrant the *per se* imposition of discovery sanctions, especially the severe sanction of an adverse inference instruction to a jury. Instead, *Chin* reinforces the important role and wide discretion of the trial court in considering how to address the loss of evidence on a "case by case" basis, and the Second Circuit's express requirement that proof of "relevance" and "prejudice" is always required before spoliation sanctions may issue – even if a party acted in a grossly negligent manner. *Chin* also instructs that, rather than follow the *per se* standards pronounced in *Pension Committee* (which was written by one of the most influential judges in the country in the field of e-Discovery), trial courts must consider the totality of the circumstances – including the availability of other evidence (including testimony) – versus bright line rules, when addressing claims of alleged spoliation, similar to the analysis performed by Judge Francis in *Orbit One*. However, *Chin* still involved circumstances where the plaintiffs were not prejudiced by the Port Authority's failure to issue a written litigation hold and the consequent destruction of documents. While the Second Circuit's decision is helpful for addressing those circumstances, as a general matter, employers should take steps to institute a comprehensive preservation strategy that includes appropriate written litigation holds when the duty to preserve has been triggered.

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13 In *Orbit One*, Magistrate Judge James C. Francis, IV held that spoliation sanctions, much less a severe sanction such as an adverse inference instruction, cannot be issued absent a showing that "relevant" information has been destroyed, instructing:

> There is a pervasive risk that electronic information will be lost during the course of litigation, whether through inadvertence, intentional spoliation, or failure to institute and properly implement a litigation hold. Consequently, the law provides a range of sanctions and remedies that may be imposed when the destruction of evidence occurs. *No matter how inadequate a party's efforts at preservation may be however, sanctions are not warranted unless there is proof that some information of significance has actually been lost.*
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> Sanctions are not warranted merely because information is lost; the evidence must be shown to have been "relevant." As the Second Circuit has explained in connection with an application for an adverse inference,
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> > "[R]elevant" in this context means something more than sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence. Rather, the party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that the destroyed unavailable evidence would have been of the nature alleged by the party affected by its destruction.
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> *Residential Funding,* 306 F.3d at 108-09.
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> ...
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> > Some decisions appear to omit such a requirement. In *Pension Committee*, for example, the court stated that "[r]elevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner." . . . The implication of Pension Committee, then appears to be that at least some sanctions are warranted as long as any information was lost through the failure to follow proper preservation practices, *even if there has been no showing that the information had discovery relevance, let alone that it was likely to have been helpful to the innocent party. If this is a fair reading of Pension Committee, then I respectfully disagree.*

271 F.R.D. at 431, 438-39 (emphasis added).

14 *Id.* (*quoting Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002)).

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