DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 07-1065

DANIELLE R. CESARANO

Appellant,

v.

REED SMITH LLP

Appellee.

Appeal from the Superior Court
of the District of Columbia

BRIEF FOR METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT URGING REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL REGULATION

STATE STATUTES

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INTEREST OF *AMICUS CURIAE*[1]

The Metropolitan Washington Employment Lawyers Association (MWELA) is the local chapter of the National Employment Lawyers Association, a national organization of attorneys, primarily plaintiffs' counsel, who specialize in employment law. MWELA is participating in this appeal because the trial court misapplied a straightforward -- but crucial -- rule that governs the triggering of the statute of limitations in cases challenging the termination of employment. The rule is that the clock starts ticking when an employee receives unequivocal notice of termination.

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[1] Both parties to this appeal have consented to the filing of this brief. DCCA Rule 29(a).

Here, though, the court said that the statute began to run when appellant should have surmised she would probably be fired. MWELA's 300 members and their clients share an abiding concern for clarity in the application of the statute of limitations, especially in the termination setting, where the ex-employee is frequently *in extremis* and it is vital that all filing deadlines be met.

MWELA's members regularly communicate with one another about issues relating to statutes of limitations and other employment law matters. They do this daily through an active list serve and monthly through a newsletter. In addition, MWELA conducts continuing legal education programs for its members, including monthly seminars focusing on a particular subject and an annual daylong conference, which usually features one or more judges as speakers.

MWELA also participates as *amicus curiae* in important cases in the three jurisdictions in which its members mostly practice – the District of Columbia, Maryland and Virginia -- including several in this Court. *See, e.g., Jung v. George Washington University*, 875 A.2d 95 (D.C. 2005), *amended by*, 883 A.2d 104 (D.C. 2005); *Lively v. Flexible Packaging Ass'n*, 830 A.2d 874 (D.C. 2003) (en banc); *Hollins v. Federal National Mortgage Ass'n*, 760 A.2d 563 (D.C. 2000); *Freas v. Archer Services, Inc.*, 716 A.2d 998 (D.C. 1998).

MWELA has a fundamental interest in seeing that statutes of limitations are applied in an easily understood manner, consistent with the decisions of the Supreme Court and this Court. That did not happen below, so MWELA submits this brief urging reversal.

QUESTION PRESENTED

On October 28, 2002, Reed Smith notified Danielle Cesarano that she would be terminated effective November 11. Cesarano filed suit against Reed Smith on October 24, 2003 -- less than a year after receiving notice of termination -- alleging that the firing was unlawful

under the District of Columbia Human Rights Act and the D.C. Family and Medical Leave Act, both of which have a one-year statute of limitations.

Reed Smith filed two motions for summary judgment below but did not contend in either that Cesarano's unlawful termination claims were barred by limitations. Indeed, the firm conceded that "the claims relating to her termination are timely." Nevertheless, the trial court unaccountably ruled that the statute of limitations on Cesarano's termination claims began running *before* she was notified of termination on October 28, 2002 and that her challenge to the firing was time-barred. The court then entered summary judgment for Reed Smith.

The sole issue presented by this appeal is whether the trial court erred in ruling that the statute of limitations on Cesarano's termination claims began running before she was notified of termination on October 28, 2002.

STATEMENT

A. Factual Background

Appellant Danielle Cesarano began working as an associate attorney in appellee Reed Smith LLP's Washington, D.C. office in March 2000. Associates at the firm are normally evaluated in the autumn, and Cesarano received a positive appraisal in the fall of 2000. Six months later, in April 2001, Cesarano suffered an acute burn to her right hand while attending a training session at Reed Smith's Pittsburgh headquarters. As a result, she experienced "severe pain" in the hand, apparently throughout the period covered by this litigation, and the pain "impose[d] limitations on her daily activities." Order Granting Defendant's Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment (September 5, 2007) (hereafter Order), App. I at 54.

On her physician's advice, Cesarano took two leaves of absence in 2001, the first from mid-June to mid-July and the second from early August through late October. Even when she was in the office in 2001, her doctor limited her to working four hours per day after her injury. Early in January 2002, though, Cesarano's physician permitted her to work eight hours per day, and she promptly informed Reed Smith of this development. *Id.* at 55.

On July 20, 2001, during her first leave of absence, Cesarano met with one of her supervisors at Reed Smith, Douglas Spaulding. Concerned about some of Spaulding's remarks at that meeting -- *e.g.*, that her injury was a "stutter step" in her career and that it was "absolutely a cause for concern," that there was a "possibility that I could get pushed out, and that certainly, if nothing else, the situation would affect my compensation," and "that it would be very difficult to staff me on any cases . . . because of the uncertainty associated with my schedule" -- Cesarano recorded them by taking notes. *Id.* at 73-74. She understood that Spaulding was saying that the "unpredictable quality of my condition is very worrisome for the firm," and that he was commenting on "their difficulty in staffing me on any cases while I am still injured." *Id.* at 74-75. And while Cesarano "appreciate[d] these comments to an extent," she felt that Reed Smith could accommodate such concerns but that the firm had not done so. *Id.* at 75.

Cesarano ordinarily would have received an evaluation in the autumn of 2001, just as she had in the fall of 2000, but the appraisal was postponed until May 2002 because of her leave of absence. At that time, Reed Smith rated Cesarano as "Meets Expectations Minus," a mediocre rating but not the firm's lowest (the lowest rating for associates was "Falls Below Expectations").. Reed Smith had no problems with the quality of Cesarano's work; rather, her rating reflected a concern about billable hours, which had not been a problem before her injury.

Cesarano's supervisor, Richard Sullivan, met with her to discuss the evaluation and at one point said she said she should bill 200 hours per month. The trial court gave great weight to this supposed requirement, reasoning that Cesarano knew she could not meet it and so must have known she would be fired. But in his deposition, Sullivan disclaimed any attempt to establish a rigid standard for Cesarano, testifying that 200 hours "simply was used as a way of showing her you need to get your hours up because you're behind." App. V-A at 1077 (deposition page 150). In any event, if Sullivan really meant to impose a new condition of employment, 200 hours per month was significantly higher than the firm's annual target for associates of 1900 hours, which Cesarano has shown is mostly observed in the breach anyway. *See* Brief of Appellant at 25.

Both parties agree that Reed Smith did not fire Cesarano in May 2002. She denies it, and the head of Human Resources at the firm testified that "[t]ermination of Ms. Cesarano's employment as a result of the [May 2002] review . . . was never an option or an issue." *See* Appendix V at 896. Certainly she was not "notified unequivocally of [her] termination" at that time. *Stephenson v. American Dental Ass'n*, 789 A.2d 1248, 1252 (D.C. 2002).

Cesarano assiduously sought to increase her billable hours after May 2002, to the point of exceeding the eight-hour daily working limitation set by her doctor even though Reed Smith had not provided the ergonomic workstation that he recommended. Cesarano's effort to boost her billables showed promise. *See* Brief of Appellant at 34. She was concerned, though, that Reed Smith had impeded her ability to augment her hours by failing to assign her sufficient work, and she expressed this concern in a self-evaluation required before her next regularly scheduled evaluation in October 2002.

The self-evaluation contains several references to Cesarano's hours. She begins on a positive note, saying that her "workload steadily increased over the spring months, although it

was not until the past couple of months that things really began to flourish once again." App. VI at 1193. Indeed, her workload was clearly on the upswing, with billings of 136 hours in July 2002 and 155 in August -- a total that, annualized, comes close to Reed Smith's malleable target of 1900 for associates. *See* App. VII-A at 1746-47.

Cesarano remained frustrated, however, with the firm's failure to accommodate her condition following her return to work in late October 2001. She said that this "lack of understanding regarding the nature of my disability and the ongoing process of my recovery" was "[p]erhaps the greatest challenge I faced" during the previous year. App. VI at 1194. In this regard, she reserved her harshest criticism for the firm's failure to give her assignments after she was injured:

> I was unable to meet the billable hour requirement because, as a result of my required medical leave, I was not given any substantive work for a lengthy period of time following my return. * * * Moreover, once I started receiving more work, I was often encouraged, and on more than one occasion specifically advised, to write off my time.

Id. at 1196.

Cesarano submitted this self-evaluation in September 2002. Reed Smith fired her a month later. Specifically, on October 28, 2002, Reed Smith again rated Cesarano as "Meets Expectations Minus." And unlike in May, the firm unequivocally fired her and told her that at her last day would be November 11.

B. Procedural History

Cesarano filed this lawsuit on October 24, 2003, within a year of being notified of her firing, alleging that the termination violated the District of Columbia Human Rights Act, D.C. Code §§ 2-1401 *et seq.*, and the D.C. Family and Medical Leave Act, D.C. Code §§ 32-501 *et*

seq., both of which have a one-year statute of limitations. *See* 2 D.C. Code § 2-1403.16(a); D.C. Code § 32-510(b).

In particular, Cesarano said that she was a disabled woman under the Human Rights Act, or alternatively that Reed Smith regarded her as disabled, and that she was treated more harshly than able-bodied men, many of whom were permitted to remain with the firm in the face of serious problems with billable hours. She also alleged that the firm failed to accommodate her disability and in fact punished her for it with its miserly work assignments -- and then turned around and fired her because of low billables. Cesarano similarly claimed that her firing undermined her right to reinstatement following medical leave under the D.C. Family and Medical Leave Act, *see* D.C. Code § 32-505(d), particularly where Reed Smith knew that any fall-off in billable hours was directly attributable to her leave.[2]

Following discovery, Reed Smith filed a motion for partial summary judgment and then a motion for summary judgment, arguing that Cesarano's claims failed on the merits and, in some instances, on limitations grounds. But the firm did *not* contend that Cesarano's assertion that her firing was unlawful -- the central claim in this case -- was barred by limitations. On the contrary, Reed Smith recognized that "the claims relating to her termination are timely." Memorandum in Support of Defendant's Motion for Partial Summary Judgment, App. II at 105.

The trial court ruled that disputed issues of material fact precluded summary judgment on the merits of Cesarano's claims. In particular, there were genuine factual disputes concerning (1) "whether or not plaintiff is disabled," (2) "the reasoning behind plaintiff's actual termination,"

[2] The firm correctly understood that the "gist" of Cesarano's complaint was that she "was discriminated against by Reed Smith and terminated as a result of that discrimination." App. V at 908 (deposition page 202).

and (3) "whether or not defendant made sufficient accommodations to plaintiff's condition." Order, App. I at 58-59.

Having found that factual disputes would not permit summary disposition on the merits, the trial court then granted summary judgment to Reed Smith on limitations grounds, even though the firm acknowledged that "the claims relating to [Cesarano's] termination are timely." The court reached this conclusion by inferring from Cesarano's notes that she was "build[ing] a case" against Reed Smith and was aware of possible discrimination in the summer of 2001, when she began taking the notes. Order, App. I at 71. The court believed as well that Cesarano "effectively was on notice of her impending termination in May of 2002 when she received her review," *id.* at 30, despite the head of HR's admission that termination "as a result of the review . . . was never an option or an issue." Appendix V at 896.

This appeal followed, and Cesarano moved for summary reversal. The Court denied the motion and set the case for full merits briefing.

ARGUMENT

INTRODUCTION AND SUMMARY

Clarity is essential in dealing with limitations. Neither lawyers nor lay people should be forced to guess about deadlines. Perhaps recognizing this, the Supreme Court and this Court have done their part for clarity on the limitations front, especially in the area of unlawful terminations.

In two cases decided nearly 30 years ago, the Supreme Court held that the statutory clock is triggered in a termination case when the employee receives unequivocal notice of termination. *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Chardon v. Fernandez*, 454 U.S. 6 (1981). This Court has followed *Ricks* and *Chardon*, if anything placing even more emphasis on

the need for the notice of termination to be unambiguous. *Stephenson v. American Dental Ass'n, supra*, 789 A.2d 1248; *Brown v. National Academy of Sciences*, 844 A.2d 1113 (D.C. 2004).

In the present case, the trial court duly mentioned *Ricks* but ran aground in applying it. In particular, the court ignored the only notice of termination that Danielle Cesarano ever received, which occurred on October 28, 2002 when Reed Smith told her she would be fired effective November 11.

It is clear as a matter of law that limitations began accruing on Cesarano's termination claim on October 28, 2002, and the court below should have accepted this date. Instead, the court chose an earlier date – perhaps May 2002, when Cesarano received a marginal evaluation due to low billable hours, or maybe as early as July 2001, when she began to take notes out of an understandable concern that Reed Smith was treating her unfairly and discriminatorily.

There are fatal problems with using either the July 2001 or the May 2002 date – or indeed any date earlier than October 28, 2002. Choosing July 2001 ignores the fact that Cesarano's concern at that time was not termination but rather Reed Smith's failure to accommodate her disability *in the workplace*. In this regard, the Supreme Court has noted that termination is a "discrete act" and has held that "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act." *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). Cesarano's concerns in July 2001 did not start the clock on her termination claim.

Nor did the evaluation she received in May 2002. Here the court compounded its error by deciding an *undisputed* fact against Cesarano. That is, both parties agree that she did not receive notice of termination in May, with Reed Smith's head of Human Resources testifying that termination in May 2002 "was never an option or an issue." Nevertheless, the court below

inexplicably ruled that Cesarano somehow "effectively was on notice of her impending termination" at that time.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Supreme Court reviewed the principles governing the analysis of motions for summary judgment in EEO cases. Among other things, the Court held that the court considering the motion "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 151. On this record, it is doubtful that a jury could properly infer that Cesarano was on notice of her termination in May 2002. Certainly a jury is "not required to believe" this, so the possibility that Cesarano might have been on notice in May must be "disregarded." The trial court, however, not only failed to disregard the possibility of May notice, the court regarded it very highly, making it the centerpiece of its decision to grant summary judgment in favor of Reed Smith.

If this decision stands, employees will be obliged to file administrative charges and lawsuits every time their boss sits down with them for a heart-to-heart chat, because a court might say that the statute of limitations for a possible termination claim began running when the boss sat down. But the decision below is wrong both legally and factually and should not stand. The trial court's judgment should be reversed.

I. THE TRIAL COURT DID NOT ADHERE TO THE *RICKS/CHARDON* RULE, UNDER WHICH THE STATUTE OF LIMITATIONS DID NOT BEGIN RUNNING UNTIL OCTOBER 28, 2002

In EEO cases under Federal law, the statute of limitations in a termination case begins to run on the date when the employee receives unequivocal notice of termination. *Delaware State College v. Ricks*, *supra*, 449 U.S. 250; *Chardon v. Fernandez*, *supra*, 454 U.S. 6. This Court has followed the Supreme Court's lead, as have a majority of state courts construing state or local law. *Stephenson v. American Dental Ass'n, supra*, 789 A.2d 1248; *Brown v. National Academy*

of Sciences, *supra*, 844 A.2d 1113. A minority of state courts, including the Maryland Court of Appeals, hold that the statute of limitations is triggered later, on the date employment actually ends. *See Haas v. Lockeed Martin Corp.*, 914 A.2d 735, 746 n.14 (Md. 2007) (collecting cases).[3] Were this issue unresolved in the District of Columbia, *amicus* would suggest that the Court adopt the minority rule for the reasons set forth in *Haas*.

The Supreme Court adopted the *Ricks/Chardon* rule to prevent stale claims, especially where, as in *Ricks*, the notice of termination occurred substantially before its effective date. *See Ricks*, 449 U.S. at 259-60. The minority approach points to "the relative simplicity in application of a bright line rule." *Haas*, 914 A.2d at 752. But neither the Supreme Court nor this Court has sacrificed clarity and ease of administration, because both insist that notice of termination be unequivocal and unambiguous.

In *Ricks*, "termination of employment . . . [was] a delayed, but inevitable, consequence of the denial of tenure." 449 U.S. at 257-58. Thus the college's June 1974 letter, which formally advised the plaintiff of the tenure denial and offered him a one-year terminal contract, plainly notified him both of his termination and its effective date -- at the end of the next academic year. *See id.* at 261-62. In *Chardon*, where each of the plaintiffs was notified that his employment would end on a specific date, the Court saw the situation as substantively the same as in *Ricks*, which meant that the limitations period was triggered by receipt of the notice: "in each case, the operative decision was made -- and notice given -- in advance of a *designated date* on which employment terminated." 454 U.S. at 8 (emphasis added).

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[3] The Equal Employment Opportunity Commission, which has binding regulatory authority concerning the administrative processing of EEO complaints against Federal agencies, also sees the effective date as the trigger. 29 C.F.R. § 1614.105(a)(1).

This Court has similarly emphasized that notice of termination is sufficient to start the accrual of limitations, but the notice must be clear and unequivocal. In *Stephenson*, the plaintiff was told on March 29, 1996 that he would be terminated effective May 28. 789 A.2d at 1248. That is, on March 29, he was "notified unequivocally of his termination," *id.* at 1252, so the statute began running. *Stephenson* cited a number of cases that applied the *Ricks/Chardon* rule, *see id.* at 1251, and many used the same term -- "unequivocal" -- to describe the nature of the notice of termination. *Mull v. Arco Durethene Plastics, Inc.*, 784 F.2d 284, 288 (7th Cir. 1986); *Wade v. Knoxville Utils. Bd.*, 259 F.3d 452, 460 (6th Cir. 201); *Weber v. Moses*, 938 S.W.2d 387, 391-92 (Tenn. 1996); and *Johnson & Johnson Med., Inc. v. Sanchez*, 924 S.W.2d 925, 928 (Tex. 1996). Finally, *Stephenson* stressed that, in that case, "there was nothing to suggest that [the termination] decision was tentative." 789 A.2d at 1252. Instead, the notice of termination was unequivocal.

The notice of termination in *Brown v. National Academy of Sciences, supra*, was similarly free from ambiguity: "On May 2, 1994, Ms. Brown was called into a meeting . . . [at which] she was given her termination letter . . . which stated that her employment was terminated, effective July 1, 1994." 844 A.2d at 1117. Hence it was clear as a matter of law that under *Ricks*, *Chardon* and *Stephenson*, the statute of limitations started running on May 2, 1994. The Court cautioned, though, that "our decision today does not derogate from the principle that we recently affirmed that 'unless the evidence regarding the commencement of the running of the statute of limitations is so clear that the court can rule on the issue as a matter of law, the jury should decide the issue on appropriate instructions.'" *Id.* at 1120 n.8, *quoting Lively v. Flexible Packaging Ass'n, supra*, 830 A.2d at 892 n.29.

In the present case, the *only* time that Danielle Cesarano received unequivocal notice of termination was on October 28, 2002, when she was told she would be fired effective November 11. Among other things, this was the first and only time that she got "a designated date on which employment terminated," *Chardon*, 454 U.S. at 8, and notice cannot be unequivocal unless the employee is told its effective date. Otherwise, she would have to guess whether to come in to work each day.

The trial court was plainly offended by Cesarano's taking of notes. But she began to suspect something was amiss as a result of a conversation with Douglas Spaulding during her medical leave, and a natural – indeed a lawyerly – reaction to perceived unfairness is to document it. Any inferences to be drawn about note taking are for the jury, not for a court on summary judgment.

The court below confused the import of Cesarano's notes, erroneously assuming that her awareness of possible discrimination in July 2001 was enough to start the statute of limitations on her termination claim. Order, App. I at 81. In the summer of 2001, however, Cesarano was concerned about general discriminatory treatment, including a failure to accommodate her disability – not the separate discriminatory act of termination. In *National R.R. Passenger Corp. v. Morgan, supra*, 536 U.S. 101, the Supreme Court cautioned that the focus must be on the type of employment practice complained about, because "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act." *Id.* at 113. Such "[d]iscrete acts" include "termination," *id.* at 114, so the "clock" on a termination claim is not triggered by the presence of some other type of discrimination.

The trial court believed that the statute of limitations started at the latest at the time of Cesarano's evaluation in May 2002, when she supposedly was "on notice of her impending

termination." Order, App. I at 80. Imagine that she had filed suit in May 2002, claiming discrimination in termination. There is no doubt that Reed Smith would have moved to dismiss, saying – correctly – that Cesarano had not received notice of termination. Instead, the firm is forced to try to defend the trial court's reasoning after conceding below that Cesarano's termination claim was timely.

The difference between the "discrete act" of termination and other types of discriminatory treatment is perhaps best illustrated in the context of retaliation. A worker may complain about a type of discrimination separate from termination, such as sexual harassment, and then be fired for making the complaint. *See, e.g., Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). The running of the statute of limitations for the termination claim is self-contained; it is not related to when the clock starts for harassment. Indeed, the claims are so separate that an employee need not prevail on the underlying complaint of discrimination to win on retaliation. *Parker v. Baltimore & Ohio R. Co.*, 652 F.2d 1012, 1020 (D.C. Cir. 1981) ("making the protected nature of an employee's opposition to alleged discrimination depend on the ultimate resolution of his claim would be inconsistent with the remedial purposes of Title VII . . . [which] would be ill served by telling employees that . . . internal opposition [to discrimination], though encouraged, is undertaken 'at the accuser's peril.'").

The Supreme Court in *Ricks* and *Chardon*, and this Court in *Stephenson* and *Brown*, each emphasized the necessity of the notice of termination being clear and unequivocal. Here only the notice Cesarano received on October 28, 2002 met these requirements. This means that the statute of limitations did not begin running until October 28, and Cesarano's complaint – which was filed within a year of that date – was timely. The trial court's contrary conclusion is wrong.

II. IN REACHING ITS DECISION ON LIMITATIONS, THE TRIAL COURT IMPROPERLY RESOLVED DISPUTED FACTUAL ISSUES AGAINST CESARANO

In this case, it is clear as a matter of law that the statute of limitation began running on Danielle Cesarano's termination claim on October 28, 2002. But if there were any doubt about this – and there is not – the question when the statute was triggered should have gone to the jury. *Lively v. Flexible Packaging Ass'n*, *supra*, 830 A.2d at 892 n.29 ("unless the evidence regarding the commencement of the running of the statute of limitations is so clear that the court can rule on the issue as a matter of law, the jury should decide the issue").

Instead, the court below decided factual questions adversely to Cesarano, most egregiously by ignoring the admission by Reed Smith's Human Resources chief that "[t]ermination of Ms. Cesarano's employment as a result of the [May 2002] review . . . was never an option or an issue." App. V at 896. This was also error.

In *Reeves v. Sanderson Plumbing Products, Inc.*, *supra*, 530 U.S. 133, the Supreme Court marked the path that a court must follow in assessing a motion for summary judgment in an EEO case. First, the court "should review all of the evidence in the record" and "must draw all reasonable inferences in favor of the nonmoving party." In addition, the court "may not make credibility determinations or weigh the evidence." Finally, it "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 150-51. In this case, however, the trial court drew inferences in favor of the *moving* party (Reed Smith), and it weighed the evidence in the firm's favor. Certainly the "jury is not required to believe" that Cesarano received notice of termination anytime before October 28, 2002, and the court below erred in finding otherwise.

In its opposition to summary reversal, Reed Smith indicated that it might try to defend the judgment below on grounds different from those relied on by the trial court. Presumably, the firm will seek to show that the error on limitations is harmless, because it deserved to win on the merits. This venture is a non-starter.

Cesarano demonstrates convincingly why the "jury is not required to believe" that Reed Smith will prevail on the merits; it follows that it would be futile for the firm to argue that the trial court's judgment should be affirmed on merits grounds. *See* Brief of Appellant at 28-49. As one example, Cesarano makes a compelling argument that her firing was the product of retaliation, in which a plaintiff establishes a prima facie case

> by showing (1) that he or she was engaged in a statutorily protected activity, (2) that his or her employer took an adverse action, and (3) that there was a causal relationship between the protected activity and the adverse action. * * * "The causal connection . . . may be established by showing that the employer had knowledge of the employee's protected activity, and that the adverse personnel action took place shortly after that activity."

Arthur Young & Co. v. Sutherland, 631 A.2d 354, 368 (D.C. 1993) (citations and footnote omitted).

There is no question that Cesarano engaged in protected activity and that Reed Smith knew it. The trial court noted it was undisputed that "[p]rior to her termination, plaintiff repeatedly expressed concern about her lack of billable work to her superiors . . . also expressed concern that the lack of billable work was due to her disability [and] complained that defendant was not accommodating her disability." Order, App. I at 57 (footnotes omitted). In particular, Cesarano voiced all these concerns in the self-evaluation she submitted in September 2002, just before she was fired in October.

Cesarano's expressions of concern and complaints were "statutorily protected activity," *see Parker*, *supra*, 652 F.2d at 1020, and Reed Smith took "adverse action" by terminating her.

Finally, she demonstrated "a causal relationship between the protected activity and the adverse action" by showing that she was fired shortly after submitting the self-evaluation to her superiors. Thus she established a prima facie case of retaliation without difficulty. Reed Smith responded by stating that it fired Cesarano because of low billable hours, but it was undisputed that "[t]here were several men, not disabled, who did not meet defendant's target [for] billable hours" and who were not terminated. Order, App. I at 58. *See also* Brief of Appellant at 30-32.

A jury considering such evidence could easily find Reed Smith's "proffered explanation [to be] unworthy of credence." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). And if that happens, "it is *permissible* for the [jury] to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) (emphasis original). This is because the jury "can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose," which "is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" *Id.*(citation omitted).

The trial court erred in resolving factual issues against Cesarano on the limitations issue, and this Court may not cure that error by resolving merits disputes against her. The facts become an issue, though, only if it is *not* clear as a matter of law when the limitations period began to run. But it is clear: under *Ricks* and *Chardon*, as well as *Stephenson* and *Brown*, limitations began accruing on October 28, 2002.

CONCLUSION

The Supreme Court recently reiterated in a case under the Age Discrimination in Employment Act that "[t]he ADEA, like Title VII" – and also like the D.C. Human Rights Act –

"sets up a 'remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process,'" and "[t]he system must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes." *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1158 (2008). Among other things, this means that clarity is crucial in matters of limitations, so lay people will know precisely what their deadlines are. The limitations decisions of the Supreme Court and this Court promote clarity about limitations in termination cases. The decision below does not.

The judgment of the trial court should be reversed.

Respectfully submitted,

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