

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2018

PHILADELPHIA, WEDNESDAY, OCTOBER 10, 2018

VOL 258 • NO. 71

An **ALM** Publication

## EMPLOYMENT LAW

# Reliance on Credibility Determination Leads to Denial of Summary Judgment

BY SID STEINBERG

*Special to the Legal*

Many employment terminations result from employers simply believing one employee's version of events over another's. This, in turn, is often nothing more than a credibility determination with which courts are generally reluctant to interfere. This is not always the case, however, as exemplified by the recent decision in *Eboda v. PNC Bank*, No. 17-701, 2018 U.S. Dist. LEXIS 159470 (E.D. Pa. Sept. 18, 2018).

### FAILURE TO PROMOTE SETS THE STAGE

Monica Eboda, an African-American female, was first hired by PNC in 2008 as a "business banker." After two promotions, she was in charge of a large territory in the Pennsylvania-New Jersey region. Eboda was a strong performer, and at one point, her market even ranked first in the entire company. Nevertheless, Eboda was never tapped for any further promotions. She asked for a development plan and claimed to have been denied. She sought guidance from her manager on how to advance in the company and claimed to have been shut down. At the same time, mostly between 2011 and 2012, her white, male colleagues were given growth opportunities and were picked to fill open positions over Eboda.



**SID STEINBERG** is a principal and chair of Post & Schell's employment and employee relations and labor practice groups. Steinberg's practice involves virtually all aspects of employee relations, including litigation experience defending employers against employment discrimination in federal and state courts. He also represents employers before federal, state and local administrative agencies, and regularly advises employers in matters including employee discipline, labor relations, and the creation or revision of employee handbooks. He can be reached at [ssteinberg@postschell.com](mailto:ssteinberg@postschell.com).

### CONFLICT WITH EXECUTIVE ASSISTANT

Eboda received administrative support from a white woman, Linda Menhardt, who also supported Eboda's white, male colleague, Lawrence Wirth. Unfortunately, "Eboda and Menhardt ... long endured a strained relationship." Starting as early as 2008, Eboda contended that Menhardt repeatedly asked to be transferred to only support Wirth. According to Eboda, this request was echoed by Wirth. She also claimed that Menhardt treated her with disrespect and undermined her. In contrast, Eboda alleged that Menhardt treated Wirth with respect and fairness. Eboda believed that Menhardt's "contempt was racially motivated." Eboda's belief was supported by one of her colleagues who testified that

Menhardt had said that Eboda only got her job because of her race.

Eboda and Menhardt's relationship continued to deteriorate. In October 2014, after a perceived personal slight, Menhardt gave Eboda a poor review in her role as manager. Two months later, Eboda requested that Menhardt be transferred to Wirth's team. Menhardt subsequently filed a complaint, claiming that Eboda retaliated against her for her poor manager review by transferring her and, most importantly, "eliminating half her duties."

### INVESTIGATION LEADS TO TERMINATION

PNC conducted a two-month investigation into Menhardt's complaints. In the investigation, "Eboda consistently reported that she did not retaliate against Menhardt and that she merely granted Menhardt's and Wirth's repeated requests to transfer Menhardt to Wirth's cost center." However, Menhardt and Wirth contradicted Eboda. Specifically, Wirth claimed that he had never discussed Menhardt completely transferring to his team, only partially transferring. Menhardt also said she never requested a full transfer but had only discussed a partial transfer. Numerous other employees (all Caucasian) contradicted other parts of Eboda's explanation of the transfer request.

Without corroborating evidence, PNC concluded that Eboda was dishonest

about the basis for Menhardt's transfer and that her co-workers were telling the truth. Subsequently, Eboda was terminated pursuant to PNC's code of ethics for retaliating against Menhardt for her managerial review and for allegedly lying during the investigation. PNC's code specifically requires an employee to "provide honest and accurate information in investigations." Following the investigation, Wirth took over all of Eboda's territories.

## TERMINATION LEADS TO LEGAL ACTION

Eboda sued PNC for racial and gender discrimination under Title VII and the PHRA. PNC filed a motion for summary judgment, arguing that Eboda had failed to establish a prima facie case of race or gender discrimination because she could not show that "similarly situated non-African Americans or male employees were treated more favorably." PNC also argued that a "fair and unbiased investigation" showed that Eboda had violated its policies by retaliating against Menhardt and lying during the investigation.

## THE PRIMA FACIE CASE

The district court rejected PNC's argument that Eboda could not establish a prima facie case of discrimination because it had completed a fair investigation. On the contrary, the court found that Eboda had provided sufficient evidence that the investigation was neither fair nor unbiased. "Specifically, [Eboda submitted] evidence that PNC gave credence to the accounts of white men and women over her account without sufficient corroborating evidence to support those credibility determinations."

Additionally, although Eboda was not suing PNC for failure to promote, the court found that PNC's failure to promote Eboda and its preferential treatment of white, male colleagues, along with the derogatory comments by Menhardt gave important context to Eboda's claim. "In consideration of that context [and] the

fact that Eboda satisfies the first three prongs of a prima facie case ... the court is persuaded that genuine issues of material fact exist as to when Eboda was terminated under circumstances that could give rise to an inference of intentional discrimination."

## QUESTIONS ABOUT PRETEXT

PNC further argued that it was entitled to summary judgement because it had a legitimate, nondiscriminatory reason for terminating Eboda—its reasonable belief that she lied and retaliated against Menhardt. The court agreed that PNC had satisfied that prong of

---

*Although PNC may have followed proper protocol in conducting its investigation, the court found there to be a genuine issue of fact as to whether 'the investigation was fair and unbiased.'*

---

*McDonnell Douglas* framework, but then turned onto the last portion of the *McDonnell Douglas* framework, whether PNC's proffered reason for terminating Menhardt was merely pretext. Although PNC asserted that its investigation and results were not mere pretext, Eboda argued "that PNC valued the accounts of white men and women over her own account without sufficient evidence to make that determination." The court agreed and pointed to multiple areas where Eboda was able to discredit PNC. Because Eboda was able to discredit PNC and the investigation, Eboda had created a genuine issue of material fact with respect to whether PNC's legitimate, nondiscriminatory reason for terminating her was credible, and denied the motion for summary judgment.

By the time Eboda brought her lawsuit, the statute of limitations for any failure to promote claim had clearly elapsed. Nevertheless, PNC's early actions in failing to promote Eboda ultimately hurt them in Eboda's termination action. Those actions demonstrated a pattern of discriminatory conduct, which only bolstered Eboda's claim that her termination was because of her race and gender.

Much of PNC's defense in this case rested on breadth and depth of its investigation, which found that Eboda had retaliated against her assistant and lied to investigators. Although PNC may have followed proper protocol in conducting its investigation, the court found there to be a genuine issue of fact as to whether "the investigation was fair and unbiased."

The decision does not make clear what PNC could have done to have improved its investigation—other than come to a different conclusion. It appears that Eboda was, by circumstance, the only African-American interviewed and, as such, if she was found to lack credibility, her Caucasian colleagues would have to have been believed. This potentially creates a difficult scenario for employers under similar circumstances, where they may be forced to make credibility decisions between employees of different (protected or unprotected) classes. •