

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2019

PHILADELPHIA, WEDNESDAY, MAY 8, 2019

VOL 259 • NO. 89

An **ALM** Publication

EMPLOYMENT LAW

Three-Year Delay Not Sufficient for Dismissal for Failure to Prosecute

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Special to the Legal

How long is too long for a plaintiff to let her case sit before it can be dismissed for failure to prosecute? One year? Two years? Three? According to the U.S. Court of Appeals for the Third Circuit in *Hildebrand v. Allegheny County*, even three years of dormancy may not warrant dismissal of a potentially meritorious claim if there is no evidence that the plaintiff caused the delay or acted in bad faith.

FACTUAL BACKGROUND

Anthony Hildebrand was a detective in the Allegheny County District Attorney's Office. Between 2005 and 2009, Hildebrand was a strong performer and had no significant issues at work, according to the opinion. That changed in 2009, when Hildebrand was assigned a new supervisor—Assistant Chief Richard Ealing. According to Hildebrand, once Ealing became his supervisor, he and other employees started taunting him with age-based insults. Hildebrand also claimed that Ealing gave his work to younger employees and assigned him “meaningless busywork.” Hildebrand was eventually demoted and Ealing allegedly told him “he had gotten rid of old detectives previously and he was going to do the same to Hildebrand.”



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In February 2011, Ealing and another supervisor accused Hildebrand of, among other things, using a DA's Office vehicle without permission. Although Hildebrand claimed that younger workers regularly did the same without incident, he was suspended for five days. The alleged unauthorized use of the vehicle led to Hildebrand's termination that same month.

DOCKET REMAINS CLOSED FOR THREE YEARS

Hildebrand filed a complaint with the Equal Employment Opportunity Commission in January 2012. After receiving his right-to-sue letter, in December 2012, he filed a complaint against the DA's Office and Allegheny County in the U.S. District Court for the Western District of Pennsylvania,

asserting claims under the Age Discrimination in Employment Act, Section 1983, and state law.

The DA's Office moved to dismiss Hildebrand's claims, and the motion was granted by the district court. Hildebrand then appealed to the Third Circuit, which affirmed in part and reversed in part. Hildebrand filed a petition of certiorari to the Pennsylvania Supreme Court regarding his claims that were dismissed, which was denied in February 2015. During the time that the petition of certiorari was pending, the DA's Office filed a second motion to dismiss the remaining claims.

In February 2015, the case was returned to the district court's docket. However, because of a clerical error, the docket remained closed. The district court did not lift the stay or rule on the pending motion and neither party took any action for over three years.

While the case was languishing, Ealing passed away. After his death, the DA's Office moved to dismiss for failure to prosecute. The district court granted the motion, reasoning that it was Hildebrand's responsibility to prosecute this claim and he and his counsel “should have taken some affirmative step to reignite his sole remaining federal claim before this court.” The district court also found that it was “implausible that the plaintiff would not have at least

inquired of his counsel over the last three years” why his claim was not moving forward. The district court further noted that Ealing’s death posed significant evidentiary challenges if the case were to be litigated.

DISTRICT COURT ABUSED ITS DISCRETION

On appeal, the Third Circuit determined that the district court failed to properly apply the *Poullis v. State Farm Fire & Casualty*, 747 F.2d 863 (3d Cir. 1983), factors, particularly in its examination of the extent of Hildebrand’s responsibility for the delay, its failure to consider Hildebrand’s “otherwise responsible litigation history,” its failure to adequately consider other possible sanctions, and its decision to ignore the fact that Hildebrand’s claim, as pleaded, had merit. Additionally, the Third Circuit emphasized that dismissal with prejudice is an “extreme” sanction.

In *Poullis*, the Third Circuit set forth six factors that must be considered in evaluating a motion to dismiss for failure to prosecute, which are: the extent of the party’s personal responsibility; prejudice to the adversary; history of dilatoriness; was conduct willful or in bad faith; effectiveness of other sanctions; and whether the claim has merit.

Regarding the first *Poullis* factor—Hildebrand’s fault for the dust having gathered on the case—the Third Circuit determined that there was no evidence that Hildebrand was “personally responsible for the delay” or that “he and his counsel discussed why his case had not proceeded.” Based on the Third Circuit’s reasoning, in order for the first *Poullis* factor to weigh in favor of dismissal, a defendant must somehow present evidence that the plaintiff actually knew

that the case was delayed and took no action. The logical conclusion that a responsible plaintiff would realize his case had not advanced and should ask his counsel why his case had not moved forward in three years is, apparently, irrelevant to this inquiry.

According to the Third Circuit, the district court also erred in its analysis of the third *Poullis* factor, whether the litigant has a history of delaying litigation, because it did not adequately consider that Hildebrand had previously been a responsible litigant. The Third Circuit characterized the three-year delay as “an isolated incident” and found that Hildebrand’s previous history of responsible litigation “should serve to mitigate the weight the district court placed in favor of dismissal.”

Although it is tempting to let an adversary delay his case into oblivion, as exemplified by Hildebrand, that temptation can do you a disservice.

Additionally, although the district court correctly determined that Hildebrand had not engaged in willful or bad faith conduct, the Third Circuit determined that it was an error for the district court to consider that factor as “neutral.” Instead, because there was no willful or bad faith conduct, the district court should have weighed that factor against dismissal. The Third Circuit also determined that the district court failed to engage in a thorough examination of other sanctions that could have been

imposed and completely neglected to consider the last *Poullis* factor—whether the plaintiff’s claims were meritorious.

Thus, in spite of the fact that the case was dormant for three years and of one the DA Office’s main witnesses (and Hildebrand’s alleged antagonist) passed away, the Third Circuit vacated the dismissal and remanded the case back to the district court to reconsider the *Poullis* factors in light of its opinion.

LET CASES LANGUISH AT YOUR OWN RISK

Although it is tempting to let an adversary delay his case into oblivion, as exemplified by *Hildebrand*, that temptation can do you a disservice. If, on remand, the district court decides that the *Poullis* factors do not warrant dismissal, the DA’s Office will have to litigate this case without a key witness. Although the district court might fashion an evidentiary sanction to attempt to ameliorate this issue, the DA’s Office will still be at a serious disadvantage, unable to present Ealing to contradict Hildebrand’s story. Additionally, at this point, eight years removed from Hildebrand’s termination, other witnesses’ memories of the events may be hazy, at best.

A long lapse of time, in and of itself, is insufficient to warrant dismissal. Without some evidence of personal responsibility or bad faith conduct on the part of the plaintiff, following *Hildebrand*, courts are unlikely to grant a defendant’s motion to dismiss for failure to prosecute. •