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Decades-Old Workplace Bias Burden Test Under Circuit Scrutiny

Deep Dive

- **New federal appeals court orders highlight misapplication**
- **Plaintiff's bar divided over McDonnell Douglas' usefulness**

A growing number of federal appeals court rulings are finding a misapplication of a long-standing US Supreme Court burden-shifting standard used to assess liability in employment discrimination cases, igniting further debate over its usefulness.

The high court's 1973 *McDonnell Douglas Corp. v. Green* decision established a three-step alternative method for plaintiffs to prove bias when direct evidence—like explicit discriminatory statements connected to race, gender, and other protected characteristics—isn't available. It specifically alternates the parties' burden of proof to determine if a worker was fired or experienced a negative employment action because of unlawful bias..

But rulings this month from the US Court of Appeals for the Eleventh and Tenth circuits reviving workplace bias claims are among the latest to caution against district courts' overly rigid or erroneous application of *McDonnell Douglas*. They reaffirmed that plaintiffs need only present a plausible claim to survive early dismissal, rather than fully satisfying the burden-shifting test at the outset of litigation.

The Supreme Court has repeatedly made the point that *McDonnell Douglas* is merely an evidentiary framework and not the only standard to prove liability, and a worker may still prove bias with circumstantial evidence as an alternative, employment law scholars said.

"It's interesting to me that courts are still struggling," said Marcia L. McCormick, an employment law and women's and gender studies professor at Saint Louis University School of Law.

"It requires either Congress to come back and amend" Title VII of the 1964 Civil Rights Act and "provide instructions to courts about how they ought to view complaints in this area," or for the justices to offer additional guidance, she said. Title VII is one of several employment discrimination laws that courts can analyze through *McDonnell Douglas.*

Paul W. Mollica, a civil rights attorney at Equip for Equality, acknowledged the lack of consistency in the framework's application, but said that further clarity from the high court is unnecessary because there's already controlling authority on how it may be applied.

"The only question to be decided" by the district court before a case can go to trial "is whether the evidence is sufficient to prove an adverse action was taken for discriminatory reasons," he said. "The error that a lot of judges have made over the decades has been to assume that" the three-step burden-shifting analysis "is somehow the substantive law of Title VII."

How It Works

The standard requires a worker to establish a "prima facie case" of discrimination—essentially an initial showing that they're part of a protected class, were qualified for the position, and suffered an adverse employment action that occurred under circumstances suggesting bias.

The employer must then provide a legitimate, non-discriminatory reason for the adverse employment action. Then, the burden returns back to the worker to put forth evidence that the employer's reason is a pretext for hiding bias.

Many federal appeals courts, including the Eleventh, Ninth, Seventh, Sixth, and Second circuits, have established variations in applying *McDonnell Douglas*, such as requiring plaintiffs to build a prima facie case of discrimination while allowing them to offer circumstantial evidence at the early pleading phase of litigation or at the later summary judgment stage.

In a recent concurrence supporting the revival of a former Colorado high school administrator's religious bias claim, Judge Harris L. Hartz of the Tenth Circuit said the full court may need to determine how the standard is to be applied. It "simply distracts" district courts from focusing on the sufficiency of the allegations or evidence, he said.

McDonnell Douglas was initially created to aid plaintiffs amid judicial reluctance—when there were no jury trials under Title VII—to find discrimination by employers, he said. But it has eventually become "a favorite of the defense bar" as employers use it to challenge the sufficiency of a claim before they progress to more costly litigation stages, he said.

'Extra Method of Proof'

Despite courts' findings of misapplication of *McDonnell Douglas* and the potential harm it can do to a worker's case, it's still a favorite of some plaintiff's lawyers who say it offers an initial path to keep claims in court.

It could otherwise be harder without any recognized structure, said Ruth Major, a Chicago-based attorney who has represented both employers and employees.

"I don't think the answer is to get rid of *McDonnell Douglas*. I think it's for the judiciary to have an understanding of how it works as an extra method of proof that doesn't have to be used," she said. "Discrimination cases are hard to prove because you're basically looking into the heart of people, and the Supreme Court has recognized that" by opening the door for workers to get evidence through discovery.

Until there's more uniformity among courts, Mollica said that plaintiff's attorneys must be "thoughtful" when educating the presiding judge on the circumstantial evidence available. "A more holistic view of the record is what the Supreme Court intended" judges to do when assessing discrimination cases, he said.

EEOC Impact

The need for uniformity across courts is also important to the US Equal Employment Opportunity Commission, which receives thousands of bias charges filed by private-sector workers annually, said David Lopez, a professor at Rutgers Law School and former general counsel of the agency.

As such, the commission frequently files amicus briefs to caution courts against using a stringent application, he said. Any "mechanical" or "rigid application" at the summary judgment or motion to dismiss stage of a lawsuit has been "something that has really caused an enormous amount of concern" for the EEOC, Lopez said.

There's a lot of "growing sympathy" from federal appeals courts that lower courts' misapplication "is actually complicating things," he said.

But until the Supreme Court decides to take up the matter, federal appeals courts may need to take a firmer stance on issues related to *McDonnell Douglas* to increase the chances of such a review, attorneys said.

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