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DISCRIMINATION

Despite judicial misgivings about the *McDonnell Douglas* framework, it remains alive and well in employment discrimination litigation, according to Littler Mendelson's Adam C. Wit. In this BNA Insights article, Wit examines the reasoning behind the courts' application of this standard and asks whether the *McDonnell Douglas* framework still has a place in analyzing discrimination claims. He concludes that the framework, ''perhaps in truncated form, still has value.''

Coleman v. Donahoe: Should McDonnell Douglas Framework Be Put to Rest?

BY ADAM C. WIT, LITTLER MENDELSON P.C.

Employment litigators can recite in their sleep the all-too-familiar ''burden-shifting'' scheme laid out by the U.S. Supreme Court for Title VII[1] and most other employment discrimination litigation, originally in *McDonnell Douglas Corp. v. Green*,[2] and refined in several later cases, including *Texas Department of Community Affairs v. Burdine*,[3] *U.S. Postal Service Board of Governors v. Aikens*,[4] and *St. Mary's Honor Center v. Hicks*.[5]

Essentially, the scheme was designed to provide a framework within which to assess discrimination claims where the plaintiff does not have ''direct'' evidence of discrimination. It is a three-part process, requiring the plaintiff to first establish a prima facie case of discrimination by showing that (1) he or she is a member of the protected class, (2) he or she is meeting the employer's legitimate expectations, (3) he or she suffered an adverse employment action, and (4) other similarly situated individuals who were not in the protected class were treated more favorably.[6]

[1] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.

[2] 411 U.S. 792, 5 FEP Cases 965 (1973).

[3] 450 U.S. 248, 25 FEP Cases 113 (1981).

[4] 460 U.S. 711, 31 FEP Cases 609 (1983).

[5] 509 U.S. 502, 62 FEP Cases 96 (1993).

Adam C. Wit is the Office Managing Shareholder for the Chicago office of Littler Mendelson P.C. He may be reached at awit@littler.com. Littler associates Shanda Sibley and Amanda Inskeep assisted in the research and preparation of this article.

[6] This is but one articulation of the fourth prong of the prima facie case and the one most pertinent to this article. The original fourth prong, as set forth in *McDonnell Douglas*, was whether, after the plaintiff's application for employment was rejected, the position for which he had applied remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications. Of course, the complained-of adverse action in *McDonnell Douglas* was a ''failure to hire.'' The Supreme Court recognized that the facts of each case would ''vary, and the specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.'' Thus, courts have adopted a number of ''fourth prongs'' to suit the adverse employment action before them. See, e.g., *Petts v. Rockledge Furniture*, 534 F.3d 715, 103 FEP Cases 1348 (7th Cir. 2008) (fourth element in RIF is whether employee's job duties are absorbed by other employees outside the protected class); *Pantoja v. American NTN Bearing Mfg. Corp.*, 495 F.3d 840, 846, 101 FEP Cases 235 (7th Cir. 2007) (151 DLR AA-1, 8/7/07) (''Once an employee can show (in the sense of raising an issue of material fact at the summary judgment stage) that he is meeting his employer's legitimate expectations (the second element), then the fact that the employer needs to find another person to perform that job after the employee is gone raises the same inference of discrimination that the continuation of a search does in the hiring situation.''); *Vaughn v. Watkins Motor Lines Inc.*, 291 F.3d 900, 906 7 WH Cases2d 1478, 88 FEP Cases 1723, (6th Cir. 2002) (105 DLR AA-1, 5/31/02) (in discharge claim, fourth element is that plaintiff was replaced by,

 ISSN 0418-2693

If the plaintiff establishes a prima facie case, the burden of production, not persuasion, shifts to the defendant to provide a legitimate, nondiscriminatory reason for the adverse employment action. Once that is accomplished, the plaintiff must establish that the reason articulated by the defendant is a pretext for discrimination.

Characterizing this process as a ''burden-shifting'' scheme is somewhat of a misnomer, given that the burden of proof remains with the plaintiff throughout.

In *Coleman v. Donahoe*,[7] the U.S. Court of Appeals for the Seventh Circuit recently reviewed the *McDonnell Douglas* framework in detail in reversing a district court's decision to grant the employer summary judgment in a sex and race discrimination and retaliation case brought under Title VII. In a concurring opinion, Judge Wood, joined by Judges Tinder and Hamilton, called for the death of the *McDonnell Douglas* framework, arguing that it had lost its ''utility'' and had, in essence, overcomplicated the assessment of discrimination claims.

This is not the first time a judge or practitioner has sounded this call. For example, in *Wells v. Colorado Department of Transportation*,[8] Judge Hartz of the Tenth Circuit wrote a dissent condemning *McDonnell Douglas* and calling for its abolishment. This is ironic, given that Judge Hartz also wrote the majority opinion in the *Wells* case, in which he applied the *McDonnell Douglas* framework to the facts at hand.

These judicial misgivings notwithstanding, the *McDonnell Douglas* framework remains alive and well in employment discrimination litigation. This article examines the reasoning behind Judge Wood's concurrence and asks the question: Does the *McDonnell Douglas* framework still have a place in analyzing discrimination claims?

***Coleman* Raises 'Similarly Situated' Issue.** The plaintiff in *Coleman* was an African American clerk for the U.S. Postal Service who was terminated after 32 years of service because, the Postal Service contended, she had threatened to kill her supervisor and posed a danger to her co-workers. The plaintiff alleged, in part, that her termination was the result of race discrimination in violation of Title VII, and most pertinent to this discussion, offered evidence that two white employees at the same facility had only been suspended after threatening an employee at knife point.

The district court granted summary judgment for the Postal Service, finding that the plaintiff had failed to establish a prima facie case because the two white employees in question were not similarly situated to the plaintiff.

The Seventh Circuit reversed this decision, ostensibly because it found (among other reasons) that there *were* sufficient similarities between the plaintiff and the two comparators to create a genuine issue of material fact. The court defined the two questions before it as:

> First, just how alike must comparators be to the plaintiff to be considered similarly situated? Second, can evidence that a similarly situated employee received better treatment serve not only as an element of the plaintiff's prima facie case, but also satisfy the plaintiff's burden to show that the employer's legitimate nondiscriminatory reason for its action was pretextual?

The court answered the second question in the affirmative. Quoting *McDonnell Douglas*, the court noted that comparator evidence was ''especially relevant'' to the issue of pretext. The court further explained:

> Where the plaintiff argues that an employer's discipline is meted out in an uneven manner, the similarly situated inquiry dovetails with the pretext question. Evidence that the employer selectively enforced a company policy against one gender but not the other would go to both the fourth prong of the prima facie case and the pretext analysis.

The Seventh Circuit determined that the plaintiff had offered evidence to support a finding that she was sufficiently similar to the comparators whom she identified. This finding, coupled with other evidence, was enough to create a genuine issue of material fact about whether the Postal Service's articulated reason for terminating the plaintiff was pretextual.

The *McDonnell Douglas* framework, perhaps in truncated form, still has value.

In her concurrence, Judge Wood seized on the overlap in the ''similarly situated'' analysis between the prima facie case and pretext to argue that *McDonnell Douglas* no longer served a useful purpose, and that employment discrimination litigation should be handled in a similarly ''straightforward way'' as tort litigation. Judge Wood explained:

> In order to defeat summary judgment, the plaintiff one way or the other must present evidence showing that she is in a class protected by the statute, that she suffered the requisite adverse action (depending on her theory), and that a rational jury could conclude that the employer took that adverse action on account of her protected class, not for any noninvidious reason.

Thus, Judge Wood suggested that all of the *McDonnell Douglas* tests simply be ''collapsed into one,'' as had already been done for the trial stage of litigation, so as to ''restore needed flexibility to the pre-trial stage.'' While much of what Judge Wood suggested makes sense, the author believes that the *McDonnell Douglas* framework, perhaps in truncated form, still has value.

First, it is worth noting that the district court in *Coleman* did not wrongly decide the case because it misapplied the *McDonnell Douglas* framework. Rather, the district court incorrectly concluded that the plaintiff and the two comparators were dissimilar.

In that regard, the district court reasoned that the three employees had different direct supervisors and held different positions.

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or his work given to, those outside the protected class); *White v. Thyssenkrupp Steel USA*, 743 F. Supp. 2d 1340, 1345, 110 FEP Cases 1052 (S.D. Ala. 2010) (204 DLR A-4, 10/22/10) (fourth element in pay claim is whether the employee is qualified to receive the higher wage).

[7] ___ F.3d ___, 114 FEP Cases 160 (7th Cir. Jan. 6, 2012) (4 DLR AA-1, 1/6/12).

[8] 325 F.3d 1205, 91 FEP Cases 1114 (10th Cir. 2003) (79 DLR A-3, 4/24/03).

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However, as the Seventh Circuit noted in reversing the decision, regardless of whom the comparators' supervisors were, the decision maker in all three instances was the same person, and all three employees were subject to the same standards of conduct, regardless of their job responsibilities. Thus, the Seventh Circuit reasoned, the district court had drawn hollow distinctions in finding the three were not similarly situated.

Case Highlights Both Flaws and Utility. In any event, the case still highlights the flaws, but also the utility of the *McDonnell Douglas* framework. The Supreme Court in the *Aikens* decision described the *McDonnell Douglas* framework as: ''merely a sensible orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.''[9] There is logic to the notion that there are certain threshold (i.e., ''prima facie'') showings a plaintiff must make before she can proceed with a discrimination claim.

True to this definition, the ''prima facie'' case is intended to be comprised of factors that are self-evident and capable of determination without resort to a detailed analysis of the evidence. These principles clearly apply to the first and third prongs of the prima facie case. In other words, it should be relatively self-evident whether the plaintiff is a member of the protected class and whether she has suffered an adverse employment action.[10]

Equally true, a plaintiff should not be able to proceed with a discrimination claim unless these factors are established—i.e., that she can claim protection under Title VII and has suffered an injury. Thus, it makes sense to require that a plaintiff establish these factors—however simple it may be to do so—before requiring that the employer provide the reason for the adverse action and assessing whether that reason is a pretext for discrimination.

The second and fourth prongs of the prima facie case—as articulated in *Coleman*—are more problematic.[11] The second prong requires the plaintiff to establish that she was meeting her employer's legitimate expectations. In *Coco v. Elmwood Care*, 128 F.3d 1177, 1180, 75 FEP Cases 513 (7th Cir. 1997), the Seventh Circuit defined ''legitimate expectations'' in this context as ''meaning simply bona fide expectations, for it is no business of a court in a discrimination case to decide whether an employer demands 'too much' of [its] workers.'' Interpreted as such, this prong has no real utility as part of the prima facie case.

For example, as a matter of course, employers generally argue that an employee who has been terminated for misconduct was *not* meeting legitimate expectations. It is equally likely that there will be disagreement between the employer and the employee about what the employer's legitimate expectations are when an employee is terminated for performance reasons.

Thus, too often this prong is so deeply linked to the employer's reason for taking adverse action, and the employee's argument about why she has been discriminated against, that assessing it simply as part of the prima facie case runs directly counter to the principles behind this initial stage of the plaintiff's burden of proof.

As a matter of course, employers generally argue that an employee who has been terminated for misconduct was *not* meeting legitimate expectations.

Recognizing this overlap, the Seventh Circuit has more than once decided to skip this prong of the prima facie case altogether and address it during the pretext phase. The theory behind the court's approach is that if the evidence is insufficient to establish that the employer's reason for taking adverse action is a pretext for discrimination, it surely could not be used to satisfy the prima facie case.[12] Of course, this practice defeats the idea that the prima facie case acts as the gatekeeper before a detailed analysis of the facts is necessary.

The ''similarly situated'' fourth prong is also too intertwined with the ultimate question to be decided—whether the plaintiff was discriminated against—to be easily included as part of the prima facie case. This is evident from the struggles of the Seventh Circuit in *Coleman* to explain how the ''similarly situated'' issue differed between the prima facie and pretext analyses.

In that regard, part of the Postal Service's argument was that the plaintiff and the white employees were not comparable because they considered the plaintiff's conduct a credible threat, while they believed that the other two employees were engaged in ''horseplay.'' The Seventh Circuit reasoned that this issue of motivation was not part of the prima facie analysis:

> An employer's honest belief about its motives for disciplining a Title VII disparate treatment plaintiff is relevant, but at the pretext stage, not for the plaintiff's prima facie case. The similarly-situated inquiry is about whether employees are *objectively* comparable, while the pretext inquiry hinges on the employer's *subjective* motivations.

Of course, this begs the question: What does it mean to be ''objectively comparable?''

Earlier in its opinion, the Seventh Circuit described the factors a plaintiff must show in the ''usual case'' to demonstrate sufficient similarity to a comparator: ''(1) dealt with the same supervisor, (2) were subject to the

[9] 460 U.S. at 715.

[10] There is, of course, a body of case law addressing the issue of what is, and what is not, an ''adverse employment action,'' but this is more a matter of law than an issue dependent upon detailed factual analysis.

[11] As discussed above, the fourth prong has been articulated in other cases in such a way that it *could* be relatively self-evident, such that it might be of more value in the prima facie case. Thus, using *McDonnell Douglas* itself as an example, it should be fairly self-evident whether the job for which the plaintiff was rejected remained open, and the employer continued to seek applicants of the plaintiff's qualifications. By the same token, it should be fairly self-evident whether the plaintiff was replaced by someone not in the protected class (which is another articulation of the fourth prong).

[12] See, e.g., *Hague v. Thompson Distrib. Co.*, 436 F.3d 816, 823, 97 FEP Cases 545 (7th Cir. 2006) (28 DLR A-2, 2/10/06); *Rummery v. Ill. Bell Tel. Co.*, 250 F.3d 553, 556, 85 FEP Cases 1188 (7th Cir. 2001) (103 DLR A-2, 5/29/01).

same standards, and (3) engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them.''

At least with respect to the third factor, it would seem that there usually will be a ''subjective'' component to whether there were ''mitigating'' circumstances or whether employees' circumstances ''differed'' to some degree or another. Plus, it is difficult to determine whether there are differing or mitigating circumstances between employees' conduct without first knowing what the reason was for the employer's decision. Yet, the employer need not articulate this reason until *after* the plaintiff has established a prima facie case.

Seventh Circuit: No 'Magic Formula.' Indeed, the factors to be considered in determining whether employees are similarly situated likely will differ from case-to-case. Thus, the Seventh Circuit in *Coleman* stated that there is no ''magic formula'' to the ''similarly situated'' analysis; that the inquiry ''should not devolve into a mechanical, one-to-one mapping between employees.''

In any case, if courts are going to parse ''objective'' versus ''subjective'' analyses into two separate parts of the inquiry, it makes more sense to collapse both steps into the pretext analysis, as courts have done with respect to the second prong of the prima facie case.

Ultimately, there are three basic questions posed by the bulk of discrimination cases: (1) Is the plaintiff protected by the statute?; (2) Did the plaintiff suffer an injury (i.e., an adverse employment action)?; and (3) Was the injury caused by discrimination?

Given the ''ins and outs'' involved in answering these questions, it makes sense to break the inquiry down as *McDonnell Douglas* prescribed. However, as Judge Wood suggests, perhaps it is time to stop paying lip service to certain components of the prima facie case just to maintain the form. Having said that, the prima facie case still serves a purpose of forcing plaintiffs to satisfy the threshold burden of establishing that they have a cause of action worthy of analysis. For that reason, the *McDonnell Douglas* framework still serves a purpose.

  DLR ISSN 0418-2693