

McDonnell Douglas Analysis Takes Another Blow: Employment Discrimination Cases Should Be Assessed from a Straightforward, Non-Shifting Perspective, Seventh Circuit Says

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The Seventh Circuit recently took another shot at the increasingly rebuked *McDonnell Douglas* framework for determining employment discrimination claims. Seasoned employment attorneys can recite the *McDonnell Douglas* burden-shifting analysis in their sleep; in fact, it's likely been the topic of some sleep-talking rants for some. Under the analysis, established by the U.S. Supreme Court in 1973, if a plaintiff lacks "direct" or "smoking gun" evidence of discrimination, which they usually do, their claim may still survive if they show that (1) they are a member of a protected class; (2) they were meeting the employer's legitimate expectations; (3) they suffered an adverse employment action; and (4) other similarly situated individuals not in their protected class were treated better. Then the burden shifts to the employer to demonstrate a legitimate reason for the alleged discriminatory action. Once the employer meets that burden of production, it reverts back to the employee to show the employer's reason is really a pretext for discrimination. Head spinning yet? The Seventh Circuit, since 2012, has criticized the analysis as burdensome and unjustified.

The first criticism came in 2012 in the 7th Circuit's *Coleman v. Donahoe*, 667 F. Supp.2d 835 (7th Cir. 2012) decision. The court held that the district court too rigidly applied *McDonnell Douglas*'s "similarly situated" requirement and should have used a more flexible standard instead, reversing the lower court's decision for the employer. Specifically, Judge Wood in her concurrence wrote, "Perhaps *McDonnell Douglas* was necessary nearly 40 years ago....this case well illustrates, the various tests that we insist lawyers use have lost their utility." She suggested that employment litigation be dealt with like tort litigation, through a straightforward approach. This straightforward approach again was championed on October 26, 2015 in the *Hooper v. Proctor Health Care Inc.*, No. 14-2344 (7th Cir.

2015) decision. In *Hooper*, the court recognized its recent questioning of the “continued utility of the direct and indirect methods of proof in analyzing discrimination claims” but still utilized it. However, the court reiterated what it stated in *Coleman*, that a court’s main inquiry should be “whether a reasonable jury could find prohibited discrimination.”

The clear take away is that the federal judiciary is looking beyond the framework of *McDonnell Douglas* and defense attorneys and employers should too. Since the analysis is still utilized, its requirements should not be neglected, but a defense to an employment discrimination claim also should not solely rest upon the *McDonnell Douglas* framework. Employers also should prepare a defense that takes into consideration the issues of the case and answers the question: “Could a reasonable person find discrimination here?” in the negative.

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