

When Does the Employer Have the Burden of Proof in a Discrimination Case?

Burden shifts to employer after prima facie case

By Jonathan I. Nirenberg

Until relatively recently, a plaintiff seeking to prove intentional discrimination always had the ultimate burden to prove the discrimination. However, in 1989 that began to change. Initially, the ultimate burden shifted to defendants in cases in which the employer admitted it considered a discriminatory reason for the adverse employment action. But more recently courts have begun placing the ultimate burden of proof on the employer in cases in which the evidence falls short of an admission. Unfortunately, with limited case law on the subject, there is little guidance with respect to when the burden of proof should fall on the employer, rather than the employee. However, the cases seem to indicate that the ultimate burden should be on the employer when the plaintiff presents some evidence of discriminatory animus by the decision-maker.

In 1968, in the landmark decision of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the United States Supreme Court held that the ultimate burden of proof in a discrimination case is on the plaintiff. The Supreme Court established a three-step burden-shifting test to prove discrimination, starting with the plaintiff proving a prima facie case of discrimination. Establishing a prima facie creates an inference of discrimination, and shifts the burden of production to the defendant to articulate a nondiscriminatory legitimate business reason for its action. If the defendant meets this limited burden, then the plaintiff has the ultimate burden to prove that discrimination was a determinative

factor in the defendant's action. Although *McDonnell Douglas* itself was a race discrimination case decided under Title VII, courts have applied its "determinative factor" test to virtually all forms of discrimination cases. See, e.g., *Lawrence v. National Westminster Bank New Jersey*, 98 F.3d 61, 69 (3d Cir. 1996) (recognizing *McDonnell Douglas* test applies to case under the ADA and the ADEA); *Peper v. Princeton University Bd. of Trustees*, 77 N.J. 55, 82 (1978) (applying *McDonnell Douglas* test to case under the New Jersey Law Against Discrimination).

Since direct evidence of discrimination is difficult to come by, one of the more common ways for a plaintiff to meet its ultimate burden of proof under *McDonnell Douglas* is through evidence of pretext, meaning evidence suggesting the employer's explanation for taking the adverse employment action is false. *Bergen Commercial Bank v. Sisler*, 157 N.J. 188, 209-10 (1999). In many cases, evidence of pretext, combined with the elements of the prima facie case, is sufficient to prove intentional discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000).

In 1989, the United States Supreme Court recognized that it does not make sense to apply the *McDonnell Douglas* test in cases in which the employer admits it had a discriminatory reason for an adverse employment action, but claims it would have made the same decision even if it had not considered the discriminatory reason. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Thus, in a "mixed motive" case, once the plaintiff proves a prima facie case the burden shifts to the employer to prove it would have made the same decision even irrespective of its discriminatory reason.

More recent cases have recog-

nized that the mixed-motive test applies to cases in which the employer does not admit it considered a discriminatory factor. For example, the New Jersey Supreme Court has interpreted the phrase "direct evidence" in the context of the mixed-motive proof pattern to include circumstantial evidence that "directly reflects" the alleged discriminatory animus. *McDevitt v. Bill Good Builders, Inc.*, 175 N.J. 519, 528-29 (2003); *Fleming v. Corr. Healthcare Solutions, Inc.*, 164 N.J. 90 (2000).

Extending the mixed-motive test even further, in *Desert Palace, Inc. v. Costa*, the United States Supreme Court held that direct evidence is not required to invoke the mixed motive test, but rather the ultimate burden of proof is on the employer if the plaintiff presents sufficient evidence for a reasonable jury to conclude that a discriminatory factor was a motivating factor in the employer's decision to take the adverse employment action. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003).

Specifically, the Supreme Court allowed a mixed-motive jury charge based on the plaintiff's evidence that she was the only female employee working in the defendant's warehouse, and her supervisor singled her out, gave her harsher discipline than her male co-workers, assigned her less overtime than her male counterparts, repeatedly "stacked" her disciplinary record, and either used or tolerated sex-based slurs against her.

In holding that the mixed motive test applies even though there was no direct evidence of discrimination, the Supreme Court relied on a 1991 amendment to Title VII, as well as other factors including the fact that circumstantial evidence can often be just as powerful as direct evidence. However, it did not provide clear guidance to trial courts with respect to when they should place the ultimate burden of proof of the employer.

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Two years later, in *Myers v. AT&T Corp.*, the Appellate Division adopted *Desert Palace* under New Jersey law, holding that direct evidence is not required for the mixed-motive proof pattern to apply. *Myers v. AT&T*, 380 N.J. Super. 443, 452 (App. Div. 2005), *certif. denied*, 186 N.J. 244 (2006). Ultimately, when it applied the law to the facts of the case, the Appellate Division found there was direct evidence of disability discrimination as there was an admission by the plaintiff's supervisor that she lowered the

plaintiff's performance rating because she perceived that, as a cancer survivor, the plaintiff was not working as hard as her nondisabled coworker, leading the employer to select the plaintiff for a layoff. Given this direct evidence, the Court did not need to consider the limits of *Desert Palace's* holding.

Despite the lack of express guidance on when the burden of proof should be on the employer, the case law seems to establish a relatively low threshold for a trial court to place the ultimate burden of proof on the employer. Specifically, *Myers* indicates

that the focus should be on the plaintiff's evidence when there is a factual dispute. Likewise, while there may need to be some evidence of discriminatory animus, based on its facts, *Desert Palace* suggest that the evidence does not have to directly relate to the adverse employment action at issue in the litigation. Thus, while more guidance from appellate courts undeniably would be helpful, it appears that the ultimate burden of proof should be on the employer if the evidence of discrimination is more than the evidence supporting the prima-facie case and evidence of pretext. ■