

Mixed Messages for Mixed-Motive Claims: What Standard Should Be Used?

A recent decision by the Sixth Circuit has added to the already diverse collection of summary judgment standards used by the circuit courts for Title VII mixed-motive cases. This column addresses recent case law on how federal courts are applying the mixed-motive standard.

Title VII of the Civil Rights Act of 1964 makes it an “unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”¹ In 1989, the U.S. Supreme Court held that employers could avoid liability by establishing that they would have made the same employment decision even if the protected characteristic had not been taken into account.² In response, Congress passed the Civil Rights Act of 1991 and added § 107, which states:

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.³

The language permitting a protected characteristic to be only a “motivating factor” allowed employers to be held liable for a so-called mixed-motive claim, in which both legitimate and illegitimate reasons motivate an employer’s employment decision.⁴ If a defendant-employer can demonstrate that the same decision would have been made in the absence of an impermissible

factor, Title VII limits the remedies available to the plaintiff-employee, prohibiting damage awards and, instead, permitting only declaratory or injunctive relief and the award of attorneys’ fees.⁵ Courts have also applied the mixed-motive concept to cases brought under the Age Discrimination in Employment

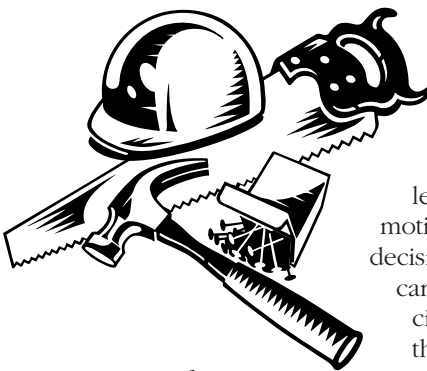
Act.⁶

When analyzing motions for summary judgment, the U.S. Supreme Court devised a burden-shifting framework for the parties in a single-motive employment discrimination case, which alternates the burdens of proof between the plaintiff and defendant.⁷ However, the Supreme Court previously held that this so-called *McDonnell Douglas/Burdine* burden-shifting framework is inapplicable when direct evidence of discrimination is available.⁸ Initially, after liability for mixed-motive claims emerged, courts permitted plaintiffs to use only direct rather than circumstantial evidence to prove such a claim.⁹ Thus, because of the circuit court’s requirement for direct evidence, courts had no need to consider whether the *McDonnell Douglas/Burdine* burden-shifting framework applied to Title VII mixed-motive cases.

Then, in 2003, the Supreme Court issued a decision that would subsequently create a multifaceted split among the circuit courts. In *Desert Place Inc. v. Costa*, the Supreme Court held that a plaintiff may use either direct or circumstantial evidence to prove a Title VII mixed-motive claim.¹⁰ However, the Supreme Court did not determine whether a court should apply the *McDonnell Douglas/Burdine* framework to a motion for summary judgment in a mixed-motive claim, as courts had used for single-motive claims. Thus, since the *Desert Place* decision, circuit courts have developed their own summary judgment standards for mixed-motive claims, resulting in a stark disparity between the circuits.

The Eighth and Eleventh Circuits

Two circuit courts of appeal continue to apply the *McDonnell Douglas/Burdine* framework in mixed-motive cases. The year after the Supreme Court decided *Desert Place*, the Eighth Circuit issued a decision concluding that *Desert Place* “has no impact on prior Eighth Circuit summary judgment decisions.”¹¹ In *Griffith v. City of Des Moines*, an employee brought suit against his employer for disparate treatment and retaliation based on his race. However, the employee was unable to offer any direct proof of the employer’s disparate treatment. The Eighth Circuit denied Griffith’s request to modify the *McDonnell Douglas/Burdine* framework, instead determining that it would continue to apply the framework as it had in previous Eighth Circuit discrimination summary judgment



decisions.

The Eleventh Circuit insinuated through two footnotes and an unpublished opinion that it would not modify its use of the *McDonnell Douglas/Burdine* analysis in mixed-motive cases after *Desert Place*.¹² Thus, in both the Eighth and Eleventh Circuits, the courts used the *McDonnell Douglas/Burdine* framework to analyze a motion for summary judgment in both single-motive and mixed-motive claims.

The Fifth Circuit

Rather than continue to apply the *McDonnell Douglas/Burdine* analysis, the Fifth Circuit has created a modified framework in which to analyze mixed-motive cases. As is done when using the traditional *McDonnell Douglas/Burdine* framework, a plaintiff must first prove a prima facie case of employment discrimination; the defendant may then rebut that claim by providing a legitimate, nondiscriminatory reason for the employment decision.¹³ However, the Fifth Circuit then allows the plaintiff to rebut this reason with evidence that the defendant's reason is not true and simply pretextual, or evidence that the defendant's proffered reason, though true, includes not only a nondiscriminatory animus but also a discriminatory one. This reason is considered the "mixed-motive alternative," which allows the plaintiff to demonstrate the "motivating factor" requirement in order to be held liable under § 107, or the "mixed-motive" section, of the Civil Rights Act of 1991.

The Fourth, Ninth, and D.C. Circuits

The Fourth, Ninth, and D.C. Circuits have chosen to add an additional test that makes it possible for a plaintiff to overcome a summary judgment motion rather than continue to use an unaltered or modified version of the *McDonnell Douglas/Burdine* framework. These courts allow a plaintiff to choose to proceed either under the traditional *McDonnell Douglas/Burdine* test or, in the alternative, to present "direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor ... motivated the adverse employment action."¹⁴ With this added factor, a plaintiff can prove a discriminatory employment practice by simply showing that discrimination or retaliation contributed to the motivating or substantial reason for the employment decision.

The Sixth Circuit

Finally, the Sixth Circuit recently addressed this issue and developed a unique standard among the circuit courts.¹⁵ In *White v. Baxter Healthcare Corp.*, an employee brought a claim against his employer, alleging he was denied a promotion and received an unfavorable performance evaluation because of his race.¹⁶ His employer argued that the applicant who received the promotion over the plaintiff possessed better qualifications and that the unfavorable evalua-

tion resulted from the plaintiff's failure to reach a certain sales goal. In recognizing that this case presented a mixed-motive race discrimination claim, the Sixth Circuit noted that it had yet to set forth a proper summary judgment standard for mixed-motive cases.

The court first affirmatively stated that the *McDonnell Douglas/Burdine* framework does not apply to summary judgment motions for mixed-motive cases. Instead, the Sixth Circuit announced a new analysis for such claims, holding that a plaintiff may survive a defendant's motion for summary judgment by simply producing evidence sufficient to convince a jury that "(1) the defendant took an adverse employment action against the plaintiff and (2) race, color, religion, sex, or national origin was a motivating factor for the defendant's adverse employment action."¹⁷

In its decision, the Sixth Circuit admitted that "the burden of producing some evidence in support of a mixed-motive claim is not onerous and should preclude sending the case to jury only where the record is devoid of evidence that could reasonably be construed to support the plaintiff's claim."¹⁸ The Sixth Circuit has completely abandoned the tried-and-tested *McDonnell Douglas/Burdine* framework, favoring, instead, to create a new framework that admittedly greatly lowers the plaintiff's burden of evidence needed to proceed to trial.

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Ramifications of *Baxter*

The Sixth Circuit's new summary judgment standard for mixed-motive cases offers a difficult standard for defendant-employers while easing the burden for plaintiff-employees. For plaintiff-employees, this case will streamline their ability to have their discrimination cases heard by a jury, as they now merely need to show that a protected characteristic such as race or age played a role in the employer's decision. Conversely, for defendant-employers, by increasing the burden for summary judgment, the new *Baxter* analysis will make it more difficult for an employer to receive a grant of summary judgment, thus increasing the chances of going to trial. Furthermore, this new standard increases the likelihood that plaintiffs will choose to bring any discrimination claim as a mixed-motive claim. Thus, defendants are warned to be on the lookout for an increased number of mixed-motive accusations.

Throughout the circuits, there has been no consensus as to this important standard that acts as a gatekeeper for a case to proceed to trial. It is important for employment counsel to be aware of this widely conflicting split among the circuits. **TFL**

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Endnotes

- ¹42 U.S.C. § 2000e-2(a)(1).
- ²*PriceWaterhouse v. Hopkins*, 490 U.S. 228, 240 (1989).
- ³42 U.S.C. § 2000e-2(m).
- ⁴*Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d

277, 284 (4th Cir. 2004).

⁵42 U.S.C. § 2000e-5(g)(2)(B).

⁶*Rachid v. Jack in the Box Inc.* 376 F.3d 305, 310 (5th Cir. 2004).

⁷Under *McDonnell Douglas/Burdine*, a plaintiff must first prove by a preponderance of the evidence a prima facie case of discrimination; the burden then shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection"; then, third, the plaintiff must prove that the defendant's proffered reason was pretext for discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252 (1981).

⁸*Trans World Airlines Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (holding that the *McDonnell Douglas/Burdine* framework is inapplicable when there is direct evidence of discrimination).

⁹*Wexler v. White's Fine Furniture*, 317 F.3d 564, 571 (6th Cir. 2003); *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999).

¹⁰*Desert Place Inc. v. Costa*, 539 U.S. 90, 92 (2003).

¹¹*Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004).

¹²*Cooper v. Southern Co.*, 390 F.3d 695, 725 n.17 (11th Cir. 2004); *Burstein v. Emtel Inc.*, 137 Fed. Appx. 205, 209 n.8 (11th Cir. 2005) (unpublished).

¹³*Rachid*, *supra* note 6, 376 F.3d at 310; *Machinchick v. PB Power Inc.*, 398 F.3d 345, 352 (5th Cir. 2005).

¹⁴*Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004); *Fogg v. Gonzales*, 492 F.3d 447, 451 (D.C. Cir. 2007).

¹⁵To date, the First, Third, and Tenth Circuits have yet to address this issue.

¹⁶*White v. Baxter Healthcare Corp.*, No. 071626, 2008 U.S. App. LEXIS 14188, at *14 (6th Cir. July 3, 2008).

¹⁷*Id.* at *47-48.

¹⁸*Id.* at *48.

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