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Supreme Court Rewrites Standard For Employment Discrimination Claims

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On June 25, 1993, the United States Supreme Court handed down its decision in *St. Mary's Honor Center v. Hicks.*[1] The case involved a claim of intentional employment discrimination by an employee who alleged he was fired because of his race. The Supreme Court took the opportunity presented by the employee's case to re-examine the legal standard it has followed for the last 20 years in deciding intentional discrimination claims under Title VII of the Civil Rights Act of 1964, and, as explained below, handed down an opinion that rewrites the standard for such claims.

This bulletin provides a brief background on intentional discrimination (also known as disparate treatment) claims under Title VII, summarizes the Court's opinion and the dissent, and discusses some of the possible implications of the Court's ruling.

Title VII Disparate Treatment Claims

Twenty years ago, in *McDonnell Douglas Corp. v. Green,*[2] the Supreme Court created a straightforward way for an aggrieved employee or applicant to claim that he or she is the victim of unlawful discrimination. In *McDonnell Douglas*, the Court ruled that a plaintiff who brings a claim of discrimination in hiring must first show he or she (1) belongs to a protected class; (2) applied and was qualified for the position; (3) was rejected, despite the fact he or she met the job requirements; and (4) was rejected, or that the employer continued to seek applications from persons with the same qualifications as the applicant. This is called establishing a prima facie case of discrimination, which is enough of a case to require the employer to come forward to rebut the claim.

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[1] ___ U.S. ___, 1993 U.S. LEXIS 4401 (S.Ct. June 25, 1993).

[2] 411 U.S. 792 (1973).

The employer then has the burden of presenting evidence that the applicant was rejected not because of race, but because of a legitimate, nondiscriminatory reason. Such reasons might be, for example, another applicant's superior academic credentials or the rejected applicant's poor performance on an interview or job sample test. This is termed rebutting the inference of discrimination, and is sometimes called the employer's burden of production of evidence. Once the employer has advanced its legitimate reason for the applicant's rejection, the applicant then has the opportunity to show that the employer's stated reason is a pretext.

The *McDonnell Douglas* scheme has been applied to discipline and dismissal cases.[3] In a dismissal case the employee must show (in order to establish a prima facie case): (1) he or she belongs to a protected group; (2) was terminated; (3) was qualified to remain in the position; and (4) the position remained open to similarly qualified applicants after the employee's dismissal. If a prima facie case is established, then the employer has the duty of showing a legitimate, nondiscriminatory reason for its action. Finally, if the employer does demonstrate a legitimate basis for the disciplinary action, the employee has the opportunity to show that the employer's explanation is a pretext.

Whether a discrimination claim involves hiring, firing, or some other action, the plaintiff's burden of rebutting an employer's explanation for its personnel actions may be met in two ways: (1) by persuading the court that a discriminatory reason motivated the employer, or (2) by persuading the court that the explanation offered by the employer is not credible.

In disparate treatment cases the person claiming discrimination always has the ultimate burden of proving that discrimination occurred, and this burden remains with that person at all times.[4] That is, even though the employer has a burden to produce evidence to rebut the claim of discrimination, the burden of persuasion is on the plaintiff. The Supreme Court has elaborated and clarified the standard originally set forth in *McDonnell Douglas* no less than five times since its inception,[5] but it has never abandoned the essential approach set forth in that case, until now. The Court chose to do so in deciding *St. Mary's Honor Center v. Hicks.*

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[3] See, e.g., McNairn v. Sullivan, 929 F.2d 974 (4th Cir. 1991); Holder v. City of Raleigh, 867 F.2d 823 (4th Cir. 1989); Moore v. City of Charlotte, 36 Fair Empl. Prac. Cases (BNA) 1582 (4th Cir. 1985); Haith v. Dean, Sec'y of Dep't of Crime Control and Public Safety, 53 Fair Empl. Prac. Cases (BNA) 881 (M.D.N.C. 1990); Harris v. Southern Railway Co., 633 F. Supp. 578 (W.D.N.C. 1986).

[4] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

[5] Teamsters v. United States, 431 U.S. 324, 335 n. 15 (1977); Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 (1978); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-55 (1981); U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983).

The Facts in *St. Mary's Honor Center v. Hicks*

The employer in this case is a state-run agency, St. Mary's Honor Center, a halfway house operated by the Missouri Department of Corrections and Human Resources (MDCHR). Melvin Hicks is an African American correctional officer at St. Mary's who was hired in August of 1978 and promoted two years later to a shift commander.

In 1983, MDCHR conducted an investigation of the administration of St. Mary's and decided to replace the old superintendent and certain other managers. John Powell became Hicks' immediate supervisor, and Steve Long became the new superintendent. Up until this point, for five years, Hicks had a satisfactory employment record.

Shortly after the change in administration, Hicks began having problems with his supervisor. In early March, 1984, he was suspended for five days for violations of institutional rules. Later that month, Hicks and received a letter of reprimand for alleged failure to investigate an inmate fight. In April he was demoted from shift commander to correctional officer for allegedly failing to ensure his employees maintained a vehicle log. Following his demotion, he confronted his supervisor, Powell, on April 19, 1984 and the two exchanged angry words. On June 7, 1984 Hicks was fired for threatening his supervisor.

Hicks filed suit in federal district court in Missouri, claiming his dismissal was based on race in violation of Title VII of the Civil Rights Act of 1964. Hicks maintained that other white employees had committed more serious offenses than Hicks, but had not been fired.

The Lower Court Rulings in *Hicks*

At the trial in district court, the judge ruled[6] that Hicks had made out a prima facie case of discrimination under the *McDonnell Douglas* framework. MDCHR then offered two legitimate, nondiscriminatory reasons for Hicks' dismissal: first, Hicks had engaged in a severe rules violation in threatening his supervisor; second, he had accumulated a series of previous rules violations.

The district court, acting as the trier of fact in this bench trial, found that the reasons advanced by MDCHR were a pretext. The court found that Melvin Hicks was the only supervisor disciplined for violations committed by his subordinates; that similar and even more serious violations committed by Hicks' coworkers were either ignored or treated more leniently; and that Hicks' supervisor, John Powell, created the final verbal confrontation in order to provoke Hicks into threatening him.

Nonetheless, even though the trial court found that Hicks had proven that the employer's proffered reasons for his dismissal were pretext, the court ruled that Hicks had

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[6] 756 F. Supp. 1244 (E.D. Mo. 1991).

not proven his claim of discrimination. The court held that Hicks had failed to carry his ultimate burden of proving that his race was the determining factor in his supervisor's decision to demote him and later to fire him. The district court concluded that even though Hicks had proven the existence of a crusade to terminate him, he did not prove that the crusade was racially motivated, rather than personally motivated. The court therefore ruled in favor of MDCHR, the employer.

The Court of Appeals for the Eighth Circuit reversed the trial court.[7] Agreeing that the matter was governed by the *McDonnell Douglas* standard, the court held that once Hicks had proven that the reasons given by Powell for his dismissal were pretext, he was then entitled to judgment as a matter of law. The Court of Appeals said:

> Because all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race.[8]

The court thus held that Hicks prevailed on his Title VII disparate treatment claim. The employer petitioned the Supreme Court for review, and the Court granted certiorari on January 8, 1993. The case was argued before the Supreme Court on April 20 and decided on June 25, 1993.

The Majority Opinion of the Supreme Court

Five members of the Supreme Court voted to overturn the Court of Appeals decision and remand the case to the trial court for further proceedings. Justice Scalia wrote the majority opinion, and was joined by Chief Justice Rhenquist, Justice O'Connor, Justice Kennedy, and Justice Thomas. The opinion has four parts.

Part I summarizes the procedural history of the case. Part II begins by stating that under the *McDonnell Douglas* scheme, a plaintiff who establishes a prima facie case of discrimination creates a presumption that the employer engaged in unlawful discrimination. But, noted Justice Scalia, the presumption only places on the employer the burden of producing evidence that the employment decision was taken for a legitimate, nondiscriminatory reason. Although the *McDonnell Douglas* scheme shifts the burden of production to the defendant, the ultimate burden of proving discrimination remains with the plaintiff. In this way the presumption operates like all other legal presumptions.[9]

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[7] 970 F.2d 487 (8th Cir. 1992).

[8] 970 F.2d at 492.

[9] The Court cited Rule 301 of the Federal Rules of Evidence, which states: "In all civil actions . . . a presumption imposes on the party against whom it is directed [in this case, the employer] the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden

The majority opinion then stated new law: once the employer introduced evidence of two legitimate, nondiscriminatory reasons for the dismissal of Hicks (the severity and the accumulation of rules violations), the shifted burden of production became irrelevant. That is, once MDCHR introduced its reasons for the action, the legal presumption of discrimination raised by the plaintiff was rebutted and the presumption dropped from the case. The plaintiff then had the opportunity to demonstrate, through presentation of his own case and cross examination of the employer's witnesses, that the reasons advanced by the employer were not the real reasons for the employment decision and that race was.

If the employer succeeds in carrying its burden of production, then, the *McDonnell Douglas* framework, with its presumptions and burdens, is no longer relevant, explained Justice Scalia. The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture. The defendant's production having been made, the trier of fact proceeds to decide the ultimate question of discrimination on the basis of race.

The majority opinion then stated more new law, with even greater significance: although rejection of the defendant employer's proffered reasons will permit the trier of fact to *infer* the ultimate fact of intentional discrimination; the holding of the Court of Appeals that rejection of the employer's proffered reasons *compels* judgment for the plaintiff is wrong. Such a construction of Title VII ignores the requirement that the Title VII plaintiff at all times bears the ultimate burden of persuasion, stated the majority.

What is required to prove discrimination, then, is "pretext-plus." In other words, it is not enough for a plaintiff to show that the employer's reasons for taking an employment action were a pretext; the plaintiff must further demonstrate that the real reason for the action was race. Applying the rule to this case, then, even though Hicks showed that he had been employed for five years without incident and was set up for dismissal by Powell, that was not enough to win.. Rather, Hicks had to show not only that his employer lied about the reasons for his firing but also that Powell was motivated by racial animus (as opposed to personal dislike or some other reason).

Part III of the majority opinion is devoted to a review of the Court's prior decisions to show that *Hicks* was supported by precedent, and to rebut the dissent by Justice Souter (discussed below). Particularly relevant to this review is language in *Texas Dep't of Community Affairs v. Burdine*[10] dealing with pretext. That case states, "should the plaintiff carry this burden [of producing a legitimate reason for its action], the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext

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of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast [in this case, Hicks].

[10] 450 U.S. 248 (1981).

for discrimination."[11] Justice Scalia argued that language does not mean that if the plaintiff proves the asserted reason to be false, the plaintiff wins. Rather, that language means that a reason is not a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason.[12]

Part IV of the opinion is essentially a rebuttal to three concerns expressed in the dissent. Justice Scalia first rejects the notion that the *Hicks* case would have dire consequences for Title VII plaintiffs. Second, he discounts the possibility that its new burden of proof formula might encourage employers to lie about their reasons for taking an action and therefore, having offered some reason for its decision, put the ball back in the plaintiff's court to disprove that reason and show discriminatory intent. Justice Scalia rejects the notion that as a result of its decision plaintiffs would have to anticipate all the possible reasons an employer might have had for taking an action and rebut each one of them. In practice, Justice Scalia stated, the reasons relied on by the employer will be made known to the plaintiff. Third, Justice Scalia concludes that the rule announced in the *Hicks* case is particularly timely in light of the Civil Rights Act of 1991, which now permits juries to decide Title VII cases. Given the nature of juries, it is particularly important that clear instructions on burdens of proof be given.

The Dissent in *Hicks*

Justice Souter, joined by Justice White, Justice Blackmun, and Justice Stevens, wrote the dissenting opinion in Hicks. The dissent makes three major points.

First, the dissent returns to the original wording in *McDonnell Douglas*, noting that it has provided a sensible, orderly way to evaluate evidence of intentional discrimination for twenty years. Justice Souter notes that the standard in *McDonnell Douglas* has been repeatedly reaffirmed and refined by subsequent decisions, but that now the majority is inexplicably casting that settled precedent aside.

Second, the dissent argues that the approach taken by the majority is not supported by precedent. In requiring that a plaintiff show "pretext-plus" (that is, not only

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[11] 450 U.S. at 253.

[12] Even though the language in *Burdine* further stated that a plaintiff may succeed in persuading a court that he or she has been the victim of intentional discrimination either "directly by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly by showing that the employer's proffered explanation is unworthy of credence,* that statement, opined Justice Scalia, was only dicta and, if understood to be the rule of law announced in the case, would render meaningless the rest of the *Burdine* decision, which held that the plaintiff had the ultimate burden of proof of discrimination. In any event, he continued, whatever doubt Burdine may have created was resolved by the decision in *U.S. Postal Service Bd. of Governors v. Aikens.* In that case, Justice Scalia reasoned, the Court held that the fact finder must determine whether the rejection of a plaintiff was discriminatory, not simply whether the evidence offered by the defendant was worthy of credence.

that the reasons given by the employer for its actions are false and the employer intended to discriminate), the Court is ignoring its prior decisions. According to Justice Souter,

> *McDonnell Douglas* makes it clear that if the plaintiff fails to show pretext, the challenged employment action must stand. If, on the other hand, the plaintiff carries his burden of showing pretext, the court must order a prompt and appropriate remedy. Or, as we said in *Burdine*: [The plaintiff] now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination. *Burdine* drives home the point that the case has proceeded to a new level of specificity by explaining that the plaintiff can meet his burden of persuasion in either of two ways: either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. That the plaintiff can succeed simply by showing that the employer's proffered explanation is unworthy of credence indicates that the case has been narrowed to the question whether the employer's proffered reasons are pretextual. Thus, because Hicks carried his burden of persuasion by showing that St. Mary's proffered reasons were unworthy of credence, the Court of Appeals properly concluded that he was entitled to judgment.[13]

Third, the dissent argues that *Hicks* will create a "scheme that will be unfair to plaintiffs, unworkable in practice, and inexplicable in forgiving employers who present false evidence in court."[14] Because it will rarely be the case that an employer makes statements that clearly evince an intent to discriminate, the practical effect of the majority opinion will be to allow employers to make up a reason for their actions, and even if the employee proves the reason to be manufactured, the employer will still win because the employee has not proven that race motivated the action. Justice Souter notes that Congress is aware of the Court's decisions on Title VII disparate treatment claims, and left them untouched by the Civil Rights Act of 1991, thus showing tacit approval for the judicial standard used by the Court in the past. He concludes: "Because I see no reason why Title VII interpretation should be driven by concern for employers who are too ashamed to be honest in court, at the expense of victims of discrimination who do not happen to have direct evidence of discriminatory intent, I respectfully dissent."[15]

Implications for North Carolina Employers

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[13] 1993 U.S. LEXIS 4401, *52 (quotation marks and citations omitted) (Souter, J., dissenting).

[14] Id. at 4401, *57.

[15] Id. at 4401, *74.

Implications for North Carolina Employers

It is important to realize that the *Hicks* decision is a fairly technical procedural ruling, which may or may not have the consequences predicted by either side. In practice, most employers will, in all likelihood, continue to assert good faith defenses for the personnel actions they take. It is also worth noting that the *Hicks* decision does not change the requirements for a plaintiff to establish a prima facie case of disparate treatment. In that regard, the *McDonnell Douglas* test remains the standard.

Still, the case clearly tilts the balance in favor of employers. Today, there are few instances of blatant race discrimination in which an employer admits its bias against members of a protected class. It has long been the case that courts have drawn an inference of discrimination from a showing that the reasons an employers asserts for its actions are false. That inference apparently may no longer be drawn.

The last time the Supreme Court rewrote the burden of proof for Title VII cases (involving disparate impact claims as opposed to disparate treatment claims), was in 1989. Congress moved to reverse those rulings by enacting the Civil Rights Act of 1991. Congress made no change in the burden of proof scheme for disparate treatment claims when it passed the 1991 legislation, but permitted such claims to go to jury trial with damage awards. The Act is generally viewed as making it easier for Title VII plaintiffs to win. It is ironic that just as the Civil Rights Act of 1991 takes effect and juries will have the opportunity to decide discrimination claims, the Supreme Court has once again made it more difficult for plaintiffs to prevail. Congress may revisit Title VII in light of the Supreme Court's ruling in *Hicks.*

In the meantime, plaintiffs asserting disparate treatment in any aspect of employment, from hiring to dismissal, may have a more difficult time prevailing than has previously been the case.

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