An Official Publication of the New Hampshire Bar Association

NEW HAMPSHIRE BAR NEWS

April 16, 2025 *Supporting members of the legal profession and their service to the public and the justice system.* Vol. 35 No. 11

Employment Discrimination and Summary Judgment: Is *McDonnell Douglas* Fading Away?

By Nancy Richards-Stower and Debra Weiss Ford


Richards-Stower


Ford

This is the 24th *Bar News* "debate" over the last 19 years between employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate). Here, they discuss the *McDonnell Douglas* burden-shifting framework, noting the different outcomes in the recent First Circuit decisions in *Ripoli v. State of Rhode Island Department of Human Services*, No. 23-1970 (1st Cir. 2024) and *O'Horo v. Boston Medical Center Corp, et al*, No. 23-1870 (1st Cir. 2025).

Nancy: It's been years since we debated summary judgment.

Deb: Well, recent First Circuit cases tapped a nerve. In *Ripoli*, the plaintiff navigated *McDonnell Douglas* and survived be- cause the evidence she used for her *prima facie* case was enough to negate the employer's reasons. In *O'Horo*, the plaintiff did not.

Nancy: I think *McDonnell Douglas* is dying (and should die). Listen to Justice [Neil] Gorsuch at the Supreme Court oral arguments in what is basically a "reverse discrimination" case, *Ames v. Ohio Dept. of Youth Services*, at **supremecourt.gov/oral_arguments/audio/2024/23-1039**.

Deb: Okay, done. Wow.

Nancy: Now, let's go through the traditional method used to decide summary judgment employment cases. How many times have you typed "*McDonnell Douglas v*. *Green*?" I've typed it over 10,000 times. When I met the plaintiff, Mr. Percy Green, I told him so.

Deb: *McDonnell Douglas* was decided in 1973, nearly two decades before jury trials were authorized by the Civil Rights Act of 1991, as a way for the bench trial judges to assess circumstantial evidence (because most cases lack direct evidence). Under *McDonnell Douglas*, plaintiff provides evidence of a *prima facie* case:

• Plaintiff is in a protected class;

• Plaintiff "met expectations" of her job duties;

• Plaintiff suffered an adverse action; and

• Others outside the protected class were treated differently.

At this point, the scales of justice tip in favor of the plaintiff. Then, the "burden of persuasion" lands on the employer to pro- duce a non-discriminatory reason for the adverse action. When it does, the scales of justice are even, and the plaintiff loses unless she offers evidence that the non-discriminatory reasons provided by the employer are false (pretextual). In the First Circuit, "pre-

text plus" evidence is required to show that the true motive was discrimination. Sometimes additional evidence is required for the "plus." Sometimes the evidence supporting the *prima facie* case suffices. With the "plus," summary judgment is denied.

Nancy: That annoying "plus" is not required everywhere to get to the jury once the plaintiff demonstrates the mendacity of the employer. "Pretext plus" was adopted (or resurrected) by some federal circuits as they all ignored *Reeves v*. *Sanderson Plumbing* (530 U.S. 133 (2000)), decided under Rule 50, sharing the same standard as summary judgment. *Reeves* said the appellate court:

"Should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe... That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, *at least to the extent that that evidence comes from disinterested witnesses*."

And there is the big rub: summary judgment is supposed to kill cases only if there are no material facts in dispute, yet in practice, each step of *McDonnell Douglas* is a death trap for plaintiffs.

Deb: In 2019, the Supreme Court issued *Bostock v. Clayton County, Georgia*. You thought it vaporized *McDonnell Douglas*.

Nancy: It did. Justice Gorsuch's majority opinion in *Bostock* stated the obvious: In law, as in life, there is often more than one

"but for" reason for any action. He emphasized that for liability to attach, a discriminatory reason "need not be the primary reason." This was in a discrimination analysis – not under the mixed motive provision of the Civil Rights Act of 1991, which is not available to retaliation claims. So, I rejoice, as *Bostock's* "multiple but for's" applies to both discrimination and retaliation. Justice Gorsuch wrote:

"When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plain- tiff 's sex was one but-for cause of that decision, that is enough to trigger the law. See *ibid*.; *Nassar*, 570 U. S., at 350.

No doubt, Congress could have taken a more parsimonious approach. As it has in other statutes, *it could have added 'solely'* to indicate that actions taken 'be- cause of' the confluence of multiple factors do not violate the law. Cf. 11 U. S. C. §525; 16 U. S. C. §511. Or it *could have written 'primarily because of'* to indicate that the prohibited factor had to be the main cause of the defendant's challenged employment decision. Cf. 22 U. S. C. §2688. *But none of this is the law we have*." (emphasis added)

Deb: Your point is that since there can be several "but for" reasons for any action, how can courts kill cases on summary judgment just because the plaintiff lacks pretext evidence for (one or all) non-discriminatory reasons?

Nancy: Exactly! The employer's defensive non-discriminatory reasons and the plaintiff's alleged discriminatory reasons can (and do) co-exist, so: jury trial!

Deb: It's true that *McDonnell Doug- las* is not required at the motion to dismiss stage (*Swierkiewicz v. Sorema,* 534 U.S. 506 (2002)), nor at trial (*United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983)), and juries aren't instructed on it (*Vance v. Ball State University*, 570 U.S. 421, 445 n.13 (2013)).

Justice Gorsuch's comments during the *Ames* argument predict what's coming for summary judgment:

"...this Court has never held that *Mc- Donnell Douglas* applies at the summary judgment stage...because nobody's asked us to do anything about it in this case...*McDonnell Douglas* was devised back when there were bench trials for these cases, and that – we passed that a long time ago. And, in summary judgment I had thought the standard a plain tiff needed to meet was just whether there was a material dispute of fact about a question of discrimination on an individual basis...but the *McDonnell Doug- las* framework has three steps, none of which appear in summary judgment or the statute. And the third step has really caught up a lot of plaintiffs, right, having to show that the – that the defendant's stated reason for the adverse employment action are pretextual...It could be that they are not pretextual, but there's still discrimination. Two causes, right? And normally we would think Title VII would capture any but for cause.

***

I do want to pick up on that point...that at least in many circuits...the step 3 inquiry on pretext has become a – an ab- solute condition that must be met. You have to show that the reason offered by the employer is pretextual to get to trial. And – again, we've never held that. This Court's never done it in the summary judgment context."

Nancy: Accord: Justice [Clarence] Thomas in his dissent from the court's refusal to grant certiorari in *Hittle v. City of Stockton, CA*., 604 U.S. ___ (2025), which could have cleanly overturned *McDonnell Douglas*:

"The application of *McDonnell Doug- las* in the summary judgment context has caused significant confusion... Whatever the origins of the confusion, it is producing troubling outcomes on the ground. Lower court decisions reflect 'widespread misunderstandings about the limits of *McDonnell Douglas*.'...Our precedent makes clear that the frame-work is, at most, a 'procedural device, designed only to establish an order of proof and production' when evaluating circumstantial evidence...Put another way, it is 'merely' a 'way to evaluate the evidence' that bears on the ultimate finding of liability. Aikens, 460 U. S., at 715. Yet, some courts treat *McDonnell Douglas* as a substantive legal standard that a plaintiff must establish to survive summary judgment or to ultimately prove a claim. See Tynes, 88 F. 4th, at 945 (observing that some parties and courts 'wrongly treat the prima facie case as a substantive standard of liability'). Some courts also fail to appreciate that *McDonnell Douglas* is necessarily underinclusive..."

Deb: As your NELA [National Employment Lawyers Association] group argues, "a list of *prima facie* case elements, only intended as suggested types of evidence, bec[ame] instead essential components of a Title VII claim."[1]

Nancy: Yet, I've been warned that *Mc- Donnell Douglas* must remain an option for plaintiffs. I just don't understand why.

Deb: Stay tuned!♦

Endnote

1. Brief amicus curiae of the National Employment Lawyers Association, *Ames v. Ohio Dept. of Youth Services*, on writ of certiorari to the Court of Appeals Sixth Circuit.

Nancy Richards-Stower is an employee rights advocate for New Hampshire and Massachusetts. She is the creator and owner of TryToSettle.com, an online settlement service that facilitates confidential blind bids to expedite dispute resolutions. Her law office website is ***jobsandjustice.com.***

Debra Weiss Ford is the managing principal at the Portsmouth offices of Jackson Lewis, PC. Its web site is ***jacksonlewis.com****.*