The Shifting Burden of Proof in US Anti-Discrimination Law in Disparate Treatment Cases.

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I. Early case-law – *Green v. McDonnell Douglas*, 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).
   A. The burden of proving discrimination shifts from the plaintiff to the defendant upon a minimal showing of a prima facie case (e.g., a minority job applicant was rejected for an open job for which he was qualified and applied, and the job remained open or was filled by a non-minority).
   B The rule was based on two assumptions:
      1. Employers act rationally, and they alone know (and can explain) the reasons for their decisions; and
      2. The most likely reason an employer would reject a qualified minority applicant for an open job is his/her minority status.
   C. If the applicant met her burden, the employer had to offer evidence of a non-discriminatory reason for its decision. If it did, the burden shifted to the plaintiff to prove that the reason given by the employer was a pretext (i.e., that the reason offered not the true reason). If the employer failed to offer a non-discriminatory reason, or if the plaintiff proved pretext (or otherwise proved a discriminatory motive), she prevailed.

II. The shift – *St. Mary's Honor Society v. Hicks*, 509 U.S. 502 (1993).
   A. The burden that shifts is merely a burden of production, not a burden of persuasion.
   B. As a result, if the plaintiff meets her burden of production under the *McDonnell Douglas* test, and the employer meets its burden of production by producing evidence of a non-discriminatory reason for its decision, the employer has fully met its burden, and the sole question is whether the plaintiff has proved by a preponderance of the evidence that the employer's motive was discriminatory. If the employer provides an explanation that the employee proves is false (pretext), the court *may* conclude that the employer was trying to cover up its discriminatory motive, and that the true reason (or a true reason) was discrimination. But a court may, alternatively, decide that the employer's reason for offering a false explanation was pretext for something other than discrimination, and that the employee has not proven that the employer had a discriminatory

motive. See also, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) (Although rejection of an employer's proffered non-discriminatory reason does not *require* the trier of fact to find discrimination (see *Hicks*), it is sufficient to *permit* a finding of discrimination).

C. The shift can be attributed to a shifting assumption about the role of discrimination in employers' decision-making: Discrimination was once perceived by American judges as common, but it is now perceived as rare; it is thus viewed as illogical to infer discrimination merely from a decision not to hire a qualified minority applicant for an open job.

III. What must the plaintiff prove?

A. *Hazen Paper v. Biggins*, 507 U.S. 604 (1993): "liability depends on whether the protected trait actually motivated the employer's decision. That is [in an age discrimination case], the plaintiff's age must have actually played a role in the employer's decision-making process and had a determinative influence on the outcome." Note that the requirement of "actually motivated" is equated with proof of "discriminatory intent." Note further, however, that intent can be proven through circumstantial evidence.

B. Must improper discrimination be the sole reason?
No. See 42 United States Code section 2000e-2 (m) (added by 1991 Civil Rights Restoration Act):
"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." *See also, Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (*emphasis added*).

C. Partial Affirmative Defense in Mixed Motive Cases:
What if the plaintiff proves by a preponderance of the evidence that her sex actually motivated the employer's decision, and was thus a motivating factor, but the employer proves by a preponderance of the evidence "that it would have taken the same action in the absence of the impermissible motivating factor."?
The employee is not entitled to back pay or reinstatement, but is entitled to injunctive relief, attorney's fees, and costs.

D. How does an employee typically prove discrimination?
Plaintiffs typically rely on a combination of comparative evidence (e.g., a black employee was fired when white employees who engaged in similar misconduct were not; a man was hired instead of a woman applicant with better qualifications; a young employee was given a promotion instead of an older employee who had more experience) combined with:

(1) evidence of pretext (e.g., an employer's claim that the employee had committed misconduct is false); and/or

(2) evidence suggesting bias against the plaintiff's group (e.g., a supervisor used racist or sexist slurs); and/or
(3) evidence of discriminatory treatment of other employees or applicants from plaintiffs' group; and/or
(4) evidence suggesting the employer (or employment decision-maker) used race or gender-based stereotypes to make judgments about the plaintiff (or others); and/or
(5) statistical evidence suggesting a pattern or practice of discrimination.

IV. The consequence of the shift

More cases are being decided on summary judgment, almost always against the employee, as judges become increasingly skeptical that the failure to hire a minority applicant or a woman is because of minority status or gender.

V. Critique/Commentary.

A. Burden of Proof.

Most (though certainly not all) U.S. law professors are critical of the Court's decision that the burden of persuasion stays with the plaintiff. See e.g., Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 Georgetown Law Journal 279 (1997).

B. Intent.

Again, most (though certainly not all) U.S. law professors are critical of the Court's decision that the plaintiff must prove discriminatory intent. One problem with this approach is the question of whether decision-makers engage in unconscious discrimination. See, e.g., Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stanford Law Rev. 317 (1987); David B. Oppenheimer, *Negligent Discrimination*, 141 University of Pennsylvania Law Rev. 899 (1993). Recent commentary on this question explores whether cognitive bias explains discrimination as a "natural" part of human psychology, in which stereotypes influence decision-making without any conscious intent. See, e.g., Linda Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161 (1995); Anthony G. Greenwald and Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 California Law Rev. 945 (2006); see also, Christine Jolls and Cass R. Sunstein, *The Law of Implicit Bias*, 94 California Law Rev. 969 (2006).

VI. Additional Noteworthy Commentary.

Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Columbia. Law Rev. 458 (2001); Kevin M. Clermont and Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* Harvard Law & Policy Review, Vol. II (2008) (available at:

http://ssrn.com/abstract=1142345); Tristin K. Green, *Insular Individualism: Employment Discrimination Law After Ledbetter v. Goodyear*, 43 Harvard Civil Rights - Civil Liberties Law Review 353 (2008).

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