

BURDEN OF PROOF IN ANTIDISCRIMINATION CASES

U.S. Insights into the CJEU Burden of Proof
Doctrine

Legislative Background

Directive 2006/54/EC (the Recast Directive) :

*“Member States shall take such measures as are necessary, in accordance with their national judicial system, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, **facts from which it may be presumed that there has been** direct or indirect discrimination, it shall be **for the respondent to prove that there has been no breach** of the principle of equal treatment.”*

- Council Directive 2000/43/EC, Art 8
- Council Directive 2000/78/EC, Art 10

To Presume – the Threshold Question

- what does it mean “to presume”
 - without other explanation of presented facts, more likely than not that discrimination explains the facts (preponderance of evidence)
 - facts indicate with fair probability that discrimination occurred (probable cause)
 - specific, articulable, and individualized suspicion that discrimination is afoot (reasonable suspicion)
 - evidence presented must be such to make highly and substantially more probable to be true than not that discrimination took place (clear and convincing evidence)

- For Respondent To Prove -

- How does respondent prove?
 - by disproving the prima facie presumption? (sufficiency burden)
 - by demonstrating that the decision was in no way related to the suspect criterion? (full burden)
- What is the threshold?

The Goal Question

- What needs to be proven?
 - Motive
 - Conscious
 - Unconscious
 -
 - Bias
 - Prejudice
 - Stereotype (rational and/or irrational)
 - Negative Implications of Membership
 - Direct (discriminatory but legitimate standard)
 - Indirect (systemic discrimination)

McDonnell Douglas Corp. v. Green (438 U.S., 1973)

- is participation in illegal civil-rights protest legitimate reason for non-hiring or pretext
- order and allocation of proof in private, non-class-action challenging employment discrimination
- efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions

McDonnell Douglas: the Structure of the Burden Distribution

- Prima Facie Case – plaintiff must carry initial burden
 - PFC may be done by showing:
 - Membership
 - Application
 - Qualifications
 - Rejection
 - Position remained opened
- The Shift
 - Articulate some legitimate, nondiscriminatory reason
 - the rebuttal weight: does not have to be “objective” (technically work-related) but cannot be a pretext
- The Remand
 - a fair opportunity to show that that the stated reason was in fact pretext
 - inconsistencies (comparator)
 - past treatment
 - relevant statistics (general pattern)
 - general policy and practices

McDonnell Douglas: Qs

- PFC: an inference or presumption?
 - inference: deduction the factfinder may make from established facts on the basis of reason and experience
 - shifts the burden of persuasion
 - threshold: “more likely than not” or higher
 - presumption: a rule of law that requires the factfinder to assume, at least temporarily, the existence of certain facts once a party has proved other – usually logically related – facts
 - shifts the burden of production
 - threshold: preponderance or less
- The Shift: the threshold question
 - If the PFC requires
 - inference: preponderance or higher
 - presumption: most likely lower than preponderance
 - the threshold determines defendant’s ability to employ “the least accessible reason” strategy
 - the examples of evidence suggested in the context of remand phase suggestive of the preponderance or higher evidentiary level required from defendant at the shift phase

Texas department of Community Affairs v. Burdine (450 U.S., 1981)

- CoA: “defendant must prove by a preponderance of evidence the existence of legitimate, nondiscriminatory reason and...by objective evidence that those hired or promoted were better qualified than the plaintiff”
- Does employer need to prove
 - “convincing objective reasons” for decision
 - that plaintiff’s qualification were inferior (comparator)

Burdine – (re)shaping the doctrine - PFC

- “The ultimate burden of persuading...that the defendant intentionally discriminated...remains at all the times with the plaintiff.”
- PFC:
 - the purpose: eliminate the most common nondiscriminatory reasons for unfavorable treatment
 - the plaintiff must prove by *the preponderance of evidence* that:
 - Applied
 - Rejected
 - Circumstances *giving rise to inference* of unlawful discrimination
 - creates a *presumption* of unlawful discrimination
 - if the court believes the plaintiff’s evidence and the defendant remains silent the court must enter judgement for the plaintiff

Burdine – (re)shaping the doctrine –Shift

- The burden that shifts is to rebut *the presumption (in fact the inference)* by producing evidence that unfavorable treatment was “because of” legitimate, nondiscriminatory reason
 - burden of production (intermediate burden)
 - enough to raise genuine issue of fact - clearly set forth, through the introduction of admissible evidence (e.g. witness stand)
 - explanation must be clear and reasonably specific
 - allow the court *rationaly* to conclude (???) that the decision has not been motivated by discriminatory animus
 - need not persuade the court that it was actually motivated by proffered reasons
 - Purpose: to frame the factual issue with sufficient clarity so that the plaintiff will have full and fair opportunity to demonstrate pretext

Burdine – (re)shaping the doctrine – Remand

- the burden (of production) merges with the ultimate burden of persuading the court that the plaintiff has been a victim of unlawful discrimination
 - Directly: discriminatory reason more likely motivated the defendant than the reason he proffered
 - Indirectly: showing that the proffered explanation is unworthy of credence
- the comparator: the plaintiff's task
 - shifting the task to the employer harbors a substantive (!!!) error
 - prohibition of discrimination does not demand preferential treatment
- What was the Burdin about?
 - making antidiscrimination effective or helping the courts to be more effective within the context of status quo?
 - effective procedural rules or shaping the substantive scope (meaning) of the equal treatment protection?

Role of Comparator

- merely instrumental
 - evidentiary means of proving “because of”/”related to” requirement
 - Issue of consistency = issue of credibility
- can be employed in different stages of evidentiary procedure (PFC, the shift or the remand) and by both parties

PFC Challenges: who does what

- the inference or the presumption (or something in between)
 - legal presumption allows the plaintiff who cannot establish the “because of” (related to suspect criterion) requirement to survive a motion for judgment (due to lack of evidence) and thus force the employer to articulate the reasons for decision
 - issue of transparency
 - accounts for (**very basic**, initial) disparity in access to information between the plaintiff and the defendant regarding the background of the disputed decision
 - low evidentiary threshold allows defendant to make plaintiff’s protection right ineffective (chose reason that is most difficult to prove by preponderance of evidence or higher)
 - access to employers data and resources becomes crucial
- the weight of persuasion v. the weight of production
 - inference *tends to* invite preponderance or higher in the PFC and the Shift phase
 - Presumption allows (not necessitate) wider maneuvering space

PFC Challenges: the Weight of Transparency

- for the PFC phase to work effectively the issue of transparency is crucial
 - application:
 - no formal application process; employee unaware of the opportunity; employer's employment/promotion policy is informal and subjective or vague and secretive;
 - *the futile gesture doctrine*
 - qualifications
 - absolute (minimal qualifications) or relative (comparator)
 - clear, known and easily accessible standards of measurement
 - remained open
 - how can the plaintiff know whether employer hired or not and when he hired or who he hired
 - the same-group defense
 - “because of” (aspect of) status as a protected class member
 - Hire and fire employees to prevent them from reaching some benefits tied to “loyalty”, “experience”; developing a track record to qualify for promotion; because of individual commitment to critical aspects of the equality struggle (feminist views, participation in public protests, etc)

The Shift Challenges: objectivity

- Legitimate reason defense:
 - legitimate as “fairness” – “objective”, work-related reasons
 - the fundamental rights protection defense
 - autonomy; private property; entrepreneurship
 - legitimate as nondiscriminatory – any but suspect
 - the futile gesture doctrine (respecting (legal but) discriminatory standards of others due to legitimate business concerns)

Key Insight from the EU Perspective

- the structure of the burden of proof is not important merely because it determines the ability of the plaintiff to use antidiscrimination protection promised by the equal treatment guarantees (the issue of effectiveness)
- the burden of proof is an instrument that can be used to (re)shape the very (substantive) meaning of equal treatment guarantees (the normative issue)
 - If that this the case than the EU faces the risk of substantive inconsistencies in antidiscrimination law due to national procedural autonomy – the risk of (in)effective protection within the EU legal order due to “nationality” of the legal procedure used at a particular local theritory

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- C-109/88 Danfoss (1989)

*“if the system of pay is **totally** lacking in **transparency** and statistical evidence reveals a difference in pay between male and female workers the burden of proof shifts to the employer **to account for the pay difference by factors unrelated to sex.**”*

- PFC:

- membership
- “applied and denied – the applicant asked for explanation
- total lack of transparency
- statistical evidence - circumstances *giving rise to what (inference or presumption)*

- The Shift:

- factors unrelated to sex – legitimacy as nondiscriminatory reason?
- account for – articulate or persuade?

C-127/92 *Enderby v Frenchay Health Authority*

“if the pay of speech therapists is **significantly** lower than that of pharmacists and if the former are **exclusively women** while the latter are **predominantly men**, there is a prima facie case of sex discrimination

Where there is a prima facie case of discrimination, it is for the employer **to show that there are objective reasons** for the difference in pay. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory (see, by analogy, the judgment in *Danfoss*, cited above, at paragraph 13). ”

Enderby - PFC

- PFC elements:
 - Membership
 - application and denial
 - Circumstances giving rise to still not clear what
 - external “objective” comparability standard
 - “significantly lower” pay
 - nontransparent use of assumed **collective** bargaining power
 - employer tried defense of procedural equality - to rely on standards “legitimized” through “democratic” process
 - Lack of transparency in the supposedly “representative” process and the real-life experience of unions as men’s club suggest the readiness to infer discrimination

Enderby – the Shift

- The Shift elements:
 - *for the employer **to show** that there are **objective** reasons for the difference*
 - articulate or persuade?
 - *introduction of “objectivity” (coupled with the real-life experience of unions as men’s clubs) suggests legitimacy as fairness approach – burden of persuasion*
- Slighting Scale:
 - the weight of the burden imposed at the shift stage related the strength of the prima facie at the first stage

C - 54/07 Feryn

“Article 8 of Directive 2000/43 states in that regard that, where there are *facts from which it may be presumed* that there has been direct or indirect discrimination, it is *for the defendant to prove that there has been no breach* of the principle of equal treatment. The precondition of the obligation to adduce evidence in rebuttal which thus arises for the alleged perpetrator of the discrimination is a ***simple finding that a presumption of discrimination has arisen*** on the basis of established facts.

Statements by which an employer publicly lets it be known that, under its recruitment policy, it will not recruit any employees of a certain ethnic or racial origin ***may constitute facts*** of such a nature as to give rise to a presumption of a discriminatory recruitment policy.

It is, thus, for that employer ***to adduce evidence*** that ***it has not breached*** the principle of equal treatment, which it can do, ***inter alia***, by showing that the actual recruitment practice of the undertaking does not correspond to those statements.

It is for the national court to verify that the facts alleged against that employer are established and ***to assess the sufficiency of the evidence which the employer adduces in support*** of its contentions that it has not breached the principle of equal treatment.”

Feryn - PFC

- PFC = simple finding of presumption
 - plaintiff need not present facts allowing inference (by preponderance of evidence or higher)
 - how “simple” is the standard for burden of production
 - public statements enough (no any proof of actual discrimination, past behavior, patterns etc.) - reasonable suspicion?
 - plaintiff can present facts allowing inference
 - Enderby’s “there is” prima facie discrimination?
 - increases the required burden of persuasion for the defendant?

Feryn – the Shift

- The Shift Elements:
 - **aduce** evidence
 - no breach of the equal treatment
 - provide *any* reason not related to suspect criterion
 - legitimacy as nondiscrimination
 - objectivity defense an option but not necessity
- What level of persuasion suffice for “simple presumption”
 - national court to verify: “sufficient to support” the contention
 - the term “sufficient” suggests above 50% - the preponderance of evidence

Some Other Relevant Cases (to consider)

- C - 17/05 Cadman
- C-381/99 Brunhoffer !!!
- C-104/10 Kelly
- C-81/12 Steaua FC

Is there a normative insight?

- the CJEU burden of proof doctrine as a looking glass of the substantive scope of direct discrimination as its main antidiscrimination guarantee?
 - the notion of “objectivity” – legitimacy as “fairness”
 - goes beyond the notion of
 - intent
 - unconscious bias
 - the shifting of the burden of persuasion
 - Goes beyond the notion of
 - rational stereotypes
- ability to effectively counter act systemic discrimination?
 - Feryn; Steaua FC; Brunhoffer suggest responsibility of employers for implications of their actions that are not caused by “purely theirs” responsibility
 - PFC allowing presumption of discrimination allows plaintiffs to “push” defendants to justify their actions as “business objective” which might open some room for balancing between costs of discriminatory practices legitimized by every-day life and costs of asking employers to participate in their removal

Many Thanks for Your Attention
and Patience