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Unequal Severance Benefits and Discrimination Claims

By Kevin C. McCormick

In an interesting published decision, the U.S. Court of Appeals for the Fourth Circuit has held that an offer of less favorable severance benefits to a female may constitute sex discrimination in violation of Title VII. This article takes a closer look at this case.

Background Facts

Karla Gerner began working for Chesterfield County, VA, in June 1983. By July 1997, she was the County's Director of Human Resources. Throughout Gerner's career, she always received positive performance evaluations. After she had put in more than 25 years of employment in the County, including 12 as Department Director, on Dec. 15, 2009, County officials informed Gerner that her position was being eliminated due to reorganization. The officials asked Gerner to sign an agreement that offered her three months' pay and health benefits in exchange for her voluntary resignation and a waiver of any claims against the County. Gerner considered the offer for a few days and ultimately declined it. The County then terminated her employment effective Dec. 15, 2009, without any severance pay or benefits.

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Is *McDonnell Douglas* in for a Bumpy Ride?

By Ralph A. Morris and Alexis M. Dominguez

The long-standing practice of resolving Title VII indirect discrimination claims through summary judgment using the *McDonnell-Douglas* framework has recently come under fire. For nearly 40 years, employers and employment attorneys have relied on the framework created by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) to resolve indirect discrimination claims. But a recent decision from the Seventh Circuit has raised concern over the permanence of *McDonnell Douglas*. *See Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012).

Judge Diane Wood's concurrence in *Coleman* calls into question *McDonnell Douglas's* utility, and proposes an alternative standard for deciding employment discrimination claims. While the simplicity of the proposed standard is appealing, change is unlikely to come quickly. In fact, appellate courts are still broadening the scope of *McDonnell Douglas*, which is — and for the foreseeable future will likely continue to be — the accepted standard for deciding indirect employment discrimination claims through summary judgment.

Burden-Shifting Framework

Until recently, the *McDonnell-Douglas* framework provided a universally accepted standard for determining whether an employee's indirect discrimination claim could survive summary judgment. Under the framework, the employee must first establish a *prima facie* case of discrimination by showing that: 1) she belongs to a protected class; 2) she was qualified for the position in question; 3) she suffered some adverse employment action; and 4) the employer treated similarly situated employees outside the protected class differently. After the employee establishes each of these elements, there is a presumption of unlawful discrimination.

Employers rely on the similarly situated employee element of the test as a principal method for defeating indirect discrimination claims at the summary judgment stage. Employees often establish the first three elements of the *prima facie*

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test, but employees are often unable to identify similarly situated employees outside the protected class who were treated differently. *See, e.g., Fane v. Locke Reynolds, LLP*, 480 F.3d 534, 540 (7th Cir. 2007) (holding that employee failed to identify similarly situated employees who were treated more favorably to support race discrimination claim).

To show that another employee is similarly situated, the plaintiff is generally required to show that the other purported comparators "dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." *See Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 617-18 (7th Cir. 2000); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992). Although the plaintiff need not show that the comparators are directly comparable, courts sometimes construe this element narrowly, making it difficult for plaintiffs to satisfy the similarly situated employee requirement. *See, e.g., Bobo v. United Parcel Serv., Inc.*, 665 F.3d 741, 749 (6th Cir. 2012).

If the plaintiff establishes a *prima facie* case of discrimination, the employer then has the burden of production to show a non-discriminatory reason for the adverse employment action. Failure to present a legitimate non-discriminatory reason for the adverse employment action will result in a denial of the employer's summary judgment motion. But if the employer fulfills its burden of production, the plaintiff again has the burden of showing that the employer's purported reason for the adverse action is a pretext.

Coleman v. Donahoe

Courts have applied the *McDonnell-Douglas* framework countless times. However, a recent concurring opinion in *Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012), questioned *McDonnell Douglas's* utility. In *Coleman*, an African-American postal worker with 32 years of experience sued the United Stated Postal Service (USPS), alleging that she was terminated for racial discrimination, among other reasons. The plaintiff was terminated after her psychiatrist disclosed that Ms. Coleman had thoughts about killing her supervisor. USPS argued that the plaintiff was terminated for violating a "zero-tolerance" policy against threats or violent behavior.

The plaintiff argued that similarly situated employees were treated more favorably and that USPS's stated reason for her termination was a pretext. In support of this argument, Ms. Coleman offered evidence that USPS issued one-week suspensions to two white male employees after they threatened a co-worker at knifepoint. The district court granted summary judgment for USPS, noting that the plaintiff could not make out a *prima facie* case for discrimination because the proposed comparators were not similarly situated employees.

On appeal, the Seventh Circuit reversed summary judgment on plaintiff's discrimination claim. The Seventh Circuit held that plaintiff's use of two white male employees as comparators was sufficient to establish a *prima facie* case of discrimination. Although the comparators had a different supervisor and held different job titles, all three employees worked under the same ultimate decision-maker and were subject to the same rules and disciplinary standards. Further, in the eyes of the appellate court, the proposed

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Mandatory Retirement in Law Firms and Other Partnerships

By Rosanna Sattler and James E. Kruzer

Two months after celebrating his 90th birthday, Supreme Court Justice John Paul Stevens retired in June 2010. Had he worked for one of the many large law firms whose attorneys argue before the Supreme Court, Justice Stevens might have been pushed into retirement decades earlier. A recent settlement between New York-based law firm Kelley Drye & Warren LLP and the U.S. Equal Employment Opportunity Commission (EEOC) compels a second look at mandatory retirement in law firms and other partnerships. Under a consent decree, the firm agreed to end its policy of stripping partners who continued to practice after age 69 of their interest in the firm, reducing their ability to manage the firm's operations, and replacing their payment with a discretionary annual bonus that, in the case of one partner, was characterized as "discriminatorily low." Faced with aging baby boomers and possible exposure to age discrimination claims, law firms and other partnerships will likely relax fixed requirements based on age, such as mandatory retirement and forced changes in equity participation, compensation, and status, which turn away profitable professionals and risk legal liability.

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Partnership: An Exception To the Rule

Congress enacted the Age Discrimination in Employment Act of 1967 (ADEA) with the stated purpose of "promot[ing] employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). The ADEA allows employers to discharge or refuse to hire individuals based on their age pursuant to a "bona fide hiring or retirement plan" that is not undertaken to evade the protections of the statute. 29 U.S.C. § 623(j)(2). The "bona fide occupational requirement" carve-out to the ADEA applies to airline pilots, law enforcement officers, and firefighters.

Unlike the bona fide occupational exception to the ADEA, the permissibility of mandatory retirement ages for partners in law firms, accounting firms, medical practices, and other professional settings depends upon the position that partners are not employees for the purposes of federal anti-discrimination law. The distinction between "partner" and "employee" is not one that can be ascertained merely by the labels given to individuals. A more important consideration is whether the entity treats partners as employees, and functions more like a corporation. The Supreme Court noted in a case involving the application of a different federal anti-discrimination law to four physicians in a medical practice: "Today there are partnerships that include hundreds of members, some of whom may well qualify as 'employees' because control is concentrated in a small number of managing partners." *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 446 (2003) (internal citations omitted).

The recent Kelley Drye case revisits its issues surrounding law firm partnership explored in *EEOC v. Sidley Austin Brown & Wood,* 315 F.3d 696 (7th Cir. 2002). In *Sidley*, the firm, opposing a subpoena from the EEOC, argued that 32 demoted partners were "employers" within the meaning of anti-discrimination law because: 1) their income was based on a share of the firm's profits; 2) they made capital contributions to the firm; 3) they were liable for the firm's debts; and 4) they had some administrative or managerial responsibilities. *Id*. at 699. While granting the firm most of the relief it sought, Judge Richard Posner viewed the firm's attempts to characterize itself as a partnership skeptically. Judge Posner pointed out that most of the aspects of partnership on which the firm rested its argument were no different from those of many corporations whose executives were considered employees under anti-discrimination law. Looking under the hood at the firm's governance structure, he pointed out that all of the power of the 500-partner firm resided in a 36-member unelected committee. *Id*. at 702-03. He likewise was unimpressed by the one factor that truly seemed to distinguish the firm from corporations — law firm partners' potential liability. Viewed in light of the relative powerlessness of the 32 demoted partners, the potential assessment of debt was of no help to the contention that these partners were employers.

The argument for treating the partners as employers hinged on the assumption that they did not need the protection of anti-discrimination laws because they had recourse under partnership law. *Id*. at 704. As Judge Posner articulated, the reasons for exempting partnerships from anti-discrimination laws are: partnership law gives partners effective remedies against their fellow partners; partnership relations would be poisoned if partners could sue each other for unlawful discrimination; and the relationship among partners is so intimate that they should be allowed to discriminate. *Id*. at 702. The *Sidley* case ultimately resolved with the entry of a consent decree whereby the firm paid $27.5 million to the former partners. The consent decree included an injunction barring the law firm from

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any "formal or informal policy or practice" requiring retirement as a partner once an individual reached a certain age and a provision that "Sidley agrees that each person for whom the EEOC has sought relief in this matter was an employee" for the purposes of the ADEA.

EEOC v. Kelley Drye: Post-Recession ADEA Enforcement

In 2010, the EEOC filed a lawsuit against Kelley Drye, alleging that the firm discriminated against Eugene T. D'Ablemont and similarly situated attorneys by allowing their continued practice at the firm only on the condition that they give up their ownership interest and be compensated through discretionary bonuses. In pursuing this case, the EEOC announced its intention to enforce the ADEA in law firms. The EEOC's acting chairman at the time the suit was filed, Stuart J. Ishimaru, stated, "This lawsuit should serve as a wake-up call for law firms to examine their own practices to ensure they comport with federal law."

The case ultimately resolved with the entry of a consent decree in April 2012. Notably, unlike in the *Sidley* case, Kelley Drye denied and continued to deny in the consent decree that its partners were "employees" for purposes of the ADEA. The firm had already amended its partnership agreement shortly after the filing of the suit to eliminate the status of "Life Partner," the role occupied by partners at the firm once they turned 70. A permanent injunction was entered, preventing the firm from:

- Involuntarily terminating, expelling, retiring, reducing the compensation of, or making other adverse changes to an individual's status with the firm because of age;
- Maintaining any formal or informal compensation policy or practice that provides for compensation for attorneys being involuntarily reduced based on their age;
- Maintaining any formal or informal policy or practice requiring involuntary retirement of a partner or requiring relinquishment of an attorney's partnership status as a condition of continued employment once the partner has reached a certain age;
- Requiring attorneys to cease their service involuntarily on any committee of the firm or any practice group because of age; and
- Taking any action, or maintaining any policy or practice, with the purpose of retaliating against any person because the person has made any formal or informal complaint about, or has taken any action to oppose, any of the conduct alleged by EEOC in this case to violate the ADEA, or any conduct that is prohibited by the decree.

Additional conditions of the settlement required distribution of the consent decree to each partner and the continued conspicuous display of the "EEO is the Law" poster outlining relevant antidiscrimination measures. Each partner is required to complete a two-hour training on the ADEA as well as other federal anti-discrimination laws. In addition to this training, members of the firm's executive committee will have a one-hour training session with a special emphasis on the ADEA. To compensate D'Ablemont for his services, the firm agreed to pay $574,000 in back pay and 12% of fees collected for designated client matters going forward. The consent decree is effective for three years and requires the firm to provide the EEOC with a written report containing a summary of each complaint of age discrimination every six months. While the consent decree remains in effect, the EEOC may monitor the firm's compliance through inspecting records and interviewing witnesses.

A press release concerning the settlement of the case against Kelley Drye suggests that the EEOC will continue to pursue similar claims against partnerships with mandatory retirement ages. "Our strong enforcement of the Age Discrimination in Employment Act is critical to ensuring that workplaces are free from discrimination," said EEOC General Counsel P. David Lopez. Jeffrey Burstein, EEOC Trial Attorney in the EEOC's New York District Office, stated, "I urge other law firms to assess their retirement policies."

Expected Changes to Retirement Ages

EEOC v. Kelly Drye was filed amidst a global recession, during which many law firms chose to de-equitize underperforming partners in an effort to save money. If, as seems likely, additional cases concerning mandatory retirement ages in partnerships are filed, courts will take a hard-nosed look at the ways in which those firms are governed, how partners are compensated, and the partners' stake in the firm when deciding whether they qualify has employees for the purposes of federal anti-discrimination law. As law firms and other professional firms stray from the traditional forms of partnership and move closer to a purely corporate structure, they risk losing the status that insulates them from liability under the ADEA and other anti-discrimination laws. Of course, that is not necessarily a bad thing. Global practices are *de rigueur* these days for law, finance, accounting, and other professional firms. It is unlikely that firms will forego growth and profits to maintain more traditional aspects of partnership. It remains to be seen how firms with hundreds of partners can operate efficiently without the type of executive committee that Judge Posner viewed as akin to a corporate board.

Finally, by abolishing mandatory retirement, whether voluntarily or in anticipation of litigation, firms will retain some of their most experienced, knowledgeable, and profitable members. Mandatory retirement may have outlived its usefulness as individuals live and work longer, a reality that merits legal recognition and protection.

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Disability-Related Misconduct

Part One of a Two-Part Article

By Andrew A. Nicely

The Americans with Disabilities Act (ADA) protects persons with disabilities from discrimination at the hands of employers, educational institutions, public accommodations, and state and federal facilities. One feature that renders the ADA unique among anti-discrimination measures is that, in addition to proscribing adverse actions on the basis of a person's membership in the protected class, the statute requires covered parties to provide reasonable accommodations for disabled individuals under certain circumstances. Since its enactment in 1990, the statute has posed a number of interpretive challenges for those seeking to comply with its mandates, including what it means to be "disabled," and the extent to which a particular accommodation is "reasonable" under the circumstances. One question that many courts have grappled with is whether and to what extent accommodations must be made for a disabled person who engages in misconduct as a result of his or her disability. This article examines the divergent approaches that courts have taken in their resolution of that issue.

Overview of the ADA Requirements for Employers

In the employment context, the ADA prohibits discrimination against a "qualified individual on the basis of disability." 42 U.S.C. § 12112(a). A person has a "disability" if she has "a physical or mental impairment that substantially limits one or more major life activities ... ; a record of such an impairment; or [is] ... regarded as having such an impairment." 42 U.S.C. § 12102(1). A person is "qualified" for employment if she "with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. § 12111(8). Employers are required to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A). Whether a particular accommodation is reasonable depends on a variety of factors; employers are not obligated to offer accommodations that would involve the creation of a new position, the retention of a second employee to supervise the disabled worker, or that would otherwise impose an undue hardship on the company. *See Id*.

Disciplining Disabled Employees

It is the prerogative of business owners to establish policies and rules governing the conduct of their personnel. Often, misconduct in violation of the company's rules may result in termination. When the misbehaving individual is disabled, however, an employer must consider two questions. First, is the employee otherwise qualified for the job? Second, assuming that the rule violations are a manifestation of a disability, is there some accommodation that could be made that would allow the person to fulfill the essential functions of her position?

The ADA, as interpreted by the EEOC and as applied by the courts, affords no protection to employees who engage in four types of misconduct: that related to the consumption of illegal drugs (on the job or off the job), misconduct caused by alcoholism or the consumption of alcohol, misconduct attributed to a condition that is not recognized as a disability under the ADA, and threats or acts of violence.

Drug Users

The EEOC's Technical Assistance Manual to Title I of the ADA provides that "an individual who is currently engaging in the illegal use of drugs is not an 'individual with a disability'" and, accordingly, an employer "may discharge or deny employment to" or otherwise take adverse action against the person. *See* EEOC Technical Assistance Manual: Title I of the ADA § 8.2 (Jan. 1992); *see also Id*. § 8.3. This rule applies with equal force to employees who suffer from a recognized disability, even if the disability is identified by the employee as the root cause of his or her decision to use illegal drugs. *See Fahey v. City*, No. 10-civ-4609, 2012 WL 413990 (E.D.N.Y. Feb. 7, 2012) (rejecting ADA claim of firefighter who tested positive for cocaine use, notwithstanding evidence that the plaintiff developed Post-Traumatic Stress Disorder as a result of his experience working at Ground Zero during the 9/11 terrorist attacks). An employer may not, however, discriminate against a drug addict who no longer is using drugs.

Employees with Certain Psychological Disorders

The ADA excludes from the definition of "disability" a number of psychological conditions and disorders, including transvestism, trans-sexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders that are not the result of a physical impairment, other sexual behavior disorders, compulsive gambling, kleptomania, and pyromania. *See* 42 U.S.C. §§ 12208, 12211(b). Because these are not "disabilities" for ADA purposes, employees who engage in conduct or other manifestations of one of these conditions have no recourse under the ADA if they are terminated on that basis.

Alcoholics

Alcoholics stand on a somewhat higher footing under the ADA. The EEOC's Technical Assistance Manual provides that "[a] person who is an alcoholic *is* an 'individual with a disability'" for ADA purposes. Technical Assistance Manual § 8.2 (emphasis added). Thus, an employer may not discriminate against a person merely because he is an alcoholic. However, companies are not

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obligated to exempt alcoholics from performance standards or personnel policies. Instead, the Technical Assistance Manual recognizes that "[e]mployees who use drugs or alcohol may be required to meet the same standards of performance and conduct that are set for other employees." *Id*. Furthermore, "[a]n employer may discipline, discharge or deny employment to an alcoholic whose use of alcohol impairs job performance or conduct to the extent that s/he is not a 'qualified individual with a disability.'" *Id*.

Violent Employees

Courts have not hesitated to hold that a fourth category of employees — those who commit violent acts or threaten to do so — are outside the protections of the ADA, even if their behavior is related to or caused by a disability. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 78-79 (2002) (holding that disabled employees are not otherwise qualified for employment if they present a "direct threat" to their own health and safety or that of others). In some jurisdictions, the employer bears the burden of establishing that the employee's threatening behavior cannot be reasonably accommodated. That burden, where it exists, is easily met. In *Bodenstab v. Cnty. of Cook*, 569 F.3d 651 (7th Cir. 2009), cert. denied 130 S. Ct. 1059 (2010) (Mem.), for example, the Seventh Circuit held that the defendant county had no obligation to accommodate an employee who announced that he was going in for some medical tests and that, if he were found to have metastatic cancer, he might return to work and "take some people with [him]." *Id*. at 658 (internal quotation marks omitted); accord *Palmer v. Circuit Court of Cook Cnty.*, 117 F.3d 351, 353 (7th Cir. 1997) (holding that the duty to accommodate disabled employees does not "run[] in favor of employees who commit or threaten to commit violent acts"). And in *Newland v. Dalton*, 81 F.3d 904 (9th Cir. 1996), the Ninth Circuit had no difficulty concluding that the defendant employer was entitled to terminate an employee who went on a "drunken rampage" with a firearm at a local bar. *Id*. at 906.

Part Two of this article will discuss disciplining disabled employees.

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The Litigation

Unhappy with that turn of events, Gerner filed a claim with the EEOC alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended. In short, Gerner alleged that the County did not offer her the same "sweetheart" severance package it offered to other similarly situated male counterparts when the County sought to terminate their employment. Gerner alleged that prior male department directors, including employees who were not meeting performance expectations, were transferred to positions with less responsibility while being allowed to continue their salary and benefits, and were kept on the payroll with benefits for up to six months or more to enhance their retirement benefits. Gerner identified four specific male comparators whom she claimed were treated more favorably than was she.

The County moved to dismiss Gerner's complaint making two primary arguments. The first was that the severance offer did not constitute an actionable adverse employment action that would trigger a violation under Title VII. The second was that Gerner's complaint failed to describe adequately the male comparators whom she claimed were treated more favorably. The trial court agreed with the County and summarily dismissed Gerner's complaint.

The Appeal

In considering this novel issue, the Fourth Circuit first began with review of the specific language of Title VII, which prohibits an employer from discriminating against "any individual" with respect to compensation, terms, conditions or privileges of employment because of such individual's … gender. To establish a *prima facie* case of gender discrimination, the employee must show: 1) Membership in a protected class; 2) Satisfactory job performance; 3) Adverse employment action; and 4) That similarly situated employees outside the protected class received more favorable treatment.

The district court dismissed Gerner's complaint because it believed that she failed to allege a "factual basis" for the third element, that is, that she failed to allege an adverse employment action. The district court found that the County's offer of a less favorable severance package did not constitute an adverse employment action for two reasons. First, the court held that the severance benefit offer must be a "contractual entitlement" to provide the basis of an adverse employment action under Title VII. Second, the court held that because the offer of the severance package was made after Gerner had been terminated, it could not constitute an adverse employment action.

The Fourth Circuit considered and rejected both of those conclusions. Relying on an earlier Supreme Court decision, *Hishon v. King and Spalding*, 467 U.S. 69 (1984), the Fourth Circuit rejected the notion that an employment benefit must be a contractual right in order for its denial to provide the basis of a Title VII claim.

In *Hishon*, the Supreme Court held that any benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all. Thus, even though the County was not obligated to offer any severance benefits to Gerner, when it decided to do so, it could not offer Garner a lesser benefit

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because of her gender, than what it offered to her male comparators.

Regarding the second claim, that Gerner was no longer an employee when the severance was offered, the Fourth Circuit had little difficulty resolving that issue. As the Fourth Circuit noted, according to the timeline offered by Gerner, at the Dec. 15, 2009, meeting, County officials informed her that her position was being eliminated, but offered to permit her to resign with three months' severance pay and health benefits if she signed a waiver of claims against the County.

Gerner also alleged that the County permitted her to consider the offer until Dec. 21, 2009, and that she did so and then rejected the offer. Only after she refused the County's offer of severance, did the County terminate her employment, making the termination retroactive to Dec. 15, 2009. On these allegations, it is hard to establish that Gerner had been terminated before the severance benefits were offered.

Moreover, even if Gerner had been terminated, that fact would not bar her claims. Under Title VII, it is unlawful for an employer to discriminate against "any individual" on the basis of membership in a protected class. The courts have consistently interpreted this intentionally broad language to apply to potential, current and past employees. Thus, as a former employee, Gerner could still press her Title VII claims. (*Karla Gerner v. County of Chesterfield, Virginia*, Fourth Circuit No. 11-1218, Decided March 16, 2012.)

Bottom Line

This is an interesting decision because it highlights difficulties an employer faces when deciding on the appropriate severance that should be awarded to a departing employee in exchange for a release of claims. Often, when employers are considering this issue, they necessarily focus on the risk that the departing employee may present in the event of litigation. The riskier the case, the more generous the severance benefits.

This decision adds a new wrinkle to that consideration because it highlights the fact that employers must not only figure out the appropriate severance to offer so that the employee accepts it, they must also make sure that the offer to that particular employee is not deemed discriminatory by another employee whose termination may not present as much of a risk to the employer.

One way to avoid this vexing problem is simply to use a set formula to provide a certain amount of severance benefits based on years of employment, salary level or job title. However, by following such a set, lockstep approach, you may lose your flexibility to fashion an appropriate severance package to deal with a particularly risky termination.

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comparators' conduct was at least as serious as the plaintiff's conduct.

The Seventh Circuit also held that the plaintiff presented sufficient evidence of pretext to avoid summary judgment. The court noted that a plaintiff alleging discrimination may rely on comparator evidence to both establish a *prima facie* case of discrimination and show pretext. Accordingly, the plaintiff could also use the comparator evidence to show that USPS's proffered reason for firing her was a pretext. The court added that there was not enough evidence for USPS to conclude that the plaintiff's statements constituted a true threat or that she posed a danger. Ms. Coleman's statements were made during a counseling session, and the psychiatrist indicated that Ms. Coleman was not a threat to others when she released her to return to work. If the employer had legitimate concerns it could have subjected Ms. Coleman to a fitness for duty exam. Accordingly, the plaintiff was able to show that USPS's justification was a pretext, and the Seventh Circuit reversed summary judgment on the discrimination claim.

In a short concurring opinion, Judge Wood expressed her concern over the "snarls and knots" currently facing courts and litigants when deciding discrimination cases. *McDonnell Douglas's* original intent was to "simplify the plaintiff's task in presenting [a discrimination] case." But Judge Wood noted that since *McDonnell Douglas*, the methods for deciding discrimination and retaliation claims have become complicated. Not only is there now a direct and indirect method for proving discrimination, but also a "direct method [that] permits proof using circumstantial evidence," which requires courts "to see if a 'convincing mosaic' can be assembled" to show direct discrimination. Additionally, as noted in the majority opinion, in indirect discrimination cases, evidence of a *prima facie* case of discrimination (such as comparator evidence) is "equally helpful for showing pretext."

Frustrated with the varied methods for deciding discrimination claims, Judge Wood went on to question the utility of the *McDonnell-Douglas* framework. While Judge Wood noted that "[p]erhaps *McDonnell Douglas* was necessary nearly 40 years ago, when Title VII litigation was still relatively new in the federal courts," now, "the various tests that we insist lawyers use have lost their utility."

Judge Wood proposed a new summary judgment standard for deciding employment discrimination and retaliation claims that requires the plaintiff to "present evidence showing that she is in a class protected by the statute, that she suffered the requisite adverse action (depending on her theory), and that a rational jury could conclude that the employer took that adverse action on account of her protected class, not for any non-invidious reason."

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Analysis

Despite Judge Wood's concurrence, *McDonnell Douglas* will likely remain the standard for deciding indirect discrimination claims. Any positive aspects of Judge Wood's proposed summary judgment standard are far exceeded by *McDonnell Douglas's* precedential value.

Judge Wood's proposed standard is not without merit. As she noted in her concurrence, similar standards are already being used by courts to decide direct and indirect discrimination cases at the trial stage. For example, the Seventh Circuit's pattern jury instructions require the plaintiff to "prove by a preponderance of the evidence that he was [discriminated against] by the Defendant because of his [protected class]." Fed. Civ. J. Instructions of the Seventh Circuit, § 3.01 (2009). This trial stage standard is not unlike Judge Wood's proposed summary judgment standard, suggesting that courts would easily adapt to the new standard. And the proposed standard is a simpler method for deciding discrimination claims. Rather than forcing courts and litigants to determine the appropriate discrimination standard for a particular case, the standard would apply to both indirect and direct discrimination claims. The shorter three-part test would also allow courts to focus on the central issue of whether the plaintiff could convince a rational jury that she suffered adverse employment action because of her protected status.

However, despite the simplicity of the proposed standard, there is still reason for *McDonnell Douglas* to endure. First, *stare decisis* requires lower courts to follow Supreme Court precedent. When this presumption is coupled with the nearly 40 years of case law interpreting *McDonnell Douglas*, the possibility that courts will abandon the framework because a simpler standard is proposed seems unlikely. Moreover, there would be nothing to prevent courts from complicating Judge Wood's proposed standard over time as they have with *McDonnell Douglas*.

Additionally, as noted, Judge Wood's motivation for proposing this new standard was not to repair the current *McDonnell Douglas* standard. Instead, she sought to simplify a working standard. Because the current framework functions properly, there is no reason for courts to abandon *McDonnell Douglas*.

Furthermore, the concurrence is not binding authority and has not affected the manner in which courts decide indirect discrimination claims. As noted above, the majority in *Coleman* applied *McDonnell Douglas*. And the Seventh Circuit has continued to apply the *McDonnell-Douglas* framework in indirect discrimination cases, even in cases where the circuit court has acknowledged flaws with the current standard. *See Good v. Univ. of Chicago Med. Ctr.*, 11-2679, 2012 WL 763091 (7th Cir. Mar. 12, 2012) (noting that the "direct and indirect methods for proving and analyzing employment discrimination cases … have become too complex, too rigid, and too far removed from the statutory question of discriminatory causation," but applying *McDonnell Douglas* to decide against the plaintiff in a reverse racial discrimination claim). *See also Luster v. Ill. Dept. of Corrections*, 652 F.3d 726 (7th Cir. 2011) (acknowledging that the framework is not perfect but noting that McDonnell Douglas "remains the law of the land for handling cases without direct evidence of discrimination").

Broadened Scope

Confirming that *McDonnell Douglas* remains good law, two circuit courts recently expanded its scope to apply to ADEA and FMLA claims. Earlier this year, the Sixth Circuit decided *Donald v. Sybra*, 667 F.3d 757 (6th Cir. 2012), in which it affirmed the district court's use of *McDonnell Douglas* to decide the defendant's summary judgment motion in an FMLA interference claim. Although the Sixth Circuit had not explicitly applied *McDonnell Douglas* to an FMLA interference claim in the past, the court noted that it had "effectively adopted the *McDonnell Douglas* tripartite test without saying as much." Accordingly, the Sixth Circuit held that *McDonnell Douglas* was the correct test for the district court to use when deciding the defendant's summary judgment motion.

Likewise, the Ninth Circuit recently affirmed that the burden-shifting framework applies to age discrimination claims. *See Shelley v. Geren*, 666 F.3d 599 (9th Cir. 2012). Though the Ninth Circuit had not considered whether *McDonnell Douglas* continued to apply to ADEA claims following the Supreme Court's decision in *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), in line with several other circuit courts, the Ninth Circuit held that "nothing in *Gross* overruled our cases utilizing this framework to decide summary judgment motions in ADEA cases." Accordingly, the court affirmed that *McDonnell Douglas* applies in age discrimination cases.

Therefore, although Judge Wood's concurrence may appeal to some, employers and employment attorneys can assume that it is unlikely that courts will cease using *McDonnell Douglas* to decide indirect discrimination cases in the near future. Even those courts that have questioned *McDonnell Douglas's* utility, like the Seventh Circuit, acknowledge that they are required to apply *McDonnell Douglas*. And with a consensus among the circuit courts that *McDonnell Douglas* remains effective, there is no reason to believe that the Supreme Court will overturn the framework any time soon. But should other circuit courts begin to question the utility of *McDonnell Douglas*, the Supreme Court may eventually grant *certiorari* to reconsider whether it remains the appropriate test.

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