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Gorsuch Would Lay McDonnell Douglas Test To Rest

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With one of the judges in our Tenth Circuit Court of Appeals now officially nominated to the U.S. Supreme Court, we expect to continue being bombarded with questions about him. Most recently, we were asked, "What effect will Judge Neil Gorsuch have on employment law?" Knowing his opinions, we can safely say that — if Judge Gorsuch has his way — the McDonnell Douglas test will be laid to rest.


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The McDonnell Douglas test is a framework used in employment discrimination cases to determine whether an employee has offered sufficient circumstantial evidence to allow the claim to survive summary judgment and proceed to trial. The test is named after the U.S. Supreme Court opinion in which it was created — McDonnell Douglas Corp. v. Green.[1] The McDonnell Douglas test is bedrock employment law doctrine. It is to employment law what Socrates is to philosophy. And Judge Neil Gorsuch, President Donald Trump's nominee to fill Justice Antonin Scalia's vacancy on the U.S. Supreme Court, is not a fan of the test.[2]

Judge Gorsuch of the U.S. Court of Appeals for the Tenth Circuit is perhaps best known for his lyrical, straightforward and folksy writing style. He is a conservative textual originalist in the tradition of Justice Antonin Scalia.

Gorsuch's interpretation of employment law doctrines, including Title VII of the Civil Rights Act of 1964 and 1991, the Americans with Disabilities Act, and the Family Medical Leave Act, do not fit neatly within either a conservative or liberal ideology. A review of Gorsuch's employment law cases shows he applies the law fairly and consistently utilizing a direct writing style that is easy to comprehend for lawyers and non-lawyers alike. For example, Gorsuch's opinions have both affirmed and reversed summary judgment to employers.[3] He has affirmed successful-employee trial verdicts and awards of attorneys' fees.[4] His opinions have also tackled multiple issues of first impression in the Tenth Circuit including interpreting the 2009 Lilly Ledbetter Fair Pay Act's ambiguous phrase "discrimination in compensation."[5] He also authored the Tenth Circuit's opinion concluding that plaintiffs may not maintain an employment discrimination action under Title II of the ADA, a conclusion followed by other circuit courts.[6] Each of Gorsuch's employment law opinions is nuanced, well-reasoned, and an example of a judge fulfilling his duty to apply the law to the facts.

Gorsuch's employment law opinions are remarkable, however, for their apparent disdain for the

McDonnell Douglas burden-shifting framework. The U.S. Supreme Court decided McDonnell Douglas Corp. v. Green[7] in 1973. There, the court established the test for plaintiffs who lack direct evidence of discrimination. The court stated that under this test, a plaintiff has the initial burden of establishing a prima facie case of discrimination. To do this, the plaintiff, an employee or applicant, must show:

> (i) she belongs to a protected class, such as a racial minority or a qualified individual with a disability; (ii) that she was qualified for the employment benefit at issue; (iii) she suffered an adverse employment action; (iv) she was treated less favorably than others outside her protected class.

If the plaintiff can meet this relatively easy burden, the burden then shifts to the employer to articulate a "legitimate, nondiscriminatory reason" for the adverse employment action. If the employer does that, the burden then shifts one final time to the employee, who has to show that the employer's proffered reason is false or "pretext" for discrimination.

Judge Gorsuch's criticism of McDonnell Douglas began in 2009, shortly after he was appointed to the bench. Writing for the Supreme Court in Paup v. Gear Prods,[8] a case arising under the Age Discrimination in Employment Act, Judge Gorsuch reluctantly applied the McDonnell Douglas framework. He noted that he was "obliged to apply the McDonnell Douglas framework" because "McDonnell Douglas of course remains binding on us."[9] He criticized the test for "improperly diverting attention away from the real question posed by the ADEA — whether age discrimination actually took place — and substituting in its stead a proxy that only imperfectly tracks that inquiry."[10] In his application of the test, Gorsuch concluded that the plaintiff (under the unusual facts of the case) had presented enough circumstantial evidence to survive summary judgment.[11]

In 2014, Judge Gorsuch renewed his criticism in Barrett v. Salt Lake County.[12] There, the plaintiff helped a colleague successfully pursue a sexual harassment claim. In response, the employer demoted the plaintiff and hired a new employee to take his old job. Barrett sued the county, arguing that his demotion was retaliatory and violated Title VII of the Civil Rights Act of 1964. After a jury found for the plaintiff, the employer argued that it was entitled to judgment as a matter of law because the plaintiff did not prove at trial the various things required to make out a "prima facie case of retaliation" under McDonnell Douglas. Judge Gorsuch described the county's argument as "ambitious," noting that McDonnell Douglas "plays no role in assessing post-trial" motions and "questioned whether McDonnell Douglas ... continues to be helpful enough to justify the costs and burdens associated with its administration."[13]

Just last year, Judge Gorsuch took a more direct shot at McDonnell Douglas in Walton v. Powell.[14] There the defendant employer asked the Tenth Circuit to adopt the McDonnell Douglas framework in First Amendment retaliation claims. Judge Gorsuch identified multiple reasons why any expansion of McDonnell Douglas was a poor idea. First, he concluded that "tide of authority runs strongly against it" because neither the Tenth Circuit nor the Supreme Court has ever applied McDonnell Douglas to a First Amendment retaliation claim. Second, Gorsuch admitted that neither court had been asked directly to apply McDonnell Douglas to First Amendment cases, but he thought it was "notable that not a single judge in any of these cases expressed a yearning for McDonnell Douglas."

Gorsuch continued to criticize the test noting that it possessed "limited value even in its native waters" and was properly relegated to circumstantial evidence summary judgment cases. Gorsuch openly questioned whether McDonnell Douglas is relevant at all. He wrote:

> And still then, in the narrow remaining class of (summary judgment, circumstantial-proof) cases, it may be that McDonnell Douglas is properly used only when the plaintiff alleges a "single" unlawful motive — and not "mixed motives" — lurking behind an adverse employment decision. A potentially crippling limitation given that Title VII's statutory language doesn't ever require plaintiffs to establish more than mixed motives to prevail. Indeed, given so many complications and qualifications like these, more than a few keen legal minds have questioned whether the McDonnell Douglas game is worth the candle even in the Title VII context ... [15]

Gorsuch is hardly alone in his criticism of McDonnell Douglas. The Honorable Diane Pamela Wood, Chief Judge for the U.S. Court of Appeals for the Seventh Circuit dedicated an entire concurrence to criticizing the "snarls and knots" of McDonnell Douglas.[16] Ironically, Chief Judge Wood was a potential President Obama appointee to fill the Supreme Court position ultimately filled by Justice Sonia Sotomayor.

Gorsuch is not the only critic of McDonnell Douglas. But as a potential Supreme Court Justice, he may become one of the first critics of the test to be in a position to actually change or eliminate it. Gorsuch has never stated how he would revise (or replace) the McDonnell Douglas test. Any revision of McDonnell Douglas, however small, would cause a significant change in how employment discrimination lawsuits are prosecuted and defended.

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[1] McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

[2] Gorsuch reached the same conclusion as the United States Supreme Court's conservative majority in the Hobby Lobby craft stores contraception case. Compare Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1157 (10th Cir. 2013); with Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (U.S. 2014).

[3] Young v. Dillon Cos., 468 F.3d 1243, 1246 (10th Cir. 2006) ("Our review confirms that, on the limited record developed by plaintiff during discovery, entry of summary judgment was appropriate."); Orr v. City of Albuquerque, 531 F.3d 1210, 1212 (10th Cir. 2008) ("After a thorough review of the record in this case, we find the evidence sufficient that a reasonable jury could find defendants' explanation pretextual and infer discriminatory animus on the basis of pregnancy. Accordingly, we reverse and remand this matter for trial."); Montes v. Vail Clinic, Inc., 497 F.3d 1160, 1162 (10th Cir. 2007) (affirming grant of summary judgment to employer); Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079, 1083(10th Cir. 2007) (affirming in part and reversing in part district court's grant of summary judgment); Johnson v. Weld County, 594 F.3d 1202, 1206 (10th Cir. 2010) (affirming summary judgment to employer).

[4] Barrett v. Salt Lake County, 754 F.3d 864, 866 (10th Cir. 2014) (affirming district court's denial of employer's post-trial motion for judgment notwithstanding the verdict and affirming vast majority of attorney's fee award).

[5] Almond v. Unified Sch. Dist. #501, 665 F.3d 1174, 1175 (10th Cir. 2011).

[6] See Elwell v. Okla. ex rel. Bd. of Regents of the Univ. of Okla., 693 F.3d 1303, 1305 (10th Cir. 2012); Brumfield v. City of Chicago, 735 F.3d 619, 630 (7th Cir. 2013) (following Elwell); Reyazuddin v. Montgomery Cnty., 789 F.3d 407, 420 (4th Cir. 2015) (following Elwell)

[7] McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

[8] Paup v. Gear Prods., 327 Fed. Appx. 100 (10th Cir. 2009).

[9] Id. at 113.

[10] Id.

[11] Id. at 113-114; see also Hinds v. Sprint/United Mgmt. Co., 523 F.3d 1187, 1202 n. 12 (10th Cir. 2008) (noting the Court will apply the test "so long as McDonnell Douglas remains the law governing our summary judgment analysis").

[12] Barrett v. Salt Lake County, 754 F.3d 864 (10th Cir. 2014); see also Wilkins v. Packerware Corp., 260 Fed. Appx. 98, 106 (10th Cir. 2008) ("In doing so, we readily acknowledge that Mr. Wilkins is correct that we have previously criticized charging a jury on the intricacies of McDonnell Douglas 'jargon.'").

[13] Id. at 867 ("Some of our colleagues have highlighted just this point and questioned whether McDonnell Douglas, even if now relegated largely to summary judgment, continues to be helpful enough to justify the costs and burdens associated with its administration.").

[14] Walton v. Powell, 821 F.3d 1204, 1210-1211 (10th Cir. 2016).

[15] Id. (Citations Omitted).

[16] Coleman v. Donahoe, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, C.J. concurring) ("I write separately to call attention to the snarls and knots that the current methodologies used in discrimination cases of all kinds have inflicted on courts and litigants alike. The original McDonnell Douglas decision was designed to clarify and to simplify the plaintiff's task in presenting such a case. Over the years, unfortunately, both of those goals have gone by the wayside.").
