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Labor Law -- Civil Rights Act of 1964 -- Burden of Proof in Employment Discrimination Cases -- McDonnell Douglas Corp. v. Green

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recordings unprotected by uniform federal law. Unfortunately, in attempting to undermine the distasteful business of tape piracy, the Court set aside sound legal reasoning for a cause that, to be handled properly, required legislative attention and revision of the federal Copyright Act to include sound recordings explicitly within its scope. Effective relief will come only when Congress decides to assert its full power in the copyright field, by enacting a permanent version of its tape piracy statute. At that time, the *Goldstein* decision will admittedly be rendered moot with respect to tape and sound recordings. However, it will remain a misguided precedent for future cases regarding state protection of federally unprotected classes of writings.

SUSAN KAGAN LANGE

Labor Law—Civil Rights Act of 1964—Burdens of Proof in Employment Discrimination Cases—*McDonnell Douglas Corp. v. Green.* [1]—Percy H. Green, a black mechanic, was hired by the McDonnell Douglas Corporation in 1956. In 1963, Green requested and was granted a transfer to a position as a laboratory technician—a position with no union security—in the aircraft manufacturing plant in St. Louis. In 1964, Green was laid off along with a number of other workers from his department as a result of a decrease in work load.

Green had been active in the civil rights movement during his tenure with McDonnell Douglas. He protested his discharge as being racially motivated to the President's Commission on Civil Rights; the United States Departments of Justice, the Navy, and Defense; and the Missouri Commission on Human Rights. During late 1964 and 1965, Green protested McDonnell Douglas' allegedly racially discriminatory hiring practices as a member of CORE and ACTION, two civil rights groups. The protests included picketing the home of James F. McDonnell, chairman of the board of McDonnell Douglas; a "stall-in" which blocked the main highway access route to the McDonnell Douglas plant by means of parking rows of cars in the road; and a "lock-in" during which certain McDonnell Douglas employees were locked into a downtown St. Louis office building

field open in view of contemplated major reforms of the Copyright Act in the near future. Yarnell, supra note 121, at 242. However, Justice Douglas concluded that, notwithstanding the strong drive for federal protection of sound recordings, Congress was reluctant to enact this amendment for more than a limited trial period in which this new monopoly approach could be considered. 412 U.S. at 574 (dissenting opinion).

[1] 411 U.S. 792 (1973). The statement of facts presented in this note is digested from the Supreme Court opinion, id. at 794-98; the circuit court opinion, 463 F.2d 337, 338-40 (8th Cir. 1972); and the district court opinion, 318 F. Supp. 846, 847-50 (E.D. Mo. 1970).

housing their offices. As a result of the "stall-in," plaintiff's car was towed and he pleaded guilty to the charge of obstructing traffic. Although during the "lock-in" plaintiff was not physically involved in chaining the door, he testified to the district court that he approved the action.

On July 26, 1965, Green responded to an advertisement run in the St. Louis newspapers the previous day seeking applicants for the position of electric mechanic. McDonnell Douglas refused to hire him, although the company "never has disputed [his] technical ability to perform the work required in that position."[2]

On September 14, 1965, Green filed a complaint with the Equal Employment Opportunity Commission (EEOC). He charged that McDonnell Douglas refused to hire him "because of [his] race and because of [his] persistent involvement in the Civil Rights Movement."[3] The EEOC found reasonable cause to believe that McDonnell Douglas had refused to employ Green because of his involvement in civil rights activities, in violation of Title VII of the Civil Rights Act of 1964.[4] The EEOC made no finding as to Green's claim of racial bias, also prohibited by Title VII.[5]

After EEOC conciliation efforts failed, the EEOC informed Green that he had a right to institute action in federal court.[6] On April 15, 1968, Green filed a complaint in the United States District Court for the Eastern District of Missouri, charging McDonnell Douglas with denying him employment "because of his involvement in civil rights activities."[7] On March 20, 1969, Green attempted to amend his complaint to include racial bias as a reason for McDonnell Douglas' refusal to rehire. On motion of defendant, the amended portion was stricken and dismissed.[8] The court held that there is no federal jurisdiction over a ground for complaint when the EEOC has made no finding as to reasonable cause with respect to that ground.

The case was then tried on the issue of whether McDonnell Douglas had refused to rehire plaintiff because of his civil rights activities. The district court held:

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[2] 463 F.2d at 339.

[3] Id.

[4] Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (Supp. II 1972), provides in pertinent part: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . ."

[5] Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1970), provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

[6] 42 U.S.C. §§ 2000e-5(f)(1), (3) (Supp. II 1972).

[7] 318 F. Supp. at 847.

[8] 299 F. Supp. 1100 (E.D. Mo. 1969).

> (a) Plaintiff has not shown that defendant was motivated by racial prejudice or because of plaintiff's legitimate civil rights activities. . . .
>
> (c) The Civil Rights Act does not protect activity which blocks entrance into or from an employer's plant or office.
>
> (d) Defendant's refusal to reemploy plaintiff was based on plaintiff's misconduct, which justified the refusal to rehire.[9]

Green appealed to the United States Court of Appeals for the Eighth Circuit, claiming (1) that the trial court erred in determining that participation in the "stall-in" and "lock-in" did not fall within the protection of the Civil Rights Act, and (2) that the trial court erred in striking his claim of racial bias against McDonnell Douglas.[10] The court of appeals upheld the lower court's disallowance of Green's claim of discrimination on the basis of his participation in civil rights activities, stating that "an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer."[11] However, the appellate court also held that the trial court had erred in striking Green's claim of racial bias, as an EEOC finding of reasonable cause is not a jurisdictional prerequisite to a civil action in federal court for employment discrimination.[12] The court therefore remanded the case for a full consideration of Green's claim of racial bias.

The United States Supreme Court granted certiorari[13] "[i]n order to clarify the standards governing the disposition of an action challenging employment discrimination . . . ."[14] The Court's opinion in *McDonnell Douglas,* written by Justice Powell, establishes new standards of proof for cases of employment discrimination. The opinion also sets forth the requirements for action by the Equal Employment Opportunity Commission in order to establish federal jurisdiction in a case of alleged employment discrimination. Furthermore, the opinion modifies the standards laid down in *Griggs v. Duke Power Co.*[15] as to what will constitute a valid justification for an employer's refusal to hire. The Court, vacating the court of appeals' judgment and remanding for further consideration, HELD:

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[9] 318 F. Supp. at 851. The court's conclusion "(b)" dealt with plaintiff's claim that his original layoff was also racially motivated, a claim which the district court found barred by the statute of limitations. This issue will not be discussed further in this note.

With regard to conclusion "(a)," query why the court, having stricken Green's amended count as to racial bias, then commented upon the merits of this charge in the opinion.

[10] 463 F.2d at 340.

[11] Id. at 353 (revised opinion).

[12] Id. at 342.

[13] 409 U.S. 1036 (1972).

[14] 411 U.S. at 798.

[15] 401 U.S. 424 (1971).

In a case of employment discrimination under the Civil Rights Act, the plaintiff bears the initial burden of establishing a prima facie case. In order to establish a prima facie case of racial discrimination, the complainant must establish:

> (i) that he belongs to a racial minority;
> (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
> (iii) that, despite his qualifications, he was rejected; and
> (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[16]

The burden then shifts to the defendant, who must establish a "legitimate, nondiscriminatory reason" for plaintiff's rejection.[17] The plaintiff must then be granted an opportunity to prove that defendant's stated reason is merely a pretext.[18] The Court also held that the absence of an EEOC finding of reasonable cause does not defeat federal jurisdiction in cases of alleged racial discrimination in employment.[19]

This note will discuss the shifting burdens of proof in employment discrimination cases, as set forth by the Court in *McDonnell Douglas*. The new standards established by the Court for proving a prima facie case and for rebutting such a case will be examined. The Court's creation of a third step in the chain of proof will then be discussed and criticized. Finally, this note will examine the Court's elimination of the necessity of an EEOC finding on each charge in order for the federal courts to exert jurisdiction in cases of alleged employment discrimination.

As is true in the usual civil action, the burden of going forward with evidence in employment discrimination cases rests initially with the plaintiff. If the plaintiff successfully shows all four required elements, as set out above, he has established a prima facie case of racial discrimination. Such criteria do not include a burden on the plaintiff to prove any element of intent to discriminate on the part of the employer.[20]

In prior cases charging employment discrimination, the courts have often placed the burden on the plaintiff to establish by a

[16] 411 U.S. at 802 (outline form supplied).

[17] Id.

[18] Id. at 804.

[19] Id. at 798.

[20] The requirement of intent has been all but eliminated in case law preceding *McDonnell Douglas*. In Papermakers Local 189 v. United States, 416 F.2d 980, 996 (5th Cir. 1969), the court said: "[T]he statute [the Civil Rights Act] . . . requires only that the defendant meant to do what he did, that is, his employment practice was not accidental." Accord, Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970); United States v. Local 357, IBEW, 356 F. Supp. 104, 117 (D. Nev. 1973); United States v. Central Motor Lines, Inc., 338 F. Supp. 532, 559 (W.D.N.C. 1971).

preponderance of the evidence that the employer has discriminated.[21] Some courts have gone so far as to require the plaintiff to prove by a preponderance of the evidence that the employer has discriminated *intentionally*.[22] The Court in *McDonnell Douglas* required much less of the plaintiff: merely that he prove the factual framework which would lead to a conclusion of racial discrimination. The Court's recitation of necessary elements substantially echoes the finding of the court of appeals in this case that "[w]hen a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job, . . . he presents a prima facie case of racial discrimination . . . ."[23]

One might predict that since the requirements of making out a prima facie case of racial discrimination have become easier to meet, dozens of employers will be subject to actions alleging racially discriminatory employment practices. But the Court has kept the adversary relationship balanced in that the requirements for the employer to rebut the prima facie case have also been eased. Once the plaintiff has established the elements of a prima facie case, the burden then shifts to the employer to set forth some "legitimate, nondiscriminatory reason" for his rejection of the plaintiff.[24] In this case, the Court found that McDonnell Douglas' stated reason for not rehiring Green—that is, participation in illegal demonstrations against the corporation—was reasonable and nondiscriminatory. "We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination."[25]

While adequately deciding the case before it, the Court failed to establish any guidelines as to what constitutes a "legitimate, nondiscriminatory reason," thereby diminishing the precedential value of the decision. Justice Powell said: "We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire."[26] The Court relied on *NLRB v. Fansteel Metallurgical Corp.*,[27] a case brought under the National Labor Relations Act, in order to substantiate the contention that an employer need not "absolve and rehire one who has engaged in . . . deliberate, unlawful activity against it."[28] But the Court would not decide whether unlawful activity in and of itself can serve as a "legitimate, nondiscriminatory reason" for

[21] See, e.g., Dewey v. Reynolds Metals Co., 429 F.2d 324, 328 (6th Cir. 1970); Ochoa v. Monsanto Co., 335 F. Supp. 53, 59 (S.D. Tex. 1971); Barnes v. Lerner Shops, Inc., 323 F. Supp. 617, 620 (S.D. Tex. 1971). See also *McDonnell Douglas*, 463 F.2d at 343.

[22] See, e.g., Frockt v. Olin Corp., 344 F. Supp. 369, 370 (S.D. Ind. 1972); Andres v. Southwestern Pipe, Inc., 321 F. Supp. 895, 898 (W.D. La. 1971).

[23] 463 F.2d at 344.

[24] 411 U.S. at 802.

[25] Id. at 803.

[26] Id. at 802-03.

[27] 306 U.S. 240, 255 (1939), quoted in *McDonnell Douglas*, 411 U.S. at 804.

[28] 411 U.S. at 803.

respondent's refusal to rehire: "We need not consider or decide here whether, or under what circumstances, unlawful activity not directed against the particular employer may be a legitimate justification for refusing to hire."[29] Thus, although it is clear that the standards articulated by the Court in this case have changed the previous standards for rebutting a prima facie case of employment discrimination, it is more difficult to determine precisely what the new standards are.

The Eighth Circuit in *McDonnell Douglas* applied traditional standards in ruling that the burden was on the employer "to demonstrate a substantial relationship between the reasons offered for denying employment and the requirements of the job."[30] This is what has usually been required of the employer in the past—to articulate some "business necessity" which required him to apply a particular standard (*e.g.*, requirement of a high school diploma, or disqualification of anyone with a criminal record) to all potential employees or employees eligible for promotion.[31] The burden of persuasion was on the defendant to demonstrate "that the adverse action was based on business necessity, was carefully tailored to the precise peculiarities of the immediate situation, and did not involve any residual elements of the operation of a discriminatory system."[32]

In addition to articulating a legitimate business necessity, the employer had to show that he had applied such qualifications to all employees equally.[33] For instance, if a corporation could prove that the position was of such a nature that it demanded employees who were free from any past convictions, this standard would have to be applied to all white applicants as well as to black applicants.

The case which has provided much of the precedent in the area of "business necessity" as a justification for what might otherwise be labeled discriminatory hiring practices is *Griggs v. Duke Power Co.*[34] In *Griggs,* the question before the Court was whether requirements of standardized tests and a high school diploma as requisites for employment or promotion, which requisites tend generally to operate against the employment and promotion of blacks, are discriminatory. The Court concluded that such tests are outlawed by Title VII unless it can be shown that they are "a reasonable measure of job performance."[35] This case was discussed by the Supreme Court in *McDonnell Douglas.*[36] However, the Court failed to recognize the significant relationship between the two cases. It is

[29] Id. at 803 n.17.

[30] 463 F.2d at 344.

[31] See cases discussed in text at notes 34-35, 39-46 infra.

[32] Blumrosen, Strangers in Paradise: *Griggs v. Duke Power Co.* and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59, 87 (1972).

[33] See, e.g., Richardson v. Hotel Corp. of America, 332 F. Supp. 519, 521 (E.D. La. 1971).

[34] 401 U.S. 424 (1971).

[35] Id. at 436.

[36] 411 U.S. at 805-06.

submitted that the *McDonnell Douglas* decision in fact broadens the scope of what is declared a legitimate reason sufficient to rebut a prima facie case of discrimination under *Griggs*.

The Court in *McDonnell Douglas* first tried to discount the precedential value of *Griggs* for the instant case:

> The court below appeared to rely upon *Griggs v. Duke Power Co.*, . . . in which the Court stated: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." . . . But *Griggs* differs from the instant case in important respects. . . . [In the instant case, respondent] had engaged in a seriously disruptive act against the very one from whom he now seeks employment. And petitioner does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee. Petitioner assertedly rejected respondent for unlawful conduct against it and, in the absence of proof of pretextual or discriminatory application of such a reason, this cannot be thought the kind of "artificial, arbitrary, and unnecessary barriers to employment" which the Court found to be the intention of Congress to remove.[37]

After laboriously distinguishing *McDonnell Douglas* from *Griggs*, the Court then went on to find that even if one were trying to measure the facts of the instant case against the standards of *Griggs*, the results would be the same: "[I]n this case, given the seriousness and harmful potential of respondent's participation in the 'stall-in' and the accompanying inconvenience to other employees, it cannot be said that petitioner's refusal to employ lacked a rational and neutral business justification."[38] If the facts of *McDonnell Douglas* cannot be judged by *Griggs* standards, why did the Court deliberately attempt to bolster its decision by fitting the facts into a *Griggs* "business necessity" test? It is submitted that what the Court was doing in *McDonnell Douglas* was altering the standards set out in *Griggs* by broadening their scope; why it was reluctant to admit this is a mystery. The decision in *McDonnell Douglas* drastically changes the concept of "business necessity" and opens up new areas for reasonable justification of refusal to hire.

The "business necessity" test enunciated in *Griggs* was applied and refined in a series of cases prior to *McDonnell Douglas*. In

[37] Id. (citations omitted).

[38] Id. at 806 n.21.

Richardson v. Hotel Corp. of America,[39] the court upheld a policy which made necessary the discharge of a black bellhop who, it was discovered, had a previous conviction of theft. The court agreed that a hotel manager is justified in refusing employment to one convicted of theft where the employee in the course of employment will have access to the valuable property of others. The court said:

> Furthermore, the evidence demonstrates that the policy followed with respect to the plaintiff has been followed with regard to white bellmen. . . . Because of this, it may be concluded that the discharge of the plaintiff was not the result of an artificial, arbitrary or unnecessary barrier, but resulted instead from a genuine business need.[40]

In another major case in the progression of case law defining the concept of "business necessity," *Robinson v. Lorillard Corp.,*[41] the court narrowed the scope of what will constitute "business necessity":

> [T]he business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.[42]

In *Rowe v. General Motors Corp.,*[43] the plaintiffs successfully challenged racially discriminatory practices in promotion and transfer. The court in *Rowe* stated:

> The *only* justification for standards and procedures which may, even inadvertently, eliminate or prejudice minority group employees is that such standards or procedures arise from a non-discriminatory legitimate business necessity. . . .
>
> It is clearly not enough under Title VII that the procedures utilized by employers are fair in form. These procedures must in fact be fair in operation.[44]

Similar reliance was placed on the "business necessity" test in *Dorcus v. Westvaco Corp.*[45] and *Davis v. Washington.*[46]

[39] 332 F. Supp. 519 (E.D. La. 1971).
[40] Id. at 521.
[41] 444 F.2d 791 (4th Cir. 1971).
[42] Id. at 798 (footnotes omitted).
[43] 457 F.2d 348 (5th Cir. 1972).
[44] Id. at 354-55 (emphasis in original) (citations omitted).
[45] 345 F. Supp. 1173 (W.D. Va. 1972).
[46] 352 F. Supp. 187 (D.D.C. 1972).

It is clear that the courts have imposed their own interpretation on the test enunciated in *Griggs* as to what will justify refusal to hire. The only justification for standards or qualifications which tend to operate disproportionately against black applicants seeking employment, promotion or transfer is an "overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."[47]

It is doubtful whether the Court in *McDonnell Douglas* could realistically have accepted the qualification against hiring Green as falling under the "business necessity" exception. The Court attempted halfheartedly to fit the facts into such a framework,[48] but because this was not the true basis for the decision, it failed to do so convincingly. It is submitted that what the Court was really doing was expanding the allowable justifications for employment decisions which may appear to discriminate against blacks beyond the narrow ground of "business necessity."

What the Court has said implicitly in *McDonnell Douglas* is that even if the employer should decide to implement as an employment policy the disqualification of any applicant who has provably participated in an illegal demonstration against the company, this qualification would be justifiable and would successfully rebut the plaintiff's prima facie case, *not* on the grounds of business necessity, but because it is a "legitimate, nondiscriminatory reason." Unfortunately, the Court has not gone far enough with this new interpretation. It has articulated no guidelines as to what factors, in future cases, will successfully meet the test of a legitimate nondiscriminatory reason. It is conceivable that nearly any requirement could be justified by a legitimate nondiscriminatory reason, but one would presume that the Court did not intend to include any and all requirements set up by employers. The standards have most definitely been changed, but only future decisions will determine to *what* they have been changed.

Another significant change articulated by the Court is the addition of another step in the trial process. After the employer has rebutted the employee's prima facie case, the inquiry does not end. According to the Court, the employee must then be afforded a fair opportunity to show that the employer's stated reasons are, in fact, merely a pretext to cover up racial discrimination.[49] The Court suggested certain criteria for examination in order to determine whether the reason given in this case was pretextual: whether the standard (here refusal to hire one who has participated in illegal demonstrations which threaten to disrupt the operation of the employer) was applied to all employees equally; the employer's record of treatment of the employee during his term of prior employment;

[47] *Robinson*, 444 F.2d at 798.

[48] See 411 U.S. at 806 n.21, quoted in text at note 38 supra.

[49] Id. at 804.

the employer's response to the employee's participation in *legal* demonstrations; and the employer's general policy with regard to minority employment.[50]

In contrast to the framework used by the *McDonnell Douglas* Court, the following two-pronged approach to examination of the charge was used in *Witherspoon v. Mercury Freight Lines, Inc.*:[51]

> [1] The plaintiff made out a prima facie case of discrimination by the above evidence.
>
> [2] The burden of proving absence of discrimination moved to defendant, which attempted to explain on the ground of business necessity, stating that long haul drivers must have personalities, age, family, and health backgrounds different from city drivers. But these factors are not shown to have been applied to the plaintiff or to other black applicants.[52]

In *Witherspoon,* the question of whether the reason given by the employer is pretextual seems to be raised as a consideration in the weight to be placed on the employer's rebuttal. In *McDonnell Douglas,* on the other hand, proof that the employer has used a pretext becomes a separate act in the play, an element as indispensable to the proper conduct of the trial as proof of a prima facie case.

It is submitted that the establishment of this new step in the trial process is wholly unnecessary. The first step is for the plaintiff to put forth a prima facie case of racial discrimination. It is then up to the defendant to articulate "some legitimate, nondiscriminatory reason for the employee's rejection."[53] Inherent in articulating a legitimate nondiscriminatory reason is the elimination of all doubt that such reason is pretextual or manufactured. If the burden of proof is on the defendant to prove a legitimate nondiscriminatory reason in order to rebut the plaintiff's case, then obviously he must convince the court that his reason is both legitimate and nondiscriminatory. "Legitimate" is defined by Webster's Third New International Dictionary as "genuine."[54] If the defendant satisfies the court that his reason was a genuine nondiscriminatory reason, then he has proven ipso facto a nonpretextual reason.[55] Since the Court is

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[50] Id. at 804-05.

[51] 457 F.2d 496 (5th Cir. 1972).

[52] Id. at 498 (outline form supplied).

[53] 411 U.S. at 802.

[54] Webster's Third New International Dictionary of the English Language 1291 (P. Gove ed. 1963).

[55] In Taylor v. Safeway Stores, Inc., 6 FEP Cas. 556 (D. Colo. Sept. 18, 1973), the court followed the sequence of proof outlined in *McDonnell Douglas.* In *Taylor,* the plaintiff made out a prima facie case; the defendant overcame the force of the prima facie case by articulating a "legitimate, nondiscriminatory reason" in his rebuttal; then the court found that the defendant's reason was pretextual in the third stage of the case. It is submitted that in such a case, the defendant has never successfully met his burden of rebuttal; he failed at the second phase of the case, not at some contrived third step.

apparently not using "legitimate" in the sense of "genuine," it seems that the term has been rendered totally meaningless by the Court's procedural arrangement. Giving the plaintiff an additional opportunity to challenge this reason is superfluous, since the plaintiff has had an opportunity to cross-examine during the second phase of this process. Moreover, the creation of this third step shifts the burden of proof to the plaintiff. It is submitted that for several reasons the burden should be on the defendant to prove the legitimacy of his reason to the court's satisfaction during his rebuttal case.

First, the type of proof that one would need to assert that the reason enunciated is pretextual—that is, statistics on minority employment or files on specific employees—is clearly more easily available to the defendant than to the plaintiff. It is much easier for the defendant to prove that his reason is nonpretextual by exhibiting his records for minority hiring for the past few years than it is for the plaintiff to discover one fact that will assure the court the reason is pretextual.

In addition, the purpose of the Civil Rights Act would seem to be not only to assure employees of access to the federal courts with their complaints, but also to assure them of affirmative relief where discrimination has taken place. By relieving the defendant of the burden of proving that his reason is not makeshift, the Court is leaving him with no burden at all. In order to rebut, he must merely come up with any reason which can be found legitimate and nondiscriminatory, even if that reason is a sham, for it is now the plaintiff's responsibility to prove that it is a sham.

Another important holding of *McDonnell Douglas* is that the failure of the EEOC to find reasonable cause to believe that a violation of the Civil Rights Act has occurred does not defeat federal jurisdiction. Under the statutory scheme set up in the Civil Rights Act,[56] the plaintiff must first make his complaint to the Equal Employment Opportunity Commission (EEOC). The EEOC is then afforded an opportunity to investigate the charges informally. The Commission then decides whether or not there is reasonable cause to believe that the charges are true.

If the EEOC finds reasonable cause, there is a mandatory period during which the EEOC is expected to attempt to eliminate the alleged discriminatory practice through "conference, conciliation, and persuasion."[57] If the EEOC finds no reasonable cause, the complaint is dismissed.

It is clear from the statute that after the conciliation period, if the EEOC has failed to bring a resolution of the problem, either the EEOC, the complainant or in some cases the Attorney General may sue in a United States district court.[58] As long as the charge was

[56] 42 U.S.C. § 2000e-5(b) (Supp. II 1972).
[57] Id.
[58] 42 U.S.C. §§ 2000e-5(f)(1), (3) (Supp. II 1972).

properly filed initially, *even if the complaint was dismissed by the EEOC,* the plaintiff still has this right.[59]

In *McDonnell Douglas,* the district court dismissed Green's complaint of racial discrimination in McDonnell Douglas' hiring procedure because the EEOC made no finding as to reasonable cause.[60] The Eighth Circuit remanded the case for full trial on this charge, holding that an EEOC finding of reasonable cause is not a prerequisite to establishing federal jurisdiction.[61]

The point of contention arises because although the statute spells out clearly the rights of complainants where the EEOC has found reasonable cause and where the EEOC has found no reasonable cause, the statutory language makes no mention of the eventuality that the EEOC makes no finding on the charge at all, as occurred in this case. However, there is no reason to treat the Commission's failure to make a finding any differently than a Commission finding of no reasonable cause. The reasoning of the Fifth Circuit in *Beverly v. Lone Star Lead Construction Corp.*[62] would seem equally applicable here:

> We are convinced that Congress did not intend to make the EEOC final arbiter of complainants' rights. . . . The Commission is neither required nor physically able to conduct an "in depth" investigation in every case . . . . We will not permit the single finding of this investigatory agency to stand as a complete defense which precludes all hope of adversary adjudication or remedial action in the courts.[63]

In fact, courts in the past have permitted suits in cases where the EEOC has made no finding on the charge of discriminatory practices.[64]

What the Supreme Court has done in *McDonnell Douglas* is to

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[59] 42 U.S.C. § 2000e-5(f)(1) (Supp. II 1972) provides in part:

> . . . If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. . . .

42 U.S.C. § 2000e-5(f)(3) (Supp. II 1972) provides in part: "Each United States district court . . . shall have jurisdiction of [such actions]. . . ."

[60] 298 F. Supp. at 1102.

[61] 463 F.2d at 342.

[62] 437 F.2d 1136 (5th Cir. 1971).

[63] Id. at 1138, 1141.

[64] See, e.g., Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969); Lowry v. Whitaker Cable Corp., 348 F. Supp. 202 (W.D. Mo. 1972); cf. Johnson v. Goodyear Tire & Rubber Co., 349 F. Supp. 3 (S.D. Tex. 1972).

make it more difficult for plaintiffs to successfully prove charges of discriminatory employment practices. Although the Court reduces the requirements for establishing a prima facie case, at the same time it opens up a whole new area of grounds that will serve to rebut such a prima facie case. Whereas in the past the defendant had to prove some business necessity in order to rebut a prima facie case of discrimination, now any legitimate nondiscriminatory reason will do. The Court is reluctant to describe its holding as broadening the standards articulated in *Griggs;* but that is exactly what it has done. The scope of "legitimate, nondiscriminatory, reason[s]" is much broader than that of "business necessity."

In addition, the Court has now put the burden of proof of the issue of pretext on the plaintiff instead of on the defendant. If the Court is going to demand proof of a legitimate nondiscriminatory reason as rebuttal, then it is submitted that the question as to whether there has been any pretext should arise there; the defendant should have the burden, in his rebuttal, of proving that his reason is nonpretextual as an element of the legitimacy of that reason. The *McDonnell Douglas* Court, in establishing a whole new step in the trial procedure, has significantly increased the plaintiff's burden of proof.

The Court in *McDonnell Douglas* has also committed a serious omission in declining to establish any guidelines for what will serve as a "legitimate, nondiscriminatory reason." This omission will undoubtedly create snarls of litigation in attempts to establish just what the Court really meant. Of course, it is impossible to provide for all eventualities in the potential employment discrimination suits which may arise. But it is submitted that the Court should have been somewhat more specific than simply enunciating the standards of "legitimate" and "nondiscriminatory;" it should have articulated some guidelines for interpreting these standards.

The decision in *McDonnell Douglas* has grave implications. Any step which makes it more difficult for plaintiffs to hold employers accountable for discriminatory employment practices is an unwelcome one. The congressional intent of Title VII of the Civil Rights Act of 1964 has been interpreted as encouraging ordinary citizens to act as private attorneys general in rooting out discrimination wherever they might experience it.[65] The prospect of decreased chances for success in this effort frustrates that intent.

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[65] See LeBlanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602, 611 (E.D. La. 1971).