

# The Legal Intelligencer

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## 3rd Circuit Rejects Heightened Test In Reverse Discrimination Lawsuit

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*Special to the Legal*

In the case of *Iadimarco v. Runyon*, 190 F.3d 151 (3rd Cir. 1999), the 3rd Circuit recently ruled that white, male plaintiffs who file claims of reverse discrimination under Title VII will be required to demonstrate the same prima facie case as members of a minority group.

In this decision, the 3rd Circuit rejected the so called "background circumstances" test, which requires a plaintiff to demonstrate that the defendant is the "unusual employer" who discriminates against the majority, in order to state a prima facie case. By rejecting this test, the court refused to accept a standard which would heighten the level of scrutiny for such plaintiffs under Title VII.

As a result of this opinion, the 3rd Circuit is now in conflict with other circuits regarding the appropriate standard for stating a prima facie case of reverse discrimination. This state of affairs beckons the Supreme Court to revisit Title VII's framework in order to clarify the procedures to be applied in such cases.

To better understand the significance of *Iadimarco* — which results in an egalitarian approach for all Title VII plaintiffs, regardless of racial classification — a review of the historical development of the "background circumstances" test is necessary.

### "BACKGROUND CIRCUMSTANCES" TEST

Because direct proof of discriminatory

animus rarely exists, the Supreme Court fashioned a method for Title VII plaintiffs to demonstrate a claim through the use of indirect circumstantial evidence. This framework was originally laid out in the seminal case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

As applied to a refusal-to-promote case, a plaintiff carries an initial burden under Title VII of showing that: (i) he belongs to a racial minority; (ii) he applied and was qualified for the position sought; (iii) he was rejected despite being qualified for the position; and (iv) that after rejection, the employer held the position open and continued to seek other applicants.

After a prima facie case is established, "the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." If the employer meets its burden, then the employee has the final opportunity to show that the proffered reason was pretextual.

Notwithstanding its apparent clarity, confusion has resulted in reverse discrimination cases with regard to the first prong of *McDonnell Douglas*, which requires a plaintiff to be a member of a minority group.

Although the Supreme Court has since ruled that persons of all race are afforded protection under Title VII, some circuits have acknowledged that, on its face, the first prong is not applicable to reverse discrimination cases. This paradoxical result has caused the 7th, 10th and D.C. circuits to adopt the "background circumstances" test in an attempt to resolve the confusion

regarding the first prong of the *McDonnell Douglas* standard.

Accordingly, in the reverse discrimination case of *Parker v. Baltimore and Ohio R.R. Co.*, 652 F.2d 1012 (D.C. Cir. 1981), the District Circuit held that a plaintiff may "rely on the *McDonnell Douglas* criteria to prove a prima facie case of intentional disparate treatment when background circumstances support the suspicion that the defendant is that unusual employer who discriminated against the majority." See also *Mills v. Health Care Serv. Corp.*, 171 F.3d 450 (7th Cir. 1999); *Reynolds v. School Dist No. 1*, 69 F.3d 1523 (10th Cir. 1995).

The 10th Circuit, which has likewise adopted the test, has applied the belief that it is proper to adjust the prima facie case in reverse discrimination cases because "...the presumptions in [a] Title VII analysis...are valid when a plaintiff belongs to a disfavored group [and] not necessarily justified when the plaintiff is a member of an historically favored group." *Livingston v. Roadway Express Inc.*, 802 F.2d 1250,1252 (10th Cir. 1986).

In the case of *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993), the court delineated two categories of background circumstances which would suffice for purposes of a prima facie case. A plaintiff could produce evidence demonstrating that the employer is the type that is inclined to discriminate invidiously against whites or evidence which raises an inference that there is something "fishy" about the facts of the case. The *Harding* Court said that such evidence could include schemes to fix performance ratings,

a “rigged” hiring system, a departure from usual procedures or being passed over despite superior employment qualifications.

## **IADIMARCO V. RUNYON**

In *Iadimarco*, the plaintiff filed a reverse discrimination case against his employer, the U.S. Postal Service, after being denied certain promotional opportunities. He claimed that the employer selected a minority candidate who possessed lesser job qualifications for a position.

In his prima facie case, the plaintiff produced evidence that the decision makers were African-American and that the employer had previously distributed a memo suggesting that diversity in promotions was encouraged. The plaintiff argued that the diversity memo was “smoking gun” evidence of reverse discrimination.

The trial court noted that other courts, including courts within the 3rd Circuit, have embraced the “background circumstances” test in reverse discrimination cases. Opting to apply this standard, the trial court rejected the plaintiff’s claims based upon a finding that the evidence constituted insufficient background circumstances for purposes of the prima facie case.

The court ruled that under the test, the memo did not create a suspicion that the requisite background circumstances existed due to the fact that it was merely a restatement of the Civil Service Reform Act. The fact that the decision-makers were minorities was also of no import to the court’s analysis. The trial court’s ruling, which dismissed the plaintiff’s case, was subsequently appealed to the 3rd Circuit.

In reviewing the trial court’s rationale, the Appellate Court first noted that the *McDonnell Douglas* test, requiring proof that the person is a minority, was created within the historical context of the civil rights movement. The court also said that the *McDonnell Douglas* analysis “...stems from congressional efforts to address the nation’s history of discrimination against racial minorities, a legacy of racism so entrenched that we presume acts, otherwise unexplained, embody its effect.”

The appellate court reasoned that the *McDonnell Douglas* test should not be altered to incorporate the “background circumstances” test in reverse discrimination

cases. Therefore, it was rejected by the 3rd Circuit.

The court noted the developments in the 6th Circuit, which did adopt the test, but subsequently rejected its reasoning because it imposed a more onerous standard on white, male plaintiffs than members of a minority group. In that case the court stated: “[w]e have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are [w]hite or male than for their non-[w]hite or female counterparts.”

Refusing to adopt a heightened level of scrutiny, the 3rd Circuit said that “...all that should be required to establish a prima facie case in the context of ‘reverse discrimination’ is for the plaintiff to present sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon a trait that is protected under Title VII.”

According to the 3rd Circuit, this is the appropriate expression for the first prong.

The 3rd Circuit noted that other courts profess that the “background circumstances” test does not make the pursuit of reverse discrimination cases more arduous for plaintiffs. To that end, a variety of courts have reasoned that the test does not preclude a majority plaintiff from producing direct evidence of discrimination, thereby eschewing the need for the *McDonnell Douglas* framework. Some courts have also reasoned that the test can be satisfied even where “background circumstances” can not be shown, if the plaintiff “...has established a logical reason to believe that the [employer’s] decision rests on a legally forbidden ground.” *Carlson v. Bethlehem Steel Corp.*, 82 F.3d 157 (7th Cir. 1996)(per curiam).

That, by itself, can shift the burden to the defendant to prove that the adverse job action was legitimate and non-discriminatory. With deference to the reasoning of the other circuits, the *Iadimarco* court nevertheless rejected the test.

The 3rd Circuit also rejected the test because it viewed the standard as being “vague” and “ill-defined.” Reviewing other case law, the court noted that it was nearly impossible to define “background circumstances” in a way which is “...neither under nor over inclusive, and possible to satisfy.”

Another reason for rejecting the test cen-

ters on the potential for jury confusion. According to the court, a Title VII plaintiff “...needs only to present sufficient evidence to allow a fact finder to conclude that the unexplained decision that forms the basis of the allegation of discrimination was motivated by discriminatory animus.”

The court reasoned that evidence of “background circumstances” would typically be introduced at the pretext stage. This would in essence require the plaintiff to produce evidence of pretext at the outset of the case, to merely substantiate the first prong of the *McDonnell Douglas* standard. Requiring a plaintiff to proffer evidence of the employer’s decision-making process is unfair at that early stage because such evidence is not typically in the hands of the plaintiff prior to discovery, the court held.

In conclusion, the *Iadimarco* court rejected the adoption of the “background circumstances” test and held that the plaintiff did present a prima facie case, thereby permitting him to proceed with his cause of action.

## **SUPREME COURT REVIEW**

The schism which now exists within the circuit courts of appeals begs the Supreme Court to revisit the mechanics of *McDonnell Douglas* as applied to reverse discrimination cases. Should the Supreme Court take that opportunity, it will have to address a number of fundamental issues.

It is arguable that pre-*Iadimarco* rulings have made it more difficult for a plaintiff to pursue a reverse discrimination case under Title VII. Thus, the Supreme Court is faced with the challenge of reconfiguring the framework in a way that is fundamentally fair to the majority and is not offensive to the rights of members of a minority group.

The position taken by the 3rd Circuit should cause the Supreme Court to give consideration to the *Iadimarco* opinion and to adopt standards which are equal for all Title VII plaintiffs. Simply requiring that a plaintiff show only that he was treated less favorably than others because of a trait protected by Title VII would preserve the remedial purpose of the legislation — to eradicate all discrimination regardless of the race of the plaintiff.