

THURSDAY, FEBRUARY 8, 2024

PERSPECTIVE

Disability discrimination: testing is not always required

By JJ Johnston

Few employers would ever admit that they actually took an adverse action against an employee because that worker happened to be part of a protected class. However, without such an admission or other clear and convincing evidence that the discipline, demotion or termination was, in fact, tied to the employee's protected status, it can be challenging for plaintiffs to pursue employment discrimination claims.

The best these plaintiffs can usually do in such cases is to present circumstantial evidence in support of claims that the termination or other negative action was primarily attributable to their race, sex, religion, disability, or other protected status. They may need to jump through some hoops before they can introduce their circumstantial evidence, however. Among those hoops is a requirement that they pass a three-part test that is used to determine whether there is actually a basis for letting them prove discrimination through circumstantial evidence.

But if a discrimination claim can be proven through direct evidence, there is no need for the three-part test. For discrimination claims that are based on an employee's disability, the test is, in many instances, completely unnecessary. So before automatically invoking the three-part test, counsel should review the facts of any disability discrimination case in which they are involved to understand if its application is warranted



Shutterstock

The McDonnell Douglas test

The three-part McDonnell Douglas burden-shifting test derives from the U.S. Supreme Court's decision in *McDonnell Douglas Corp. v. Green* (411 U.S. 792 (1973)). That case involved a claim under Title VII, the federal statute for workplace discrimination and it addressed the handling of claims for which there is no direct evidence of illegal discrimination.

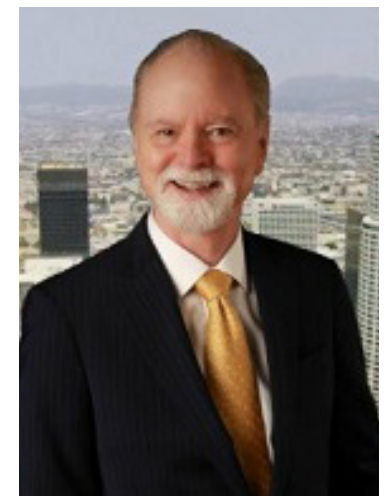
The test involves these steps: (1) the plaintiff making a prima facie showing of employment discrimination, (2) the employer producing a legitimate reason for the adverse employment action, and (3) the burden shifting back to the plaintiff to prove intentional discrimination by offering evidence of

the employer's discriminatory motive, which can include attacking the employer's proffered reasons as pretexts for discrimination.

Essentially, once a plaintiff shows that the discrimination occurred, the employer can provide a non-discriminatory reason for its action. It will attempt to show by clear and convincing evidence that it would have taken the exact same action for a legitimate, independent reason, even if the plaintiff was not a member of a protected class or had not engaged in protected activity.

The employee can still prevail, however, by producing other evidence demonstrating that the ostensible reason was merely a pretext for illegal discrimination.

JJ Johnston is the founder of Johnston Mediation.



If, for example, the employee participated in a work stoppage - as happened in *McDonnell Douglas* - he might be able to present evidence showing that non-minority workers who engaged in the same activity were not terminated or otherwise disciplined.

Disability discrimination

There are often good reasons to apply *McDonnell Douglas* when plaintiffs allege disability discrimination against their employers. The burden-shifting test makes sense when a disabled worker has been terminated and lacks direct proof that his or her disability was the primary reason for the employer's action. The employee can try to establish that the company's stated reason - for example, that the worker couldn't perform the requisite job tasks - was merely a pretext for an illegal act by showing that reasonable accommodations were available and that such accommodations would have enabled him or her to do the job.

But for many disability claims, the *McDonnell Douglas* test is unnecessary and inappropriate. When direct evidence shows discrimination based on disability, there is no reason to work through the test's

three stages. The California Civil Jury Instructions provide clear guidance on the manner in which most of these disability discrimination claims should be handled.

Specifically, the Use Notes for CACI Instruction 2540 explain that even though direct evidence of intentional discrimination is usually hard to come by, this is not generally the case with disability discrimination cases, which "often involve direct evidence of the role of the employee's actual or perceived disability in the employer's decision to implement an adverse employment action."

According to the CACI Instruction, the question to be decided in many disability discrimination cases is not what the employer's reasons were for taking a negative action against a disabled worker but whether effective accommodations were available. The only questions to be answered are (a) whether the employee was able to perform the essential job functions, (b) whether there were reasonable accommodations that would have allowed the employee to perform those functions, and (c) whether a reasonable accommodation would have imposed an undue hardship on the employer.

Case law

In *Wallace v. County of Stanislaus* ((2016) 245 Cal.App.4th 109 [199 Cal.Rptr.3d 462]) an appeals court overturned the trial court's jury instruction requiring proof of animus or ill will on the part of the employer that terminated a disabled employee, holding that the plaintiff "could prove the requisite discriminatory intent by showing his actual or perceived disability was a 'substantial motivating factor/reason'" for the employer's action.

The court said that only where there is "no direct evidence that the adverse employment action taken by the employer was motivated by race, religion, national origin, age or sex," will proof of discriminatory motive be governed by the three-stage burden-shifting test.

Notably, the court distinguished disability cases from other forms of discrimination: "Although the same statutory language that prohibits disability discrimination also prohibits discrimination based on race, age, sex, and other factors, ... disability discrimination claims are fundamentally different from the discrimination claims based on the other factors.... These differences arise because (1) additional statutory provisions apply to disability

discrimination claims, (2) the Legislature made separate findings and declarations about protections given to disabled persons, and (3) discrimination cases involving race, religion, national origin, age and sex often involve pretexts for the adverse employment action - an issue about motivation that appears less frequently in disability discrimination cases."

Conclusion

Instead of automatically applying *McDonnell Douglas* to disability discrimination cases, both courts and counsel should review the facts of the case to determine what reason the employer has given for the termination. If the reason is that the employee could not perform the essential functions of their position with or without a reasonable accommodation, or that it would have posed an undue hardship for the employer to provide an accommodation, then the three-part burden-shifting test simply does not apply. On the other hand, if the employer's stated reason for the termination is unrelated to the disability - for example, the employee was terminated for alleged poor performance - the test must be applied.