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THE SLAP-IN-THE-FACE STANDARD AND EMPLOYER PRETEXT: PLACING LIMITS ON COURT EVALUATION OF EMPLOYEE QUALIFICATIONS

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ABSTRACT

This article discusses and evaluates the standard that has developed in at least five Circuit Courts of Appeal to resolve disputes between employers and employees (or applicants) over qualifications for specific jobs. The standard has become popularly known as the "slap-in-the-face" standard. Following this approach, courts operate under the assumption that, absent clear proof to the contrary, the employer is better suited to evaluate candidate qualifications than the courts, thereby removing the courts from the position of being an *ad hoc* personnel committee.

When an employee or applicant files a claim of unlawful discrimination based on disparate treatment, one of the claims that he or she is likely to proffer as proof of this discrimination is the "fact" that he or she was the most-qualified candidate. In such instances, the employer usually counters that the successful candidate was actually more qualified. When two views of qualifications are presented to a court, is it up to the court to determine which party truly is the most qualified for the job? Does this mean that a jury (or a judge in a bench trial) is expected to sit as an *ad hoc* personnel review committee and second guess an

employer's selection criteria and policies? Since jury trials were authorized for disparate treatment cases under the Civil Rights Act of 1991 [1], juries have now become participants in this dilemma as well. The important question is: How far should judges and juries go in assessing individual qualifications in equal employment opportunity matters? Or, another way of putting it: Just how far may courts go in overriding managerial discretion in making employment decisions?

The purpose of this article is to examine the limitations that have been placed on the ability of courts (judges and juries) to reevaluate employers' business decisions under what is best termed as the "slap-in-the-face" standard. Because this standard has been applied to disparate treatment analysis, the authors provide the reader with a brief review of the analytic framework for evaluating this form of unlawful discrimination. Particular attention is paid to examining the court's role in making determinations of pretextual discrimination. Finally, management practices that would enhance an employer's ability to utilize a slap-in-the-face challenge are presented.

DISPARATE TREATMENT

Under Title VII, there are generally two forms of unlawful discrimination: disparate impact and disparate treatment. Disparate impact is sometimes referred to as *unintentional* discrimination and occurs when a facially-neutral selection requirement (i.e., a college degree, professional certification, test score, etc.) has the effect of excluding a disproportionate number of individuals from a given protected class from further consideration in the selection process [2]. Since this form of discrimination is not germane to our topic, no further discussion is provided. Because the slap-in-the-face standard does not apply to disparate impact, our efforts will focus exclusively on the second form of discrimination, disparate treatment.

Disparate treatment, as the other form of unlawful discrimination, is also actionable under Title VII, and is sometimes referred to as *intentional* discrimination. It is intentional in that the employer's actions are triggered by a desire to deny an individual a tangible job benefit (i.e., hiring, promotion, work assignment, etc.) because of that individual's membership in a protected class (race, color, religion, sex, or national origin). The central issue in disparate treatment litigation is that the complaining party has the burden of demonstrating that the employer's employment action really was motivated by the complaining party's protected class status [3]. The complaining party may accomplish this by offering credible direct or circumstantial evidence of the employer's discriminatory motives. Direct evidence of disparate treatment could be statements by a representative of an employer, corroborated by witnesses, that he or she would not select any individual from the complaining party's protected class. For example, a statement by a manager that "I did not hire the candidate because women lack basic supervisory skills," would be sufficient to establish the employer's discriminatory intent. In

the absence of such direct evidence, the complaining party can still establish a *prima facie* case of unlawful discrimination based on circumstantial evidence. More often than not, disparate treatment is established in this manner.

The method for producing circumstantial evidence was developed in the Supreme Court's decision in *McDonnell Douglas Corp. v. Green* [4]. This case established a three-stage legal analysis that shifts the burden of proof from the complaining party (applicant/candidate) to the respondent (employer) and back to the complaining party again [4, at 802] (see Table 1). First, the complaining party has to establish a *prima facie* case of discrimination. Second, the respondent must articulate a nondiscriminatory reason for his or her action. Third, the complaining party is afforded a final opportunity to prove that the respondent's nondiscriminatory reason is actually a pretext for discrimination [5].

To accomplish the first stage, the *prima facie* case, the complaining party has to meet four criteria: 1) he or she belongs to a class protected under Title VII (race, color, religion, sex, or national origin); 2) he or she suffered an adverse job action (i.e., was not hired, was not promoted, was discharged, was laid off, etc.); 3) he or she was qualified to do the job; and 4) the employer gave more favorable treatment to employees or applicants who were outside the complaining party's protected class, but who also had equal or fewer qualifications than the complaining party [6]. This fourth proof, particularly ". . . had equal or fewer qualifications," is the crux of the slap-in-the-face standard—who is best suited to assess a candidate's qualifications? To carry the burden in establishing a *prima facie* case, the complaining party must be able to convince the fact finder (jury or

Table 1. Three-Stage Analysis of Disparate Treatment

I. Complaining Party's *Prima Facie* Case:
   - A. The complaining party is a member of a protected class.
   - B. The complaining party suffered an adverse employment action.
   - C. The complaining party was qualified.
   - D. An applicant was selected who was outside the complaining party's protected class, but who also had equal or fewer qualifications than the complaining party.

II. Employer's Rebuttal: The employment action was based on legitimate nondiscriminatory reasons.

III. Complaining Party's Rebuttal: The employer's legitimate nondiscriminatory reasons were not true, but were a pretext for discrimination.

Sources: *McDonnell Douglas Corp. v. Green* (1973) [4]; *Texas Dept. of Community Affairs v. Burdine* (1981) [36]; and *St. Mary's Honor Center v. Hicks* (1993) [3].

judge) that his or her qualifications are at least equal to, if not better than, those of the successful candidate. At this stage of the process, this is not a particularly onerous burden. The complaining party has to produce only enough facts to imply that discrimination has occurred [7].

If the complaining party has provided enough circumstantial evidence to establish a *prima facie* case, the issue now proceeds to the respondent's rebuttal. Since the *prima facie* evidence is circumstantial, it has not, of and by itself, established that Title VII *has* been violated, only that it *may have* been violated [8]. The employer is afforded an opportunity to rebut the complaining party's allegations by showing that the employment decision was based on a criterion other than the complaining party's protected class membership. If the employer does not offer a rebuttal (that is, remains silent), the court will be required to enter a judgment for the complaining party [9]. The employer's rebuttal is critical in the court's determination of unlawful discrimination.

In most instances, employers will offer a rebuttal, and a successful rebuttal is accomplished by showing that the selection decision was predicated on some legitimate nondiscriminatory reason [10]. This is not an overly difficult burden for the employer to carry, as the legal standard for a legitimate nondiscriminatory reason requires only that it has to be credible and reasonable [4, at 802]. It does not have to be the best decision, or even a good decision, provided it is not an unlawful decision [11-13].

The potential problem occurs at the next stage of the process, the complaining party's rebuttal. When the complaining party claims that he or she is actually the more-qualified candidate, he or she is alleging that the employer's evaluation of who was the best candidate is a pretext [14]. The word "pretext" means a lie, a phony reason for an action [15]. When "pretext" is applied to unlawful discrimination, it means more than an unusual act, or a poor choice on the part of the employer; "it means something worse than a business error; 'pretext' means deceit used to cover one's tracks" [16, at 1005]. It is pretextual in that the employer is claiming that the decision was based on the evaluation of the candidate's qualifications when it was actually based on his or her race, ethnicity, or sex. The employer is attempting to use a legitimate reason (employee qualifications) as the foundation for an unlawful action (discrimination). What a court is required to determine is not that the employer made a mistake in judgment, but *intended* to discriminate unlawfully.

Herein lies the problem confronting fact finders in resolving any disagreement between the complaining party and employer over qualifications. The complaining party is essentially asking the fact finder to intervene and assume the function of a personnel review board. This process presents no major problems when the complaining party's qualifications are clearly superior to or inferior to those of the candidate who was selected. However, what happens when the differences in qualifications are not so easily discernible? What happens when candidates appear to be closely matched? What happens in those situations in

which disparities in qualifications between the candidates ". . . are not enough in and of themselves to demonstrate discriminatory intent . . .?" [17, at 280].

Under the "slap-in-the-face" standard, it must be shown that the complaining party was *clearly* better qualified than the person the employer selected [18]. As one federal court has already noted, neither judges or juries are ". . . as well suited by training and experience to evaluate qualifications for high level promotion in other disciplines as are those persons who have trained and worked for years in the field of endeavor for which the applications under construction are being evaluated" [19, at 847]. The courts' role is to prevent discriminatory hiring processes, not to "act as a 'super personnel department' that second-guesses employers' business decisions" [20, at 1330]. Accordingly, the complaining party, to convince a court that the employer was motivated by discriminatory animus, must show that he or she was overwhelmingly more qualified than the other candidates [21]. Pretext on the employer's part cannot be established by simply identifying minor differences between the complaining party's qualifications and those of the successful candidate [22]. Pretext is established by showing that the employer's reason for his or her decision was untrue.

THE SLAP-IN-THE-FACE STANDARD

The "slap-in-the-face" standard has been adopted in at least five circuits (see Table 2) as a means of limiting the discretion of fact finders (judges and juries) to impose their evaluation of employee qualifications over that of the employer when determining pretextual discrimination. The standard's purpose is to ensure that the only differences in candidate qualifications that are considered are those that are clearly suspect. The standard gets its peculiar name from a Fifth Circuit decision, *Scott v. University of Mississippi* [23], in which the court held that when juries are called upon to evaluate the relative qualifications of two employees, pretext on the part of the employer cannot be concluded unless disparities in their qualifications "are so apparent as to jump off the page and *slap us in the face*" [23, at 508].

When it comes to examining the employer's articulated nondiscriminatory reason for the action, courts that have adopted this standard have restricted themselves to determining whether the employer gave an honest evaluation for the action, not necessarily the best evaluation [24]. To allow otherwise would elevate the court to serving as a "super-personnel department that reexamines an entity's business decisions" [25, at 464; 26].

Limiting the Role of the Court

"[A]part from searching for discriminatory intent, it is not the function of the jury to scrutinize the employer's judgment as to who is best qualified to fill the position; nor is it the jury's task to weigh the respective qualification of the

Table 2. Federal Circuits that Have Adopted the Slap-in-the-Face Standard

Circuit	States within jurisdiction	Case
2nd	Connecticut, New York, and Vermont	*Byrnie v. Town of Cromwell* (2001) [28]
5th	Louisiana, Mississippi, and Texas	*Edwards v. Principi* (2003) [18]
7th	Illinois, Indiana, and Wisconsin	*Bernales v. County of Cook* (2002) [27]
10th	Colorado, Kansas, Oklahoma, New Mexico, Utah, and Wyoming	*Bullington v. United Airlines, Inc.* (1999) [21]
11th	Alabama, Florida, and Georgia	*Hall v. Alabama Association of School Boards* (2003) [7]

applicants" [17, at 281]. As the Supreme Court noted, juries' duties do not include determining whether the employer's decision was the correct one, or the fair one, or even the best one, only whether the decision was motivated by discriminatory intent [3, at 511]. The jury's duty is to serve as a fact finder, not as an *ad hoc* personnel review committee to which every management decision may be appealed.

The rationale for establishing this standard of analysis lies in the fact that neither judges nor juries are trained in the relevant business or industry to enable them to make an informed assessment of which applicants are truly best qualified [18; 19; 27]. Does a court have sufficient knowledge of a particular industry, its processes, its technologies, its competitive pressures, or its resource constraints to know who in a candidate pool would be the most successful industrial engineer or sales manager? Employers, by virtue of their experiences and expertise, are more qualified for making these decisions, and courts should refrain from second guessing employers on these decisions [17, at 280]. This reality by no means implies that judges and juries should not question the employer's decision, only that their judgment should not override employers except when the complaining party's credentials are so superior to the other candidate's credentials that no reasonable person would have chosen the other candidate [28].

Not all jurisdictions have accepted these premises. Specifically, the Ninth Circuit has declared that it rejects the slap-in-the-face test by stating that "we have *never* followed the Fifth Circuit holding that the disparity in candidates' qualifications must be so apparent as to jump off the page and slap us in the face to support a finding of pretext" [29, at 1194]. As a result, the restrictions imposed

Table 3. Federal Circuits that Have Rejected the Slap-in-the-Face Standard

Circuit	States within jurisdiction	Case
9th	Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington	*Raad v. Fairbanks North Star Borough* (2003) [29]

by slap-in-the-face standards do not apply in the nine states of the Ninth Circuit (see Table 3). It is presumed that, at least in that circuit, courts may more easily impose their evaluations over employers'.

Other Applications of Slap in the Face

The authors do not wish to create the impression that the slap-in-the-face standard of analysis is limited exclusively to Title VII issues arising from disparate treatment. It has also been applied to the Age Discrimination in Employment Act (ADEA), which also follows the three-stage analytic framework of *McDonnell Douglas Corp. v. Green* [4]. The application of the slap-in-the-face standard for disparate treatment analysis for Title VII and the ADEA is identical [19, 23, 30]. In fact, the slap-in-the-face standard could be applied in any situation subject to the disparate treatment analysis. At the time of this writing, however, the slap-in-the-face standard has not been applied beyond these two statutes.

WHAT COURTS SHOULD EVALUATE IN ESTABLISHING PRETEXT

Under disparate treatment, the responsibility of the court is to evaluate the employer's justification for his or her actions to determine whether they are pretextual. Although it is clear, at least in five circuits (the Second, Fifth, Seventh, Tenth, and Eleventh), that some restriction exists in second guessing an employer's business decision, this does not mean that the courts must roll over and play dead. For one thing, those disparities in qualifications that *do* slap them in the face are clearly sufficient to establish pretext.

The application of the slap-in-the-face standard can best be illustrated in the case of *Edwards v. Principi* [18]. The complaining party, an African-American male with a master's degree, had applied for an administrative position. The position in question prescribed duties and responsibilities calling for the incumbent to participate with the supervisor or other managers in reviewing administrative needs of the department. The position was graded at an experience level

requiring the incumbent to handle the departmental budget and provide overall administrative and personnel management. All current employees who met the qualification requirements, which included a master's or equivalent graduate degree or two full years of progressively higher-level graduate experience, were eligible to apply for the position. The complaining party and six other candidates were selected to be interviewed for the position by a panel that consisted of a white male, a white female, and an African-American female, all of whom served in supervisory capacities in the organization.

The panel's selection process involved a review of each candidate's application and a structured interview in which each candidate was asked an identical set of questions. Candidates' responses to questions were independently scored on a scale of one to five. Afterward, all the scores were tabulated independently by each panel member, and composite scores were developed. The complaining party was ranked last among the seven candidates.

The panel selected a white woman for the position. Although she did not have the same level of education as the complainant, the panel concluded that she had more practical experience in administrative support work through her various secretarial and administrative positions with the Veteran's Administration and federal government. All three panelists concluded that while the complaining party was well-educated, he did not possess the same work experience, specifically and directly related to the job in question, that the other candidates did. It was conceded that the complaining party was qualified for the job, but because of his work experience, the successful candidate was *more-qualified.*

When the complaining party initiated Title VII litigation against his employer, he alleged that the panel's justification for selecting the white female was a mere pretext to hide its unlawful discrimination. To this contention, the Fifth Circuit Court of Appeals applied the slap-in-the-face standard, holding that it ". . . has held that in evaluating non-promotion discrimination cases it [the court] will not substitute its own views or judgment for those in an organization who have been charged with the evaluation duty by virtue of their own years of experience and expertise in the field in question, unless the record shows that the plaintiff was clearly better qualified than the chosen candidate" [18, at **8]. Although the record had shown that the complaining party was qualified for the position by his level of education, he was rejected because the panel felt that he lacked the type of work experience the position required. According to the Fifth Circuit Court of Appeals, the complaining party had failed to show that he was clearly the better-qualified candidate. Therefore, the court chose to ". . . not substitute its own judgment for that of the panelists, all of whom possessed multiple years of supervisory and administrative experience in their respective positions . . ." [18, at **8-9].

The courts may also consider other evidence of pretext beyond disparities in applicants' qualifications. There is nothing to preclude fact finders from

considering any "disturbing procedural irregularities" such as the employer falsifying or manipulating decision criteria or altering applicant documents [31]. The courts may also consider evidence of the employer's prior treatment of the complaining party [32]. In some cases, even statistical data may be considered, provided that it shows a pattern of practice directed toward members of a given protected class [33]. It should be noted, however, that in order for statistical data to support a complaining party's pretext burden, there must be a connection between the statistics and the employer's challenged treatment of the complaining party [34].

REDUCING EXPOSURE TO ALLEGATIONS OF PRETEXT

Employers can reduce their exposure to allegations of pretextual discrimination and enhance the possibility of defending their actions under the slap-in-the-face standard by adhering to some basic human resource management principles. Establishing written and objective selection criteria for evaluating candidates is perhaps the best proactive measure. These standards would preclude candidates, judges, and juries from injecting their own subjective opinions as to what constitutes relevant qualifications, because these were clearly delineated by the employer before the selection process began.

Once criteria have been clearly defined, employers must make all the necessary efforts to ensure that those criteria are consistently applied to all candidates [35]. When two, or more, candidates appear to have very similar qualifications, the decision makers should document the reasons for the selection of one candidate over the other. Reasons for concluding one candidate was more qualified or more desirable than another should be carefully explained and committed to writing at the time the selection is made. If allegations are made six to 12 months after the fact, it is unlikely that the decision makers will clearly recall their rationale for making their choice.

CONCLUDING REMARKS

The slap-in-the-face standard is currently recognized in five federal circuits covering 18 states (refer to Table 2). In these jurisdictions, courts are not prohibited from substituting their evaluation of a candidate's qualifications for management's, but may do so only when the disparity in qualifications between the candidates is so apparent that any reasonable person would have chosen the complaining party. Although this slap-in-the-face standard provides some protection for management's prerogative to make decisions that are best for its company, this by no means absolves managers of their obligation to make ethical and legal employment decisions.

If anything, the slap-in-the-face standard creates an incentive for managers to ensure that they base their employment decisions and practices on sound, objective business reasons. Managers need to be aware that courts will not hold them accountable for failing to make the business decision, but they will be accountable if they make unlawful ones.

ENDNOTES

1. Civil Rights Act of 1991, 42 U.S.C. § 1981 (2004).
2. *Raytheon Co. v. Hernandez,* 2003, U.S. LEXIS 8965, 14-16 (December 3, 2003).
3. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 513-514 (1993).
4. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).
5. *Davis v. Chevron Corp.,* 14 F.3d 1082, 1087 (5th Cir. 1994).
6. *Holifield v. Reno,* 115 F.3d 1555, 1561-1562 (11th Cir. 1997)
7. *Hall v. Alabama Association of School Boards,* 326 F.3d 1157, 1166 (11th Cir. 2003).
8. *Teamsters v. United States,* 431 U.S. 324 (1977).
9. *O'Connor v. Consolidated Coin Caterers Corp.,* 517 U.S. 308, 311 (1996).
10. U.S. Equal Employment Opportunity Commission. *Compliance Manual,* Washington, DC: Government Printing Office, 2002.
11. *Sanchez v. Phillip Morris, Inc.,* 992 F.2d 244, 247 (10th Cir. 1993).
12. *Kariotis v. Navistar International Transportation,* 131 F.3d 672, 677 (7th Cir. 1987).
13. *Fischbach v. District of Columbia Dept. of Corrections,* 86 F.3d 1180, 1183 (D.C. Cir. 1996).
14. *Brill v. Lante Corporation,* 119 F.3d 1266, 1273 (7th Cir. 1977).
15. *Russell v. Acme Evans Co.,* 51 F.3d 64, 68 (7th Cir. 1995).
16. *Clay v. Holy Cross Hospital,* 253 F.3d 1000 (7th Cir. 2001).
17. *Deines v. Texas Dept. of Protective and Regulatory Services,* 164 F.3d 277 (5th Cir. 1999).
18. *Edwards v. Principi,* 2003 U.S. App. 23459 (5th Cir. 2003).
19. *Odom v. Frank,* 3 F.3d 839 (5th Cir. 1993).
20. *Simms v. Oklahoma,* 165 F.3d 1321 (10th Cir. 1999).
21. *Bullington v. United Airlines, Inc.* 186 F.3d 1301, 1319 (10th Cir. 1999).
22. *Chock v. Northwest Airlines, Inc.,* 113 F.3d 861, 864 (8th Cir. 1997).
23. *Scott v. University of Mississippi,* 148 F.3d 493 (5th Cir. 1998).
24. *Pollard v. Rea Magnet Wire Co.,* 824 F.2d 557, 560 (7th Cir. 1987).
25. *Dale v. Chicago Tribune Co.,* 797 F.2d 458, 464 (7th Cir. 1986).
26. *Verniero v. Air Force Academy School Dist. No. 20,* 705 F.2d 388, 390 (10th Cir. 1983).
27. *Bernales v. County of Cook,* 37 Fed. Appx. 792 (7th Cir. 2002).
28. *Byrnie v. Town of Cromwell,* 243 F.3d 93, 103 (2nd Cir. 2001).
29. *Raad v. Fairbanks North Star Borough,* 323 F.3d 1185 (9th Cir. 2003).
30. *EEOC v. Louisiana Office of Community Services,* 47 F.3d 1438 (5th Cir. 1998).
31. *Beaird v. Seagate Tech Inc.,* 145 F.3d 1159, 1168 (10th Cir. 1998).
32. *Colon-Sanchez v. Marsh,* 733 F.2d 78, 81 (10th Cir. 1984).
33. *Bruno v. W. B. Saunders Co.,* 882 F.2d 760, 767 (3rd Cir. 1989); *cert. denied,* 493 U.S. 1062 (1995).

34. *Gadson v. Concord Hospital,* 966 F.3d 32, 35 (1st Cir. 1992).
35. U.S. Equal Employment Opportunity Commission, Uniform Guidelines on Employee Selection, 29 C.F.R. § 1607.11 (2004).

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