J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 12(3) 239-247, 2007

THE DEMISE OF THE "SLAP IN THE FACE" TEST: A PROFOUND CHANGE IN ASSESSING PRETEXT OR MERELY A MATTER OF SEMANTICS?

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ABSTRACT

In 2004 the *Journal of Individual Employment Rights* published an article about the "slap-in-the-face" standard for ascertaining employer pretext in disparate treatment cases arising under Title VII of the Civil Rights Act of 1964. In 2006, the Supreme Court of the United States explicitly declared that standard to be impermissible. This paper discusses the changes imposed by the Supreme Court's decision in *Ash v. Tyson Foods* and its implications for employers. The Court's decision may have a greater impact on the language used in analyzing pretext than it does on the process used by the courts to determine whether the complaining party has shown there are disparities in qualifications. This article examines the implications of the latest ruling for employer responsibilities during the selection process.

Most businesses will ultimately face employment law issues. With each stage of the employment process—hiring, promoting, disciplining, dismissing—the

doi: 10.2190/IE.12.3.e
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employer has the potential of having to deal with costly and distracting litigation. It is, therefore, important that employers understand current legal issues affecting the employment process. A recent decision by the Supreme Court of the United States changes the standard by which some courts will review an employer's decision not to hire an individual or promote an employee [1]. Arguably, by rejecting the standard known as "slap-in-the-face," the Supreme Court is making it easier for complaining parties to prevail in Title VII cases. On the other hand, it may just be that the Supreme Court disliked the use of the slap-in-the-face metaphor. The *Ash v. Tyson Foods, Inc.*, case also serves as a reminder to employers of the importance of preventing discrimination in the hiring and promoting process [1].

In *Ash* two African-American employees of Tyson Food's Gadsden, Ala. facility claimed that they had been unlawfully discriminated against when they were denied promotion. The employer contended that the employees who were selected were better qualified than those who were not. The complaining parties countered by claiming that the employer's explanation for its decision was a pretext. The United States Court of Appeals for the Eleventh Circuit applied the aforementioned slap-in-the-face standard to the allegation of pretext and ruled in favor of the employer [2], a decision which was ultimately appealed to the Supreme Court.

Since the authors had previously published a paper in 2004 in *Journal of Individual Employment Rights* entitled, "The slap-in-the-face standard: Placing limits on court evaluations of employee qualifications" [3], and because the Supreme Court has now ruled on this subject, we are updating and discussing this matter. In the earlier article, we noted that the U.S. circuit courts of appeal were divided on whether this standard was applicable for analyzing the qualifications of applicants/candidates in disparate treatment claims under Title VII of the Civil Rights Act of 1964. At issue was just how far federal courts and juries may go in assessing which candidates are best qualified for the positions in question. In at least five circuits (the Second, Fifth, Seventh, Tenth, and Eleventh), it was a generally held belief that unless the disparities in individual candidate's qualifications were blatant, the employer would be considered to be the better judge of a candidate's qualifications than a judge or jury [4-7]. That is to say, when differences are slight, the court should defer to the employer's judgment and not second-guess which candidate was better qualified. In the case that gave this standard its peculiar name, the court ruled that disparities between individual qualifications serve as evidence of discrimination only when the disparities "are so apparent as to jump off the page and slap us in the face" [8, at 847]. In short, pretext cannot be established by simply identifying minor differences between a complaining party's qualifications and those of a successful candidate [9]. The antithesis of this view is that the disparity does not have to be so apparent in order to support a finding of pretext on the part of the employer [10].

In February 2006, the Supreme Court, in *Ash v. Tyson Foods, Inc*., ruled that the slap-in-the-face standard, or at least the term, is not to be used in any Title VII proceedings [1]. However, in making its ruling, the Court affirmed the basic underlying principle of the standard. This article conveys the arguments for the slap-in-the-face standard presented in the earlier article and discusses the extent to which it remains legally relevant. We present general findings in *Ash v. Tyson Foods*, along with the implications this decision is likely to have on the four circuits that applied this standard of review.

"SLAP IN THE FACE" PRIOR TO *ASH V. TYSON FOODS*

Our previous article examined the challenges to an employer's legitimate nondiscrimination rationale for candidate selection based on employee qualifications. A common employer defense in justifying a selection is the claim that the final choice was not predicated on the complaining party's protected class membership, but rather on the employer selecting the candidate thought to be best qualified for the job in question.

In a lawsuit alleging Title VII discrimination, the complaining party has the burden of proof. To prove a *prima facie* case of unlawful discrimination based on disparate treatment, the complaining party must demonstrate that: 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 [11].

Having established this, the burden of proof then shifts to the employer, which is given the opportunity to rebut the allegations. Except in some very rare instances when an employer can muster a *bona fide* occupational qualification defense, the employer's successful rebuttal entails offering evidence to show that the selection decision was not based on the complaining party's race, color, religion, sex, or national origin [12]. The rationale in such cases is that the employer's decision does not have to be the best decision, or even a good decision, but it cannot be an unlawful decision [13].

At this juncture, the complaining party may attempt to undo the employer's defense by claiming that the employer's decision is a pretext or a falsehood [14]. The court in *Jaramillo v. Colorado Judicial Dept*. stated that a complaining party can prove pretext by showing that an employer's nondiscriminatory reasons for its actions contained "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" [15, at 1308]. The court further stated that pretext evidence may consist of "prior treatment of plaintiff; the employer's policy and practice regarding minority employment (including statistical data);

disturbing procedural irregularities (i.e., falsifying or manipulating . . . criteria); and the use of subjective criteria" [15, at 1308]. However, if the employer establishes a nondiscriminatory explanation for its decision, the issue is not "the correctness or desirability of [the] reasons offered . . . [but] whether the employer honestly believes in the reasons it offers" [16, at 373 in 14, at 1270]. If in judging the complaining party's qualifications or performance, the employer makes ". . . an error too obvious to be unintentional, perhaps it had an unlawful motive for doing so" [13, at 1183].

Herein lies the dilemma facing the courts: how are disagreements between the complaining party and employer over qualifications to be resolved? The complaining party is essentially asking the factfinder to step into the shoes of the employer and assume the function of a personnel review board and second-guess the employer's decision. This is not a difficult problem if the complaining party's qualifications are clearly superior to or inferior to those of the candidate who was selected. However, what happens when the disparity in the candidates' credentials is not so clearly perceptible? Where does a court draw the line in those instances in which differences in qualifications between the candidates ". . . are not enough in and of themselves to demonstrate discriminatory intent . . ." [17, at 280]?

This is the juncture where the slap-in-the-face standard comes into play. In those circuits adopting this standard, courts had limited themselves to determining whether the employer gave an honest evaluation for the selection decision, not necessarily the best evaluation [18]. The underlying premise for applying this rule for analysis is based on the presumption that neither judges nor juries are sufficiently knowledgeable about the respective business or industry to make an informed assessment of which applicants are truly best qualified [19]. As a consequence, unless the disparities in candidate qualifications were "so apparent as to jump off the page and *slap us in the face*" [20, at 533], the court would refrain from overriding the employer's decision. The question now becomes: Did this premise radically change with the Supreme Court's decision in *Ash v. Tyson Foods, Inc*. [1]?

THE CASE OF *ASH V. TYSON FOODS*

The case itself involved two African-American employees of Tyson Foods' Gadsden, Alabama facility. In 1995, Anthony Ash and John Hithon applied for two open positions as shift managers. When Tyson promoted two white applicants with far less experience instead, Ash and Hithon filed a Title VII complaint alleging unlawful discrimination based on race. They further alleged that Tyson's legitimate nondiscriminatory reasons for not promoting them (i.e., the other candidates were better qualified) were pretextual [2]. As part of its defense, Tyson Foods asserted that Ash and Hithon had not been promoted because the plant had been experiencing performance problems [2].

A trial took place in the U.S. District Court for the Northern District of Alabama. At the close of the employees' case, Tyson Foods moved for judgment as a matter of law. The district court denied Tyson's motion and allowed the case to proceed to a jury. The jury rendered a verdict in favor of the employees and awarded them $250,000 in compensatory damages and $1.5 million in punitive damages. Following the jury's verdict, the district court granted Tyson its renewed motion for judgment as a matter of law or, in the alternative, a new trial. Ash and Hithon appealed to the Eleventh Circuit Court of Appeals. The Eleventh Circuit concluded that Ash had failed to present sufficient evidence that his employer had discriminated against him, or that Tyson's reasons for not promoting him were a pretext. Specifically, "Pretext can be established through comparing qualifications only when 'the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face'" [2, at 533].

One of the principal issues before the Supreme Court in *Ash v. Tyson Foods* was whether the Eleventh Circuit had used the proper standard of evidence in determining whether the employer's proffered legitimate nondiscriminatory reason for making its selection decision was factual or a pretext. In a short, unanimous opinion, the Supreme Court ruled that the Eleventh Circuit had "erred in articulating the standard for determining whether the asserted non-discriminatory reasons for Tyson's hiring decisions were pretextual" [1, at 1197]. It is important to note the word "articulated." In *Ash*, it would appear that the Court's primary problem with the Eleventh Circuit's decision was the terminology it used to express its method of analysis. Specifically, the Supreme Court voiced its distaste for the slap-in-the-face standard, *per se*, by ruling that,

> [t]he visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications [1, at 1197].

Although the Supreme Court declared that the slap-in-the-face standard (qualifications so disparate as to jump off the page and slap you in the face) is imprecise and unhelpful, it did not articulate a more clear-cut standard for the lower courts to follow. Specifically, the Supreme Court announced that, "[t]his is not the occasion to define more precisely what standard should govern pretext claims on superior qualifications" [1, at 1197]. Instead, it provided less-definitive guidance by citing several appellate court decisions that approached the issue of employer pretext from different perspectives [21]. The three cases offered as acceptable examples were *Cooper v. Southern Co*. [22], *Raad v. Fairbanks North Star Borough School District* [23] and *Aka v. Washington Center Hospital* [24].

GUIDANCE FOR EMPLOYERS

The Eleventh Circuit's *Cooper v. Southern Company* decision expressed the standard that pretext on the part of an employer is not established unless the

"disparities in qualification [are] of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question [22, at 732]. That the rigor of the analysis in *Cooper* appears to be similar to the articulation of the slap-in-the-face standard is not surprising. *Cooper* was a case involving that standard [22, at 732]. Specifically, *Cooper* provided the following unambiguous guidance in regard to the application of the standard:

> [The complaining party] "cannot . . . establish pretext simply by showing that [the complaining party] is more qualified than [individual selected]. Rather, [the complaining party] must adduce evidence that the disparity in qualifications is 'so apparent as virtually to jump off the page and slap you in the face.'" *This principle "should be understood to mean that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question*" [22, at 732] [emphasis added].

Aka v. Washington Center Hospital, a District of Columbia circuit case, appears to be close to the *Cooper* standard in rigor by placing the threshold for determining pretext at the point where a "reasonable person would have found the plaintiff to be significantly better qualified for the job" [24, at 1294]. The language in *Aka* does not appear to contradict the language found in *Cooper* (a case which applied the slap-in-the-face standard).

When compared with the other two decisions, *Raad*, the Ninth Circuit decision, seems to impose a less-rigorous standard [23]. Some might even say a more employee-friendly standard. According to *Raad*, the appropriate standard for assessing pretext is determined when the complaining party's qualifications (when considered against the qualification standards alone) are *clearly* superior to those of the candidate whom the employer chose [13, at 1194]. "Clearly superior" is a less-onerous threshold than requiring the difference in qualifications to be "significantly better" or "of such weight and significance." In addition, the court in *Raad* stated that the complaining party can indirectly or directly prove pretext and the evidence, whether indirect or direct, is to be considered as a whole [13, at 1194].

It appears that the Supreme Court, rather than choosing a specific standard, has instead opted for a range. One can conclude that since the Supreme Court offered all three of these tests as examples, any one of the three would be acceptable. Therefore, should one circuit choose to use *Cooper* as its standard and another use *Raad*, then either test would be adequate in the eyes of the Supreme Court. It would further appear, either intentionally or unintentionally, that the Supreme Court has allowed the circuit courts a modicum of discretion in analyzing pretext. A court could apply the fairly strenuous standards of *Cooper* or *Aka* or the more employee-friendly standard of *Raad*.

As for the motive behind the Supreme Court's distaste for the slap-in-the-face standard, it may be little more than its dislike of the analogy. Some may contend that the motive underlying the removal of this standard was to make it easier for complaining parties to prevail in showing employer pretext. In *Ash*, the petitioner-employees argued that the slap-in-the-face standard is so stringent that it has never satisfied a district court or appellate court in the Eleventh Circuit [25]. If, however, the impetus was to make it easier for complaining parties to prevail, then the Supreme Court could have easily settled on *Raad* as the appropriate precedent to follow. Instead, the Supreme Court provided the lower courts three models for analysis from which to choose.

Implications for Employers

If the slap-in-the-face standard had meant, in the circuits using the term (the Fifth, Tenth, and Eleventh circuits) [26], that disparities between candidates must be of such magnitude and significance that a reasonable person would select the complaining party over the selected applicant [27-29], then *Ash v. Tyson Foods* has changed little other than specifically prohibiting the use of the phrase.

On remand, the Eleventh Circuit analyzed *Ash* in accordance with the Supreme Court's own guidance. Not surprisingly, this time the pretext claim was analyzed using the standard it had previously set forth in *Cooper* (but this time avoiding the use of the term slap-in-the-face). Under the *Cooper* standard, the Eleventh Circuit again concluded that the complaining party still failed to establish that the employer's proffered rationale for its selection decision was pretextual [30]. The complaining party was unable to prove that his qualifications were clearly superior to those of the individual whom the employer selected [30].

From a practical standpoint, *Ash* may have changed little. In practice, it remains the employer's responsibility to clearly articulate the requirements for a successful candidate and demonstrate that the candidate selected for the position was more qualified than those who were not selected. For example, a well-written statement setting forth the qualifications for the particular job would be prudent for an employer to have in place. It would then be important that the employer document the business reason for the selection decision using the qualification statement. Furthermore, the employer should educate supervisors and managers to be mindful that their comments or actions may be viewed as discriminatory by their fellow workers, applicants, and, ultimately, a jury. If these measures are practiced and enforced, challenges stating that the selection decision is predicated on a reason that is a pretext will likely not be successful.

Employers must also be mindful that if an employment decision is based on a subjective quality, such as enthusiasm, that a jury may deem otherwise and find instead that the candidate/employee was truly enthusiastic about the job. If the employer is making its decision based on a subjective assessment of some attribute, it is advisable that the employer clearly indicate the candidate/employee's

lack of that subjective consideration on the interview sheet. An employer will want to be cautious, though, in putting too much emphasis on subjective assessments. The *Aka* court held that when an employer relies heavily on "highly subjective" criteria, such as "interpersonal skills," it may support an inference of discrimination [24, at 1298]. If an employer places a strong reliance on subjective criteria and the jury finds that the candidate/employee "was otherwise significantly better qualified than the successful applicant," the reliance on the subjective criteria may be masking the employer's discriminatory intent [24, at 1294].

So, what is the current status of the case law? Will the Supreme Court clarify which standard to use in evaluating a candidate's or employee's qualifications? Less than a year after the Supreme Court remanded *Ash* to the Eleventh Circuit, the petitioner-employees filed another petition for certiorari with the Supreme Court [31]. The petitioners asked the Supreme Court to grant the writ of certiorari to resolve the conflict among the circuit courts as to which standard the courts should use in evaluating qualifications evidence [31]. The petitioners argued that the *Ash* case provided an "exceptionally appropriate 'occasion to define more precisely' the standard governing this matter of proof" [31, at 10-11]. Despite the petitioner's argument and the widespread conflict among the circuit courts on what standard to use in evaluating qualification evidence, on January 22, 2007, the Supreme Court denied the petition for certiorari. Since the Supreme Court has denied review in cases involving employer pretext, the circuit courts will either follow their established precedent or one of the three appellate cases mentioned above.

ENDNOTES

1. *Ash v. Tyson Foods, Inc.,* 126 S. Ct. 1195 (2006).
2. *Ash v. Tyson Foods*, 129 Fed. Appx. 529, 531 (11th Cir. 2005), *vacated* 126 S.Ct. 1195 (2006).
3. R.K. Robinson, G.M. Franklin, and W.D. Davis, The "slap in the face" standard: Placing limits on court evaluations of employee qualifications. *Journal of Individual Employment Rights*, 11 (2)141-150, 2004.
4. *Byrnie v. Town of Cromwell Board of Education*, 243 F.3d 93 (2nd Cir. 2001).
5. *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1445 (5th Cir. 1995).
6. *Bullington v. United Airlines, Inc*, 186 F.3d 1301, 1319 (10th Cir. 1999).
7. *Hall v. Alabama Association of School Boards*, 326 F.3d 1157 (11th Cir. 2003).
8. *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993).
9. *Sanchez v. Phillip Morris Inc*, 992 F.2d 244, 247-248 (10th Cir. 1993).
10. *Raad v. Fairbanks North Star Borough School District*, 323 F.3d 1185, 1194 (9th Cir. 2003).
11. *Holifield v. Reno*, 115 F.3d 1555, 1561-1562 (11th Cir. 1997).
12. U.S. Equal Employment Opportunity Commission, *Compliance Manual*, Washington, D.C.: Government Printing Office, 2002.
13. *Fischbach v. District of Columbia Department of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir 1996).

14. *Brill v. Lante Corporation*, 119 F.3d 1266, 1273 (7th Cir. 1997).
15. *Jaramillo v. Colorado Judicial Dept.*, 427 F.3d 1303 (10th Cir. 2005).
16. *McCoy v. WGN Continental Broadcasting Co*., 957 F.2d 368, 373 (7th Cir. 1992).
17. *Deines v. Texas Department of Protective and Regulatory Services*, 164 F.3d 277, 280 (5th Cir. 1999).
18. *Gustovich v. AT&T Communications*, 972 F.2d 845, 848 (7th Cir. 1997).
19. *Edwards v. Principi*, 80 Fed. App. Lexis 950, 953 (5th Cir. 2003).
20. *Scott v. University of Mississippi*, 148 F.3d 493, 508 (5th Cir. 1998).
21. *Higgins v. Tyson Foods,* 2006 U.S. App. Lexis 21962 (11th Cir. 2006).
22. *Cooper v. Southern Co*., 390 F.3d 695 (11th Cir. 2004).
23. *Raad v. Fairbanks North Star Borough School District,* 323 F.3d 1185 (9th Cir. 2003).
24. *Aka v. Washington Center Hospital,* 156 F.3d 1284 (D.C. Cir. 1998).
25. Petition for Writ of Certiorari, *Ash v. Tyson Foods, Inc.*, No. 05-379, 11-12.
26. *See Bullington v. United Air Lines, Inc.*, 186 F. 2d 1301, 1319 (10th Cir. 1999) (citing *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993).
27. *Cofield v. Goldkist, Inc.,* 267 F.3d 1264, 1268 (11th Cir. 2001).
28. *Denney v. City of Albany,* 247 F.3d 1172, 1187 (11th Cir. 2001).
29. *Lee v. GTE Florida* 226 F.3d 1249, 1153 (11th Cir. 2000).
30. *Ash v. Tyson Foods, Inc,* 190 Fed. Appx. 924 (11th Cir. 2006).
31. Petition for Writ of Certiorari, *Ash v. Tyson Foods, Inc.*, No. 06-706.

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