

Supreme Court No. 88012

Douglas Daugherty,

Appellant,

v.

The City of Maryland Heights, Missouri,

Respondent.

Brief of Amicus Curiae

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on behalf of Appellant

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Table of Contents

Table of Authorities.....	2
Statement of Interest	6

I. The Court of Appeals erred in using the McDonnell Douglas test to analyze whether Daugherty could prove the elements of his case. The MAI verdict director states

the elements Daugherty would need to prove at trial.7

II. The Court of Appeals erred in finding that a statement by a person involved in the decision making process was not direct evidence of age discrimination.....11

III. The Court of Appeals erred in its descriptions of the fourth prong of the McDonnell Douglas prima facie case.15

IV. The Court of Appeals erred in holding that there was no issue of fact in dispute

as to whether Maryland Heights regarded Daugherty as having an impairment and whether Daugherty’s perceived disability was a factor in his discharge.....22

Conclusion.....28

Certificate of Service.31

Certificates of Compliance.....32, 33

Table of Authorities

Cases

<u>Boyd v. Schwan’s Sales Enterprises</u> , 23 S.W.3d 261 (Mo. App. 2000)	9
<u>Chalfant v. Titan Distribution, Inc.</u> , ___ F.3d ___, No. 06-1414, 2007 U.S. App. LEXIS 1328 (8 th Cir. 1/22/07).....	27
<u>Cook v. Atoma Int’l of America, Inc.</u> , 930 S.W.2d 43 (Mo. App. 1996).....	16
<u>Cumpiano v. Banco Santander Puerto Rico</u> , 902 F.2d 148 (1 st Cir. 1990).....	17
<u>Devor v. Blue Cross & Blue Shield of Kansas City</u> , 943 S.W.2d 662 (Mo. App. 1997)	18
<u>Dominguez-Curry v. Nevada Transp. Dep’t</u> , 424 F.3d 1027 (9 th Cir. 2005)	13
<u>EEOC v. City of Independence, Mo.</u> , 471 F.3d 891 (8 th Cir. 2006)	12
<u>EEOC v. Liberal R-II Sch. Dist.</u> , 314 F.3d 920 (8 th Cir. 2002)	12, 13, 15
<u>EEOC v. Sears Roebuck & Co.</u> , 233 F.3d 432 (7 th Cir. 2000).....	23
<u>Estate of Heidt</u> , 785 S.W.2d 668 (Mo. App. 1990)	25
<u>Griffith v. City of Des Moines</u> , 387 F.3d 733 (8 th Cir. 2004).....	13
<u>Grigsby v. Reynolds Metals Co.</u> , 821 F.2d 590 (11 th Cir. 1987)	16
<u>H.S. v. Board of Regents, Southeast Missouri State University</u> , 967 S.W.2d 655 (Mo. App. 1998).....	24
<u>Harvey v. Washington</u> , 95 S.W.3d 93 (Mo. banc 2003)	9
<u>Int’l Brotherhood of Teamsters v. United States</u> , 431 U.S. 324 (1977)	20

<u>ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.</u> ,	
854 S.W.2d 371 (Mo. banc 1993).....	9, 14, 24, 26
<u>Jones v. Dillard’s, Inc.</u> , 331 F.3d 1259 (11 th Cir. 2003)	19
<u>Jones v. Robinson Property Group, L.P.</u> , 427 F.3d 987 (5 th Cir. 2005).....	13
<u>Keeney v. Hereford Concrete Products, Inc.</u> , 911 S.W.2d 622 (Mo. banc 1995).	16
<u>Koszor v. Ferguson Reorganized Sch. Dist. R-2</u> , 849 S.W.2d 205 (Mo. App.	
1993)	18
<u>Landon v. Northwest Airlines, Inc.</u> , 72 F.3d 620 (8th Cir. 1995).....	25
<u>Lindsay v. Mazzio’s Corp.</u> , 136 S.W.3d 915 (Mo. App. 2004).....	9
<u>Lukas v. Baxter Healthcare Corp.</u> , 467 F.3d 1049 (7 th Cir. 2006)	13
<u>McBryde v. Ritenour Sch. Dist.</u> , 207 S.W.3d 162 (Mo. App. 2006)	8
<u>McDonnell Douglas Corp. v. Green</u> , 411 U.S. 792 (1973)	7, 17
<u>Medley v. Valentine Radford Communications</u> , 173 S.W.3d 315 (Mo. App. 2005)	18
<u>Mercantile Bank of St. Louis v. Benny</u> , 978 S.W.2d 840 (Mo. App. 1998)	9
<u>Midstate Oil Company, Inc. v. Missouri Comm’n on Human Rights</u> ,	
679 S.W.2d 842 (Mo. banc 1984).....	7, 8, 12
<u>Miles v. Dell, Inc.</u> , 429 F.3d 480 (4 th Cir. 2005)	19
<u>O’Connor v. Consolidated Coin Caterers Corp.</u> , 517 U.S. 308 (1996).....	20
<u>Perry v. Woodward</u> , 199 F.3d 1126 (10 th Cir. 1999),	
<u>cert. denied</u> , 592 U.S. 1110 (2000)	17, 19
<u>Philips v. Ford Motor Co.</u> , 413 F.3d 766 (8 th Cir. 2005).....	20

<u>Reeves v. Sanderson Plumbing Co.</u> , 530 U.S. 133 (2000)	17, 21
<u>Ribaud v. Bauer</u> , 982 S.W.2d 701(Mo. App. 1998)	9
<u>Rose-Maston v. NME Hospitals</u> , 133 F.3d 1104 (8th Cir. 1998)	25
<u>Spiegla v. Hull</u> , 371 F.3d 928 (7 th Cir. 2004)	10
<u>St. Mary’s Honor Center v. Hicks</u> , 509 U.S. 502 (1993).....	21
<u>State ex rel. Dean v. Cunningham</u> , 182 S.W.3d 561(Mo. banc 2006).....	11
<u>State ex. rel. Diehl v. O’Malley</u> , 95 S.W.3d 82 (Mo. banc 2003)	8, 24
<u>Suarez v. Pueblo Int’l, Inc.</u> , 229 F.3d 49 (1 st Cir. 2000).....	21
<u>Swyers v. Thermal Science, Inc.</u> , 887 S.W.2d 665 (Mo. App. 1994).....	16
<u>Sylvester v. SOS Children’s Villages Illinois, Inc.</u> , 453 F.3d 900 (7 th Cir. 2006)...	13
<u>Talley v. Bravo Pitino Restaurant, Ltd.</u> , 61 F.3d 1241 (6 th Cir. 1995)	12
<u>Texas Dep’t of Community Affairs v. Burdine</u> , 450 U.S. 248, 253-54 (1981) .	16, 25
<u>Timmons v. General Motors Corp.</u> , 469 F.3d 1122 (7 th Cir. 2006)	21
<u>Wells v. SCI Management, L.P.</u> , 469 F.3d 697(2006)	20
<u>Williams v. Ford Motor Co.</u> , 14 F.3d 1305 (8 th Cir. 1994)	18, 20
<u>Young v. American Airlines</u> , 182 S.W.3d 647 (2005)	18
<u>Young v. Warner-Jenkinson</u> , 152 F.3d 1018 (8th Cir. 1998)	25
Statutes and other authority	
R.S. Mo. 213.010, <u>et seq.</u>	8
R.S. Mo. 213.101(4)	23
R.S. Mo. 213.055.....	23

R.S.Mo. 296.010, <u>et seq.</u> (repealed)	7
MAI 31.24	8
8 CSR 60-3.060(1)(E).....	23
8 CSR 60-3.060(1)(F).....	24, 26
42 U.S.C. § 12101, <u>et seq.</u>	23

Statement of Interest

Amicus Curiae the St. Louis Chapter of the National Employment Lawyers Association is a voluntary membership organization of approximately 50 lawyers who represent employees in labor, employment, and civil rights disputes in the St. Louis area. The Chapter is an affiliate of the National Employment Lawyers Association (NELA) which consists of more than 3,000 attorneys who represent individuals in controversies arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous amicus curiae briefs in state and federal courts across the country regarding the proper interpretation and application of employment discrimination laws to ensure that such laws are fully enforced and that the rights of workers are fully protected. Members of the St. Louis Chapter of NELA regularly represent plaintiffs in discrimination and retaliation cases brought under the Missouri Human Rights Act.

I. The Court of Appeals erred in using the McDonnell Douglas test to analyze whether Daugherty could prove the elements of his case. The MAI verdict director states the elements Daugherty would need to prove at trial

The Court of Appeals entered summary judgment against Daugherty on his age and disability discrimination claims under the Missouri Human Rights Act (“MHRA”), measuring his evidence against the elements for proving a claim of discrimination under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)¹(Slip op., 6-7), based on this court’s decision in Midstate Oil Company, Inc. v. Missouri Comm’n on Human Rights, 679 S.W.2d 842, 846 (Mo. banc 1984). In Midstate Oil, this court held that disparate treatment claims under the MHRA² should be tried and evaluated under the McDonnell Douglas methodology.

¹Under McDonnell Douglas, *supra*, 411 U.S. at 802-04, the plaintiff must establish a four-part prima facie case (membership in a protected class; qualification for the position; a decision regarding the position, such as discharge or failure to hire; and, that the position remained open), the employer must then articulate (not prove) a legitimate nondiscriminatory reason for its conduct, and the plaintiff must prove that the reason articulated by the defendant is a pretext.

²Then codified at R.S.Mo. 296.010, *et seq.* (repealed).

A. The change to the MHRA, providing for a circuit court trial, gave the circuit court a different role in the enforcement process

Midstate Oil was decided at a time when the MHRA's enforcement mechanism was administrative and the circuit court's role was limited to that of appellate review of the administrative proceeding. State ex. rel. Diehl v. O'Malley, 95 S.W.3d 82, 89 (Mo. banc 2003); Midstate Oil, supra, 679 S.W.2d at 844-45. Since Midstate Oil, however, the legislature has amended the MHRA, now codified at R.S. Mo. 213.010, et seq., to provide for a right of action in circuit court and this court recently held that under the Missouri Constitution, that right included a trial by jury. Diehl, supra, 95 S.W.3d at 92. Thus, when MHRA cases are tried in circuit court, the jury is instructed that to find for the plaintiff on his claim for discrimination, it must believe certain elements, those stated in MAI 31.24.³ McBryde v. Ritenour Sch. Dist., 207 S.W.3d 162, 169 n. 6 (Mo. App.

³MAI 31.24 provides: Your verdict must be for plaintiff if you believe:

First, defendant (here insert the alleged discriminatory act, such as "failed to hire",

"discharged" or other act within the scope of Section 213.055, RSMo) plaintiff, and

Second, (here insert one or more of the protected classifications supported

2006).

B. The verdict director provides the elements of the cause of action

by the evidence such as race, color, religion, national origin, sex, ancestry, age, or disability) was a contributing factor in such (here, repeat alleged discriminatory act, such as “failure to hire”, “discharge”, etc.), and

Third, as a direct result of such conduct, plaintiff sustained damage.

Now that there is verdict director for cases tried under the MHRA and its function, like that of all verdict directors, is to require “the jury to find all ultimate issues or elements necessary to the plaintiff's case,” Harvey v. Washington, 95 S.W.3d 93, 97 (Mo. banc 2003), and the purpose of summary judgment is to avoid a trial when the plaintiff is unable to establish an element which the jury must find for the plaintiff to prevail at trial, ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993), the verdict director necessarily is the yardstick against which the evidence should be measured in a summary judgment motion.⁴ See, e.g., id., at 382 (using the verdict director to state the elements creditor needed to establish contract of

⁴The Court of Appeals noted that not all summary judgment cases are decided by reference to the verdict director, citing Ribaudo v. Bauer, 982 S.W.2d 701, 704 (Mo. App. 1998). Slip op., 8-9. In Ribaudo, the court decided an issue reserved for the court under common law, determining whether a statement is defamatory.

guaranty); Lindsay v. Mazzio's Corp., 136 S.W.3d 915, 921 (Mo. App. 2004); Boyd v. Schwan's Sales Enterprises, 23 S.W.3d 261, 264-65(Mo. App. 2000); Mercantile Bank of St. Louis v. Benny, 978 S.W.2d 840 (Mo. App. 1998).

To measure the evidence against any set of elements other than those in the verdict director is to say that the elements of a cause of action vary depending on the occasion for the court's inquiry, which is not the case. Therefore, unless application of McDonnell Douglas always results in the same outcome as application of MAI 31.24, McDonnell Douglas must not be a correct statement of the elements of an MHRA case. The risk in treating MHRA cases differently from other causes of action, by requiring plaintiffs to prove elements other than those in the verdict director, is plaintiffs will lose their right to a jury trial in what has become the quagmire of the many variations on the McDonnell Douglas prima facie case (see, Part III, infra).

For example, as discussed in Part III, the variation on the McDonnell Douglas prima facie case used by the Court of Appeals for Daugherty's age discrimination claim⁵ - which calls for the plaintiff to prove that his replacement

⁵With regard to Daugherty's disability discrimination claim, the variation on McDonnell Douglas which the Court of Appeals required Daugherty to meet to establish just his prima facie case, not even accounting for the rest of his evidentiary burden, called for Daugherty to prove what amounted to all of the elements of MAI 31.24 except

was not in the same protected class - could result in summary judgment against an employee even if the evidence showed that the employer fired him as part of an effort to get rid of its older workers, as long as the employer eventually hired a younger person to fill the position. Certainly, if the employer fired an employee because of his age, then it violated the MHRA, there would be a submissible case under MAI 31.24, and the employer should not be allowed to escape responsibility for its discriminatory conduct because of a different employment decision at some later point in time. Since under McDonnell Douglas the employee would not be able to establish even a prima facie case, then McDonnell Douglas cannot be the correct measure of the elements of an MHRA claim. Given that the purpose of the MHRA is to protect important societal interests via broad enforcement authority, State ex rel. Dean v. Cunningham, 182 S.W.3d 561, 565

damages: membership in a protected class, he was discharged, and there is evidence to infer that the disability was a factor in his discharge. Slip op., 13. Application of the full McDonnell Douglas analysis would have also required Daugherty to, additionally, prove that the reason articulated by the City for firing him was a pretext. If Daugherty had evidence sufficient to infer that disability was a factor in his discharge, there should be no need to prove pretext. The prima facie case, therefore must be overstated. Cf., Spiegla v. Hull, 371 F.3d 928, 941-42 (7th Cir. 2004)(reversing line of First Amendment cases where plaintiff's burden had come to be so heavy, there was nothing left for defendant to rebut).

(Mo. banc 2006), treating a motion for summary judgment under the MHRA differently than a motion for summary judgment in other civil cases by imposing additional elements cannot be what the legislature intended. Therefore, the Court should hold that the elements of an MHRA case for purposes of summary judgment are those that the plaintiff would need to prove at trial, as stated in the MHRA verdict director.

II. The Court of Appeals erred in finding that a statement by a person involved in the decision making process was not direct evidence of age discrimination

If the court uses the analytical tools from the federal courts' discrimination cases rather than MAI 31.24 as a statement of the elements, then prior to analyzing a case under McDonnell Douglas, the moving party-defendant should be required to establish that the plaintiff, as the claimant, will be unable to prove his case through direct evidence, as that term is defined in the caselaw.⁶ If there is direct evidence of discrimination, the burden of proof shifts to the employer to prove that it would have made the same decision absent consideration of the illegitimate factor, EEOC v. Liberal R-II Sch. Dist., 314 F.3d 920, 922 (8th Cir. 2002).

⁶In Midstate Oil, the court did not analyze the facts using the direct evidence approach and used only the McDonnell Douglas analysis, 679 S.W.2d at 848 (dissent).

A. Direct evidence, in employment discrimination cases, is evidence showing discriminatory animus

As the term is used in the context of employment discrimination cases, direct evidence is “evidence showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action.” EEOC v. City of Independence, Mo., 471 F.3d 891, 895 (8th Cir. 2006). It may include evidence demonstrating a discriminatory animus in the decisional process or actions or remarks of the employer that reflect a discriminatory attitude, not necessarily related to the challenged conduct and not necessarily from the actual decision maker. EEOC v. Liberal R-II School Dist., supra, 314 F.3d at 923; Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1249 (6th Cir. 1995)(racist remarks about customers). The quantum and gravity of evidence required to constitute direct evidence is that amount which would “allow the factfinder to conclude that [a discriminatory] attitude more likely than not was a motivating factor in the employment decision.” EEOC v. Liberal R-II School Dist., supra, 314 F.3d at 923. In the employment discrimination context, direct evidence refers to the causal strength of the proof, not whether it is circumstantial. Sylvester v. SOS Children’s Villages Illinois, Inc., 453 F.3d 900, 902-03 (7th Cir. 2006); Lukas v. Baxter Healthcare Corp., 467 F.3d 1049, 1052 (7th Cir. 2006)(near admissions are not required); Jones v. Robinson Property

Group, L.P., 427 F.3d 987, 993 (5th Cir. 2005)(persons with decision making authority bore discriminatory animus; evidence need not show that race was sole factor to be direct evidence); Dominguez-Curry v. Nevada Transp. Dep't, 424 F.3d 1027, 1038 (9th Cir. 2005)(evidence of discriminatory animus towards protected class); Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004)(direct evidence is not the converse of circumstantial evidence).

B. O'Connor's statements were direct evidence of age bias in the decision making process

Measured against this definition of direct evidence are the statements of one of the decision makers, chief of police Thomas O'Connor, about the motive of another decision maker, that of the City's attorney, Mark Levins. Slip op., 10. O'Connor said that Levins "would love to take some young stud here who has twelve, fifteen years on - - some young stud and bring him in to the job." He stated that even he was not safe and that Levins had "got it for guys fifty-five years older." O'Connor agreed that Levins's attitude towards employees constituted age discrimination. (L.F. 724-25) O'Connor's statements about Levins's discriminatory animus were linked to the decision to discharge Daugherty, as the Court of Appeals noted that O'Connor made the statements about Levins's bias in the context of shifting the blame for the City's termination decision. Slip op., 10. Because O'Connor admitted the known bias of his fellow

decision maker in explaining the decision to discharge Daugherty, his statements are direct evidence of age discrimination.

The Court of Appeals found that O'Connor's statements were not direct evidence of the City's discriminatory animus based on reasons which would require the factfinder to assume that O'Connor was not telling Daugherty the truth. To find that O'Connor did not mean what he said, the jury would be required to draw an inference in the City's favor from the circumstances surrounding O'Connor's words, i.e., that O'Connor was hiding the truth from Daugherty to avoid a confrontation. While a jury could certainly infer from the circumstances that O'Connor lied to Daugherty, the inference does not make O'Connor's statements any less direct. Indeed, if an inference favorable to the moving party is required for the summary motion to be sustained, then motion must be denied. ITT Commercial Finance, supra, 854 S.W.2d at 382. Even if O'Connor testified that he did not mean what he said or if he were to deny having made the statements, the statements would be no less direct. O'Connor's explanations and denials would simply go to the weight the jury might give to Daugherty's direct evidence.

Since Daugherty established his age discrimination case through direct evidence, the Court of Appeals should not have gone on to engage in the McDonnell Douglas analysis because "creating an inference of discrimination" was unnecessary." EEOC v. Liberal R-II School Dist., supra, 314 F.3d at 926

(internal quotations and cites omitted).

III. The Court of Appeals erred in its descriptions of the fourth prong of the McDonnell Douglas prima facie case

Assuming Daugherty did not produce direct evidence of the City's motivation for discharging him, and he was going to establish his case through indirect evidence under McDonnell Douglas, the Court of Appeals incorrectly held that Daugherty needed to prove, as the fourth prong of his prima facie case, that Maryland Heights replaced him with a younger employee. Slip op., 12-13.

A. McDonnell Douglas did not call for employees to prove as one prong of the prima facie case that the employer discriminated against all members of the employees' class

The U.S. Supreme Court created the McDonnell Douglas test (see, n. 1, supra), which allows plaintiffs to prove intentional discrimination by indirect evidence, because it recognized that plaintiffs in these types of cases rarely have access to direct evidence of discrimination. Grigsby v. Reynolds Metals Co., 821 F.2d 590, 595 (11th Cir. 1987).⁷ A rejected applicant, for example, may not even

⁷Where there is no Missouri case on point, Missouri courts have looked to relevant federal or state employment discrimination caselaw interpreting analogous statutes. Keeney v. Hereford Concrete Products, Inc., 911 S.W.2d 622, 624 (Mo. banc 1995). This

meet the decision makers or know who they are. Similarly, in a discharge or promotion case, the decision may have been made by someone at a regional office or by human resources personnel in another location.

Thus, the McDonnell Douglas prima facie case, with what was intended to be its non-onerous burden, eliminates the most common nondiscriminatory reasons which could explain the conduct at issue, e.g., discharge, demotion, or failure to hire. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981). Once the plaintiff shows that he is protected by the law and that there is some sort of employment action about which he is complaining, he need only provide evidence that he was qualified for the position he was seeking (step two) and that there really was a job opportunity (step four); at that point, the employer is required to articulate a legitimate nondiscriminatory reason for its conduct. Because a plaintiff's prima facie burden is supposed to be so light, even after establishing his prima facie case, he retains the burden of proving that the em-

look at other caselaw is not confined to the U.S. Supreme Court or one particular circuit's cases, e.g., Cook v. Atoma Int'l of America, Inc., 930 S.W.2d 43, 47 (Mo. App. 1996); Swyers v. Thermal Science, Inc., 887 S.W.2d 665, 657 (Mo. App. 1994).

ployer's articulated reason for taking the challenged action is a pretext. If a plaintiff can prove that the employer's articulated reason is a pretext, a jury can infer discrimination. Reeves v. Sanderson Plumbing Co., 530 U.S. 133, 146 (2000).

Applying the concept that the prima facie burden is not supposed to be onerous, in McDonnell Douglas, which was a failure to hire case, the court held that the plaintiff could satisfy the fourth prong of the prima facie case by showing that the position he was seeking remained open and the employer continued to seek applicants "from persons of complainant's qualifications," 411 U.S. at 803, with no requirement that the employer hire someone of a different race than the plaintiff. The material issue in the fourth prong as stated by the Supreme Court was whether there was a vacancy. See, e.g., Perry v. Woodward, 199 F.3d 1126, 1135 (10th Cir. 1999), cert. denied, 592 U.S. 1110 (2000)(job not eliminated after employee's discharge); Cumpiano v. Banco Santander Puerto Rico, 902 F.2d 148, 155 (1st Cir. 1990)(continued need for people with similar qualifications).

The evolution of the fourth prong from McDonnell Douglas into some extra burden, such as requiring a plaintiff to prove that his replacement was of a different race, sex, national origin, or age, has been criticized and sometimes abandoned where it is an issue, because instead of accomplishing the purpose of McDonnell Douglas, which is to aid a plaintiff who has no access to direct evidence of discrimination, it improperly forces a plaintiff to prove that his

employer discriminated not just against him, but also against all members of his protected class. Perry v. Woodward, *supra*, 199 F.3d at 1138 n.8; see also, Williams v. Ford Motor Co., 14 F.3d 1305, 1308 (8th Cir. 1994). Thus, while the Court of Appeals required Daugherty to prove that the City replaced him with someone outside the protected group (or younger) as the fourth prong of his prima facie age discrimination case (Slip op., 12), when it came to Daugherty's disability discrimination claim, the Court cited to a different version of the fourth prong and did not require Daugherty to prove that his replacement was not

disabled.⁸

⁸The Court of Appeals listed three prongs for the disability prima facie case, with the third prong being, “there is evidence to infer that the disability was a factor in his discharge.” In context, it is clear that the court was referring to the analogous fourth prong of non-disability discrimination cases. The genesis of the three-pronged disability discrimination case which the Court of Appeals cited includes a statement that the term “handicap” under the MHRA incorporates the requirement that the person be qualified for his job, meaning that the first and second prongs have been combined. Devor v. Blue Cross & Blue Shield of Kansas City, 943 S.W.2d 662, 666 (Mo. App. 1997), cited in

Medley v. Valentine Radford Communications, 173 S.W.3d 315, 320-21 (Mo. App. 2005). See, e.g., Young v. American Airlines, 182 S.W.3d 647, 653 (2005)(fourth prong in race case).

The Court of Appeals's finding that the City replaced Daugherty with an older person is not dispositive of whether age was a factor contributing to its decision to fire Daugherty. Cf., Koszor v. Ferguson Reorganized Sch. Dist. R-2, 849 S.W.2d 205, 207 (Mo. App. 1993)(employer's motive is determined as of the time of decision). Instead, it is a piece of evidence and, indeed, it can be evidence of a smokescreen to hide an unlawful motive. For example, an employer may give the plaintiff's title to a person who shares the plaintiff's protected characteristic, but then give the plaintiff's duties to someone else. Jones v. Dillard's, Inc., 331 F.3d 1259, 1264 (11th Cir. 2003)(malicious employers disguise their conduct); see also, Miles v. Dell, Inc., 429 F.3d 480, 488 (4th Cir. 2005).

Requiring a plaintiff to prove that his replacement is outside his protected class can produce anomalous results. For example, if Maryland Heights fired all of its female employees because it wanted an all-male workforce, but for some reason hired a woman into one of the vacated positions a few weeks later, a woman who had lost her job because of the City's original decision would not be able to establish a prima facie case. See, Perry v. Woodward, supra, 199 F.3d at 1137. The example illustrates the fallacy in conditioning a prima facie case on the race, sex, religion, or age of the plaintiff's replacement: the employer's after-the-fact decision about a different person does not change history. If the employer's motive for getting rid of an employee was his age, then the employer violated the

MHRA, regardless of his subsequent measures. A test which produces a different result, therefore, cannot be correct.

B. This Court should reject the line of cases which have turned the fourth prong of the prima facie case into an extra burden of proving an inference of discrimination

Even the version of the fourth prong of the prima facie case which the Court of Appeals noted in reference to Daugherty's disability discrimination claim - that the plaintiff must produce evidence establishing an inference of discrimination - is not the standard stated in McDonnell Douglas and the Supreme Court's later decisions.⁹ Requiring a plaintiff to prove an inference of

⁹As the federal caselaw has wandered from the original intent of McDonnell Douglas, so too have the courts struggled with the meaning of the fourth prong. Thus, even within the same circuit, while some cases hold that the fourth prong of a discharge case requires the plaintiff to prove that he was similarly situated in all respects to someone who was not discharged, e.g., Wells v. SCI Management, L.P., 469 F.3d 697, 701 (2006); Philips v. Ford Motor Co., 413 F.3d 766, 768 (8th Cir. 2005) others hold that at the prima facie level, similarly situated involves less proof than it would at the pretext phase. Williams v. Ford Motor Co., *supra*, 14 F.3d at 1308-09.

discrimination as a single prong of the prima facie case alters its purpose, which was simply to eliminate two obvious reasons which might explain an employer's employment decision: lack of basic qualifications and no vacancy. See, O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996); Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 n. 44 (1977).

By requiring an employee to establish an inference of discrimination as part of the prima facie case, he must meet two burdens of proof to survive summary judgment: first, when he has to establish the inference of discrimination as just one of the four prongs of the prima facie case and, again, after the defendant articulates (not, proves) its nondiscriminatory reason, when he has to prove that the reason is a pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-07 (1993). If a plaintiff has already established evidence from which a jury can infer discrimination as the fourth prong of his prima facie case, then he has already established enough to go to the jury, Timmons v. General Motors Corp., 469 F.3d 1122, 1126-27 (7th Cir. 2006), so any version of McDonnell Douglas which requires the plaintiff to produce an unquantified amount of evidence of discrimination as part of his prima facie case imposes a greater burden than that which was required by the U.S. Supreme Court. Indeed, the Supreme Court has already flatly rejected any requirement that a plaintiff prove some extra indicia of discrimination in a McDonnell Douglas-indirect evidence case. Reeves v. Sanderson Plumbing Co., supra, 530 U.S. at 146-49.

Under the principles of McDonnell Douglas, in a case such as this, where the City discharged Daugherty, he can establish the fourth prong of the prima facie case with evidence eliminating the possibility that the City no longer had a need for persons to perform the services he had been rendering. Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 54 (1st Cir. 2000). Since the Court of Appeals was convinced that the City gave Daugherty's job to someone else, Daugherty met his prima facie burden.

IV. The Court of Appeals erred in holding that there was no issue of fact in dispute as to whether Maryland Heights regarded Daugherty as having an impairment and whether Daugherty's perceived disability was a factor in his discharge

The Court of Appeals erred in granting Maryland Heights summary judgment on Daugherty's disability claim because of the presence of underlying issues of material facts as to what Daugherty's job duties were, whether or not he could perform those duties, whether Maryland Heights perceived him as disabled and whether this perception was a contributing factor in his discharge. These key material issues of fact preclude summary judgment. The Court of Appeals could not find as a matter of law that (a) Maryland Heights accurately described the essential functions of his job to the examining physicians or to the court in its summary judgment motion, (b) that Daugherty could not perform the essential

functions of his job, (c) that Maryland Heights did not regard Daugherty as disabled as defined by the Missouri Human Rights Act or (d) that Maryland Heights gave no consideration at all to Daugherty's perceived disability where Daugherty produced evidence that create issues of fact for a jury on all these points.

Daugherty's burden of proof on his disability claim at trial is to prove (1) Maryland Heights discharged him and (2) his perceived disability was a contributing factor in such discharge and (3) as a direct result of such conduct, Daugherty sustained damages. MAI 31.24. This instruction is based upon the prohibition in the Missouri Human Rights Act making it illegal for an employer to "discharge any individual...because of such individual's ...disability." R.S. Mo. 213.055.

Daugherty claims he is protected by the MHRA because Maryland Heights regarded him as disabled. Even under the more summary judgment friendly federal case law, the issue of whether a person is disabled within the meaning of the Americans With Disabilities Act, 42 U.S.C. § 12101, et seq., is for the jury to decide. EEOC v. Sears Roebuck & Co., 233 F.3d 432, 438 (7th Cir. 2000). The issue is also a jury question in Missouri which is why the second "element" of MAI 31.24, requires plaintiff to prove that his having been regarded as disabled by the defendant contributed to the discharge decision. An employee qualifies for protection under the Missouri Human Rights Act if he is "regarded as" having a

physical “impairment which substantially limits one or more of a person’s major life activities...which with or without reasonable accommodation does not interfere with performing the job” at issue. R.S. Mo. 213.010(4).

Courts should decide disability discrimination claims without reference to federal law, where Missouri statutes and regulations define the legal elements. Under the guidelines of the Missouri Commission on Human Rights, being “regarded as having such an impairment means a person [has] a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or by others as constituting such a limitation. 8 CSR 60-3.060(1)(E). An impairment “does not interfere with performing the job” at issue if it “does not substantially interfere with a person’s ability to perform the essential functions of the employment for which the person...is engaged....” 8 CSR 60-3.060(1)(F).

MAI 31.24 was approved after this court’s decision in State ex rel. Diehl v. O’Malley, supra, affirming the right of Missouri citizens to a jury trial on their Missouri Human Rights Act claims. Missouri courts analyzed disability claims brought under the MHRA prior to Diehl and the approval of MAI 31.24, using a McDonnell Douglas analysis. They required plaintiffs to begin by making a prima facie showing “(a) that he is disabled under the definition of the Act, (b) that he was discharged, and (c) that there was some evidence to infer that his disability was a factor in the discharge decision.” H.S. v. Board of Regents, Southeast

Missouri State University, 967 S.W.2d 655 (Mo. App. 1998). Meeting this prima facie showing requires the same evidence as the first and second elements of MAI 31.24.

The important difference between the burden of proof imposed by MAI 31.24 and a traditional prima facie showing is that a plaintiff opposing summary judgment does not have the burden of proof in making a prima facie showing. The burden on a summary judgment motion remains with the movant to establish the absence of material issues of fact. ITT Commercial Finance, *supra*, 854 S.W.2d at 378-380. The federal courts which developed the prima facie requirement have always maintained that a prima facie showing is not meant to be an insurmountable obstacle to trial. The U.S. Supreme Court has explained that the plaintiff's burden at the prima facie stage is not "onerous." Texas Dep't of Community Affairs v. Burdine, *supra*, 450 U.S. at 253. Accordingly, the Eighth Circuit recognizes that "the threshold of proof necessary to make a prima facie case is minimal." Rose-Maston v. NME Hospitals, 133 F.3d 1104, 1107 (8th Cir. 1998); Young v. Warner-Jenkinson, 152 F.3d 1018 (8th Cir. 1998); and that the "prima facie burden is not so onerous as, nor should it be conflated with, the ultimate issue" of discriminatory motive. Landon v. Northwest Airlines, Inc., 72 F.3d 620, 624 (8th Cir. 1995).

The Court of Appeals erred in finding Daugherty could not make his prima facie showing. Summary judgment should seldom be granted in an employment

discrimination case because the “elusive fact” of motive which must be proved using circumstantial evidence is the key issue, Estate of Heidt, 785 S.W.2d 668, 670 (Mo. App. 1990). Further, an employee should seldom lose at the prima facie stage of a summary judgment analysis because his burden at this stage in the analysis is “minimal.” Yet, Daugherty lost his disability discrimination claim on summary judgment at the prima facie stage. This should not have happened. First, Daugherty was not required to make a prima facie showing because the summary judgment analysis should have been done using MAI 31.24 and applicable Missouri law on disability claims brought under the Missouri Human Rights Act. Second, under either analysis, Daugherty produced evidence creating a factual issue as to whether he qualified for protection under the Missouri Human Rights Act because he was able to perform the essential functions of his job but Maryland Heights perceived him as disabled and this perception was a contributing factor in his discharge.

In finding that Daugherty “failed to make a prima facie case of disability discrimination under the MHRA,” Slip op., 15, the Court of Appeals improperly made factual findings by drawing inferences in favor of the movant, Maryland Heights, and ignored facts in the record that raised a genuine dispute of facts on elements of Daugherty’s claim. ITT Commercial Finance, supra, 854 S.W.2d at 378. It decided the factual issue of whether Maryland Heights mistakenly believed Daugherty had “an actual, non-limiting impairment which substantially limits the

major life activity of working.” Slip op., 14-15.

In order to make this factual finding, it necessarily decided the underlying factual issues. It decided Maryland Heights had a belief that Daugherty could not perform “certain duties.” Under 8 CSR 60-3.060(1)(F), it does not matter if Daugherty could not perform “certain duties” because Daugherty could not legally discharge Daugherty if he could perform “the essential functions of the employment for which the person...is engaged....” Thus, identity of the “essential functions” of Daugherty’s job are a factual issue in this case.

The Court of Appeals found Daugherty specifically admitted that Maryland Heights requires all its police officers to be able to perform all these duties. Slip op., 15. This requirement does not equate with the legal concept of an “essential function of employment” for purposes of the Missouri Human Rights Act.” The identity of essential job functions can be established from evidence regarding “(1) the employer’s judgment as to which functions are essential; (2) written job descriptions prepared before advertising or interviewing applicants for the job; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring the incumbent to perform the function; and (5) the current work experience of incumbents in similar jobs.” Chalfant v. Titan Distribution, Inc., No. 06-1414, 2007 U.S. App. LEXIS 1328, *13 (8th Cir. 1/22/07). Here, the evidence on these points is contradictory and a jury will have to determine the identity of Daugherty’s essential job functions.

Ignoring the factual dispute as to the identity of the essential functions of Daugherty's job, the Court of Appeals went on to make the factual determination that Daugherty was unable to perform some of these functions. The Court of Appeals also erroneously made the factual finding that Maryland Heights did not regard Daugherty as disabled as defined by the MHRA. It found Maryland Heights "did not have a mistaken belief that Daugherty had an actual, non-limiting impairment that substantially limits his major life activity of working." Slip op., 15. The Court of Appeals could not make this fact finding without overlooking Daugherty's evidence that the decision makers considered him disabled. (L.F. 359, 362, 382, 409 and 440)

Finally, the Court of Appeals erroneously made the ultimate factual finding on Daugherty's disability discrimination claim when it found that Maryland Heights gave no consideration at all to Daugherty's perceived disability. It made the factual finding that Maryland Heights "based its decision to terminate Daugherty on his inability to perform his job as a police officer." Slip op., 23. In so doing, it overlooked evidence in the record which would support a finding that Maryland Heights's decision to discharge Daugherty. Maryland Heights was not entitled to summary judgment where the ultimate fact, the reason for his discharge, remains at issue.

Conclusion

Missouri law has evolved since this Court decided Midstate Oil. The McDonnell Douglas test, conceived to abate the plaintiff's burden of trying to survive summary judgment where direct proof of discrimination was difficult or impossible to acquire, has become a morass of conflicting articulations yielding differing results depending on which version of the test is picked by the trial judge, then by the Court of Appeals. Conflicts abound among and within the federal circuits. Such a scenario is undesirable – to say the least – because it lacks the consistency that should be the hallmark of a legal framework, and unnecessary for the simple reason that there is no basis for treating MHRA cases any differently than torts, contract breaches, or any other cause of action for which a verdict director has been approved by this court. Simply put, there is no compelling legal reason or sensible basis to retain this unwieldy heuristic approach. Instead, should this court see fit to reject the McDonnell Douglas analysis and direct that MHRA summary judgment analysis be predicated upon the elements set forth in MAI 31.24, the courts will have a clear, cogent, and uniform standard against which to decide whether a non-moving party is entitled to a jury trial.

The case at bar is a watershed event for MHRA litigation, because it is the first post-Diehl decision to squarely address the question of the utility of the McDonnell Douglas test in the summary judgment procedure. If the test is retained by this Court it will constitute an embrace of McDonnell Douglas in all its

federal murkiness as evidenced by the debate over what constitutes the fourth prong of the prima facie case. Resort to McDonnell Douglas as the framework to be used in a summary judgment analysis, rather than MAI 31.24, subordinates Missouri courts to the acceptance of legal developments evolving in the federal system, beyond their control.

McDonnell Douglas has been transformed from a facilitation to an obstacle, frequently requiring a non-moving party to prove issues having nothing to do with the elements that are set forth in the statute or the verdict director in order to have a trial on the merits.

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Certificate of service

The undersigned hereby certifies that the foregoing was served, on January 25, 2007, via U.S. mail, postage prepaid on Greg Kloeppel and Kevin J. Dolley, 9620 Lackland, St. Louis, Missouri, 63114 and James N. Foster, William B. Jones, Suite 200, 2730 N. New Ballas, St. Louis, Missouri, 63131-3039, and Amy Renee Brown, 222 Emanuel Cleaver II Blvd., Apt. 3W, Kansas City, Missouri, 64112.

Certification Pursuant to Rule 84.06(c)

Pursuant to Supreme Court Rule 84.06(c), I certify that: 1) this brief includes the information required by Rule 55.03; 2) this brief complies with the limitations contained in Rule 84.06(b); and, 3) this brief contains 7,245 words, as calculated by the Word Perfect software used to prepare this brief.

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Certification Pursuant to Rule 84.06(g)

Pursuant to Supreme Court Rule 84.06(g), I certify that the diskette filed in this matter was scanned and is virus-free.

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