

## **The Dilemma of Jury Instructions in Employment Discrimination Cases**

The dilemma posed by the lack of model civil jury instructions in the Seventh Circuit is apparent in the area of employment discrimination, where key issues are not clearly addressed by relevant case law. This article summarizes the state of the law in the Seventh Circuit and offers suggestions for crafting burden of proof instructions in employment discrimination cases.

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By now most practitioners and judges are thoroughly acquainted with the direct and indirect methods of proving up liability in employment discrimination cases under Title VII and other federal statutes in summary judgment motions. The direct method makes use of direct and circumstantial evidence, such as statements by the employer revealing a discriminatory motivation for the adverse employment decision.<sup>4</sup> The test for indirect evidence makes use of a burden shifting apparatus, as articulated in McDonnell-Douglas v. Green.<sup>5</sup>

Under the well-known McDonnell-Douglas test, a plaintiff must first establish a *prima facie* case of discrimination by showing that he or she: (1) is a member of protected class, (2) performed the job satisfactorily, (3) suffered an adverse employment action, and (4) was treated less favorably by the employer than similarly situated employees.<sup>6</sup> If the plaintiff successfully establishes this *prima facie* case, a presumption of unlawful discrimination by the employer is created. Texas Dep't. of Community Affairs v. Burdine.<sup>7</sup> The burden of production then shifts to the defendant to introduce evidence that it had a legitimate, nondiscriminatory reason for the adverse action.<sup>8</sup> If the defendant makes this showing, then the presumption of discrimination is eliminated, and the plaintiff must demonstrate, by a preponderance of the evidence, that the defendant's stated reason for the action was merely a pretext for discrimination.<sup>9</sup> To raise an inference of pretext, the plaintiff's task on summary judgment is to produce sufficient evidence to sustain a reasonable inference that the

employer's asserted reason is not the real reason for the adverse decision, but, instead, serves as a cover-up for unlawful discrimination. If the plaintiff can show that the employer may be lying, then summary judgment is denied.

At trial, the rules change. We know from St. Mary's Honor Center v. Hicks, that the employer's asserted reason for the adverse employment decision need not be the real reason; the question is whether the real reason and/or motivation for the adverse employment decision was discriminatory.<sup>10</sup> Thus, although evidence of pretext will enable a plaintiff to avoid summary judgment, evidence of pretext, alone, will not necessarily enable the plaintiff to prevail at trial. At trial, the plaintiff must carry the ultimate burden of establishing that he or she is a victim of intentional discrimination. The employer's asserted reason may be a lie, but if the employer's decision was motivated by a lawful reason that the employer does not wish to reveal, then the trier of fact cannot permissibly find in the plaintiff's favor, and the court must direct a verdict in favor of the defendant.

In short, the burden-shifting apparatus drops out at trial, and the only question that remains is whether the plaintiff was the victim of intentional discrimination.<sup>11</sup> As the Seventh Circuit explained in Gehring v. Case Corp.:

[T]he Supreme Court has held that this burden-shifting model applies to pretrial proceedings, not to the jury's evaluation of evidence at trial. Once the judge finds that the plaintiff has made the minimum necessary demonstration (the "*prima facie* case") and that the defendant has produced a[. . .] neutral explanation, the burden shifting apparatus has served its purpose, and the only remaining question -- the *only* question the jury need answer -- is whether the plaintiff is a victim of intentional discrimination.<sup>12</sup>

What the Seventh Circuit has not clearly explained is how jury instructions in employment discrimination cases should be crafted to reflect the plaintiff's ultimate burden of proof, given the law that jury instructions mirroring either or both the indirect or direct methods of proof are

inappropriate. The dilemma for district court judges in the Seventh Circuit is that there are no model jury instructions reflecting these legal principles. Instead, a vacuum has been created that is being randomly filled up on a case-by-case basis by various interpretations of the case law.

The case law in this circuit indicates that the “central question” is whether the plaintiff has established “a logical reason to believe that the decision rests on a legally forbidden ground,” *i.e.*, “whether the employer would have taken the same action had the employee been of a different race, age, sex, religion, national origin, etc. and everything else remained the same.”<sup>13</sup> These statements establish that the plaintiff in an employment discrimination case must ultimately prove that “but-for” the impermissible motive, he or she would not have been discriminated against. This much is clear. What is not clear is how this ultimate burden of proof can be reconciled with the Seventh Circuit’s decision in Mayall v. Peabody Coal Company,<sup>14</sup> on the one hand, and the 1991 Amendments to Title VII of the Civil Rights Act of 1964, on the other.

#### **A. The Mayall Decision**

The problem presented by the absence of official model jury instructions reflecting the plaintiff’s ultimate burden of proof is exacerbated by the “model” instruction given in Mayall v. Peabody Coal Company.<sup>15</sup> In Mayall, the court did set out, verbatim, and approve the burden of proof instruction given by the district judge in an age discrimination case which was challenged on appeal. The instruction was as follows:

The plaintiff has the burden of proving each of the following propositions:

First, that plaintiff was terminated from his job.

Second, that plaintiff’s age was a determining factor in the defendant’s decision to discharge him.

Third, that as a direct result of defendant’s conduct, plaintiff sustained damages.

In this case defendant has asserted the affirmative defense that plaintiff's employment would have been terminated regardless of his age. The defendant has the burden of proving this defense.

If you find from your consideration of all the evidence that each of the propositions required of the plaintiff has been proved and that defendant's affirmative defense has not been proved then your verdict should be for the plaintiff. If, on the other hand, you find from your consideration of all the evidence, that any one of the propositions the plaintiff is required to prove has not been proved, or that defendant's affirmative defense has been proved, then your verdict should be for the defendant.<sup>16</sup>

Judge Rovner, dissenting, expressed sympathy "to the plight of a district judge called upon to fashion a coherent set of jury instructions that accurately reflects the complex legal principles governing age discrimination claims" and identified the problem with this instruction. She wrote:

The district court instructed the jury that it must find in Peabody's favor if Peabody had proven that it would have terminated Mayall regardless of his age, even if Mayall had also established that age was a "determining factor" in Peabody's decision. This was a recipe for confusion. [citations omitted]. As our precedents make clear, finding that age was a "determining factor" is equivalent to finding that the plaintiff would not have been terminated "but for" his age. [citations omitted]. Thus, if a jury accepts the plaintiff's contention that age was a "determining factor" in his discharge, it has necessarily rejected the employer's contention that it would have terminated the plaintiff regardless of his age; both cannot simultaneously be true.

The district court itself seemed to acknowledge this inherent contradiction, explaining: "You cannot have both of these situations existing in the same case. If he was discharged, if we assume for the sake of discussion that the discharge was made and that his age was a determining factor in the discharge, then it would be an impossibility for the affirmative defense to be proven, so that it's got to be one or the other, and if he proves that the age was a determining factor, then that's the end of the case."<sup>17</sup>

The majority opinion did not answer the internal inconsistency identified by Judge Rovner in the instruction, nor was it really helpful in explaining what a model instruction should look like. Unfortunately, Mayall is virtually alone in its presentation of the complete burden of proof instruction for an employment discrimination case.

The inconsistency in the Mayall burden of proof instruction reflects, I submit, a subtle but profound change in the Seventh Circuit's allocation of the burden of proof on the issue of liability in mixed motive discrimination cases. Until Mayall, the conventional wisdom was that with all the shifting burdens of going forward with certain evidence, in establishing the liability of the defendant, the burden of persuasion always remained with the plaintiff to prove intentional discrimination by a preponderance of the evidence. In Mayall, the Circuit Court approved an instruction that seemingly divided the burden of proof between the parties on the issue of liability. The plaintiff still had the burden to show a violation of Title VII, but the defendant could defeat liability by showing that the employee suffered no injury, meaning that she would have been treated the same regardless of the violation.

The dual burdens of proof set out in Mayall are not only contrary to the well-established principle that the plaintiff bears the ultimate burden of proof, but this case also creates a theoretical and practical problem for all who try to apply the Mayall instruction in a post-1991 Amendment case. For instance, as part of its *prima facie* case, the Mayall plaintiff had to prove that the unlawful factor was "a motivating factor" in the adverse employment decision (i.e., "but for" the unlawful factor, the adverse employment decision would not have been made). However, in Mayall, the burden of proof instructions also provided for an affirmative defense to allow the employer to defeat liability. According to Mayall, an employer could defeat liability by proving that the adverse employment decision was based upon a lawful factor.

It is simply impossible, both as a theoretical and a practical matter, for the plaintiff to prove as part of his or her burden that the prohibited conduct was a "but-for cause" and still lose on the issue of liability. Yet, this is what Mayall holds: if the employer proves as an affirmative defense that there was a lawful reason for its decision, then a plaintiff loses even if he or she shows that age, for

instance, was the “but-for cause” of her discharge. The majority in Mayall did not explain this inconsistency.

In fact, this obvious theoretical inconsistency has never been explained by the Circuit Court. I suggest, however, that the rationale is obscurely revealed in a quintuplet of later decisions: Pilditch v. Board of Educ. of City of Chicago,<sup>18</sup> Bristow v. Drake Street Inc.,<sup>19</sup> Umpleby v. Potter & Brumfield, Inc.,<sup>20</sup> Doll v. Jesse Brown,<sup>21</sup> and Dranchak v. Akzo Nobel, Inc.<sup>22</sup>

The crux of the revealed wisdom is the application by the Seventh Circuit of the holdings in Price Waterhouse v. Hopkins<sup>23</sup> and Mt. Healthy City School District Bd. of Educ. v. Doyle<sup>24</sup> to the “mixed motive” case. These two cases teach that in order to prove a violation of Title VII and other employment laws, the employee must prove as part of its burden that a prohibited factor was the “but-for cause” of the adverse employment decision. However, the employer can still defeat liability by showing that the violation did not result in any injury because the employee would have been treated the same regardless of the prohibited factor.

This shift in the burden of proof on the issue of liability is reflected in the requirement that the employer plead and prove as an affirmative defense that regardless of the existence of the prohibited factor, if “everything else had been the same,” the employee would still have been the object of the adverse employment decision.<sup>25</sup>

## **B. The 1991 Amendments**

The 1991 Amendments to Title VII of the Civil Rights Act of 1964<sup>26</sup> overruled the holding of Price Waterhouse, and established liability solely upon proof by the plaintiff that the adverse employment decision was motivated by an impermissible motive. The Amendments eliminate the need to further defeat the defendant’s claim that, regardless of the prohibited factor, the plaintiff would have been treated the same. Liability is established under this legal rubric upon proof of an impermissible factor, even if other factors also motivated the employment decision.<sup>27</sup>

After the 1991 Amendments, proof by an employee that a prohibited factor was the “but-for cause” of the employment decision is enough to establish liability.<sup>28</sup> Moreover, proof of injury sustained by the employee is no longer part of the liability equation. The 1991 amendments now make proof of injury a basis for **limiting** the plaintiff’s remedies, rather than a basis for **eliminating** liability.<sup>29</sup> Section 2000e - 5(g)(2)(B) provides that where there is a violation under Section 703(m) and “a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factors,” damages are limited to “declaratory relief, limited injunctive relief and attorney fees and costs” directly attributable only to the pursuit of a claim under section 703(m); compensatory and punitive damages are not available.

What is still unsettled in Seventh Circuit jurisprudence is the impact of the 1991 Amendments to Title VII on jury instructions in a mixed motive situation. In virtually all of the appellate decisions since Mayall, the 1991 Amendments have not been discussed, nor have they played a role in the court’s analysis of the burden of proof issue.<sup>30</sup>

However, in Hennessey v. Penril Datacomm Networks, Inc.,<sup>31</sup> the lone case where the 1991 Amendments were considered, Judge Evans, writing for the panel, held that, “a violation of Title VII is established if a plaintiff can prove by a preponderance of the evidence that discrimination was a motivating factor in the employment decision. . . .”<sup>32</sup> Under Hennessey, if the employer proves that it would have made the same decision “in the absence of the impermissible motivating factor, . . . it is not absolved of violating Title VII, for such a finding only serves to limit the plaintiff’s remedies to declaratory and injunctive relief and limited attorney’s fees and costs.”<sup>33</sup>

Jury instructions are impacted by the 1991 Amendments. First, the employer is no longer called upon to assert a legal motive as an affirmative defense to liability. Second, some instruction is needed to allow the employer to demonstrate and the jury to find that the employer would have taken the same action in the absence of the impermissible motivating factor.

In Hennessey, Judge Evans, speaking for the panel, reasoned that “the 1991 Civil Rights Act amended Title VII to include an *affirmative*, but for, *defense* for the employer.”<sup>34</sup> This is an unfortunate choice of words. Judge Evans simply cannot be suggesting that the burden of proof instruction should still contain an affirmative defense that requires the employer to prove that the adverse employment decision would still have resulted regardless of the impermissible motivating factor. His discussion of the 1991 Amendments and the Amendments’ limitation of damages, rather than liability, belies that notion.

If Judge Evans did mean that an affirmative defense exists for the employer, then the jury must be instructed that proof of the affirmative defense does not prevent liability but only limits the remedies available to the employer. If Judge Evans did not intend to perpetuate the employer’s affirmative defense after the 1991 Amendments, then it seems entirely appropriate for the district courts, based on the language of the 1991 Amendments and the rationale of Hennessey, to craft a special interrogatory for use at trial which outlines the analytical steps a jury is to take in deciding the questions of liability and damages.

In fact, the Eighth Circuit’s decision in Pedigo v. P.A.M. Transport, Inc.<sup>35</sup> provides guidance. In Pedigo, the Eighth Circuit Court of Appeals considered the question whether the plaintiff in a discrimination case is entitled to a jury award of compensatory damages, under the ADA, even though the employer proves that it would have made the same adverse employment decision for legitimate, non-discriminatory reasons. The plaintiff in Pedigo was a truck driver who suffered a heart attack and could no longer meet the physical requirements mandated by federal regulations for truck drivers. Five months after plaintiff’s heart attack, the employer terminated him. Mr. Pedigo brought suit under the ADA alleging that the company’s failure to find a non-driving position for him and his termination was discrimination in violation of the ADA. After a three-day jury trial, the jury found that the company had, in fact, intentionally discriminated against the plaintiff on the basis of

his disability, but they also found that the company would have made the same decision to fire him for legitimate, nondiscriminatory reasons. It then awarded Mr. Pedigo compensatory damages.

On appeal, the company argued that the trial court gave the jury the wrong instruction, as a matter of law. Unfortunately, the instruction given by the trial court is not contained in the Circuit Court's written opinion. However, the Court of Appeals did find as follows:

If the employer proves . . . that it would have made the same decision "in the absence of the impermissible motivating factor," see 42 U.S.C. § 2000e-5(g)(2)(B), the court may grant declaratory and injunctive relief and some attorney's fees and costs, see 42 U.S.C. § 2000e-5(g)(2)(B)(I), but not reinstatement, back pay, or damages, see 42 U.S.C. § 2000e-5(g)(2)(B)(ii). In other words, in a case where the employee's disability was a motivating factor in the employer's decision but the employer proves that it would have made the same decision absent consideration of the employee's disability, the remedies available are limited to a declaratory judgment, an injunction that does not include an order for reinstatement or for back pay, and some attorney's fees and costs.<sup>36</sup>

The opinion issued by the Court of Appeals demonstrates, through and through, that Title VII, as amended by the Civil Rights Act of 1991, provides for a limitation of remedies, rather than elimination of liability, upon proof by the employer that an adverse employment decision would have been made for legitimate reasons, absent the impermissible motivating factor. The opinion also cites other courts who have reached the same conclusion in the context of age, sex, and age discrimination cases.<sup>37</sup>

Based on Pedigo and a careful reading of Title VII, as amended by the 1991 Act, it seems entirely clear that discrimination cases under the ADA and the ADEA, which incorporate Title VII's burden of proof standards, require a jury instruction, perhaps in the nature of a special interrogatory, which provides that an employer's proof of a legitimate reason for the adverse employment decision will serve, not as an affirmative defense to liability, but as a limitation on the remedies a plaintiff may recover once he or she proves that an impermissible factor also motivated the decision.

One such instruction might read:

**Burden of Proof Instruction -- Age Discrimination**

In order to prove her age discrimination claim against Defendant, Plaintiff has the burden of proving each of the following propositions:

First, that she was terminated from her job;

Second, that her age was a motivating factor in Defendant’s decision to discharge her. This means that if Plaintiff had been younger than forty years old and everything else had remained the same, she would not have been discharged; and

Third, that as a direct result of Defendant’s conduct, Plaintiff sustained damages.

If you find from your consideration of all the evidence that each of the propositions required of Plaintiff has been proved, then your verdict should be for Plaintiff. If, on the other hand, you find from your consideration of all the evidence that any one of the propositions Plaintiff is required to prove has not been proved, then your verdict should be for Defendant.

Court’s Instruction No. \_\_\_\_.<sup>38</sup>

The “special interrogatory” limiting damages, in the event that an employer proves it had a legitimate basis for its decision, might look something like this:

**Special Interrogatories**

Please answer the following questions. Your answers must be unanimous.

1. Did Plaintiff prove by a preponderance of the evidence that he is “disabled” as that term is defined under the Americans with Disabilities Act?

\_\_\_\_\_ Yes  
\_\_\_\_\_ No

2. Did Plaintiff prove by a preponderance of the evidence that he is a “qualified individual with a disability” as that term is defined under the Americans with Disabilities Act?

\_\_\_\_\_ Yes  
\_\_\_\_\_ No

Answer Questions 3 and 4 only if you have answered “yes” to both questions 1 and 2.

3. Did Plaintiff prove by a preponderance of the evidence that a disability (as that term is defined under the Americans with Disabilities Act) was a motivating factor in the employer’s decision to discharge him?

\_\_\_\_\_ Yes  
\_\_\_\_\_ No

4. Did the employer prove by a preponderance of the evidence that, if the Plaintiff had not been disabled, it would have made the same employment decision.

\_\_\_\_\_ Yes  
\_\_\_\_\_ No

Answer Question 5 only if you have answered “No” to Question 4.

5. Damages are assessed against Defendant as follows:

\$ \_\_\_\_\_ for back pay  
\$ \_\_\_\_\_ for compensatory damages

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In conclusion, I believe that until the Seventh Circuit gives district courts guidance on how to formulate the burden of proof instruction in employment discrimination cases, district court judges will have to formulate their own instructions. For those judges and practitioners who are struggling, as I did, to develop instructions in this area, I hope that the sample instructions in this article, together with the analysis that I have done regarding these issues, will be of some assistance. The 1991 Amendments to Title VII changed the legal landscape and any formulation of an instruction in this area should reflect this significant change in the proof needed to establish liability. Instructions should also reflect the opportunity provided by Congress to employers by the Amendments to limit the

remedies available to employees if the employer can show that no harm resulted from the discrimination.

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1. Chief United States District Judge for the Central District of Illinois.
  2. Law Clerk to the Honorable Joe Billy McDade (1992-1994; 1997-1998).
  3. Law Clerk to the Honorable Joe Billy McDade (1998-1999).
  4. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742 (1993).
  5. 411 U.S. 792, 93 S.Ct. 1817 (1973).
  6. Id. at 802. Note that this fourth element may vary in content depending upon which of the employment discrimination laws is applicable.
  7. 450 U.S. 248, 254, 101 S.Ct. 1089 (1981).
  8. Id.
  9. Id. at 253.
  10. Hicks, 509 U.S. at 509-511.
  11. Id., at 506.
  12. 43 F.3d 340, 343 (7th Cir. 1994) (citing Postal Service v. Aikens, 460 U.S. 711, 715, 103 S.Ct. 1478 (1983); Burdine, 450 U.S. at 256).
  13. Carson v. Bethlehem Steel Corp., 82 F.3d 157, 158 (7th Cir. 1996) (citing Gehring v. Case Corp., 43 F.3d 340, 344-45 (7th Cir. 1994)).
  14. 7 F.3d 570 (7<sup>th</sup> Cir. 1993).
  15. Id.
  16. Id., at 573, n.3.
  17. See e.g., 7 F.3d at 575.

18. 3 F.3d 1113 (7<sup>th</sup> Cir. 1993).
19. 41 F.3d 345 (7<sup>th</sup> Cir. 1994).
20. 69 F.3d 209 (7<sup>th</sup> Cir. 1995).
21. 75 F.3d 1200 (7<sup>th</sup> Cir. 1996).
22. 88 F.3d 457 (7<sup>th</sup> Cir. 1996).
23. 490 U.S. 228, 109 S.Ct. 1775 (1989).
24. 429 U.S. 274, 97 S.Ct. 568 (1977).
25. See, e.g., Gehring, 43 F.3d 340 (refusing to overrule Mayall and demonstrating, inter alia, that the plaintiff still has a “but for” burden of proof).
26. 42 U.S.C. § 2000, et seq.
27. See 42 U.S.C. § 2000e - 2(m).
28. See id.
29. See 42 U.S.C. § 2000e - 5(g)(2)(B).
30. See generally Pilditch v. Board of Education, 3 F.3d 1113 (7<sup>th</sup> Cir. 1993); Bristow v. Drake Street Inc., 41 F.3d 345 (7<sup>th</sup> Cir. 1994); Umpleby v. Potter & Brumfield, Inc., 69 F.3d 209 (7<sup>th</sup> Cir. 1995); and Doll v. Jesse Brown, 75 F.3d 1200 (7<sup>th</sup> Cir. 1996).
31. 69 F.3d 1344 (7<sup>th</sup> Cir. 1995).
32. See 42 U.S.C. § 2000e - 2(m).
33. 69 F.3d at 1350.
34. Id. at 1350-51 (emphasis added).
35. 60 F.3d 1300 (8<sup>th</sup> Cir. 1995).
36. Id.
37. See supra cases cited on page 1301-02 of the opinion.
38. Gehring v. Case Corp., 43 F.3d 340 (7<sup>th</sup> Cir. 1994), Hennessy v. Penril Datacomm Networks,

Inc., 69 F.3d 1344, 1350-51 (7th Cir. 1995), and Pedigo v. PAM Transport, Inc., 60 F.3d 1300 (8th Cir. 1995) could be cited as authority for this instruction.