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## Test nixed for Illinois retaliatory discharge cases

In a clear victory for employers, the 7th U.S. Circuit Court of Appeals on July 15 held that federal courts deciding workers' compensation retaliation cases under Illinois law may not employ the *McDonnell Douglas* burden shifting analysis common to discrimination cases. *Gacek v. American Airlines, Inc.*, No. 09-3131. Such retaliation cases, the court ruled, must be decided under the more rigorous Illinois substantive tort law that requires the complaining employee to prove actual causation.

*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), was a recognition that under the federal anti-discrimination laws, employees and former employees needed some help to make their cases. Employers, even back in 1973, rarely came out and declared, "You're fired because you're a woman," or "You didn't get a raise because you're Polish." Smoking guns were and are hard to come by. Because so few cases involve direct evidence of discrimination and because it can be difficult to discern an employer's actual intent, the Supreme Court in *McDonnell Douglas* devised a burden shifting analysis that made it somewhat less difficult for suing workers to at least survive summary judgment.

As employment lawyers know, under *McDonnell Douglas*, a suing employee must demonstrate a prima facie discrimination case by showing that, with some variation (1) she was in a protected class (age, gender, race, disability, etc.); (2) she was meeting her employer's legitimate and reasonable expectations; (3) she suffered an adverse employment action, like a firing; and (4) she was replaced by an employee outside her protected class or similarly situated employees outside her protected class were treated more favorably. Once the employee establishes her prima facie case, the sued employer must proffer a legitimate, non-discriminatory reason for the adverse employment action. If it does not, an inference arises that it had acted discriminatorily. If it does, the employee can defeat summary judgment or ultimately prevail if she then can demonstrate that the employer's proffered reason for the adverse employment action was a pretext, or lie, for unlawful discrimination. This burden shifting analysis thus does not require the employee to prove actual causation to reach a trial, but rather to show that the employer was not truthful about the reason for the adverse employment action.



### Labor Daze

By Frank J. Saibert

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In *Gacek*, a diversity suit for retaliatory discharge under the Illinois Workers' Compensation Act, 820 ILCS 305/4(h), the federal trial court granted summary judgment for the employer, American Airlines, after applying the *McDonnell Douglas* framework. On appeal, the 7th Circuit affirmed the dismissal, but expressly disavowed the use of *McDonnell Douglas* in such cases. According to the 7th Circuit, the trial court should have reached the same result, as it did, because *Gacek* could not possibly have proven that his filing a workers' compensation claim caused American Airlines to fire him. The undisputed evidence showed that the airline honestly believed that *Gacek* had lied about calling off work ill and disregarded physician orders pertaining to his workers' compensation injury.

In so ruling, the 7th Circuit first noted that the Illinois Supreme Court, in 1998, expressly rejected the *McDonnell Douglas* analysis in workers' compensation retaliatory discharge cases. *Clemons v. Mechanical Devices Co.*, 184 Ill.2d 328, 704 N.E.2d 403 (1998). The Supreme Court in *Clemons* had declared that it would not "expand the tort of retaliatory discharge by reducing plaintiff's burden of proving the elements of the tort..." 184 Ill.2d at 339, 704 N.E.2d at 408. A key element of the tort, of course, is causation. Thus, since 1998 at least, Illinois state courts have been barred from deploying *McDonnell Douglas* in worker's compensation retaliatory discharge cases.

But what of federal courts deciding

these cases in diversity? There, the 7th Circuit lamented, the waters were somewhat murky, leaving federal trial courts with little guidance. "It is time," the appellate judges intoned, "we answered the question."

The court then invoked that old law school favorite, the *Erie* doctrine, to remind that federal courts sitting in diversity must apply state "substantive" law but federal "procedural" law. But what is *McDonnell Douglas*? Substantive or procedural? Same question for Illinois tort law that requires proof of causation.

According to the 7th Circuit, a substantive law "is one motivated by a desire to influence conduct outside the litigation process, such as a desire to deter accidents ..." A procedural law, by contrast, "is one motivated by a desire to reduce the cost or increase the accuracy of the litigation process, regardless of the substantive basis of the particular litigation." Using these standards, the 7th Circuit determined that the *McDonnell Douglas* test is not a general rule of procedure, but rather a substantive law "designed to make it easier for plaintiffs to withstand summary judgment in discrimination cases..." "Illinois," the appeals court pointedly noted, "doesn't want to give plaintiffs in retaliatory discharge cases governed by state law that leg up; it doesn't want to modify the conventional principles of tort law" That, stated the court, is a substantive judgment that federal courts sitting in diversity must follow.

To those who might claim that *Gacek* makes a distinction without a difference, because the result in these cases usually would be the same, the court had a ready answer. Were *McDonnell Douglas* applicable in Illinois retaliation cases, and an employer fails to advance a legitimate reason for the employee's discharge or other adverse employment action after the employee raises a prima facie case, the employee, without more, would win. No proof of causation required. The 7th Circuit pointed out that sometimes employers do not or cannot advance a legitimate reason, either because the real reason for the firing was illegal, unethical or embarrassing, the decision maker no longer works for the employer and is hostile to it, or for some other reason unrelated to discrimination. In these cases, the court suggested, the absence of *McDonnell Douglas* could make all the difference in the world.