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**RACIAL DISCRIMINATION—THE BURDEN-SHIFTING
ANALYSIS IN A MOTION FOR SUMMARY JUDGMENT—
THE NINTH CIRCUIT COURT OF APPEALS CHANGES
THE SUPREME COURT’S BURDEN OF PRODUCTION ON
A DEFENDANT’S OFFER OF NON-DISCRIMINATION:
*SIMMONS V. AMERICAN AIRLINES***

LUKE E. ALVERSON*

AMID CONCERNS of plaintiff difficulty in producing direct evidence of racial discrimination, the Supreme Court established a “burden-shifting analysis” in *McDonnell Douglas Corp. v. Green*¹ to alleviate such problems.² This analysis—originally derived for employment discrimination and later applied to other discrimination scenarios³—requires a defendant to articulate legitimate, non-discriminatory reasons for their actions in response to a plaintiff’s valid complaint of discrimination.⁴ In the recent case of *Simmons v. American Airlines*, the Ninth Circuit Court of Appeals applied the burden-shifting analysis to an issue of racial discrimination, overturning a district court grant of summary judgment.⁵ Though the use of the burden-shifting analysis was proper, the court improperly placed an emphasis on the persuasiveness and subjective credibility, rather than the legal sufficiency, of the defendant’s evidence of non-discrimination. As this article will discuss, this emphasis incorrectly in-

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¹ See *infra* note 20.

² See Matthew D. O’Leary, *St. Mary’s v. Hicks: The Supreme Court Restricts the Indirect Method of Proof in Title VII Claims*, 13 ST. LOUIS U. PUB. L. REV. 821, 824-27 (1994).

³ *E.g.*, *Green v. Rancho Santa Margarita Mort. Co.*, 33 Cal. Rptr. 2d 706, 710-11 (Cal. App. 1994) (applying *McDonnell* to a case involving racial discrimination in mortgage approval).

⁴ *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-56 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

⁵ *Simmons v. Am. Airlines*, 2000 WL 33529791, at *1 (N.D. Cal. Dec. 20, 2000).

creases the defendant's evidentiary burden as well as eases the plaintiff's ability to maintain a baseless racial discrimination suit.

On August 19, 1999, Raymond Simmons, an African-American man, boarded American Airlines ("American") flight 1726, bound for Tampa, Florida.⁶ Some time before take-off, an unidentified female passenger seated in front of Mr. Simmons complained to the flight attendants that he was using obscene language while on his cell phone, specifically the phrase, "damn white bitch."⁷ The captain was informed of the situation and requested that the flight attendants remove Mr. Simmons for the protection of the other passengers.⁸ Mr. Simmons was then asked by the flight attendants, without explanation, to retrieve his carry-on bag and get off the airplane.⁹ While being escorted off the airplane and into the airport terminal, Mr. Simmons made remarks about not being a hijacker, and was told of the reason for his removal.¹⁰ Later that day, Mr. Simmons was permitted to board a flight to Tampa.¹¹

Subsequent to the incident, American Airlines personnel completed an incident report describing the events.¹² The report summarized the incident, noting that a passenger was "shaken up" due to Mr. Simmons's use of "obscene" language, and that the captain ordered Mr. Simmons removed to "guarantee the safety of the other p[assengers]."¹³ In the "event note details" portion of the report, the obscenities used by Mr. Simmons were identified, along with the "I am not going to hijack" statement.¹⁴

Several months after the incident, Mr. Simmons filed a pro se complaint under the Unruh Civil Rights Act¹⁵ against American Airlines in California state court.¹⁶ Mr. Simmons alleged that he

⁶ *Id.*

⁷ *Id.* at *2.

⁸ *Id.*

⁹ *Id.* at *1.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at *1-2.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ The Unruh Civil Rights Act provides a cause of action against "business establishments" for denial of equal "accommodations, advantages, facilities, privileges, or services" based on race, among other characteristics. CAL. CIV. CODE § 51(b) (West 2002). The statute has been interpreted to protect airline passengers from discrimination on the basis of race. See *Abou-Jaoude v. British Airways*, 281 Cal. Rptr. 150, 154 (Cal. Ct. App. 1991).

¹⁶ *Simmons v. Am. Airlines*, 34 Fed. Appx. 573, 575 (9th Cir. 2002).

was racially discriminated against when he was removed from the flight, based on an unsubstantiated complaint.¹⁷ American removed the case to federal court and filed a motion for summary judgment, stating that Mr. Simmons was removed for disorderly conduct pursuant to business policy.¹⁸

The U.S. District Court in the Northern District of California granted American's motion for summary judgment.¹⁹ Using the Supreme Court's three-part burden-shifting analysis for discrimination claims established in *McDonnell Douglas*,²⁰ the court determined that American Airlines "articulated a legitimate, non-discriminatory reason for its actions and presented evidence sufficient to raise a genuine issue of material fact," therefore shifting the burden of proving discriminatory pretext back to Mr. Simmons.²¹ Since Mr. Simmons, in the court's opinion, did not present "specific and probative evidence" of discriminatory pretext, he therefore failed the third element of the *McDonnell Douglas* test and did not survive American's motion for summary judgment.²²

In an opinion citing only one source, the Ninth Circuit Court of Appeals reversed the district court's decision.²³ The Ninth Circuit held that American offered an implausible explanation for Mr. Simmons's removal, insufficient to shift the burden of production back to Mr. Simmons.²⁴ Borrowing language from *Burdine*, the court focused exclusively on American's perceived failure to provide evidence "legally sufficient to justify a judgment" in American's favor, ultimately keeping from Mr. Simmons the burden of producing evidence that demonstrates discriminatory pretext.²⁵

The Ninth Circuit based their opinion of American's proffered explanation on American's apparent failure to follow its

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Simmons*, 2000 WL 33529791, at *4.

²⁰ The elements of the test, as articulated, are: (1) the complainant must establish a prima facie case of discrimination; (2) the defendant must offer a legitimate reason for his actions; and (3) the complainant must prove that the defendant's reason was a pretext to mask an illegal motive. See *McDonnell*, 411 U.S. at 802-03; see also *Burdine*, 450 U.S. at 253-56; *Simmons*, 2000 WL 33529791, at *2.

²¹ See *Simmons*, 2000 WL 33529791, at *4.

²² *Id.*

²³ *Simmons*, 34 Fed. Appx. at 575-77.

²⁴ *Id.* at 576.

²⁵ *Id.*

own safety policy.²⁶ The court noted specific sections of American's safety policy²⁷ and attempted to apply it to the events of the case to determine if American's explanation was "legitimate" under its own wording.²⁸ Analyzing the situation in this context, the court noted that there was no evidence of Mr. Simmons being warned before removal from the plane, and based on this fact, the conduct was not, in their view, "misconduct" under the American Airlines policy.²⁹ The court ultimately determined that since American apparently failed to follow its own self-imposed safety policy, the evidence of Mr. Simmons's disturbance was not credible and therefore not legally sufficient to justify a judgment for the defendant.³⁰ Under such a standard, the court held that American's evidence was not a legitimate, non-discriminatory reason for removing Mr. Simmons, and was insufficient to warrant summary judgment in its favor.³¹

While the use of the burden-shifting analysis was proper, the Ninth Circuit improperly characterized the nature of the burden placed upon the defendant once the plaintiff has established a *prima facie* case of discrimination.³² The test itself requires that once a plaintiff has met his initial requirement of establishing a *prima facie* case for discrimination (the burden of which is less than preponderance of the evidence),³³ the defendant accepts a burden of rebutting the presumption of discrimination with a legitimate, non-discriminatory reason for the action.³⁴ This burden is one *only* of production; the burden of persuasion never leaves the plaintiff.³⁵ Therefore, the defen-

²⁶ *Id.*

²⁷ Section 1.16(E)(1) of the policy and relevant definitions of paragraph A provide that passenger misconduct requiring the captain's attention may result in removal of the passenger from the aircraft. The "misconduct" of a passenger is further divided into three escalating categories. Category one involves a flight attendant requesting compliance of a passenger with no further incidents and no report to the cockpit. In category two, the disturbance continues, interfering with cabin safety. Category three occurs when another passenger or crewmember is injured or subjected to threat of injury, with or without warning. *Id.*

²⁸ *Simmons*, 34 Fed. Appx. at 575-77.

²⁹ *Id.* at 576.

³⁰ *Id.* at 577.

³¹ *Id.*

³² *See id.* (evaluating the credibility of the evidence proffered by American Airlines).

³³ *Simmons*, 2000 WL 33529791, at *1.

³⁴ *Burdine*, 450 U.S. at 254.

³⁵ *Id.* at 253.

dant “need not persuade the court that it was actually motivated by the proffered reasons,” and must only raise “a genuine issue of fact as to whether it discriminated against the plaintiff.”³⁶ Once this burden is met, the plaintiff then reassumes the burden of providing probative evidence of discriminatory pretext, which in effect demonstrates that the defendant’s offered reasons were not truthful.³⁷

Much has been said of the burden of production placed on the defendant and its improper application in such discrimination claims. In an article for the St. Louis University Public Law Review, the *Burdine* articulation of *McDonnell Douglas* was discussed, specifically the fact that while a defendant must offer legally sufficient reasons to justify a judgment in its favor, it is improper to evaluate the reason’s credibility at that stage.³⁸ To evaluate credibility at this initial burden-shifting stage would be to improperly raise the defendant’s burden beyond that of production.³⁹ The California Court of Appeals for the Fourth District, in the case of *Rancho Santa Margarita*, reiterated the Supreme Court’s concern regarding the incorrect application of the defendant’s burden.⁴⁰ By elevating the defendant’s burden through allowing a court to reject poor reasons for a defendant’s action, even though non-discriminatory, the plaintiff could improperly avoid presenting probative evidence of that discrimination.⁴¹

Looking no further than the opinion in *Burnett*, an expression of concern can be found regarding application of an improper

³⁶ *Id.* (citing *Bd. of Trs. of Keene State Coll. v. Sweeney*, 439 U.S. 24, 25 (1987)).

³⁷ *Id.* at 256; *see also* *Schuler v. Chronicle Broad. Co.*, 793 F.2d 1010, 1011 (9th Cir. 1986) (stating that for a plaintiff to withstand a defendant’s motion for summary judgment in a discrimination suit, the plaintiff must offer specific and significantly probative evidence that the alleged purpose of the defendant was a pretext for discrimination).

³⁸ *See Burdine*, 450 U.S. at 254-55; O’Leary, *supra* note 2, at 824-27 (discussing the three-part burden-shifting analysis under *McDonnell*, as clarified in *Burdine*, at the time of the first burden-shift).

³⁹ *See supra* note 38.

⁴⁰ *Rancho Santa Margarita*, 33 Cal. Rptr. 2d at 710-11; *see also* *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) (“[N]othing in law would permit us to substitute for the required finding that the [defendant’s] action was the product of unlawful discrimination, the much different (and much lesser) finding that the [defendant’s] explanation of its action was not believable.”).

⁴¹ *Rancho Santa Margarita*, 33 Cal. Rptr. 2d at 710-11.

standard for the defendant.⁴² In criticizing a ruling of the Fifth Circuit, the Supreme Court explains:

[T]he [defendant's] burden is satisfied if he simply 'explains what he has done' or 'produces evidence of legitimate non-discriminatory reasons.' It is clear that the Court of Appeals required much more: it placed on the defendant the burden of persuading the court that it had convincing, objective reasons for [acting as it did] . . . We have stated consistently that the [defendant's] prima facie case of discrimination will be rebutted if the [defendant] articulates lawful reasons for the action; that is to satisfy [the burden] the [defendant] need only produce admissible evidence which would allow the trier of fact rationally to conclude that the [action] has not been motivated by discriminatory animus.⁴³

The Court concluded that in demanding more than this, the Fifth Circuit was incorrectly requiring the defendant to persuade the trier of fact that its actions were non-discriminatory, rather than simply satisfying a burden of production.⁴⁴

The Ninth Circuit's application of American's own safety policy to the facts of *Simmons* incorrectly resulted in American Airlines being required to bear a burden of persuasion as to the legitimacy and credibility of its non-discriminatory reasons. Beginning its analysis of the burden-shifting structure, the court stated that the test does not give American Airlines "carte blanche to proffer any explanation, regardless of plausibility. . .to shift the burden back to Simmons," and focuses on the "legally sufficient" language of *Burdine* to establish the legal standard.⁴⁵ While this language is in the correct context, the court erroneously looks to American's in-flight safety policy as an evaluation tool of the evidence's credibility in an attempt to establish (or perhaps discredit) the "legal sufficiency" of American's evidence, completely ignoring the standard established by the Supreme Court.

As explained by the Court in *Burdine*, "legally sufficient" refers *only* to the admissibility of the defendant's evidence and its possibility of allowing rational triers of fact to conclude that there was no discriminatory intent; an evaluation of credibility has no place in the analysis at this point.⁴⁶ Notwithstanding American's

⁴² *Burdine*, 450 U.S. at 257.

⁴³ *Id.* (citations omitted).

⁴⁴ *Id.*

⁴⁵ *Simmons*, 34 Fed. Appx. at 576.

⁴⁶ *See Burdine*, 450 U.S. at 257.

valid argument that the safety policy only applies while aircraft is in-flight (not, as in this case, while on the tarmac), the court did not discuss the significance of following the safety policy in a discriminatory context, much less provide a legal basis for using the safety policy as a standard.⁴⁷ What the court should have done is analyze the incident report American Airlines submitted by asking, “does this report explain, in non-discriminatory terms, why American removed Mr. Simmons from the flight,” or “does the report raise a genuine issue of fact as to whether American discriminated against Mr. Simmons?” Upon answering “yes” to either of these questions, the burden would properly shift back to the plaintiff to produce probative evidence of discriminatory pretext.

The Ninth Circuit’s use of American’s safety policy as an objective evaluator ultimately presents two problems. First, it undermines the Supreme Court’s requirement that the defendant should not be forced to bear a persuasive burden in presenting evidence.⁴⁸ While this court and others may believe the reason offered by American Airlines is poor, by either their own personal standards or American’s safety policy, it is of absolutely no consequence in determining whether American satisfied its burden of legal sufficiency under the *Burdine* test, so long as it is non-discriminatory and offered through admissible evidence.⁴⁹

Second, and perhaps more significantly, the decision allowed Mr. Simmons to effectively skip the Supreme Court’s third and arguably most important part of the burden-shifting test: the rebutting of American’s evidence of non-discrimination through the presentation of evidence showing American’s actions to be pretext of racial discrimination.⁵⁰ What is missing from *Simmons* is exactly what a legitimate claim should contain—at no time did Mr. Simmons present evidence that American Airlines had any discriminatory purpose whatsoever. By reversing the district court’s grant of summary judgment, the Ninth Circuit has effectively imposed an improper burden of persuasion on defendants

⁴⁷ *Simmons*, 34 Fed. Appx. at 575-77 n.3.

⁴⁸ See *Burdine*, 450 U.S. at 256-58 (discussing the misconstruing of the test by the Fifth Circuit and the rationale behind not requiring persuasion from the defendant).

⁴⁹ See *id.*; see also *Rancho Santa Margarita*, 33 Cal. Rptr. 2d at 711 (discussing the problems of evaluating defendant’s explanation in the burden-shifting analysis).

⁵⁰ See *supra* note 48; see also *Schuler*, 793 F.2d at 1011 (“To withstand an employer’s motion for summary judgment in a discrimination suit, the employee must do more than establish a prima facie case and deny the credibility of the [defendant’s] witnesses.”).

in racial discrimination suits, which not only creates difficulty for defendants in rebutting baseless claims, but further gives a plaintiff carrying an empty shotgun of accusation undeserved standing and significance in the legal system.