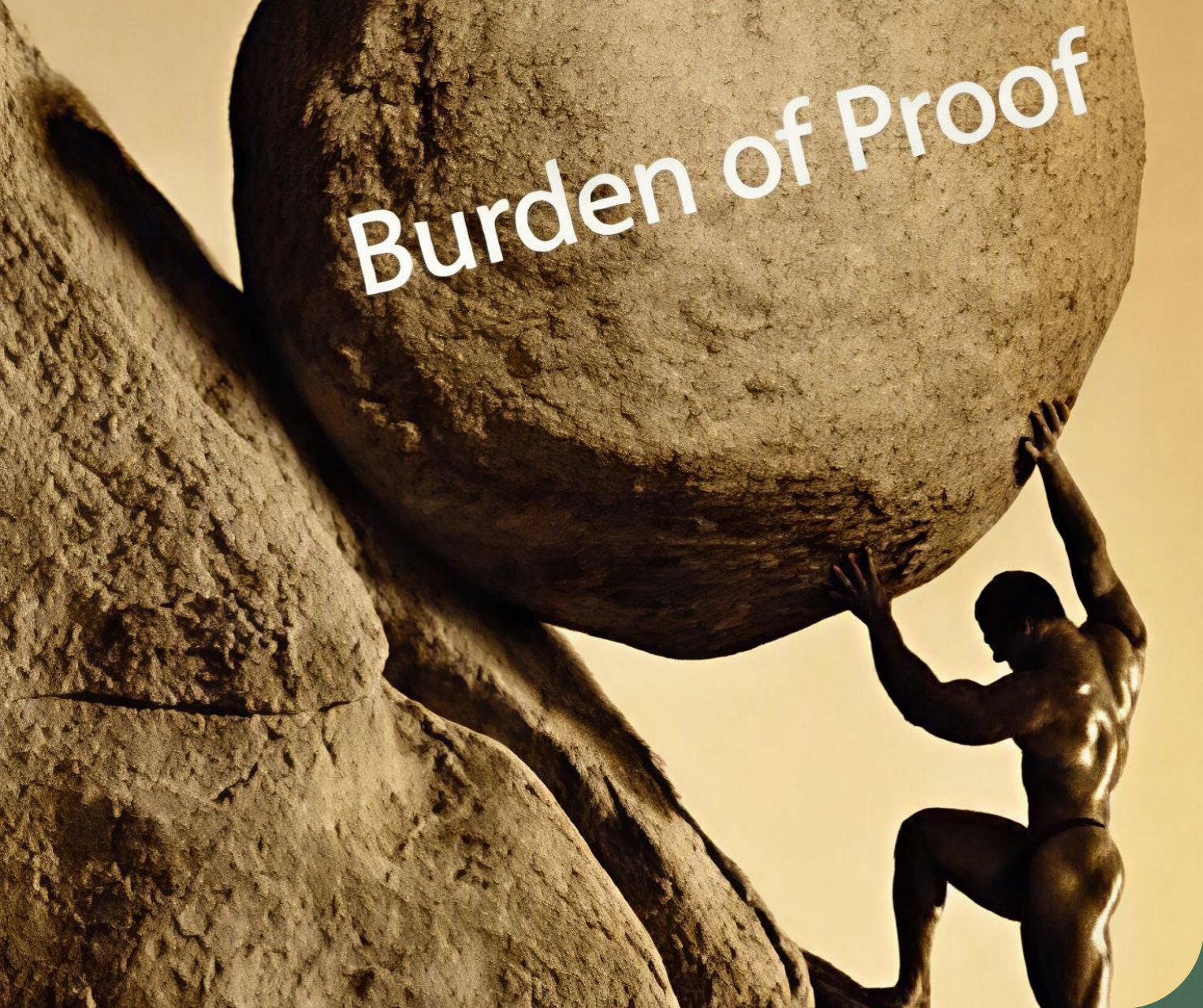




Burden of Proof

**Summary Judgment:
*McDonnell Douglas v.
Green* -- Mayhem:
Will its Burden
Shifting Mechanism
Survive and, if Not,
What Will Replace It?**

**ALLISON A. JONES
DOWNER, JONES, MARINO & WILHITE
401 MARKET STREET, SUITE 1250
SHREVEPORT, LOUISIANA
71101
318 214 4444
AJONES@DHW-LAW.COM**

EMPLOYMENT CASES HAVE ALWAYS BEEN HARD!!!

Unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree. Employers are rarely so cooperative as to include a notation in the personnel file, 'fired due to age,' or to inform a dismissed employee candidly that he is too old for the job. *Thornbrough v. Columbus & Greenville R.R.*, 760 F.2d 633, 638 (5th Cir. 1985), (citation omitted), abrogated by *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).



GEORGE WASHINGTON AND HIS HATCHET



CIVIL RIGHTS EXPANSION 1964 –



**AS PART OF THAT
MOVEMENT
CONGRESS HAS
CONTINUED TO
EXPAND RIGHTS
OF EMPLOYEES**

LAWS FROM 1960 TO 2008 HAVE INCREASED FEDERAL CLAIMS

- ▶ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 – **AMENDED IN 1991**
- ▶ The Age Discrimination in Employment Act of 1967 29 U.S.C. §§ 621–634
- ▶ The Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (1990) – **AMENDED IN 2008**
- ▶ Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654 (statute) and 29 C.F.R. Part 825 (federal regulations), 1993



INCREASE IN CASE FILINGS IN FEDERAL COURT



WHAT IS A JUDGE TO DO?

JURISPRUDENTIAL PLAINTIPHOBIA?

- ▶ **FROM THE PERIOD JUNE 30, 2020, TO JUNE 30, 2021,**
- ▶ **ONLY 0.6% OF ALL EMPLOYMENT LAW CASES REACHED THE TRIAL STAGES**
- ▶ **SEE TABLE C-4: U.S. DISTRICT COURTS—CIVIL CASES TERMINATED, BY NATURE OF SUIT AND ACTION TAKEN, DURING THE 12-MONTH PERIOD ENDING JUNE 30, 2021, STAT. TABLES FOR THE FED. JUDICIARY (2021)**
- ▶ **SPECIFICALLY, OF THE 8,699 CASES THAT WERE FILED, ONLY FIFTY-FIVE REACHED A TRIAL: FORTY-FIVE JURY TRIALS AND TEN BENCH TRIALS**

PRE-TRIAL TERMINATION

- Table C-4. U.S. District Courts–Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending December 31, 2025

Table C-4.
U.S. District Courts–Civil Cases Terminated, by Nature of Suit and Action Taken,
During the 12-Month Period Ending December 31, 2025

Nature of Suit	Total	No Court Action	Court Action						
			Total Court Action	Before Trial	During or After Pretrial	During or After Trial			Percent Reaching Trial
						Total	Non-Jury	Jury	
Total Cases	266,008	60,447	205,561	175,735	28,195	1,631	499	1,132	0.6
United States Cases	46,026	11,034	34,992	33,777	1,053	162	114	48	0.4
Actions Under Statutes									
Consumer Credit	8,758	2,069	6,689	5,498	1,174	17	1	16	0.2
Telephone Consumer Protection Act	2,077	727	1,350	1,197	150	3	-	3	0.1
Cable/Satellite TV	388	110	278	252	26	-	-	-	-
Bankruptcy Suits	1,615	239	1,376	1,358	14	4	2	2	0.2
Antitrust	731	216	515	424	86	5	-	5	0.7
Civil Rights									
ADA–Employment	2,906	570	2,336	1,606	709	21	-	21	0.7
ADA–Other	9,890	3,566	6,324	5,878	434	12	7	5	0.1
Employment	10,260	1,795	8,465	6,128	2,236	101	6	95	1.0
Education	835	109	726	588	134	4	1	3	0.5
Other Civil Rights	19,636	2,995	16,641	14,645	1,768	228	32	196	1.2

POST TRIAL STATISTICS ARE WORSE

- ▶ In 2021, when an employee won at trial, the appellate court reversed the jury verdict in about 41% of those cases
- ▶ In contrast, when the employer won before the district court, it will face a reversal rate of only 8.72%
- ▶ See Kevin M. Clermont & Stewart J. Schwab, “Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?”, 3 HARV. L. & POL’Y REV. 103, 103–04, 113 (2009)

POST TRIAL STATISTICS ARE WORSE

- ▶ **This discrepancy “raises the specter that federal appellate courts have a double standard for employment discrimination cases, harshly scrutinizing employees’ victories below while gazing benignly at employer victories.”**
- ▶ **See Kevin M. Clermont & Theodore Eisenberg, “Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments,” 2002 U. ILL. L. REV. 947, 949 (2002)**



HOW DID THIS HAPPEN?



MANY TOOLS WERE AVAILABLE

- ▶ **Aggressive efforts by judges to settle cases**
- ▶ **Increased use of alternative dispute resolution or mediation**
- ▶ **BUT the increase in summary dispositions stirs fear that, in the haste to resolve weak cases, courts risk overriding the text of Title VII !!!!**
- ▶ **See, Paul W. Mollica, “Federal Summary Judgment at High Tide,” 84 Marquette Law Review 141 (2000)**

SUMMARY JUDGMENT

- ▶ FED. R. CIV. P. 56(c):
 - ▶ [t]he judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KASPERSKY LAB, INC.; and
KASPERSKY LABS LIMITED,

Plaintiffs,

v.

U.S. DEPARTMENT OF
HOMELAND SECURITY; and
KIRSTJEN NIELSEN
Secretary of Homeland Security

Defendants.

Civ. No. 17-2697 (CKK)

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN
THE ALTERNATIVE, FOR SUMMARY JUDGMENT



HISTORY OF SUMMARY JUDGMENT

- ▶ First utilized in 1979: See, *Fid. & Deposit Co. of Md. V. United States ex. rel. Smoot*, 187 U.S. 315, 320 (1902)
- ▶ (noting that as early as 1879 the United States Supreme Court had ruled favorably on summary judgment procedure).
- ▶ Initially, courts did not favor summary judgment procedure in the area of employment and were loath to approve of it.



***HAYDEN V.
NAT'L BANK,
595 f.2d 994,
997 (5th Cir.
1979)***

- ▶ When motive and intent are an issue, as with employment discrimination cases, the granting of summary judgment is questionable and should be utilized with great caution.

***Thornbrough
v. Columbus
& Greenville
R.R. 760.
F.2d 633,
640-641 (5th
Cir. 1985)***

- ▶ “In general, summary judgment is an inappropriate tool for resolving claims of employment discrimination, which involve nebulous questions of motivation and intent. See *Hayden v. First National Bank*, 595 F.2d 994, 997 (5th Cir.1979)
- ▶ “When dealing with employment discrimination cases, . . . granting of summary judgment is especially questionable.” *EEOC v. Southwest Texas Methodist Hospital*, 606 F.2d 63, 65 (5th Cir.1979), cert. denied, 445 U.S. 928, 100 S. Ct. 1314, 63 L. Ed. 2d 761 (1980).

***Thornbrough
v. Columbus
& Greenville
R.R. 760.
F.2d 633,
640-641 (5th
Cir. 1985)***

“Often, motivation and intent can only be proved through circumstantial evidence; determinations regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of the fact-finder. In reviewing a case on appeal, it is difficult to determine what evidence might legitimately sway the fact-finder and hence be material. Thus, if any facts are in dispute, summary judgment is generally inappropriate. ”



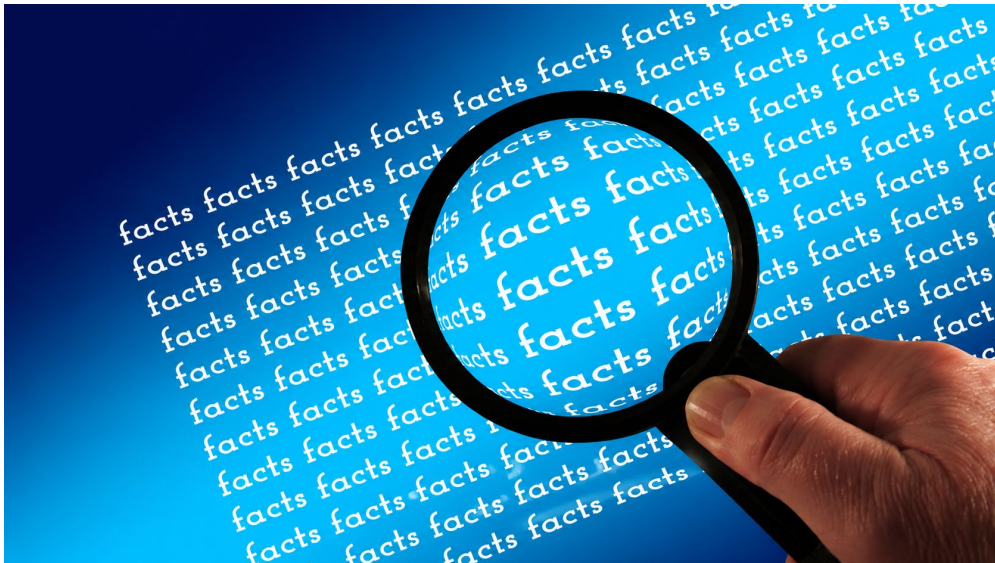
**MY HOW TIMES HAVE
CHANGED!**

1985



**HOW DID
THIS
HAPPEN?**

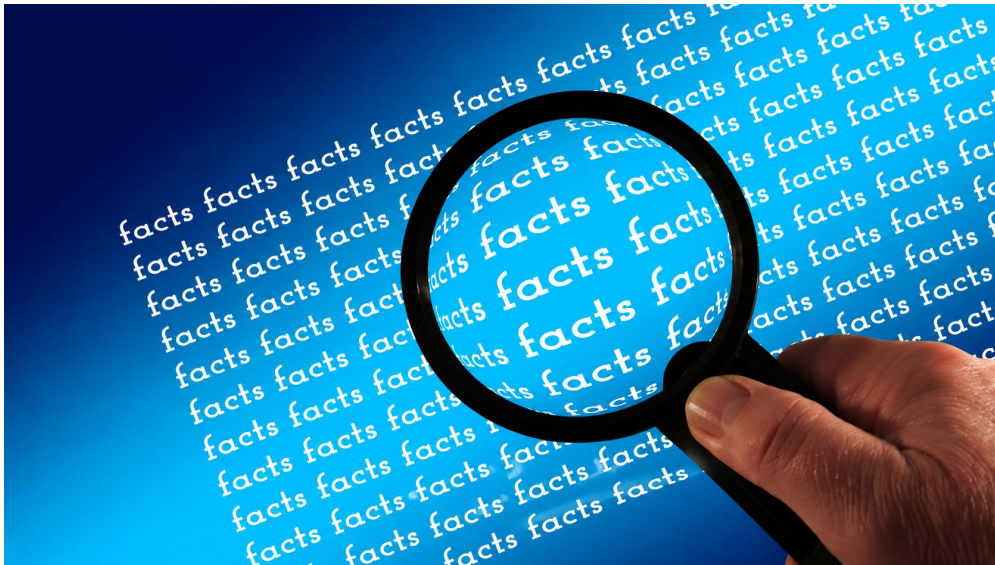
THE TRILOGY – 1986



► ***MATSUSHITA ELECTRICAL
INDUSTRIAL CO. V. ZENITH
RADIO CORP., 475 U.S. 574
(1986)***

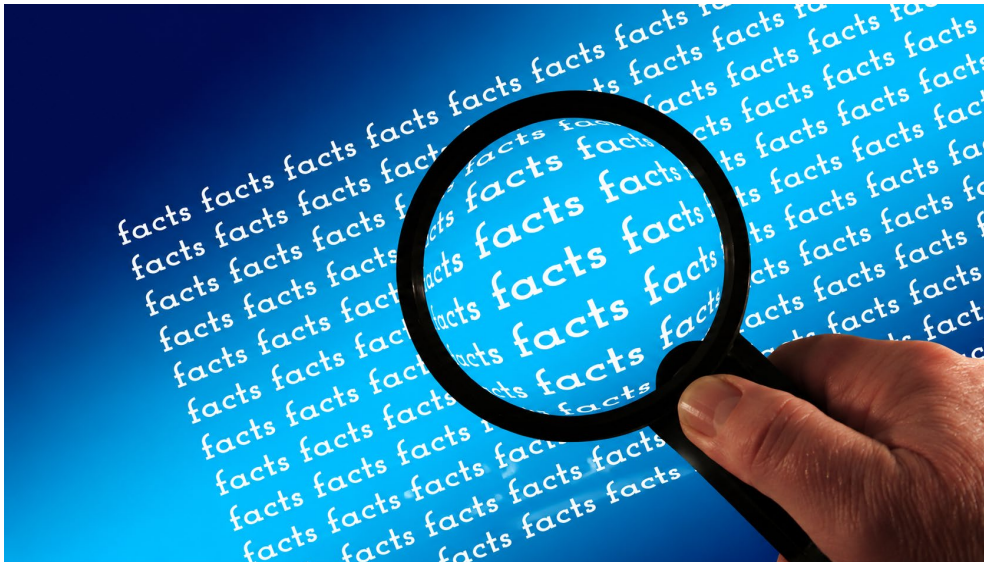
- **Parties who move for summary judgment are not required to show a total lack of evidence in support of the opponent's claim. Rather, the nonmovant must establish, as stated in the rule, the existence of a material genuine issue of fact.**

THE TRILOGY – 1986 –THREE MONTHS LATER



- ▶ ***CELOTEX V. CATREET*, 477 U.S. 242 (1986)**
- ▶ **Summary judgment is appropriate “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case”**
- ▶ **It is now quite clear that the party opposing summary judgment must in fact show that a material issue exists for trial.**

THE TRILOGY – 1986 – THAT SAME DAY



▶ ***ANDERSON V. LIBERTY LOBBY, INC.*, 477 U.S. 242 (1986)**

▶ **There must be a “genuine issue” as to a “material fact.”**

Non movant must present evidence that allows a reasonable jury to return a verdict for the non-movant on fact affecting the outcome of a lawsuit.

Plaintiff cannot avoid summary judgment by merely asserting that jury might not believe the defendant’s denial of intent.

The non-movant must present concrete evidence from which a juror can conclude in his favor.



DESPITE THE 1985 ATTITUDE

POST 1986 TRILOGY CASES

**WITH THE ADDITION OF POST 1991
JURY TRIALS**

**FEDERAL COURTS BECAME
BELIEVERS IN THE USE OF
SUMMARY JUDGMENT – BUT THEY
APPLIED BENCH TRIAL
JURISPRUDENCE**



**THE SUPREME COURT'S
1986 SUMMARY
JUDGMENT TRILOGY
CASES HAVE HAD A
DEVASTATING EFFECT
ON CIVIL RIGHTS LAW**

**“CREDULOUS COURTS
AND TORTURED
TRIOLOGY: THE
IMPROPER USE OF
SUMMARY JUDGMENT
IN TITLE VII AND ADEA
CASES,” 34 B.C. L. REV.
203, 205 (1993)**



ISSUE OF INTENT

- ▶ **THE DIFFICULTY IN EMPLOYMENT CASES DOES NOT ARISE WHEN THERE IS INFINITE EVIDENCE OF INVIDIOUS ACTIVITY ON THE PART OF THE ILL INTENTIOND EMPLOYER.**
- ▶ **THE MOVING TARGET IS WHAT TO DO WHEN CIRCUMSTANTIAL EVIDENCE IS EMPLOYED AND THERE IS LITTLE OR NOT DIRECT PROOF OF DISCRIMINATION?**



***McDonnell Douglas Corp. v. Green, 411
U.S. 792 (1973)***

BACK IN 1973



World Population
3,927,538,695

USA Population
212 millions

President of the
United States

Richard Nixon



STARS BORN

Paul Walker
Heidi Klum
Jason Nash
Pharrell Williams
Kate Beckinsale

Popular TV Shows

M*A*S*H
The Waltons
Sanford and Son
All in the Family
Hawaii Five-O



HISTORICAL EVENTS

Skylab launched as the USA's first space station.

The World Trade Center officially opens in New York City.

The 1973 oil crisis began in October 1973 when the members of the Organization of Arab Petroleum Exporting Countries proclaimed an oil embargo.

The first handheld cellular phone call is made by Martin

WHAT THINGS COST

Gallon of Milk.....	\$ 1.36
Dozen Eggs.....	\$ 0.78
Postage stamp.....	\$ 0.08
Average salary.....	\$11,147
Gallon of gas.....	\$0.39
Average new car.....	\$4,052
Average house.....	\$35,100

Sports Highlights

MLB World Series
Oakland Athletics
Superbowl
Miami Dolphins
NBA Champions
New York Knicks
Stanley Cup Champs
Montreal Canadiens



Popular Songs

Tie a Yellow Ribbon Round
the Ole Oak Tree
Tony Orlando and Dawn
Jim Croce
Bad, Bad Leroy Brown
Killing Me Softly with His Song
Roberta Flack
Let's Get It On
Marvin Gaye
My Love
Paul McCartney & Wings

Oscar Winners

ACTOR
The Godfather
Marlon Brando
ACTRESS
Liza Minnelli
Cabaret
DIRECTING
Bob Fosse
BEST PICTURE
The Godfather

***MCDONNELL DOUGLAS* BURDEN SHIFTING MECHANISM**

- ▶ **A three-part burden-shifting process — was developed for use in bench trials, not for summary judgment. It requires:**
 - ▶ **1. A prima facie case of discrimination.**
 - ▶ **2. The employer must offer a legitimate, non-discriminatory reason for the adverse action.**
 - ▶ **3. The plaintiff to show that the employer's reason is pretextual**

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS V. BURDINE, 450 U.S. 248 (1981)

- ▶ **Supreme Court held that the defendant does not have to convince the trier of fact that the stated reasons motivated it.**
- ▶ **DEFENDANT ONLY HAS THE BURDEN OF PRODUCTION AND IS NOT REQUIRED TO PERSUADE THE TRIER OF FACT THAT THE ADVERSE ACTION WAS NON-DISCRIMINATORY**
- ▶ **PLAINTIFF HAS THE BURDEN OF PROOF IN PROVING THE ASSERTED NON-DISCRIMINATORY JUSTIFICATION WAS PRETEXTUAL**
 - ▶ **PERSUADING THE TRIER OF FACT THAT DISCRIMINATION WAS THE EMPLOYER'S MOTIVATION**
 - ▶ **OR**
 - ▶ **SHOWING THAT THE EMPLOYER'S PROFFERED REASON WAS "UNWORTHY OF CREDENCE"**



BENCH TRIAL

MCDONNELL DOUGLAS CREATED FOR A DIFFERENT ERA

- ▶ **BENCH TRIALS:** It was designed to guide judges at bench trials at a time when Title VII cases were tried to be bench and jury trial were not available.
- ▶ **BENCH TRIALS:** In the *McDonnell Douglas* bench trial analysis, the factual determinations were by the district judge after a bench trial which necessarily required a district judge to weigh competing evidence.
- ▶ **VIEWED AS PLAINTIFF FRIENDLY:** as it was meant to assure that the plaintiff has his day in court despite the unavailability of direct evidence. See, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, (1985)



AFTER 1991: JURY TRIALS

POST 1991

- ▶ The ***McDonnell Douglas/Burdine*** burden shifting migrated from bench trial to summary judgment without the United States Supreme Court ever examining whether it belonged.
- ▶ Courts have never fully grappled with whether the second step of this ***McDonnell Douglas*** test violates summary judgment standards by requiring judges to credit the defendant's evidence and to give that evidence a certain weight and place in the court's analysis.



INCONSISTENT WITH SUMMARY JUDGMENT ?

- ▶ **Requiring a defendant to meet a burden of production in step two, but then requiring a plaintiff to meet a burden of persuasion at step three upends summary judgment procedure by forcing the non-moving party to meet a higher burden than non-moving plaintiffs in other federal court cases.**
- ▶ **Sandra F. Sperino, “Irreconcilable: McDonnell Douglas and Summary Judgment,” 102 N.C. La. Rev. 459, 483 (2024)**

CREATION OF OTHER NON-TEXTUAL JURISPRUDENTIAL CONFUSION

- ▶ **SAME ACTOR DEFENSE**
- ▶ **“SIMILARLY SITUATED”
COMPARATOR TESTS**
- ▶ **HONEST BELIEF
DOCTRINE**



NEW SOUTH BRITAIN ASSURANCE CO. LTD.

*Spices and Dainties are here sold by Wholesale or Retail at the lowest Rates of Profit
and delivered with Care and promptness*

3rd 2/9

[illegible]

Mr W reported for the Kansas and Kansas and Oregon and New
Hampshire and New York and New York and New York and New York
and New York and New York and New York and New York and New York
and New York and New York and New York and New York and New York

Erstellung der Broschüre unter dem Namen

These 1970 Redfish being at the highest abundance was at 5000 yards. The second peak in abundance was at the 10000 yard mark. The 15000 yard mark was the least abundant and the 20000 yard mark was the most abundant. The 25000 yard mark was the least abundant and the 30000 yard mark was the most abundant. The 35000 yard mark was the least abundant and the 40000 yard mark was the most abundant. The 45000 yard mark was the least abundant and the 50000 yard mark was the most abundant. The 55000 yard mark was the least abundant and the 60000 yard mark was the most abundant. The 65000 yard mark was the least abundant and the 70000 yard mark was the most abundant. The 75000 yard mark was the least abundant and the 80000 yard mark was the most abundant. The 85000 yard mark was the least abundant and the 90000 yard mark was the most abundant. The 95000 yard mark was the least abundant and the 100000 yard mark was the most abundant.

1970s but was most convincing during the 1980s in the United States.

[illegible][illegible]

17. **Don't stop your work or stop communicating.**
 Always take your work down with you every time you leave the software.
 When you're not working, you're not working.

* Bitte auch folgende Personen mitteilen, die Sie kennen und die Sie als Kontaktpersonen für die Kontaktaufnahme mit dem Patienten betrachten:

[illegible]

WHAT THE HECK HAPPENED TO THE TEXT OF TITLE VII?



THE RESULTS HAVE BEEN DISASTROUS

CASES CALLING FOR KILLING *MCDONNELL DOUGLAS* AT SUMMARY JUDGMENT

- ▶ *Hollis v. Morgan State Univ.*, 153 F.4th 369, 387–88 (4th Cir. 2025) (Quattlebaum, J., concurring);
- ▶ *Jenny v. L3Harris Techs., Inc.*, 144 F.4th 1194, 1201 (10th Cir. 2025) (Eid, J., concurring);
- ▶ *Tynes v. Fla. Dep’t of Juv. Just.*, 88 F.4th 939, 949–51 (11th Cir. 2023) (Newsom, J., concurring);
- ▶ *Walton v. Powell*, 821 F.3d 1204, 1210–11 (10th Cir. 2016) (Gorsuch, J.);
- ▶ *Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring);
- ▶ *Provenzano v. LCI Holdings, Inc.*, 663 F.3d 806, 813 (6th Cir. 2011);
- ▶ *Brady v. Off. of Sergeant at Arms*, 520 F.3d 490, 493–94 (D.C. Cir. 2008) (Kavanaugh, J.);
- ▶ *Griffith v. City of Des Moines*, 387 F.3d 733, 745–46 (8th Cir. 2004) (Magnuson, J., concurring specially);
- ▶ *Wells v. Colo. Dep’t of Transp.*, 325 F.3d 1205, 1221 (10th Cir. 2003) (Hartz, J., writing separately)

***Brady v. Off. of Sergeant at Arms*, 520 F.3d 490, 493–94 (D.C. Cir. 2008) (Kavanaugh, J.)**

- ▶ **Then Judge Kavanaugh described the prima facie case as “a largely unnecessary slideshow” that has “spawn[ed] enormous confusion and wast[ed] litigant and judicial resources.”**



***Walton v. Powell*, 821
F.3d 1204, 1210–11 (10th
Cir. 2016) (Gorsuch, J.)**

- ▶ **Then Judge Gorsuch
questioned “whether
the *McDonnell
Douglas* game is worth
the candle”**



***Coleman v. Donahoe*, 667
F.3d 835, 863 (7th Cir. 2012)
(Wood, J., concurring)**

- ▶ Judge Wood called the framework an “allemande worthy of the 16th century.”
- ▶ Allemande “any of a number of German dances, in particular an elaborate court dance popular in the 16th century.”



FIFTH CIRCUIT

- ▶ ***Nall v. BNSF Ry. Co.*, 917 F.3d 335, 351–52 (5th Cir. 2019) (Costa, J., concurring)**
- ▶ **(applying *McDonnell Douglas* at the summary judgment stage is “inefficien[t] and unfair[],” (noting that more than 57,000 court opinions have cited it))**



***Tynes v. Fla. Dep't of Juv. Just.*, 88 F.4th 939, 949–51 (11th Cir. 2023) (Newsom, J., concurring)**

- ▶ **Judge Newsom: the *McDonnell Douglas* framework “not only lacks real footing in the text of Rule 56, but, worse, actually obscures the answer to the only question that really matters at summary judgment.”**



***Hollis v. Morgan State Univ.*,
153 F.4th 369, 387–88 (4th
Cir. 2025) (Quattlebaum, J.,
concurring)**

- ▶ **“[w]hat began as a tool
for processing evidence in
a Title VII bench trial has
far too often turned into
the substantive test for
intentional discrimination
at summary judgment.”**



HINTS AT REVERSAL FROM UNITED STATES SUPREME COURT

- ▶ ***Hittle v. City of Stockton*, 145 S. Ct. 759, 763 (2025) (Thomas, J., dissenting from denial of certiorari);**
- ▶ **As Justice Thomas noted, circuit and district courts “know how to apply Rule 56, but we do not do so in Title VII cases.”**





***AMES V. OHIO
DEP'T OF YOUTH
SERVS., 605 U.S.
303, 319-324
(2025)***

AMES V. OHIO DEP'T OF YOUTH SERVS., 605 U.S. 303, 319-324 (2025)

- ▶ **In *Ames*, the Supreme Court assumed without deciding that the *McDonnell-Douglas* framework applied at the summary judgment stage, but begins by noting a reoccurring issue in discrimination lawsuits—Judge-made doctrines—which “have a tendency to distort the underlying statutory text, impose unnecessary burdens on litigants, and cause confusion for courts.” *Id.*, 605 U.S. at 313 (Thomas, J., concurring).**



AMES V. OHIO DEP'T OF YOUTH SERVS., **605 U.S. 303, 319-324 (2025)**

To that end, Justice Thomas stated that in the right case, the Supreme Court should reconsider whether the *McDonnell Douglas* framework is a workable and useful evidentiary tool. *Id.* 605 U.S. at 308 n.2,

Justice Thomas's forceful concurrence was joined by Justice Gorsuch and both questioned the continued use of the *McDonnell Douglas* framework.

AMES V. OHIO DEP'T OF YOUTH SERVS., 605 U.S. 303, 319-324 (2025)

The *McDonnell Douglas* framework is a judge-made evidentiary “tool,” which was originally developed for courts to use in a bench trial. *Id.* at 319.



The framework was “made out of whole cloth” and “[i]ts contours have no basis in the text of Title VII or any other source of law.” *Id.* at 320.



In fact, it appears the Supreme Court has never attempted to justify its use through textual grounds. *Id.*



Moreover, the Supreme Court has never considered—much less held—that the *McDonnell Douglas* framework is an appropriate tool for summary judgment. *Id.* 320-21.

**AMES V.
OHIO DEP'T
OF YOUTH
SERVS., 605
U.S. 303,
319-324
(2025)**

- ▶ **Justice Thomas notes that: “the framework is incompatible with the summary-judgment standard; it fails to encompass the various ways in which a plaintiff could prove his claim; it requires courts to maintain artificial distinctions between direct and circumstantial evidence; and it has created outsized judicial confusion.” *Id.* at 322.**
- ▶ **When courts invent Judge-made doctrines, such as the *McDonnell Douglas* framework, the lack of underlying legal authority necessarily creates a dearth of ways in which doctrinal ambiguities can be resolved. *Id.* at 315.**

AMES V. OHIO DEP'T OF YOUTH SERVS., 605 U.S. 303, 319-324 (2025)

**“LITIGANTS AND LOWER
COURTS ARE FREE TO PROCEED
WITHOUT THE *MCDONNELL
DOUGLAS* FRAMEWORK
BECAUSE THE SUPREME COURT
HAS NEVER REQUIRED ANYONE
TO USE IT.” *AMES*, AT 336.**

Licinio v. New York (U.S. Jan. 12, 2026)

- ▶ The cert. petitioner objected to the Second Circuit's affirmation of summary judgment in favor of his employer, a decision the appellate court reached after applying the *McDonnell Douglas* test.
- ▶ He argued that the test is not rooted in Title VII or the rules of civil procedure but is instead an ineffective judicial invention that denies employees their day in court.
- ▶ This time, the Supreme Court denied certiorari without comment or dissent.



FIFTH CIRCUIT POST *AMES*



- ***Ayodeji Awe v. Harris Health Sys.*, 2026 U.S. App. LEXIS 733, 2026 LX 58054, 163 F.4th 969,976 (5th Cir. January 2, 2026) concurrence by Chief Judge Jennifer Elrod, “I write to join the resounding chorus calling for a reconsideration of *McDonnell Douglas v Green*, 411 U.S. 792 (1973) especially as applied at summary judgment”**

FIFTH CIRCUIT POST *AMES*

- ▶ ***White v. N. La. Criminalistics Lab'y*, 2026 U.S. App. LEXIS 12877, 2026 LX 263599, 2026 WL 1208697 (2026)**
- ▶ ***Bravo v. Dall. Indep. Sch. Dist.*, 177 F.4th 604, 2026 U.S. App. LEXIS 15675, 2026 LX 279865, 2026 WL 1531713 (2026)**

RULE OF ORDERLINESS

- ▶ **A three-judge panel “may not overturn another panel’s decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court.” In re *Bonvillian Marine Serv., Inc.*, 19 F.4th 787, 792 (5th Cir. 2021)**



RULE OF ORDERLINESS

- ▶ “In particular, for a Supreme Court decision to change our Circuit’s law, it ‘must be more than merely illuminating with respect to the case before [the court]’ and must ‘unequivocally’ overrule prior precedent.” *Tech. Automation Servs. Corp. v. Liberty Surplus Ins.*, 673 F.3d 399, 405 (5th Cir. 2012) (alteration in original) (quoting *Martin v. Medtronic, Inc.*, 254 F.3d 573, 577 (5th Cir. 2001)).



RULE OF ORDERLINESS

- ▶ **The Fifth Circuit's rule of orderliness yields a rigid system of horizontal stare decisis.**
- ▶ **Requires En Banc absent an outright reversal**
- ▶ **See, for example, *Hamilton v. Dallas County*, 42 F.4th 550 (5th Cir. 2022)**



25-30556

HOLLOWAY V. PROCTER & GAMBLE MFTR



TUESDAY, APRIL 28, 2026

EN BANC COURTROOM

PANEL:

CHIEF JUDGE ELROD AND JUDGES HO
AND RAMIREZ

ALLISON ANNE JONES
MICHAEL B. TAYLOR

***HOLLOWAY
V. PROCTOR
& GAMBLE***

Oral Argument — 25-30556...

- ▶ **August 3, 2026, per curiam opinion applying**
- ▶ ***McDonnell Douglas* and affirming the**
- ▶ **District Court (Judges Elrod, Ho and Rameriz)**

- ▶ **BUT: Strong concurrence from Ho and Elrod**
- ▶ **stating that *McDonnell Douglas* is wrong**
- ▶ **“in more ways than one”**

- ▶ *** It is made out of “whole cloth” and has
“no basis in the text of Title VII or any other
source of law”**

- ▶ *** It was originally designed for courts to use
in bench trial” and the Supreme Court “has
never held that *McDonnell Douglas* is
appropriate for use at summary judgment”**



HOLLOWAY V. PROCTOR & GAMBLE

HOLLOWAY V. PROCTOR & GAMBLE

- ▶ **BUT: Strong concurrence from Ho and Elrod stating that *McDonnell Douglas* is wrong “in more ways than one” and continues.....**
- ▶ *** *McDonnell Douglas* is hard to square with “Rule 56 of the Federal Rules of Civil Procedure.”**
- ▶ *** “That’s not all.” See the text of 42 U.S.C. Section 2000e-2(m) (motivating factor)**
- ▶ *** Recognizes that “lower courts are free to proceed without the McDonnell Douglas framework.”**
- ▶ *** “I would welcome the opportunity to revisit our precedent to better align with the law of our circuit with the plain text of the Title VII and Rule 56.”**

HOLLOWAY V. PROCTOR & GAMBLE

**APPLICATION FOR EN BANC RELIEF WAS
FILED, BUT WAS DENIED**



WRIT OF CERTIORARI

FILED --- JULY 2026

***SHANNON CROSS V.
CENTRAL CONTRA
COSTA TRANSIT
AUTHORITY***

**ARISING OUT OF
CASE NO. 24-6068
(9TH CIRCUIT)**



ISSUE PRESENTED:

“Whether the judicially imposed *McDonnell Douglas* burden-shifting framework at summary judgment in a Title VII religious discrimination case led the courts below to credit the employer’s disputed account, in a manner incompatible with Rule 56 and this Court’s decisions.

PREDICTION



LOCAL PROFESSOR EXPRESSED HIS CONCERN YEARS AGO

- ▶ **William Corbett, “McDonnell Douglas, 1973-2003: May You Rest in Peace?” 6 U. Pa. J. Lab. & Emp. L. 199 (2003)**





WHAT COULD REPLACE *MCDONNELL DOUGLAS?*

**NATURE ABHORS A VACUUM ---
ARISTOTLE**

WHAT COULD REPLACE *MCDONNELL DOUGLAS*?

- ▶ The fact that *McDonnell Douglas* was originally designed to make it easier for plaintiffs in a bench trials did not prevent courts from twisting it over time at the summary judgment stage and, in doing so, adding judicially created sub tests to serve as a barrier for plaintiffs.
- ▶ Judicial inference blindness will not change simply because a new test is adopted.
- ▶ How can we then trust the courts to create a better test that works?
- ▶ How can plaintiffs be sure that once *McDonnell Douglas* is dead, it will not be replaced with more crabbed and negative interpretations of how to prove discrimination?

WHAT COULD REPLACE *MCDONNELL* *DOUGLAS*?

- ▶ Maybe *McDonnell Douglas* just needs to be modified or demoted?



**ANOTHER
OPTION?**



“CONVINCING MOSAIC?”

The Eleventh Circuit held in *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321 (11th Cir. 2011), that an employee can defeat a motion for summary judgment by presenting a “convincing mosaic” of circumstantial evidence from which a reasonable jury could infer unlawful intent on the employer’s part. This “mosaic” can include ambiguous statements or preferential treatment of other similarly situated employees, as well as pretextual justifications for its decision-making.

***Tynes v. Fla. Dep’t of Juv. Just.*, 88 F.4th 939, 949–51 (11th Cir. 2023) (Newsom, J., concurring);**

***Ismael v. Roundtree, et al.*, No. 25-10604 (11th Cir. Dec. 5, 2025)**



WHERE DO WE GO?



***McDonnell Douglas* is just one method by which the plaintiff can prove discrimination by circumstantial evidence.**



A plaintiff who cannot satisfy the *McDonnell Douglas* framework may still be able to prove her case by putting forth a convincing mosaic of circumstantial evidence allowing a jury to infer intentional discrimination by decision-maker.



A convincing mosaic of circumstantial evidence is simply enough evidence for a reasonable factfinder to infer intentional discrimination in an employment action, which is the ultimate inquiry in a discrimination lawsuit.

WHERE DO WE GO?

A plaintiff who cannot satisfy the *McDonnell Douglas* framework may still be able to prove her case by putting forth a convincing mosaic of circumstantial evidence allowing a jury to infer intentional discrimination by decision-maker.

A convincing mosaic of circumstantial evidence is simply enough evidence for a reasonable factfinder to infer intentional discrimination in an employment action, which is the ultimate inquiry in a discrimination lawsuit.

WHERE DO WE GO?

- ▶ **Utilizing convincing mosaic as an approach to analyzing the evidence, treats an employment discrimination suit in the same way as it would treat any other case, i.e. jumping directly to the ultimate question of liability in deciding whether the moving party is entitled to judgment at that stage of the case.**
- ▶ **It isn't any different than the standards ordinarily applied in deciding summary judgment and post-trial motions. That is, if the plaintiff presents enough circumstantial evidence raising a reasonable inference of intentional discrimination, the claim survives summary judgment.**

WHERE DO WE GO?

Although decisions from the Fourth, Seventh, and Ninth Circuits have toyed with the notion of reviewing an “entire mosaic” of evidence, the Seventh Circuit expressly rejected the test in *Ortiz v. Werner Enters., Inc.* 834 F.3d 760 (7th Cir. 2016)

Ortiz v. Werner Enters., Inc. 834 F.3d 760 (7th Cir. 2016)

That legal standard....is simply whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action. Evidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself—or whether just the “direct” evidence does so, or the “indirect” evidence. **Evidence is evidence. Relevant evidence must be considered and irrelevant evidence disregarded, but no evidence should be treated differently from other evidence because it can be labeled “direct” or “indirect.”**



WHERE DO WE GO?

- ▶ **Zachary J. Strongin, *Fleeing the Rat's Nest: Title VII Jurisprudence After Ortiz v. Werner Enterprises, Inc.*, 83 Brook. L. Rev. (2017).**

WHERE DO WE GO?

This Circuit split leaves the issue ripe for Supreme Court review to determine whether the *McDonnell Green* test is the only test or one of many fair approaches to the question

BOSTOCK V. CLAYTON COUNTY, **590 U.S, 644 (2020)**

- ▶ **Essay, “Bostock: A Clean Cut in the Gordian Knot of Causation,” 75 SMU L. Rev. 769 (2022)**
- ▶ **In *Bostock*, the Supreme Court elaborated on but-for causation, providing a solid basis upon which to rethink causation and the messy landscape of employment discrimination litigation that currently favors employers.**
- ▶ **The Court’s elegant, simple discussion of causation should inspire future courts to rid themselves of the myriad of complex and unnecessary hurdles that impede individual employee .**



***BOSTOCK V.
CLAYTON
COUNTY,
590 U.S, 644
(2020)***

- ▶ In *Bostock*, Gorsuch provided a detailed analysis of what Title VII means when it says “because of” sex, noting that “a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause . . . When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff’s sex was one but-for cause of that decision, that is enough to trigger the law.”

***BOSTOCK V.
CLAYTON
COUNTY,
590 U.S, 644
(2020)***

- ▶ Gorsuch then directly addressed whether sex (or other protected characteristics at issue) must be the “sole” but-for cause and found that “liability can sometimes follow even if sex *wasn’t* a but-for cause of the employer’s challenged decision.”
- ▶ Justice Gorsuch went on to note that but-for causation “continues to afford a viable, if no longer exclusive, path to relief under Title VII.”

Proposal?

- ▶ **1. DIRECT EVIDENCE**
- ▶ **2. *MCDONNELL DOUGLAS* IS ONLY ONE WAY**
- ▶ **3. “CONVINCING MOSAIC”**
- ▶ **4. APPLY *BOSTOCK* (NO NEED TO DISPROVE ANY EMPLOYER’S REASON IS FALSE AS BOTH THINGS CAN BE TRUE)**
- ▶ **EMPLOYER’S REASON + DISCRIMINATION AND “BUT FOR” AS APPLIED BY *BOSTOCK* IS ALWAYS A JURY QUESTION**



**THE TEXT
SAYS JURY
TRIALS:**

**LET'S HAVE
THEM**