A Mountain Too High: African Americans and Employment Discrimination

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The free market forces employers to eliminate discrimination. However, if the free market does not seriously diminish discrimination, the law must be used to force employers to correct discriminatory practices (Cohn, 2000). The law, however, has been ineffective in providing a tool to combat racial discrimination in the workplace. In effect, the law helps employers. In 1973, the U.S. Supreme Court decided an employment discrimination case involving an African American man and created a legal test for deciding employment discrimination cases that favors employers. Moreover, lower federal courts, guided by the U.S. Supreme Court mandate, have utilized this standard in consistently ruling for employers and against African Americans.

The aim of this paper is to explain the standard for deciding cases of employment discrimination based on race and review cases from the federal courts to show how difficult the standard is for African Americans to overcome. In conducting this review, the author does not suggest that the cases discussed here are exhaustive and represent every racial employment case decided. Readers should keep in mind that a lower federal court cannot stray from a U.S. Supreme Court ruling. Thus, significant variations in employment cases do not occur.

Standard for Deciding Employment Discrimination

In 1973, the U.S. Supreme Court established the test to be used by lower federal courts (i.e., federal district courts and Courts of Appeals) and itself in deciding whether an African American could establish racial discrimination in employment (McDonnell Douglas Corp. v. Green, 1973). This case has far reaching implication, applying to initial employment and promotions. In this case, Green, an African American, contended that his employer, McDonnell Douglas, engaged in discrimination in employment. Green, a mechanic, was laid off, which Green thought was tainted by racism. He protested and allegedly organized a "stall-in," in which several cars blocked the entrance to the plant during the morning shift change. Green was subsequently arrested. Later, when McDonnell Douglas began rehiring laid-off workers, Green applied but was rejected. Thereupon, Green sued, alleging racial discrimination. McDonnell Douglas' defense was that it did not rehire Green because of his illegal activity against the plant.

The U.S. Supreme Court unanimously decided how the courts were to decide racial

discrimination cases filed under the Title VII of the Civil Rights Act. It ruled that the complainant must carry the initial burden in establishing a prima facie case of racial discrimination. Such an establishment can be made by showing that he or she (a) belongs to a racial minority; (b) that he or she applied for a job for which the employer was seeking applications; (c) that he or she was rejected despite being qualified for the position; and (d) that after the complainant's rejection, the employer continued to seek applications. Once the complainant establishes these facts, the burden shifts to the employer to show some legitimate, nondiscriminatory reason for the employer's adverse decision to the complainant. Then, the complainant must be given an opportunity to show that the employer's purported decision is pretext for a racial discriminatory decision (McDonnell Douglas Corp. v. Green, 1973).

Succinct Analysis and Criticism of Standard

The primary problem with the standard in McDonnell Douglas v. Green (1973) occurs when the employer offers a reportedly nondiscriminatory reason for an adverse employment decision. For example, a number of allegedly nondiscriminatory reasons can be offered for not hiring or promoting an African American. The hiring authority could say that the African American did not interview very well – an accusation impossible to challenge. The hiring authority could say that all applicants were asked their vision for the position and the African American's response was poor while a white candidate's response was outstanding. In addition, the hiring authority could say that an African American does not have good communication skills. Once an employer alleged any of these reasons or similar reasons, the African American has the burden to show that such a reason is false.

Review and Illustrations

Some cases show how McDonnell Douglas v. Green (1973) has been applied by lower federal courts. An African American postal worker who had worked with the postal service for a number of years sought a promotion. According to the announcement, the successful candidate had to have "highly developed written and oral communication skills" and "well developed human relations skills." The screening panel consisted of three white males, though this composition violated agency's policy. Sixteen persons applied for this promotion and of this total, twelve were white males, one was Hispanic, and three were African Americans. None of the African Americans made the top five after the prescreening. Odum, one of the African Americans who had considerable years of experiences with the agency, complained, and he subsequently was given an interview. However, the job went to a white male and Odum sued for race and age discrimination. A U.S. District Court found that Odum, indeed, had been discriminated against, citing that he was better qualified and that his accomplishments were diminished in a written evaluation while the accomplishments

of white applicants were highlighted. However, the Fifth Circuit Court of Appeals reversed the District Court's decision (Odum v. Frank, 1993). Extending the U.S. Supreme Court's decision in McDonnell Douglas Corp. v. Green (1973), the Fifth Circuit Court stated that:

> We also remain cognizant of the fact that the evaluation of applicants (and applications) for high level positions in any discipline – business, industry, government, military, or education – involves both objective and subjective elements. We also recognize that subjectivity has a potentiality for abuse by those evaluators who would use it to shield improprieties in the selection process, possibly even as a pretext for discrimination. On the other hand, as a general rule, judges are not as well suited by training or experience to evaluate qualifications for high level promotion in other disciplines as are those persons who have trained and worked for years in the field of endeavor for which the applicants under consideration are being evaluated. Therefore, unless disparities in curricula vitae are so apparent as virtually to jump off the page and slap us in the face, we judges should be reluctant to substitute our views [Emphasis by Author] for those of the individuals charged with the evaluation duty by virtue of their own years of experience and expertise in the field in question (Odum v. Frank, 1993, p. 847).

This standard has been repeated in a number of cases (Deines v. Texas Department of Protective and Regulatory Services, 1999).

In another case, an African American woman, Laverne Perkins, was employed with General Electric Capital Auto Financial Services when a part of the company, G. E. Technology, was sold. Employed with General Electric since 1986, Ms. Perkins was in the portion that was sold. When she later learned that General Electric had openings, she expressed interest through an email and formally applied with her former employer. Following an interview, a decision was made not to hire Ms. Perkins. Four white applicants were hired, which prompted Ms. Perkins to sue for racial discrimination (Perkins v. G. E. Capital Auto Financial Services, Inc., 2001).

The evaluation form used to rate the applicants included items, such as "inadequate personal skills," "interests or objectives inappropriate to match job requirements," "technical experience not strong enough," and "salary expectations too high." The person who ultimately made the hiring decision did not interview Ms. Perkins, and other employees had conducted the interviews and conveyed their impressions of the candidates. According to the persons conducting the interview, Ms. Perkins com-

plained about her current position and did not present herself positively during the interview. Furthermore, Ms. Perkins allegedly misspelled words in her initial emails (Perkins v. G. E. Capital Auto Financial Services, Inc., 2001).

The case was analyzed according to standard established by McDonnell Douglas Corp. v. Green (1973). After the employers gave their nondiscriminatory reasons for not hiring Ms. Perkins, Ms. Perkins was required to refute those reasons. Her account of the interview was vastly different, but she did not have any evidence to support that she overly complained about her current job. In addition, she noted that her alleged grammatical errors were not the reason for her not being hired because the person who responded to the emails and who made the hiring decision had also made grammatical errors. Moreover, some of the candidates who were hired had made grammatical errors on their written applications. Both a lower federal court and the Seventh Circuit Court of Appeals rejected Ms. Perkins' rebuttal arguments. Furthermore, the Court of Appeals held that even if the interviewing personnel were racially biased, Ms. Perkins had failed to show that biased information was given to the hiring supervisor and the hiring supervisor was motivated by race (Perkins v. G. E. Capital Auto Financial Services, Inc., 2001).

In yet another case, Ms. Lee Evans, an African American nurse employed by the City of Houston, was recommended for a promotion by her supervisor from Nurse II to Nurse III. This recommendation for promotion was dated May 23, 1994, which became official on August 16, 1994. Ms. Evans had to serve a six-month probationary period, according to city policy. On January 6, 1995, while still on probation, Ms. Evans appeared as a witness in an administrative proceeding for a colleague who was complaining of racial discrimination. However, this hearing was postponed. On January 11, 1995, Ms. Evans was notified by her supervisor (i.e., the same person who recommended her for a promotion) that she was being demoted. She was demoted on February 17, 1995, and suspended in July 1995. Ms. Evans sued and the City of Houston argued that she was demoted for a history of bad behavior, such as refusing work assignments and cursing out supervisors and co-workers. However, the record showed that none of this history was documented until after Ms. Evans was demoted. Both a lower federal court and the Fifth Circuit Court of Appeals rejected Ms. Evans' racial discrimination claim under the standard in McDonnell Douglas v. Green (1973).

Simply, the Fifth Circuit Court of Appeals ruled that Ms. Evans did not show that the demotion decision was based on racial reasons. The fact that Ms. Evans had appeared in an administrative proceeding in which racial discrimination was charged, that within days she was notified of her demotion, and that she had been recently promoted, did not provide evidence in her favor (Evans v. The City of Houston, 2001).

Conclusion

Contrary to the suggestion by Cohn (2000) that the law must correct racial employment discrimination when the free market fails, the law, as established by the U.S. Supreme Court, is ineffective. Moreover, the law shields and encourages racial discrimination in employment. An African American who allegedly did not interview well cannot refute such a charge. Even if the African American had a hidden tape recorder and recorded the interview, the courts have stated that they are not going to second-guess employers. Further, cases exist where some African Americans have compared their education and experiences with a successful white candidate, and the courts have refused to recognize any comparisons (Barbour v. Browner, 1999; Carney v. The American University, 1998).

This paper only reviewed a few cases. However, a more extensive analysis would not provide contradictory information. Invariably, African Americans who sue because they believe they have been discriminated against in hiring or promotion lose their cases because the current legal standard favors employers (Alexander, 2000).

References

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