

The Burden Shifting Approach

Here's what it is:

Cases of discrimination can be proven by either the direct or indirect method. In the direct method, the parties present their cases, and the Hearing Examiner examines the facts and, without reliance on inference, reaches a determination of liability or not. Cases utilizing the direct method usually have convincing testimony of discriminatory language or conduct.

In a case presented by the indirect method, the parties present their facts and apply those facts, be they inferential or direct to the respective burdens of proof and production that the law places on the parties. The indirect method of demonstrating discrimination is also known as the burden shifting approach and derives from the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) and the cases that follow those decisions.

The McDonnell-Douglas burden shifting framework follows a three-step process to determine whether discrimination occurred. Simply stated, the process goes like this:

- 1- Complainant must prove by a preponderance of the evidence (the greater weight of the credible evidence) that they are a member of a protected class or classes, that they suffered an adverse action, and that their membership in a protected class or classes and the adverse action they suffered are in some way causally connected (establishing a prima.facie.claim).

In the case of a claim of harassment, the elements of the prima facie claim are some what different. Basically, the Complainant must establish that he, she or they are a member of a protected class or protected classes and they experienced a severe or pervasive pattern of conduct sufficiently severe to prevent them from being able to perform the duties of their job. In the case of a claim of harassment in housing or public place of accommodation or amusement the final element must demonstrate a denial of the reasonable use or enjoyment of the housing or place of accommodation or amusement.

- 2- If the Complainant is able to establish a prima.facie.claim, then;
- 3- The burden shifts to the Respondent to produce a legitimate business reason for its actions or decision. In the case of disability, this may mean producing a legitimate business reason for denying an accommodation. In the case of harassment, this may mean the Respondent asserting its lack of knowledge about the harassing behavior. The burden on the Respondent is not to prove their reason, but only to provide one. If the Respondent is able to provide a legitimate business reason for its actions, then;
- 4- The burden shifts back to the Complainant to show that the Respondent's legitimate business reason is not credible or is in some way pretext for a discriminatory motive.

The burden shifting approach is used in all types of cases: housing, employment and public accommodations. Here are some examples of what the burden shifting approach looks like when

used to analyze a case. (Cases used as examples are linked to decisions in their entirety and excerpts have been used here and paraphrased for length and ease of understanding.)

Housing:

- Case: [Pollard v. Rohy, LLC](#), MEOD Case No. 20151168

Burden Shifting Step 1 (Establishing a prima.facie.claim):

The record demonstrates a causal connection between the Complainant's membership in the protected classes of race, color and lawful source of income. The Hearing Examiner finds that the Complainant's testimony and that of her supporting witness were more compelling and more credible than that of the Respondent. [Respondent] Ms. Seltz's testimony was frequently, rambling, vague and contradictory. Her explanation of her personal experience often relied on stereotypes and lacked authenticity. The allegations of misconduct by the Complainant made by Ms. Seltz point to discriminatory attitudes concerning the Complainant's race, color, and her lawful source of income. The record convincingly demonstrates that these complaints of misconduct were meritless and likely the result of discrimination. Given the discrepancies in the parties' testimony, the Hearing Examiner finds that the Complainant has made out a prima.facie claim of discrimination in housing on the bases of race, color, and lawful source of income.

Burden Shifting Step 2 (Respondent's Legitimate Business Reason):

The Respondent's burden at this point in the matter is to present a legitimate, nondiscriminatory explanation for its actions. This is a burden of production and not one of proof. The Respondent in this case was not represented by counsel, provided very little testimony to support her case, and provided almost no testimony to speak to the harassing behaviors reported by the Complainant. Ms. Seltz did attribute her actions to complaints of the Complainant's neighbors, but [...] the Hearing Examiner does not credit this testimony with much credibility. [...] The Hearing Examiner finds that the Respondent has not met its burden to produce a legitimate, nondiscriminatory reason for its behavior. Even to the extent that the Respondent produced testimony in this matter through the testimony of Ms. Seltz that testimony was often contradictory or vague and generally lacked credibility. This failure to meet its burden of proof is sufficient to find in favor of the Complainant as noted above.

Burden Shifting Step 3 (Reason Not Credible or Pretext):

Even if the Hearing Examiner accepted that the Respondent made an adequate proffer of a legitimate, nondiscriminatory explanation, the Hearing Examiner would conclude that the testimony as a whole demonstrates that the Respondent's explanation lacks credibility and is likely a pretext for an otherwise discriminatory explanation.

Employment (Termination):

- [Goldsworthy v. SPi CRM, Inc. n/k/a Inspiro](#), MEOD Case No. 20182155

Burden Shifting Step 1 (Establishing a prima.facie.claim):

First, the Hearing Examiner will determine whether the Complainant has demonstrated that he has met the [elements of a] prima.facie claim. The Complainant filed a complaint alleging age

discrimination. The Complainant's date of birth is June 1, 1970, and he was 47 years old on the date of his termination; thus, the Complainant meets the first element of the prima facie claim, that he is a member of the protected class "age". Next, the Hearing Examiner must examine the second element: whether the Complainant has established that he was adequately performing in his position with the Respondent. [...]

The performance evaluations indicate during the Complainant's four-year tenure with the Respondent, the Complainant maintained standings as a "solid performer," with one evaluation indicating he was an "excellent performer." This evaluation record was corroborated by the Complainant, Smith [a witness], and Glascock [a witness] during their testimonies.

The evidence in the record shows that Complainant was adequately performing in his position. The Complainant has met the second element of the prima facie claim. The Hearing Examiner now turns to whether or not the Complainant suffered an adverse employment action. It is clear from the record that Complainant's employment with the Respondent was terminated, establishing the third element of the Complainant's prima facie claim. Finally, the Hearing Examiner approaches the issue of whether there was a causal link between the Complainant's membership in a protected class and the Respondent's termination of the Complainant's employment, by determining if the Complainant was either replaced by someone not within the protected class, and/or the employer treated a similarly situated employee not in the protected class more favorably.

Shortly after his [Complainant's] recommendation that 23-year-old Kasey Olson be moved into a Trainer position, a recommendation that was rejected by the Respondent, the Complainant was terminated. Closely following the Complainant's termination, Kasey Olson was promoted to the vacant Trainer position. The Complainant fulfills both of the elements or possible circumstances to indicate discrimination did occur.

The Complainant has shown, by the greater weight of the credible evidence, that age, at least in some major part, motivated his termination. This finding shifts the burden to the Respondent to offer a legitimate, nondiscriminatory explanation for the Complainant's termination.

Burden Shifting Step 2 (Respondent's Legitimate Business Reason):

The Respondent indicates that the Complainant was terminated as a result of inquiries made after Glascock's discussion with Lynn Olson [witness]. These inquiries led to the conclusion that the Complainant was habitually and grossly negligent, a grave offense in the Respondent's disciplinary scheme. This proffered explanation meets the Respondent's burden to set forth a legitimate, nondiscriminatory explanation for its actions. This burden is merely one of production and not one of proof. Having met its burden of production of a legitimate, nondiscriminatory reason for the Complainant's termination, the burden shifts to the Complainant to demonstrate that the Respondent's proffered explanation is either not credible or represents a pretext for an otherwise discriminatory explanation.

Burden Shifting Step 3 (Reason Not Credible or Pretext):

The [Respondent's] proffered nondiscriminatory explanation—that he was terminated solely because he was habitually and grossly negligent—is not credible.

The fact that the Respondent has given two different reasons for the Complainant's termination, simply an "at will" termination and a termination for cause [habitual and gross negligence], further cast doubt on the Respondent's credibility. In addition to Olson's lack of credibility on the stand, Knox Krueger [witness] and Glascock's testimony was delivered in a manner that causes the Hearing Examiner to question the credibility of their testimony. Glascock was visibly under stress on the stand and needed several breaks to compose herself. While this may have been due to nervousness about the act of testifying, the Hearing Examiner believes that her reticence was, in part, due to a lack of confidence in her testimony. As with Olson, Knox Krueger's testimony was delivered with an attitude of having been put upon to testify. She had difficulty remembering dates, names and other key facts that would have lent credibility to her testimony.

In totality, these events and circumstances call into question the legitimacy of the reason the Respondent offered to justify terminating the Complainant. The record in this matter leads to the conclusion that the greater weight of the credible evidence demonstrates, at least in part, the Respondent was motivated to terminate the Complainant on the basis of his age.

Employment (Harassment):

- [Wakefield v. Simonson Bros. of Wisconsin, Inc.](#), MEOC Case No. 20112017

Burden Shifting Step 1 (Establishing a prima facie claim):

The Hearing Examiner will begin with the claims of racial harassment. Generally speaking, whether the alleged harassment comes from a customer, coworker or a supervisor, there are several elements which must be proven. In order to prevail, a Complainant must demonstrate a pervasive pattern or practice of patently offensive language or conduct of a racial nature that is sufficiently severe to interfere with the Complainant's ability to perform his or her job duties. In the case of harassment by a customer or coworker, it must be demonstrated that the employer either knew or reasonably should have known of the harassment and failed to take reasonable steps to eliminate the conduct. In the case of harassment by a supervisor, the knowledge of the employer is presumed and the opportunity to correct is either truncated or eliminated. Generally speaking, the Commission is much less tolerant of harassment by a supervisor as the Commission believes that employers have had adequate time to become familiar with the requirements of the Equal Opportunities Ordinance and the equivalent state and federal laws.

Though the Complainant testified that his supervisors were hard on him and failed to be supportive, his testimony fails to detail or explain how this conduct was either explicitly racial in nature or was patently offensive. The Hearing Examiner understands that the Complainant was extremely unhappy with the work environment, but cannot find that the Complainant's dissatisfaction establishes the minimum criteria of a claim of harassment.

While [an incident involving a supervisor] is serious, by itself, it is insufficient to establish a pattern or practice of supervisory harassment. Even given the Commission's more serious attitude about harassment, a single incident such as described herein fails to create liability on the part of the Respondent. The ordinance does not contemplate a per se standard in which even a single incident can establish a violation of the ordinance.

There can be little doubt that the word “slave” in connection with a black, African American bears significant negative connotations. In the context of [an incident involving a supervisor], accepting for the moment that it occurred as outlined by the Complainant, it is not so clear that the word “slave” was intended to have a racial meaning as opposed to a meaning more like a lack of power. [The] supervisor should certainly know that certain words are likely to have meanings well beyond those intended. [...] the fact that this is the sole circumstance to which the Complainant testified with any detail is fatal to his claim. [...] despite the ordinance and Commission’s heightened concern for supervisory harassment, a single incident particularly of language alone, is insufficient to establish liability for a hostile workplace claim of harassment. Even if the Hearing Examiner were to combine [...] comments, they do not rise to the level of a hostile workplace without more. The Hearing Examiner cannot find that two separate comments by two different supervisors unconnected with each other and particularly given the nature of the surrounding events, establishes that the complainant was exposed to a hostile workplace. The Complainant’s failure to identify other specific instances of harassing conduct by supervisors of the Respondent prevents the Hearing Examiner from finding any persistent pattern or practice of harassing conduct. [...]

Complainant describes inappropriate comments made by Carlson [co-worker] such as questioning the Complainant if he knew African Americans who had been arrested or if the Complainant took illegal drugs such as crack cocaine. The Complainant gave details of a racially offensive joke told by Carlson involving African Americans, the rape of a woman and a basketball. The Complainant testified that Carlson was generally careful to speak to the Complainant about these matters to avoid witnesses. The Complainant indicates that Carlson would harass him outside or in the back when no one else was around. Carlson denies having made any of these statements. The Complainant asserts that he complained to Dean [supervisor] and others about Carlson’s statement, but that nothing was done.

[...] the Complainant’s testimony that he was subjected to unwelcome racially offensive language while employed by the Respondent is more credible than the Respondent’s testimony that he was not. Having established that the Complainant experienced racial harassment from a coworker or coworkers, the next question is whether the Complainant reported that harassment to the Respondent’s management and gave it the opportunity to put an end to the harassment.

The Complainant testified that he informed Dean and Simonson [supervisor] about his treatment. Both Dean and Simonson deny that the Complainant informed them. Dean indicates that he observed that the Complainant appeared unhappy, but that he was not forthcoming as to the reasons for his unhappiness. While the Hearing Examiner finds that the Complainant was more than likely harassed by Carlson, the record as to his reporting the harassment to management is not proven to the requisite degree.

Burden Shifting Step 2 (Respondent’s Legitimate Business Reason):

Both Dean and Simonson deny that the Complainant informed them of the harassment.

Given the conflicting testimony between the parties as to the extent that the Complainant reported his harassment to Dean or other members of management, it remains the Complainant’s burden to establish that it is more likely than not that he reported his harassment. The Hearing Examiner cannot conclude that the Complainant has met his burden with respect to this element. While

Dean certainly has incentive to deny the Complainant's reports, the Complainant has as much incentive to testify that he made the reports. Given the fact that the Complainant appears to have shied away from causing problems and sought to be left alone, the Hearing Examiner concludes that it is as likely that he did not report his harassment as that he did.

Burden Shifting Step 3 (Reason Not Credible or Pretext):

Reporting harassment or demonstrating that an employer reasonably knew or should have known is an essential element in a claim of racial harassment. Failing to demonstrate by the greater weight of the credible evidence that either he reported the harassment to management or that management should have reasonably known of the harassment, the Complainant fails to meet his burden of proof with respect to this claim.

Public Accommodation:

- [Nichols v. Buck's Madison Square Garden Tavern](#), MEOC Case No. 20033011

Burden Shifting Step 1 (Establishing a prima facie claim):

The [Complainant] has the burden of proving that a modification was requested and that the requested modification is reasonable. The [Complainant] meets this burden by introducing evidence that the requested modification is reasonable in the general sense [...]. While the [Respondent] may introduce evidence indicating that the [Complainant's] requested modification is not reasonable [...] the [Complainant] bears the ultimate burden of proof on the issue... If the [Complainant] meets this burden, the [Respondent] must make the requested modification unless the [Respondent] [...] meets its burden of proving that the requested modification would fundamentally alter the nature of the public accommodation. [...]

Though it is a matter of dispute in the record whether the Respondent knew of the Complainant's disability, the Hearing Examiner has little trouble concluding that the Respondent knew that the Complainant was claiming to have a disability and was requesting an accommodation based upon that disability. When Steinhauer [witness] approached the Complainant and Flowers [Complainant's friend] initially, he inquired whether the Complainant's dog was a guide dog. This represents a clear indication that Steinhauer was aware that the Complainant was claiming to have a disability and was seeking an accommodation [...] consisting of the presence of his dog.

It seems clear that the Complainant attempted to show both Steinhauer and Kasdorf a copy of the ADA and to show the credentials he had for claiming Precious' [Complainant's dog] status as a service animal. Both Kasdorf [Respondent's Representative] and Steinhauer declined to examine the materials presented by the Complainant.

On this record, the Hearing Examiner concludes that Precious' presence represents a reasonable accommodation for the Complainant's disabilities. The Respondent's refusal to permit the Complainant to partake in the benefits and services of its public place of accommodation or amusement while Precious was present violates the ordinance. Had Precious been disruptive [...] or had Precious somehow altered the fundamental nature of the activity or service, it might well be a different matter. However, nothing in this record indicates that such was the case

Burden Shifting Step 2 (Respondent's Legitimate Business Reason):

Bar patron Rick Steinhauer, a Dane County Sheriff Deputy, and apparently a friend of Kasdorf, approached Complainant, asking if this was a seeing-eye dog. Complainant replied that Precious is a service animal, meaning that it can go anywhere he goes. Steinhauer asked for an explanation of the term service animal. Complainant repeated that this was his service animal, allowed to go anywhere open to the public. Steinhauer told Complainant that based on his thirty years of law enforcement experience, the dog would have to go. Kasdorf told Complainant that he would not be served with the dog present.

Burden Shifting Step 3 (Reason Not Credible or Pretext):

Steinhauer's testimony represented a seeming mix of motivations. On one hand, Mr. Steinhauer wished to present his remembrance of the events, but seemed clearly to distance himself from the impression that he had any official presence or connection with the Respondent. Steinhauer left the Hearing Examiner with the impression that he wanted to help his friends associated with the Respondent, but did not wish to jeopardize his employment with Dane County. This casts some doubts on Steinhauer's credibility and his participation in this case. The Hearing Examiner believes that Steinhauer wished to ease the circumstances and utilized his authority as a Dane County Deputy Sheriff to lend his words a weight they did not deserve. At the time of hearing, Steinhauer's testimony served only to place the Respondent in a somewhat less tenable position.

The Complainant, though not the most gracious or friendly of witnesses, gave testimony in a reasonable and straight forward manner. The Respondent's efforts to create doubt about the Complainant's credibility are generally unsuccessful and are somewhat distasteful. There is not doubt that the Complainant's testimony lacks consistency from the beginning to the end. This is not entirely unusual for any witness. Given the Complainant's medical history and the nature of his disabilities, a degree of inconsistency is not unusual. Despite, this, the Complainant's testimony rings true.

The credibility of Complainant's testimony is bolstered by that of Kelly Flowers and Merle Bailey [Complainant's treating provider].

[...] Daley's [Owner of Respondent establishment] appearance at the hearing was somewhat of a mystery. His testimony added little of substance and his statements that he does not discriminate can be seen as self-serving and without conviction. In general, Daley seemed confused and bewildered at hearing.[...]

[...] the Respondent violated the ordinance when it failed or refused to make a reasonable accommodation of the Complainant's disabilities when it refused to permit his dog Precious to remain on the premises [...].