

EMPLOYMENT LAW UPDATE

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Federal Law

The burden-shifting analysis under “McDonnell Douglas” is not applicable when plaintiff presents direct evidence of discrimination.

Enlow v. Salem-Keizer Yellow Cab Co., Inc. 389 F.3d 802 (9th Cir. Nov. 2, 2004).

By Jason A. Geller and Robert J. Buccieri

Defendant Salem-Keizer Yellow Cab Company (“Yellow Cab”) operated a taxicab company in the city of Salem, Oregon. In order to obtain a business license, the city of Salem required proof of liability insurance for every driver employed by a company. In June 1999, Yellow Cab obtained a new insurance policy at a lower yearly rate. Unbeknownst to Yellow Cab, the new policy excluded all drivers under the age of twenty-three and over the age of seventy.

The City of Salem informed Yellow Cab that its business license would be suspended if it could not provide proof of insurance by June 25, 1999. On June 24, 1999, the insurance company called Yellow Cab to inform it that plaintiff David Enlow was not covered under the new policy because he was seventy-three years old. Upon learning of the policy exclusion, Yellow Cab discharged Enlow.

Enlow filed suit against Yellow Cab alleging violations of the Age Discrimination in Employment Act (“ADEA”) and the parallel state age discrimination statute. Enlow filed a summary judg-

ment motion arguing that he had established a case of age discrimination because he was seventy-three years old, had performed his job to his employer’s satisfaction and was discharged because his employer had obtained less expensive liability insurance that excluded him.

Likewise, Yellow Cab filed a summary judgment motion arguing that Enlow had failed to produce evidence that Yellow Cab intended to discriminate against him because of his age. The District Court denied Enlow’s summary judgment motion but granted Yellow Cab’s motion. The District Court ruled that Enlow had failed to provide evidence of a discriminatory motive by Yellow Cab.

Enlow appealed both the denial of his summary judgment and the order granting Yellow Cab’s summary judgment. The Ninth Circuit affirmed the denial of the Enlow summary judgment and reversed the Yellow Cab summary judgment.

The Court ruled that when a plaintiff, like Enlow, relied solely on a disparate treatment theory of liability in an ADEA

case and presented direct evidence, the burden shifting analysis set forth in *McDonnell Douglas Corp. v. Green* 411 U.S. 792 (1973) is not applicable. By applying this burden shifting analysis, the District Court had erroneously granted the summary judgment against Enlow. The *McDonnell Douglas* analysis is only applicable when a plaintiff relies on circumstantial evidence, which was not the case here.

The Court ruled further that Enlow's summary judgment was properly denied because triable issues of fact existed. Evidence existed that revealed Yellow Cab had only temporarily discharged Enlow and was attempting to negotiate a waiver with the insurance company. Further evidence revealed that Yellow Cab had successfully obtained temporary employment for Enlow with another cab company. The insurance company had agreed to consider a waiver if Enlow passed a physical examination, which Enlow refused to do. Additionally, Enlow rejected the offer of temporary employment with another company and any offers of a future return to Yellow Cab. This reflected evidence that Yellow Cab may not have permanently discharged Enlow.

The Ninth Circuit determined that both parties had presented sufficient evidence to raise triable issues of fact, and their respective claims were thus not suitable for summary judgment.

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