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Employment Discrimination - Evidentiary Standards in Employment Discrimination Suits - Department of Correction v. Gibson

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INTRODUCTION

The declared legislative policy of North Carolina in the area of employment is "...to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap..." The policy extends to state employees as well as employees in the private sector. State employees may seek redress by appealing discriminatory treatment to the State Personnel Commission, while employees in the private sector may seek redress by appealing discriminatory treatment to the North Carolina Human Relations Council or by alleging a violation of the Civil Rights Act of 1965 and seeking redress in the courts.

4. N.C. Gen. Stat. § 143B-391 (1983) enumerates the functions and duties of the North Carolina Human Relations Council which include the promotion of equality for all citizens and the encouragement of employment of qualified people without regard to race. The Council has the authority to investigate alleged discriminatory practices and attempt to effect an amicable resolution to the practices. N.C. Gen. Stat. § 143-422.3 (1983).
5. 42 U.S.C. § 2000e-5(c) (1964). If a state agency has been established to investigate discriminatory practices, the Equal Employment Opportunity Commission must allow the state agency sixty days to resolve the discriminatory practice. In North Carolina, N.C. Gen. Stat. § 143-422.3 (1983) gives the Human Relations Council the authority to receive charges of discrimination from the Equal Employment Opportunity Commission and conciliate charges of discrimination. However, seeking relief from the Human Relations Council is not a jurisdictional prerequisite to bringing an action under Title VII because the Human Relations Council is not a "state authority established or authorized to grant or seek relief from...disciplinary practice." Spagnuolo v. Whirlpool Corp., 467 F. Supp. 364, 365 (W.D.N.C. 1979).
In *Department of Correction v. Gibson*, the North Carolina Supreme Court established evidentiary standards and principles of law to be followed in employment discrimination cases. The court adopted the standards established by federal decisions under Title VII of the Civil Rights Act of 1964. The court then found that the State Personnel Commission had improperly applied the federal evidentiary standards by imposing a stringent burden of proof on the Department of Correction and by improperly substituting its judgment for the legitimate judgment of the Department of Correction. The court remanded the case to the State Personnel Commission for a new hearing and clarified the proper evidentiary standards to be applied under N.C.G.S. § 126-36. However, the court failed to address the most crucial issue in an employment discrimination case: how the employee proves discriminatory motive on the part of his employer? The only attempt to establish means of proof was couched in conclusory terms as to what could not be considered—namely the credibility of the employer's business judgment—instead of a discussion of what could be considered. The court clarified the proper procedural framework to be utilized in a discrimination suit but failed to elaborate on the types of evidence that can be utilized to prove an employer's discriminatory motivation.

This note will examine the burden of proof which must be borne by the employee in employment discrimination cases brought under N.C.G.S. § 126-36 and the limited future utility of N.C.G.S. § 126-36.

**The Case**

Sandhills Youth Center is a minimum security prison for youthful offenders. The facility is divided into two main areas—a segregation area and a nonsegregation area. The nonsegregation area is designed to expose the inmates to a degree of freedom before they are released; the segregation area is more like a traditional prison. Since the opening of the facility in 1974, the major-

7. *Id.* at 141, 301 S.E.2d at 85.
8. *Id.* at 146-47, 301 S.E.2d at 88.
9. *Id.* at 148, 301 S.E.2d at 88.
10. *Id.* at 133, 301 S.E.2d at 80.
11. *Id.*
12. *Id.*
ity of escapes have been from the nonsegregation area.13

Earl Gibson, a black male, was a Correctional Program Assistant I (CPA I) at the Sandhills Youth Center.14 On the evening of April 23, 1979, Gibson was working the 11:00 p.m. to 7:00 a.m. shift in the segregation area.15 He was responsible for ensuring that the inmates had no mental or health problems and for ensuring that escapes were detected at the earliest possible time after their occurrence. These responsibilities were fulfilled by hourly checks throughout a shift which involved seeing "living, breathing flesh" within each cell.16 When Gibson reported for duty on the night in question a cell containing two inmates, Crumpler and Dunlap, was in a state of disarray, but when Gibson asked the guard on duty about the condition, he was told that nothing was wrong.17 During his shift, Gibson failed to properly see "flesh" in the cell containing these two inmates.18 Mr. Gibson also failed to investigate when the two inmates did not respond to a call for breakfast.19 The CPA I who took over Gibson's shift the following morning discovered that the two inmates had escaped through a heating duct in the ceiling.20 After the escape, the construction of the ceiling around the heating ducts in the segregation area was reinforced with metal lattice work.21 At the time of the escape, the segregation area was inadequate to deter escapes.22 A statement obtained from one of the inmates who had escaped indicated that the escape occurred before Gibson reported for duty.23

Gibson was dismissed as a result of the incident. Two white guards who had failed to make proper checks of the cell were given

13. Id. Sandhills Youth Center had been operating for five years at the time of the incident. One hundred nineteen inmates had escaped over that period of time. Only eight of these escapes had been from the segregation area. Apparently, this escape was the only one to have occurred from within a segregation cell.
14. Id. at 134, 301 S.E.2d at 80-81.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id. at 135, 301 S.E.2d at 81. Gibson v. Dep't of Correction, Decision and Order of State Personnel Commission at 11 (Aug. 29, 1980).
22. Id.
23. Id. at 27.
oral warnings with a follow-up letter. \(^{24}\) Gibson appealed his dismissal to the State Personnel Commission, alleging he was dismissed because of his race. The Department of Correction asserted that Gibson had been discharged due to his negligence in failing to detect the escape of Dunlap and Crumpler under circumstances which should have alerted Gibson to investigate further to ensure the presence of the inmates. To show that the Department's asserted reason was in fact a pretext for a discriminatory motive, Gibson presented evidence that in a previous incident resulting in an escape, a white guard had failed to make proper checks in the nonsegregation area but had not been dismissed. \(^{26}\) Gibson also presented evidence that no employee had ever been discharged for negligence in failing to detect an escape. \(^{28}\) The State Personnel Commission held that Gibson had raised a permissible inference that he had been dismissed due to his race and ordered Gibson's reinstatement. \(^{27}\) The superior court reversed the Commission's order, holding that the Commission had improperly applied the evidentiary standards under Title VII which resulted in a decision grounded upon unlawful procedure, affected by error of law, unsupported by substantial evidence, and arbitrary and capricious. \(^{28}\) The Court of Appeals reversed the superior court and reinstated the order of the Commission, holding that the Commission had properly applied the evidentiary standards under Title VII and the superior court had exceeded the proper scope of review under N.C.G.S. \(^{30}\) 

On appeal to the North Carolina Supreme Court, the Department of Correction argued that the Commission had analyzed the issue of pretext from the standpoint of "... the strength and

\(^{24}\) 308 N.C. at 135, 301 S.E.2d at 81.

\(^{25}\) Gibson v. Dep't of Correction, Decision and Order of State Personnel Commission at 8-9 (Aug. 29, 1980); Dep't of Correction v. Gibson, 308 N.C. 131, 142, 301 S.E.2d 78, 85 (1983).

\(^{26}\) Superintendent Hubbard testified that employees had been fired for negligence which resulted in an escape. He elaborated on this statement by further testifying that only two employees had been dismissed for negligent conduct—Gibson and another black employee, who had been sleeping on the job. The other employee was later reinstated. Therefore, Gibson is the only employee who has been fired for conduct resulting in an escape. Gibson v. Dep't of Correction, Decision and Order of State Personnel Commission at 10-11 (Aug. 29, 1980).

\(^{27}\) Id. at 37.

\(^{28}\) Gibson v. Dep't of Correction, No. 80 CVS 6262 (Wake County, Feb. 18, 1981).

\(^{29}\) Dep't of Correction v. Gibson, 58 N.C. App. 241, 293 S.E.2d 664 (1982).
merit of the employer's logic and thought processes rather than the employer's motive." The Supreme Court agreed that the Department was entitled to make a bad business decision without being charged with employment discrimination, and subsequently reversed and remanded to the State Personnel Commission.

**BACKGROUND**

Since as early as 1941 when President Roosevelt established the Committee on Fair Employment Practices, an effort has been underway in this country to eliminate employment discrimination. The Committee on Fair Employment Practices had no enforcement powers and, thus, proved to be largely ineffective. As a result, Congress ultimately enacted the Civil Rights Act of 1964 which granted broad enforcement powers to the Equal Employment Opportunity Commission to eliminate discrimination. Title VII of the Civil Rights Act of 1964 was designed to eliminate discriminatory employment practices. Title VII was necessary largely because of the failure of state and local governments to deal with civil rights problems. The philosophy behind Title VII has been succinctly stated by the United States Supreme Court as "...[tolering] no racial discrimination, subtle or otherwise." The Supreme Court had also recognized that state anti-discrimination laws play an integral role in the Congressional scheme to eliminate discrimination.

31. 308 N.C. at 148, 301 S.E.2d at 88.
33. Id.
The North Carolina legislature has been inactive in the area of civil rights legislation in the area of employment. Employment discrimination actions are typically pursued in the federal courts under Title VII. However, two isolated statutes have been enacted to deal with specific types of employment discrimination. N.C.G.S. § 168-6 prohibits employment discrimination against handicapped persons, and N.C.G.S. § 95-28.1 prohibits employment discrimination against persons who possess sickle cell trait or hemoglobin C trait. The reported decisions under these two statutes have addressed jurisdictional questions but not the substance of the discriminatory action alleged and the manner of proof required.

In 1975, the North Carolina legislature enacted N.C.G.S. § 126-36 which gives State employees the right to challenge any employment decision which is based on "...age, sex, race, color, national origin, religion, creed, political affiliation, or physical disability..." The State Personnel Commission has the power to investigate such complaints, hold hearings, and frame appropriate relief. The decisions of the State Personnel Commission are reviewable by the superior courts.

Prior to Gibson, the North Carolina courts had not addressed the issue of the proper evidentiary standards to apply in a discrimination suit brought under N.C.G.S. § 126-36. However, the language of Title VII, 42 U.S.C. § 2000e-2(a) closely parallels the wording of the North Carolina statute. In addition, the goals of Title VII and N.C.G.S. § 126-36 are the same: to eliminate discriminatory practices. Given the similarity in wording and purpose, the court in Gibson recognized the merits in applying the "tried

43. 42 U.S.C. § 2000e-2(a) (1970) provides:
   It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.
44. 308 N.C. at 141, 301 S.E.2d at 85.
Employment discrimination suits under Title VII have evolved under two separate theories—disparate impact and disparate treatment. While the two are not mutually exclusive, in that an employee may be able to choose between the two in any given case, the burden of proof imposed on the employee under each theory is different. Under a “disparate impact” theory, the employee must show a discriminatory result but need not prove discriminatory intent by his employer. The employee must make out a prima facie case of discrimination against his employer. The burden of proof then shifts to the employer to show business necessity for his actions. If the employee can show that an alternative practice would have been as effective, with less discriminatory impact, he is likely to prevail in his suit. Conversely, under a “disparate treatment” theory, the focus is on the employer's impermissible motive. The employee again must prove a prima facie case of discrimination by his employer. However, the burden of proof does not shift to the employer. A burden of production shifts to the employer to articulate some legitimate nondiscriminatory reason for his actions. Once the employer articulates a reason, the burden of

45. Id. at 136, 301 S.E.2d at 82.
46. Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982). The court recognized that Title VII cases could rightfully be asserted under different theories, but held that the fact situation before the court was more appropriately resolved under the disparate impact theory.
47. Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971) (the emphasis is on employment policies that are fair in form but discriminatory in operation; Title VII is directed to the consequences of the employment practices and not simply to motivation). See generally, Mendez, Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases, 32 STAN. L. REV. 1129 (1980).
48. The four elements of a prima facie showing of discrimination are: (1) the employee belongs to a protected class; (2) the employee has applied and was qualified for a job; (3) the employee was rejected for the job, despite his qualifications; and (4) after the employee was rejected, the employer continued to seek applications from others who had the rejected employee's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
51. Mendez, supra note 47, at 1129.
52. 411 U.S. at 802.
53. Id. The Court has used the terms “articulate” and “prove” interchangea-
proof and production merges on the employee to show, by a preponderance of the evidence, that the reason proffered by the employer is merely a pretext.\(^4\) A disparate impact theory would be utilized in a situation where an employer has facially neutral policies which adversely affect minorities. A disparate treatment theory would be utilized in a situation where an employer has failed to apply policies evenhandedly to members of all races.\(^5\) The Gibson case is an example of the latter theory.

The United States Supreme Court addressed the issue of the appropriate evidentiary standards to apply in a disparate treatment case in *McDonnell Douglas Corp. v. Green*.\(^6\) In *McDonnell Douglas* the Court held that the employee has an initial burden of production to show a prima facie case of discrimination.\(^7\) The burden on the employee is relatively insignificant at this point. The employee must show at a minimum that his treatment did not result from the two most common legitimate reasons for adverse treatment—lack of proper qualifications for the position sought and absence of a vacancy in the position sought.\(^8\) Although the original formulation of the elements of a prima facie case was in the context of the hiring process,\(^9\) the Court has recognized that it may be applicable in a differing factual situation. The formulation has been adapted and applied to promotion\(^10\) as well as discharge

\(^{4}\) See *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 257-58 (1981).

\(^{5}\) *411 U.S.* at 806. Differences in treatment could be shown by evidence that the employer's attitude was generally unfavorable to civil rights activities, minorities, or the individual during his term of employment. In *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Court stressed that the employer needed to clearly set forth the reasons for the employee's rejection.

\(^{6}\) *411 U.S.* 792 (1973).

\(^{7}\) *Id.* at 802. See *supra* note 48 for the four elements of a prima facie showing of discrimination.


\(^{9}\) *411 U.S.* at 796.

\(^{10}\) *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).
situations.\textsuperscript{61}

After the employee makes a prima facie showing of discrimination, the burden of production then shifts to the employer to articulate a legitimate nondiscriminatory reason for his actions.\textsuperscript{62} The Court grappled with this aspect of the \textit{McDonnell Douglas} formulation in \textit{Texas Department of Community Affairs v. Burdine}.\textsuperscript{63} In \textit{Burdine}, the Court stated that the purpose of requiring the employer to articulate a reason is "... to frame the factual issue with sufficient clarity so that the [employee] will have a full and fair opportunity to demonstrate pretext. The sufficiency of the [employer's] evidence should be evaluated by the extent to which it fulfills [this] function."\textsuperscript{64} The proper function of the employer's rebuttal burden is to put the employee on notice of the direction that his proof of pretext needs to take.\textsuperscript{65}

The final stage of the \textit{McDonnell Douglas} formulation is proof by the employee that the employer's reason is pretextual.\textsuperscript{66} This is the crucial issue in a disparate treatment case. The Court has addressed the issue of proving pretext on several occasions, but only in a peripheral way.\textsuperscript{67} In \textit{McDonnell Douglas}, the Court listed several situations which might support an inference of discrimination. For example, showing that nonminorities involved in acts of comparable seriousness were retained or rehired; showing that the employer's treatment of minorities in general has been historically unfavorable; or showing that the employer has reacted unfavorably to civil rights activities would support an inference that a pretext existed.\textsuperscript{68} In \textit{McDonald v. Sante Fe Trail Transportation Co.}, the Court stated in a footnote that the employee need not show

\begin{itemize}
\item \textsuperscript{62} 411 U.S. at 805.
\item \textsuperscript{63} 450 U.S. at 255. The Court elaborated on the extent of the employer's articulation. The employer must clearly set forth the reasons for the rejection of the employee sufficient to raise a genuine issue of fact.
\item \textsuperscript{64} Id. at 255-56. The Court reiterated its statement from \textit{Board of Trustees of Keene State College v. Sweeney}, 439 U.S. 24 (1978), that the employer need not persuade the trier of fact of an absence of discriminatory intent.
\item \textsuperscript{65} Friedman, \textit{The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique}, 65 \textit{CORNELL L. REV.} 1, 9 (1979).
\item \textsuperscript{66} 411 U.S. at 805.
\item \textsuperscript{68} 411 U.S. at 804-05.
\item \textsuperscript{69} 427 U.S. 273 (1976).
\end{itemize}
that race was the employer's sole motivation but need only show that "but for" the discriminatory motive the adverse action would not have resulted.\textsuperscript{70} The Court has also held that statistical data has probative value in showing pretext.\textsuperscript{71}

The biggest problem in proving pretext arises in a situation where the employer has a mixed motive for his actions. Because of the nature of discrimination and the difficulty of proof, if the employer has a mixed motive, the burden on the employee will often be insurmountable. An employee will seldom be able to rely on direct evidence of discrimination.\textsuperscript{72} The decision by the North Carolina Supreme Court in \textit{Gibson} adopted the standards as set forth in \textit{McDonnell Douglas} and its progeny, and left the issue of pretext unexamined.

\textbf{Analysis}

The North Carolina Supreme Court in \textit{Department of Correction v. Gibson}, recognized that the "ultimate burden of persuading the trier of fact that the [employer] intentionally discriminated against the employee remains at all times with the [employee]."\textsuperscript{73} In reversing and remanding, the court held that the Commission had required the Department to justify the retention of an employee when just cause to discharge the employee existed. By requiring a compelling justification for the different treatment afforded to a white employee who was not discharged when just cause existed, the court felt that the Commission had imposed a burden of persuasion on the Department.\textsuperscript{74} In conjunction with the improper imposition of the burden of persuasion on the Department, the court also held that the Commission had improperly substituted its judgment for the Department's.\textsuperscript{75} In the court's view the combination of these factors resulted in an Order by the Commission that was marred by unlawful procedure and affected

\textsuperscript{70.} \textit{Id.} at 282 n. 10.
\textsuperscript{71.} In \textit{Furnco Constr. Corp. v. Waters}, 438 U.S. 567, 580 (1978), the Court warned against relying too heavily on statistics. In a disparate treatment case the issue is the treatment of an individual, not general employment practices. Statistics have probative value, but are not conclusive. \textit{See also} International Brotherhood of Teamsters v. United States, 431 U.S. 324, 340 (1977).
\textsuperscript{72.} Friedman, \textit{supra} note 65, at 24.
\textsuperscript{73.} 308 N.C. at 138, 301 S.E.2d at 83.
\textsuperscript{74.} \textit{Id.} at 146-47, 301 S.E.2d at 87-88.
\textsuperscript{75.} \textit{Id.} at 146-48, 301 S.E.2d at 88.
Since *Gibson* was a case of first impression in North Carolina, the court looked to federal decisions for guidance in establishing evidentiary standards to be applied in employment discrimination suits under N.C.G.S. § 126-36. The court then adopted the evidentiary standards under Title VII. By adopting these standards, the court provided the Commission with a framework within which to analyze the evidence presented by the parties in an employment discrimination suit. However, a careful reading of the conclusions contained in the Commission Order makes it readily apparent that the Commission had implicitly utilized the *McDonnell Douglas* evidentiary standards:

2. . . Mr. Gibson has presented a prima facie [sic] of race discrimination. . .
3. It is not incumbent upon [the Department] to present legitimate, nondiscriminatory reasons for its decision. . .
4. It is now incumbent upon [Gibson] to show that the reasons elicited by [the Department] for imposing a harsher disciplinary punishment upon him were a pretext. . .

The court agreed with the Commission’s application of the evidentiary standards, but only as applied to the proof of a prima facie case by Gibson (Conclusion 2), and the adequacy of the rebuttal of the prima facie case by the Department of Correction (Conclusion 3). The court disagreed with the Commission’s conclusion that Gibson had shown pretextual reasons for the Department’s actions, because the Commission stated that the Department must show some compelling justification for the retention of one employee and the termination of another employee under substantially similar circumstances. The court interpreted this language as requiring the Department to prove an absence of discriminatory motive. Under *Burdine*, any burden of persuasion (proof) on the Department clearly is too stringent. The Department has a bur-

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76. *Id.* at 147, 301 S.E.2d at 88.
77. *Id.*
78. *Id.*
79. *Gibson v. Dep’t of Correction, Decision and Order of State Personnel Commission at 34-36 (Aug. 29, 1980).*
80. 308 N.C. at 142, 301 S.E.2d at 85.
81. *Id.* at 147, 301 S.E.2d at 88.
82. *Gibson v. Dep’t of Correction, Decision and Order of State Personnel Commission at 36 (Aug. 29, 1980).*
83. “The [employer] need not persuade the court that it was actually moti-
den of production not a burden of persuasion. The North Carolina Supreme Court's disagreement with the Commission's order was conclusory, and the case was remanded without any guidance for the resolution of the real issue—the proper method and type of proof of discriminatory intent that is necessary once the factual issue of pretext has been framed by the prima facie case of the employee and the rebuttal of the employer. The guidance given by the Court was to criticize the wording of the order, instead of its substance. In reaching its conclusion, the Court admitted to only a cursory examination of the conclusion by the Commission regarding the credibility of the Department's business judgment.

Unquestionably, the employee should have the burden of persuasion. In civil actions, the proponent's burden of persuasion is by the preponderance of the evidence. Proof by a preponderance of the evidence relates to the credibility of the evidence offered and not to its quantity. In an employment discrimination suit the employee must persuade the court that the reason articulated by the employer in rebutting the prima facie case is in reality a pretext for a discriminatory motive. The response by the Department to the assertion that they had a pretextual motive in discharging Gibson was misinterpreted by the Court. To show pretext, Gibson persuaded the Commission that the reasons proffered by the Department in meeting its rebuttal burden were not credible and thus not legitimate reasons. The Department failed to offer any credible alternative to Gibson's assertions. The Commission, after hearing the evidence, was persuaded that the evidence presented by Gib-
son as to pretext was of greater weight than that offered in opposition to it by the Department. 91 But the decision by the North Carolina Supreme Court denied the Commission the right to consider the weight of the evidence. 92

No language in the opinion in Gibson indicates the weight of the burden of production by the Department. The implication by the United States Supreme Court is that the burden will be satisfied by a mere scintilla of evidence, or, in other words, just enough to frame the factual issue of pretext. 93 The reason for this minimal burden stems from the purpose of the rebuttal by the employer—merely to sharpen the issue so the employee knows the direction which his proof of pretextual motivation must take. 94 The flaw in the Gibson case is the failure of the court to strike a proper balance between the employee’s burden of persuasion and the employer’s burden of production—the scales are heavily weighted in favor of the employer. If, as the court stated, the employer need only articulate a reason, then, the employer need only proffer any reason, whether it is credible or not. As a practical matter, the reasons given by a business entity will frequently be based on legitimate business judgment, which tends to be subjective. The most obvious, and possibly the only, tactic for the employee to use is to attack the credibility of the articulated business reason. The Court in Gibson established a rule that allows the business judgment of the employer to stand as irrebuttable proof that no discriminatory motive existed. This rule in effect requires the employee to pro-

91. Superintendent Hubbard, who was responsible for dismissing Gibson, was asked whether he would admit that race played a part in his decision. He responded, “[i]t depends on how big a man I am.” Id. at 29. Superintendent Hubbard, in an attempt to clarify this response, was asked on redirect examination, “[h]ow big a man are you? Would you admit that?” He responded “[y]es, I would. No, I wouldn’t . . . .” Id. at 30. Superintendent Hubbard was also vague in answering questions about whether the employees understood the policy about checking inmates. Id. at 15.

92. It is well established that the reviewing court cannot weigh the evidence and substitute its judgment for that of an agency. See In re Amp, Inc., 287 N.C. 547, 215 S.E.2d 752 (1975) (State Board of Assessments); Comm’r of Ins. v. Rate Bureau, 300 N.C. 381, 269 S.E.2d 547, reh’g denied 301 N.C. 107, 273 S.E.2d 300 (1980) (Commissioner of Insurance); Overton v. Bd. of Educ., 304 N.C. 312, 283 S.E.2d 495 (1981) (Board of Education); N.C. A & T University v. Kimber, 49 N.C. App. 46, 270 S.E.2d 492 (1980) (State Personnel Commission).


94. Id. See generally, Friedman, supra note 65.
duce direct evidence of discrimination in order to prevail on the pretext issue. The fallacy in this reasoning is that it fails to recognize that direct evidence in a modern day employment discrimination case seldom, if ever, can be produced. 96 In reaching its decision, the Court in Gibson said "[t]he sole question for the trier of fact in the context of this case is whether defendant DOC [Department of Correction] was racially motivated in its discharge of plaintiff." 96 This begs the question and does not clarify how the trier of fact is to reach its decision when no direct evidence exists. Gibson chose to challenge the credibility of the Department’s decision. The Court of Appeals correctly recognized that the Commission had rejected the Department of Corrections proffered reasons on credibility grounds, 97 but the North Carolina Supreme Court did not.

The crux of the matter is the proper use of indirect evidence to show that the employer’s reason lacks credence. The United States Supreme Court in Burdine recognized the inherent problem of proof in a discrimination case when it stated "... [the employee] may succeed ... by either directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence." 98 An analysis of an alleged discrimination charge is based on the premise that the public policy is to eliminate discriminatory practices in employment. This means to eliminate all forms of discrimination, whether in a subtle form or in an overt form. In Gibson, the Court stated that the policy behind N.C.G.S. § 126-36 was to eliminate discriminatory practices in employment. 99 The only way to completely eliminate discrimination is to scrutinize an allegation of discrimination. Three factors should be weighed by the court in establishing guidelines by which to analyze a discrimination suit where no direct evidence is available.

95. Belton, supra note 53, at 1224. Overt discriminatory practices are seldom encountered. Thus, at best, the employee may be able to prove an inference [of discrimination] ... warranted by human reason and experience that a factfinder may make from established facts." See Friedman, supra note 65, at 24, for comments on the inherent difficulty of proving what goes on in a person’s mind. 96. 308 N.C. at 147, 301 S.E.2d at 88. 97. Dep’t of Correction v. Gibson, 58 N.C. App. 241, 247, 293 S.E.2d 664, 671 (1982). "[T]he State Personnel Commission exercised its inherent function to determine credibility and weight of the evidence ..." Id. 98. 450 U.S. at 256. 99. 308 N.C. at 141, 301 S.E.2d at 85.
First, the relative unavailability of direct evidence should be determined. In this day and age, direct evidence will seldom be found. Direct evidence can be diluted by other factors. The work place is a complex environment, and it is often difficult for the employee to uncover direct evidence of discrimination. Thus, the unavailability of direct evidence is essentially a presupposed fact for purposes of this analysis. If direct evidence of discriminatory intent is available, the court would then decide any disputed questions of fact as in any civil litigation—based on the weight and credibility of the evidence.

Second, decisions by an employer are often based on subjective criteria. The employer should be required to produce objective reasons for the treatment of an employee. The employer must provide more than a self-serving assertion of a vague, amorphous business reason. Most people are aware that one of the primary functions of the Department of Correction is to prevent inmates from escaping into the community. By the same token, it is presumed that this will be accomplished by training employees to follow certain procedures in order to detect escapes. The Department should have specific criteria for disciplining its employees and should apply these criteria evenhandedly. One stated reason for discharging an employee that is found in the Department employee handbook is "[n]egligence that seriously jeopardizes the safety of fellow employees or inmates." 100 Superintendent Hubbard did not specify exactly what "seriously jeopardize" entailed. The fact that the escape occurred before Gibson ever came on duty would tend to indicate that his actions did not seriously jeopardize any fellow employees or inmates. In addition, the Department produced evidence that its employees were required to attend a training session, but the evidence was equivocal as to whether the employees understood what was required of them, 101 and whether these criteria were enforced.

Third, if the employer has established objective criteria, the next logical step is to apply these criteria evenhandedly. The employee should be able to produce comparative evidence to show that a minority was not treated the same way a nonminority was treated. The employer should be on notice that any time an exception is made to the rules, the employee personnel file should prop-

100. Division of Prisons Regulation 5 N.C. ADMIN. CODE 2F 1300 (1976).
erly reflect the reason. The reason should not be vaguely remembered two years later when a minority employee is suddenly subjected to harsher treatment. Superintendent Hubbard had no documentation to support the lenient treatment of a white employee, other than his memory, the memory of another employee, and the general nature of the facilities at Sandhills Youth Center. These factors have the disadvantage of being peculiarly susceptible to subconscious discrimination. *McDonnell Douglas* noted that a racially motivated decision could be shown by proof that a white employee was involved in acts of “comparable seriousness” and was treated more favorably.102 “Comparable seriousness” was referred to again in *McDonald v. Santa Fe Trail Transportation Co.*103 where the court stated that “precise equivalence in culpability between employees is not the ultimate question [but rather] comparable seriousness. . .revised is adequate to plead an inferential case that. . .grounds for [termination were] merely a pretext.”104 Although the culpability of Gibson and the white guard was not precisely equivalent, both failed to make proper “flesh” checks. Both incidents involved an escape. The Commission viewed the two incidents as comparably serious105 and felt that the reasons given by Superintendent Hubbard for discharging Gibson when the white guard was not discharged were not credible in light of the similarity in the surrounding circumstances.

When the Civil Rights Act of 1964 was enacted, discussions during the House hearings indicated that “. . .management prerogatives. . .are to be left undisturbed to the greatest extent possible. Internal affairs of employers. . .must not be interfered with except to the limited extent that correction is required in discrimination.”106 No bright line can be drawn as to when an employer’s managerial judgment has been interfered with unnecessarily; however, if an employer establishes objective procedures, applies the procedures evenhandedly to all employees, and properly documents employee files, many problems of proof in a discrimination case will be eliminated. The managerial judgment of the employer will be left intact, yet the employee will have the opportunity to prove his case if the employer has failed to document its actions.

104. *Id.* at 284 n. 11.
105. *Gibson v. Dep’t of Correction, Decision and Order of State Personnel Commission* at 36 (Aug. 29, 1980).
Employers will be on notice as to what tools an employee can use against them and can anticipate the available defenses. Frivolous suits by employees will be discouraged if they know the employer is adhering to stated policies.

In order to ensure that North Carolina continues to have a viable cause of action for employment discrimination, a framework must be established within which such actions may be pursued. The employee must be allowed to refute the evidence presented by the employer in rebutting the prima facie showing of discrimination. The evidence must be submitted to the trier of facts, in this case the Commission, to evaluate the credibility of the evidence. Judge Hedrick stated in a dissenting opinion in Overton v. Board of Education,\(^\text{107}\) that it is not the function of the court to substitute its judgment for that of an administrative agency when reasonably conflicting views are presented.\(^\text{108}\) Further, the North Carolina Supreme Court has stated, in reviewing an order of the State Personnel Commission, that the reviewing court was not at liberty to replace the Commission's judgment as between two reasonably conflicting views.\(^\text{109}\) The concept of a prima facie case and the rebuttal as formulated in Burdine presupposes that conflicting views will be presented. The employee must be allowed to show that the reasons proffered by the employer are not justified by the surrounding facts. The main thrust of the decisions by those courts that have grappled with the issue of pretext has been the persuasiveness of the reasons proffered by the employer and the employee.\(^\text{110}\) When the employee is able to show that the rebuttal by

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108. 51 N.C. App. at 309, 276 S.E.2d at 462 (Hedrick, J., dissenting).


the employer lacks credence, the employee will prevail. The United States Supreme Court, in reviewing an employment discrimination case, has stated its concurrence with findings as to the credence of the employer's justifications. The employee may introduce inferential evidence that the employer's reasons were not true. The employer must make more than a vague assertion of a business reason for its decision. The employer must be required to show that its decision was based on conscientious, objective, analytical business judgment. In the absence of such a showing, the employee should prevail. The employee must be given a full and fair opportunity to rebut the employer's asserted reasons. The court need not evaluate the employer's reasons in view of what decision it would have reached on its own volition. The decision may not necessarily be the best decision possible under the circumstances. But, the court must evaluate the evidence to ensure that the reason is indeed credible given the totality of the surrounding circumstances. If the employer has established a decision-making framework, the employee may be assured that no improper motive entered into the decision, even if the decision was adverse to the

1974)(reasons proffered by employee were equivocal and less than candid; personality conflicts were well-documented by the employer.)


112. In deciding the probative value of circumstantial evidence, the court must determine the reliability and the relative availability of direct evidence. Direct evidence is difficult to obtain; thus, if a court refuses to give any probative value to circumstantial evidence, the employee will never prevail. In EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th cir. 1983), the court embraced a philosophy of using a "pinch of common sense" in evaluating the credibility of evidence offered.

113. Bridgeport Guardians, Inc. v. Delmonte, 553 F. Supp. 601 (D. Conn. 1982) (Assertions by the employer as to assignments based on physical abilities were contradicted by fact that disabled white employee was given a "good assignment" even though not physically qualified. In addition, established disciplinary policies were leniently applied to whites, but strictly applied to blacks. Whites often were reprimanded or suspended for a short period, while black employees were discharged).

employee's interest.

**CONCLUSION**

The *Gibson* court established evidentiary standards to apply in an employment discrimination case under N.C.G.S. § 126-36. At the outset, the employee must make a prima facie showing of discrimination. Then the employer has a burden of production to rebut the employee's prima facie case by articulating a legitimate nondiscriminatory reason for his actions. Finally, the burden of production and persuasion merges in the employee to show that the reason proffered by the employer is a mere pretext for a discriminatory motive. The court established a procedural framework to be utilized in employment discrimination cases. However, the *Gibson* decision provides little guidance as to how an employee can properly show that an employer's articulated reason is a pretext for a discriminatory motive.

The issue of pretext is the crux of an employment discrimination suit when an employee alleges disparate treatment. In *Gibson*, the only guidance provided was the statement that the State Personnel Commission improperly infringed on the business judgment of the Department of Correction in reaching its decision that the Department had discriminated against Gibson. The primary avenue of proof that should be available to the employee was eliminated. Courts should be reluctant to intrude on the legitimate business judgment of an employer. At the same time, the interest of employees should also be recognized. Public policy demands that the employee be given an *effective* opportunity to challenge discriminatory employment decisions. The court cannot allow an employer's purported business judgment to stand as a barrier to a legitimate claim of discrimination.

The proof of pretext is difficult because of the existence of subtle forms of discrimination. The issue of pretext requires careful scrutiny of the relative unavailability of direct evidence, the objective reasons for treatment afforded to employees, and the evenhandedness of the employer in applying policies to all employees. The North Carolina Supreme Court needs to grapple with the issue of pretext and establish guidelines to ensure that N.C.G.S. § 126-36 is a viable tool in furthering the stated public policy found in N.C.G.S. § 143-422.2—to protect the right of all persons to hold employment without discrimination.

*Beth Marshall*