

## It's about *Tyne* to Try Something New: The Burden of the Standard of Proof

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### Executive Summary

In January, the Eleventh Circuit issued a decision that likely will impact employers' litigation strategies in discrimination cases. In *Tynes v. Florida Department of Juvenile Justice*, the court reiterated that the framework set out by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green* is an evidentiary framework, not a standard of liability. Thus, employees in employment discrimination cases may still be able to prove discrimination even if they cannot satisfy this framework. In reaching this decision, the court stated that parties over-emphasize the importance of the *McDonnell Douglas* elements at summary judgment. However, employers should instead emphasize why all of the evidence, taken as a whole, fails to lead to an inference of intentional discrimination.

### Background of the Case

Lawanna Tynes, a former detention center superintendent, sued her former employer, the Florida Department of Juvenile Justice (the Department), claiming in part, that her termination was the result of sex and race discrimination under Title VII. Tynes, a sixteen-year employee of the Department with no documented performance issues, was terminated for "poor performance, negligence, inefficiency or inability to perform assigned duties, violation of law or agency rules, conduct unbecoming of a public employee, and misconduct," after an unusually high number of incidents at the detention center led to a review of staffing and personnel issues. Tynes prevailed at the trial court level when the jury found that race and sex were motivating factors in her discharge. The Department filed a renewed motion for judgment as a matter of law, or alternatively, for a new trial. In its motion, the Department argued Tynes failed to present proper comparators who were "similarly situated in all material respects" and, therefore, failed to establish a *prima facie* case under *McDonnell Douglas*. The district court denied the Department's motion.

On appeal, the Eleventh Circuit affirmed the district court's ruling, holding that a plaintiff's failure to produce a comparator is not dispositive. The court noted that the *McDonnell Douglas* framework has been misunderstood as an independent standard of liability when, in fact, it is merely an "evidentiary tool that functions as a 'procedural device, designed only to establish an order of proof and production.'"

A plaintiff who fails to satisfy *McDonnell Douglas*, the Eleventh Circuit reminded, still has other avenues by which to prove her case, including proffering a "convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." The Eleventh Circuit explained that the "analysis turns on the substantive claims and evidence in the case, not the evidentiary framework," and ultimately the question is "whether there is a sufficient evidentiary basis for the jury to find that the defendant intentionally discriminated against the plaintiff." Here, the Eleventh Circuit held, the Department failed to demonstrate why the record evidence could not support the jury's verdict in favor of the plaintiff.

### Other Evidentiary Avenues

The Court also highlighted other evidentiary frameworks, including the "convincing mosaic standard." A "convincing mosaic" may be shown by evidence that demonstrates, among other things, suspicious timing, ambiguous statements, and other bits and pieces from which an

inference of discriminatory intent may be drawn. The “convincing mosaic” standard makes it easier for plaintiffs to show discrimination using evidence which may seem insignificant if taken separately but when viewed as a whole may be enough for a jury to find that the employer discriminated against the plaintiff. This evidentiary framework is particularly useful to employees who cannot provide a similarly situated comparator, as *McDonnell Douglas* requires.

## What Does this Change for Employers?

Technically, the court’s ruling is not new. The Eleventh Circuit has reiterated its prior holding that the important inquiry in an employment discrimination case is not whether the plaintiff proved their *prima facie* case under *McDonnell Douglas*, but whether the plaintiff provided sufficient evidence, taken together, from which the jury could conclude that the employer intentionally discriminated against the employee.

However, the court provided guidance for employers and litigants when presenting evidence. For employers, it is important not to focus entirely on the *McDonnell Douglas* requirements, as the eventual motion for summary judgment may end up being too narrow. And with the court’s ruling affirming *McDonnell Douglas*’s limited role as an evidentiary framework, it is very possible that other evidentiary frameworks might increase in usage. Therefore, employers should instead focus on arguing why the totality of the plaintiff’s evidence fails to lead to an inference of intentional discrimination.

If plaintiffs begin utilizing the “convincing mosaic” framework with its lower threshold, it will be crucial for employers to have evidence to rebut any discriminatory intent in their decisions. Therefore, employers should consider conducting additional training for managers and decisionmakers to reinforce that all decisions need to be made without any discriminatory intent or malice and that even small incidents can be compiled later to paint a picture of discrimination. Employers should also ensure that any adverse actions comply with applicable company policies and procedures and that employee files are well documented when practicable to counter the plaintiff’s “mosaic.”

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