

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

July 20, 2026

Christopher M. Wolpert
Clerk of Court

HUA JIANG,

Plaintiff - Appellant,

v.

CITY OF TULSA,

Defendant - Appellee.

No. 25-5097
(D.C. No. 4:23-CV-00255-CVE-CDL)
(N.D. Okla.)

ORDER

Before **HOLMES**, Chief Judge, **HARTZ**, **TYMKOVICH**, **MATHESON**,
BACHARACH, **PHILLIPS**, **McHUGH**, **MORITZ**, **EID**, **CARSON**, **ROSSMAN**, and
FEDERICO, Circuit Judges.

This matter is before the court on Appellant's *Petition for Rehearing En Banc* and
Appellee's *Response To Petition for Rehearing En Banc*.

The petition and response were circulated to all judges of the court who are in
regular active service, and a poll was called. The poll did not carry. Consequently, the
petition is DENIED.

Judges Hartz, Tymkovich, Bacharach, and Eid would grant the petition. Judge Eid has filed a separate dissent from the denial of rehearing en banc, which is joined by Judges Hartz and Tymkovich.

Entered for the Court

Per Curiam

EID, Circuit Judge, dissenting from denial of petition for rehearing en banc.

Hua Jiang—a middle-aged man from China—applied to be the superintendent of the City of Tulsa’s (“City”) A.B. Jewell water-treatment plant. The original posting required someone with a college degree in biology, engineering, environmental sciences, or a similar field. However, Jiang was rejected, and a younger, white applicant without a bachelor’s degree was hired, contrary to the job posting. Jiang reported this error to the civil-service commission, and indeed, the City redid its hiring—now without requiring a bachelor’s degree for the position—and the same candidate was hired. Jiang then sued the City for discrimination, arguing that he was passed over for the job due to his race, age, and national origin. Moreover, Jiang claims that the City’s desire to hire someone with more leadership experience was pretext for its discriminatory animus. Here, the majority held that the district court correctly granted summary judgment to the City because Jiang could not show pretext under *McDonnell Douglas*.

This case involves the burden-shifting framework of *McDonnell Douglas*, which is used by courts to determine if employment discrimination occurred under Title VII. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). As I said in my concurrence in *Jenny v. L3Harris Technologies, Inc.*, I believe that *McDonnell Douglas*’s fixation on pretext is especially problematic in cases like this one, where the facts presented at summary judgment make the case close enough to go to a jury. *See* 144 F.4th 1194, 1201 (10th Cir. 2025) (Eid, J., concurring). *McDonnell Douglas* has faced

mounting scrutiny over the years, both within this Circuit and outside of it,¹ and I believe the instant case offers us a chance to address pretext in the summary judgment context.

In focusing our inquiry on evaluating pretext, I believe that we ignore the summary judgment standard, under which courts are not to “weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial”—and, in doing so, are to view the record in the light most favorable to the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986). Put differently, if a case has made it to the third step of *McDonnell Douglas*, both parties will usually have met their burden of production. As a result, we need only to determine which party

¹ Justice Thomas has stated that he has serious doubts on multiple grounds about the use of *McDonnell Douglas* at summary judgment, including the fact that “the *McDonnell Douglas* framework lacks any basis in the text of Title VII and has proved difficult for courts to apply”; notably, Justice Gorsuch joined this opinion. *See Ames v. Ohio Department of Youth Services*, 605 U.S. 303 (2025) (Thomas, J., concurring). Moreover, several judges in our Circuit have raised doubts about the propriety of *McDonnell Douglas* in both the summary-judgment context and other postures. *See, e.g., McNellis v. Douglas Cnty. Sch. Dist.*, 116 F.4th 1122, 1144 (10th Cir. 2024) (Hartz, J., concurring); *Wells v. Colo. Dep’t of Transp.*, 325 F.3d 1205, 1221–28 (10th Cir. 2003) (Hartz, J., writing separately) (arguing *McDonnell Douglas* causes courts to “los[e] sight of the ultimate issue” at summary judgment—which is “whether the evidence supports a finding of unlawful discrimination”); *Walton v. Powell*, 821 F.3d 1204, 1211 (10th Cir. 2016) (Gorsuch, J.) (“[T]he tide runs against *McDonnell Douglas* as strongly as it does for a good reason[,] for the test has proven of limited value even in its native waters.”). And Judge Tymkovich has written that the “focus on pretext has shifted the emphasis of an employment discrimination case away from the ultimate issue of whether the employer discriminated against the complaining employee,” instead leading courts to analyze pretext using “artificial categories of evidence” or unnecessary orders of proof. Timothy M. Tymkovich, *The Problem with Pretext*, 85 Denv. L. Rev. 503, 505, 529 (2008). Additionally, judges outside of our Circuit have also criticized *McDonnell Douglas*. *See, e.g., Tynes v. Fla. Dep’t of Juv. Just.*, 88 F.4th 939, 951 (11th Cir. 2023) (Newsom, J., concurring); *Brady v. Off. of the Sergeant at Arms*, 520 F.3d 490, 493–94 (D.C. Cir. 2008) (Kavanaugh, J.); *Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring).

to believe—which is a question of fact for the jury to decide, not a legal question for the court.

Moreover, the Supreme Court has stated that the *McDonnell Douglas* framework was “never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.” *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (internal quotation marks omitted) (quoting *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978)). And the *Aikens* Court went on to say that once the defendant no longer challenged whether the plaintiff had successfully established a prima facie case, courts should no longer use *McDonnell Douglas* and simply decide whether “the defendant intentionally discriminated against the plaintiff,” “proceed[ing] to this specific question directly, just as district courts decide disputed questions of fact in other civil litigation.” *Id.* at 715–16. In other words, the Court has directed us to be more flexible when evaluating whether pretext existed under *McDonnell Douglas*, but we have not followed that instruction in this case.

Accordingly, I respectfully dissent from the court’s order denying en banc review.