

Supreme Court rejects finding of discrimination based on lack of evidence showing connection to prohibited ground

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A recent decision of the Supreme Court of Canada in a case involving an allegation of racial profiling clarifies the burden of proof in discrimination cases. In [Quebec \(Commission des droits de la personne et des droits de la jeunesse\) v. Bombardier Inc. \(Bombardier Aerospace Training Center\)](#) (July, 2015) the Supreme Court held that it cannot be presumed “based on a social context of discrimination against a group” that a specific decision made in relation to a member of that group was based on a prohibited ground under human rights legislation. Instead, there must be tangible evidence linking that decision to a prohibited ground in order to establish a *prima facie* case of discrimination, even if that evidence is circumstantial.

Mr. Latif, a Canadian citizen of Pakistani origin was a licensed pilot in both Canada and the United States. In 2004, he sought security clearance from U.S. authorities to receive flight training at a Bombardier facility in Dallas. Under the enhanced security screening process implemented following the terrorist attacks of 9/11, Mr. Latif was denied clearance by the U.S. authorities. He then sought clearance to train at Bombardier’s facility in Quebec. Bombardier refused to train him based on the decision in the U.S. Mr. Latif proceeded to file a complaint under Quebec’s Charter of human rights and freedoms alleging that Bombardier had discriminated against him on the basis of ethnic origin.

Relying heavily on an expert report filed by the Quebec Human Rights Commission, which indicated that several U.S. administrative agencies had engaged in racial profiling against people of Arab origin, Muslims or people from Muslim countries in the wake of 9/11, the Quebec Human Rights Tribunal found that Bombardier’s decision to deny Mr. Latif’s training request was discriminatory. The Tribunal ordered Bombardier to pay damages and to “cease applying or considering the standards and decisions of the US authorities in ‘national security’ matters when dealing with applications for the training of pilots under Canadian pilot’s licences”.

The Quebec Court of Appeal set aside the Tribunal’s decision finding that it was unsupported by the evidence and therefore unreasonable. It stated that because Bombardier’s decision was based solely on the decision of the U.S. authorities, in order to prove that discrimination occurred it was necessary to show that the U.S. decision was based on a prohibited ground. In the absence of that proof, the Tribunal could not reasonably find that Bombardier had discriminated against Mr. Latif.

The issue before the Supreme Court was the proper degree of proof required to establish discrimination and whether it had been met in this case. The Supreme Court started its analysis by noting the three elements that a plaintiff must show in order to establish a *prima facie* case of

discrimination. These were:

1. a distinction, exclusion or preference,
2. based on one of the prohibited grounds, and
3. which has the effect of nullifying or impairing the right to full and equal recognition and exercise of a human right or freedom.

Once a plaintiff satisfies these three elements the burden shifts to the defendant to justify its decision on the basis of the exemptions in the Quebec Charter.

It was the second element above that proved problematic for the plaintiff. The Supreme Court stated that the plaintiff must prove on a balance of probabilities that the impugned conduct was based on a prohibited ground - in other words, that there was a connection between the two. Although the plaintiff provided circumstantial evidence that the U.S. decision was based on ethnic origin, it was not sufficient to find so on a balance of probabilities. Canada's top court noted that, in fact, neither of the parties actually knew the basis for the U.S. decision. The Supreme Court dismissed the appeal on this basis. It did however provide the following caution:

However, we wish to make it clear that our conclusion in this case does not mean that a company can blindly comply with a discriminatory decision of a foreign authority without exposing itself to liability under the Charter. Our conclusion flows from the fact that there is simply no evidence in this case of a connection between a prohibited ground and the foreign decision in question.

This decision has been criticized by some as imposing too high a threshold on plaintiffs in discrimination cases. They note that often there will be little evidence of a connection between a prohibited ground and the impugned conduct, and where there is such evidence, it will generally be circumstantial. Although this may be a legitimate concern, the decision of the Supreme Court has positive aspects. It clarifies that to establish a *prima facie* case of discrimination, a plaintiff must satisfy each element of the three-part test on a balance of probabilities. Before a court or tribunal can find that a *prima facie* case of discrimination has been made out, so as to shift the burden to the defendant to explain its conduct, there must be sufficient evidence to satisfy the court or tribunal that each of these three elements has been met. The decision makes it clear that evidence which establishes that systemic discrimination exists more generally will not be sufficient to show the necessary connection between the specific decision being challenged and a prohibited ground protected under human rights legislation.

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