The Origins and Application of Title VII of the Civil Rights Act of 1964

> We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.
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> — Preamble to the Constitution of the United States of America

This preamble sets forth goals for the United States. But when? After adoption of the Constitution, nearly 100 years passed before emancipation, and that involved a civil war. It was more than two generations after that before women were allowed to vote. Our history is replete with discrimination on the basis of race, ethnicity, religion, and gender.

Historically, many societies have survived with homogeneity of race, ethnicity, or religion, but never with homogeneity of gender. Because of this one might expect gender based discrimination to be among the first to fall in a democratic society, rather than one of the last.

And yet, the 200 year history of our high court boasts of only two female justices. Only a small percentage of the Congress are female and there has never been a female president or vice-president. England has had its Margaret Thatcher, Israel its Golda Meir, and India its Indra Ghandi. The American Democracy has certainly missed the opportunity to lead the world in gender equality in leadership, and without that how can we expect to see gender equality in society?

> There will never be complete equality until women themselves help to make the laws and elect lawmakers.
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> — Susan B. Anthony, "The Status of Women, Past, Present and Future" *The Arena*, May 1897

The first equal employment bill was introduced into Congress in 1943 but failed to pass both houses. Equal employment bills were introduced in Congress on a regular basis for the next twenty years, but were either killed in committee or met their ends under the threat of Senate filibusters. Given the history of discrimination in this country, the failure of these bills was no surprise. What was a surprise, however, was the success of the equal employment provisions of the Civil Right Act of 1964. Title VII was part of a broad program of Civil Rights legislation aimed toward racial equality which was supported by President Kennedy before his assassination in 1963 and promoted by President Johnson thereafter. That program did not consider discrimination based upon gender.

Even in 1964, racial discrimination was so pervasive that the bill faced a great deal of opposition in Congress. However, when it finally appeared that Congress would approve a bill to curtail racial discrimination in employment, its opponents decided to make a last minute, "go for broke" effort, to amend the bill under consideration until it was no longer palatable to the congressional majority required for passage. One such effort was an amendment offered by Rep. John Dowdy of Texas which added "sex" to the list of protected classes. This particular amendment

was directed at the bill's public accommodation provisions. Serious or not, Rep. Dowdy made a passionate plea for his amendment: "If women and men are not entitled to equal rights, then nobody on account of religion, or color or anything else is any more entitled to it."[1]

The Dowdy amendment was opposed by the bill's sponsors. Rep. Emanuel Celler of New York characterized it as diversionist. "It is an amendment that we would expect and the kind of tactics we would expect from those who do not want this bill. They want to load this bill up with all kinds of amendments of this sort to make it unpalatable."[2] The Dowdy Amendment failed by a 115-43 vote.[3] But that was not the end of the matter.

Eventually, Rep. Howard Smith of Virginia found an appropriate place to add sex as a protected class. His amendment was "offered to the fair employment practices title of this bill to include within our desire to prevent discrimination against ... women."[4] Rep. Celler fought this amendment as well, still seeing it as a threat to the bill's passage, but eventually the amendment garnered support from several female members of Congress, including Francis Bolton of Ohio, and was passed. The irony is that Rep. Celler's fears proved unfounded; the amendment was ineffective in its goal, and the Civil Rights Act of 1964 became law. By that point, however, thanks to the efforts of its opponents, the Act prohibited discrimination in employment based on gender as well as discrimination based on race, religion and ethnicity.

While a discussion of how the proponents of the bill overcame this apparent set-back will take place later, the important point at this juncture is that the Act, and Title VII of it, were intended primarily to cover racial discrimination. Sex discrimination was not only an afterthought, but was added to the bill by its opponents in a last minute attempt to sink any real hopes of passing the entire piece of legislation.

AN EMPLOYEE'S RIGHT TO EQUAL OPPORTUNITY UNDER TITLE VII

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[1] 110 Cong. Rec. 1,978 (1964).

[2] 110 Cong. Rec. 1,979 (1964).

[3] 110 Cong. Rec. 1,979 (1964).

[4] 110 Cong. Rec. 2,577 (1964).

Under Title VII of the Civil Rights Act of 1964, an employee (or applicant) has a right to be secure in the knowledge that neither race, color, religion, sex, or national origin will adversely effect his or her opportunities for, or conditions of, employment. Title VII § 703(a)(1) makes it unlawful for employers to "fail or refuse to hire or to discharge any individual, or otherwise 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."[5] A violation of this section occurs when an employer intentionally discriminates against one of the protected classes.

There are two theories of intentional discrimination, both categorized by the courts under the general heading of Disparate Treatment. These are individual Disparate Treatment and Systemic Disparate Treatment. The key to these theories is for the party bringing the claim to prove that the employer intended to discriminate on the basis of a class protected by § 703(a)(1).

[5]Title VII §703(a), 42 U.S.C. § 2000e-2a (1991).

Title VII §703(a)(2) expands the prohibitions of §703(a)(1) to include unintentional discrimination by making it unlawful for the employer to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[6] When an employer engages in unintentional discrimination (e.g. a written test), it is using some selection device which is eliminating a suspicious proportion of the applicants who are of the protected class. Unintentional discrimination is proven through the use of Disparate Impact analysis.

Under the Disparate Impact theory, the plaintiff will attempt to prove that the selection device of which he or she is complaining is unjustly adversely affecting a disproportionate number of applicants from his or her protected class. If the applicant/plaintiff proves that the selection device at issue has a disparate impact on the protected class, the defendant/employer will have the opportunity to justify the uses of the device as a "business necessity".[7] The general outline of Disparate Impact analysis has been included here as an acknowledgment that there are many ways that Title VII can be applied. Unfortunately, we barely have enough time to address individual disparate treatment analysis here, and then in only a cursory manner.

DISPARATE TREATMENT ANALYSIS

In most cases of discrimination on the basis of a Title VII protected classification like gender or race, the most applicable legal theory is Disparate Treatment. Usually, when an employer chooses to violate Title VII, it tries to mask any discrimination. Long gone are the days when a position advertisement noted "color'ds need not apply". This makes proving intent the major task of proving a Title VII case. There are two methods of accomplishing that task. In a case of systemic disparate treatment, a plaintiff is charging that the discrimination is system wide. The plaintiff starts by showing, through a statistical analysis, that the employer's work force does not reflect the makeup of the qualified, interested labor force. In other words, if the employer is in an area in which more than 90% of the people interested in and qualified to do the job for which the employer is hiring are of one race (a protected classification), and 100% of the employer's workforce is of another race, this in and of itself evidences discrimination. The employer can then respond either by showing that the statistics the plaintiff used were inaccurate, or by showing some non-discriminatory explanation for the apparent discrimination. If the employer is unable to do so, then

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[6]Title VII §703(a)(2), 42 U.S.C. §2000e-2 (1991).

[7]*Griggs v. Duke Power Co.*., 401 U.S. 424 (1971).

the plaintiff has proven the employer's guilt. The next step is for the plaintiff to show that he or she is a member of the class discriminated against, applied for a position and was rejected, and was thus injured by the employer/defendant.[8]

The other, and more common, method of proving Disparate Treatment is the burden shifting method laid forth in *McDonnell Douglas v. Green* 411 U.S. 792; 93 S. Ct. 1817. That case will be discussed in greater depth in the proof of Title VII actions section below.

THE BONA FIDE OCCUPATIONAL QUALIFICATION (BFOQ)

[8] *Intl. Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977).

The passage of the Civil Rights Act of 1964, despite the success of Congressmen Dowdy, Smith, and other opponents in getting gender added to Title VII of the Act was no fluke. Another sponsor of the bill, Rep. Charles Goodell, also of New York, recognizing his opponents strategy, had a counter tactic of his own involving the Bona Fide Occupational Qualification (BFOQ) exception which was already available to allow limited discrimination on the basis of religion or national origin. On February 10, 1964, while Rep. Smith and Rep. Bolton were completing their editing job on the bill to add "sex" in all the necessary places, Rep. Goodell made his move. He suggested to Rep. Bolton that she might intend "that the requirement for no discrimination against an individual on the basis of sex would also be subject to a bona fide occupational qualification exception,"[9] and asked that it be added to the BFOQ section of the bill.

The discussion that took place between these two people on the House floor is really the only legislative history available on the BFOQ exception for sex discrimination. Comments by Rep. Goodell tend to indicate that he intended the exception to be construed broadly. In support of the exception he notes "[t]here are *so many instances* where the matter of sex is a bona fide occupational qualification. For instance, I think of an elderly woman who wants a female nurse. There *are many things of this nature* which are bona fide occupational qualifications.[10] It is plain that Rep. Goodell had in mind a broad application of the exception, so broad in fact, that he intended for it to virtually nullify the addition of sex as a protected classification and in so doing make the Civil Rights Act of 1964 acceptable to the requisite majority for passage.

The response she gave him was positive. She admitted that "it was not brought to my attention by the staff. But if that is the sense of the House, *I will be very glad to accept it.*"[11] Although she appeared surprised by this suggestion, Rep. Bolton clearly approved of it. She could get sex added to the bill and have hopes that it would pass the House.

Furthermore, the expectation was that if the opposition intended for the prohibition on gender-based discrimination to scuttle the bill, then they had a good reason to expect that it would. At least in part, passage may have been the result of a perception on the part of most members of Congress that this protection would not violate their expectations because the BFOQ applied to sex-based discrimination would "take the teeth out of the provision." Some may even have assumed that a requirement of a woman to fill a "woman's job" and a man to fill a "man's job" would fit into the exception, and the provision would apply to only gender neutral jobs, whatever that may be. In

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[9]110 Cong. Rec. 2,718 (1964).

[10]110 Cong. Rec. 2,718 (1964). (Emphasis added.)

[11]110 Cong. Rec. 2,718 (1964). (Emphasis added.)

short, by any reading of the legislative history, the BFOQ exception was expected to be so broad as to make it the rule, while making the protected classification of sex the exception.

THE BFOQ AS A DEFENSE TO TITLE VII SUITS

While the legislative history indicates that the BFOQ exception is a broad one, the Equal Employment Opportunity Commission (EEOC) has issued guidelines which indicate "that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels –'Men's jobs' and 'Women's jobs' – tend to deny employment opportunities unnecessarily to one sex or the other."[12] Furthermore, courts have followed the EEOC's lead, consistently finding in case after case that the BFOQ exception is a narrow one which failed to encompass the facts of their cases.[13] The courts justify this construction first by referencing the EEOC guidelines and then by suggesting that the legislative history of Title VII also implies that this exception is a narrow one.[14] The language to which the court refers describes the exception as "a *limited* right to discriminate on the basis of religion, sex, or national origin where the reason for the discrimination is a bona fide occupational qualification."[15] (Emphasis supplied.)

Section 703(e) of Title VII which effectuates the BFOQ exception limits it to those instances where it is "reasonably necessary to the normal operation of that particular business or enterprise."[16] The courts have read this section to say that "discrimination based on sex is valid only when the

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[12]29 C.F.R. § 1604.2(a) (1972).

[13]*Diaz v. Pan American World Airways, Inc.*, 442 F. 2d 385 (5th Cir. 1971); *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228 (5th Cir. 1969).

[14]*Weeks supra*.

[15]110 Cong. Rec. 7,213 (1964).

[16]Title VII § 703(e), 42 U.S.C. 2000e-2(e) (1991).

essence of the business operation would be undermined by not hiring members of one sex exclusively."[17] The essence test requires the defendant to satisfy two steps. First, to identify the *essence* of the position sought by the denied applicant/plaintiff, and then to prove that the applicant/plaintiff is, by virtue of his or her very membership in the protected class, substantially unable to perform the *essence* of that job.

[17] *Diaz supra* at 388.

The essence test is a strict one requiring "that to recognize a BFOQ for jobs requiring multiple abilities, some sex-neutral, the sex-linked aspects of the job must predominate."[18] Unfortunately, the meaning of the term "predominate" can be rather enigmatic. One example can be found in the EEOC guidelines which consider sex to be a BFOQ "[w]here it is necessary for the purpose of authenticity or genuineness."[19] The guidelines then go on to cite an actor or actress as an example. In this case, the EEOC is finding a BFOQ because the essence of acting is to convince the audience that the fiction is reality; and a male playing a female role, or vice versa, is unlikely to be convincing. Another area in which sex has been recognized as a BFOQ is "in jobs where sex or vicarious sexual recreation is the primary service provided, e.g. a social escort or topless dancer ... the employee's sex and the service provided are inseparable."[20] A good example of this is a finding that female sexuality is necessary to do the job of a Playboy Bunny because the "predominant" goal of a Playboy Bunny is to entice and titillate male customers."[21]

Where the BFOQ can be used as a defense is quite a puzzle. The BFOQ defense is an assertion that discrimination on the basis of the protected classification is necessary. As a result, it would seem illogical for a court to accept a BFOQ defense in a disparate impact cause of action. Recall, that in these situations, the employee is using some kind of selection device which is a subterfuge. It is claiming to eliminate candidates for employment, not because of their class membership, but because they do not meet some other criterion which the employer maintains is necessary to perform the functions of the job. But, if that assertion were true, then it would be unnecessary to exclude an applicant based upon the protected classification and hence the BFOQ defense would be inapplicable. Thus, by asserting that no discrimination is taking place on the basis of a protected classification, the defendant/employer is also asserting that it sees no BFOQ, and the assertion of one would be contrary to its claim of non-discrimination in the first place. Similarly, an assertion of the BFOQ defense would be illogical both as to a disparate treatment cause of action, and as to a systemic disparate treatment cause of action where an indirect, *McDonnell Douglas* form of proof is necessary.[22] In fact, the only situation in which a BFOQ defense makes logical sense would be one in which the defendant/employer not only admits that discrimination took place on the basis of a protect classification, but that such discrimination was entirely intentional.

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[18] *Wilson v. Southwest Airlines*, 517 F. Supp. 292, 301 (N.D. Tex. 1981).

[19] 29 C.F.R. § 1604.2(a)(2) (1972).

[20] *Wilson supra* at 301.

[21] *St. Cross v. Playboy Club*, Appal No. 773, Case No. CFS 22618-70 (New York Human Rights Appeal Board, 1971); *Weber v. Playboy Club*, Appeal No. 774, Case No. CFS 22619-70 (New York Human Rights Appeal Board, 1971).

[22] The *McDonnell Douglas* approach is discussed in the next section.

Dothard v. Rawlinson[23] presents an interesting example. In *Dothard*, an Alabama prison had height and weight requirements for its correctional officers which the plaintiff argued had a disparate impact, resulting in gender discrimination. The Court agreed and struck down the height and weight requirements.

However, the Department of Corrections also had an explicit regulation requiring that only male guards be hired in positions involving close contact with male prisoners. The defendant contended that this regulation was necessary because the prisons were overcrowded, inadequately staffed, were already quite volatile, and had sex offenders mixed in with the general prison population. Consequently, the defendant argued, that the mere presence of a female guard could exacerbate that volatility. The environment in Alabama's penitentiaries is a peculiarly inhospitable one for human beings of whatever sex. "Indeed, a Federal District Court has held that the conditions of confinement in the prisons of the State, characterized by 'rampant violence' and a 'jungle atmosphere,' are constitutionally intolerable." *Dothard* at 334 (citation omitted). While noting that the prison authorities were already under a court order in an unrelated case directing them correct these deficiencies, the Court held that the deficiencies created a BFOQ legitimizing the male only regulation in this particular circumstance. (Do two wrongs make a right?)

PROVING DISPARATE TREATMENT UNDER TITLE VII

Proving a case of discrimination under Title VII can be a difficult task. The true violation in a discrimination case is the motivation for an action. Firing an employee is not illegal. Firing an employee *because of his race* is violative of Title VII. Similarly, failing to promote a woman is not illegal. Failure to promote her *because she is a woman*, is a violation of Title VII. But motivation is not something subject to simple proofs like tangible facts. Proof that vehicle A impacted Vehicle B can be done with photographs and measurements. How does one show what is in someone else's mind?

One way is an admission. If the Defendant admits that it refused to hire a woman into a position, then that alone would serve to prove the discriminatory intent. This will happen where the Defendant chooses to assert a BFOQ for its actions. But as previously noted, the courts have construed the BFOQ exception in a very narrow manner. As a result, admissions made for that purpose are rare.

[23] 433 U.S. 323 (1977).

While one occasionally encounters a case with a guilty but honest defendant which results in an admission, more often than not, where a defendant is guilty of discrimination, it is not likely to admit to such guilt of its own accord. Where this does happen, it is often the result of a defendant who claims a superior morality and for the sake of principles will stand on its motivation. But more often than not, if a defendant is guilty of discrimination, it is because of personal preferences. A defendant willing to act on those preferences is not generally one compelled by the need to be honest and will lie about the lack of a discriminatory motivation.[24] As a result, plaintiffs will need another way of proving discriminatory motivation.

McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, (1973) sets forth a way of proving discriminatory motivation by circumstantial evidence. The idea is that a plaintiff must first make a *prima facie* showing, that is on its face it appears that there is discriminatory motivation. This is usually done by showing that the act was taken against members of the protected class and not against others. The defendant is then given an opportunity to explain away the appearance of discrimination. The plaintiff may then challenge that explanation. Watch for these things as you read Justice Powell's opinion.

When reading the excerpts that follow, keep in mind the procedural posture of the case when it arrived at the Supreme Court. The Supreme Court is reviewing it from the stand point of a summary judgment and not a trial.[25] In other words, the question here is whether the Plaintiff has adduced any evidence which, if believed by a jury, could lead to a finding in his favor. Given the fact

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[24]From the deposition of Floyd Eppling in the case of *Nasser Akel v. City of Chicago et al.*, 01 C 8963, Northern District of Illinois, pg. 114, ln. 22 - pg. 115, ln. 4:

Q. [By Mr. Maduff] Isn't it true, sir, that you took him to the ground because he was an Arab?

A. No, sir.

Q. That wasn't your motivation?

A. No, sir.

Q. It wasn't your motivation to take him to the ground because he was Islamic?

A. No, sir.

(Although this was not an employment case and the questions were asked for the specific purpose of obtaining denials so as to permit the admission of evidence of other acts of this nature under the rules of evidence, this would be a typical example of what would happen if the question of motivation were asked in an employment case.)

[25]After discovery in a case has been completed (including interrogatory questions, document requests and depositions) a party may move for summary judgment if it believes that it is entitled to judgment based on the uncontested facts. In the words of Fed. R. Civ. Pro. 56(c), summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to judgement as a matter of law."

that what is sought to be proved is the motivation of the company, Plaintiff is effectively required to prove what is in someone else's mind, and short of an outright admission by the Defendant, that is a nearly impossible task.

MCDONNELL DOUGLAS CORP. V. GREEN (1973)

Supreme Court of the United States
411 U.S. 792; 93 S.Ct. 1817

Mr. Justice POWELL delivered the opinion of the Court.

The case before us raises significant questions as to the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. s 2000e et seq.

Petitioner, McDonnell Douglas Corp., is an aerospace and aircraft manufacturer headquartered in St. Louis, Missouri, where it employs over 30,000 people. Respondent, a black citizen of St. Louis, worked for petitioner as a mechanic and laboratory technician from 1956 until August 28, 1964 when he was laid off in the course of a general reduction in petitioner's work force.

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The critical issue before us concerns the order and allocation of proof in a private, non-class action challenging employment discrimination. The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. [Citations omitted]

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In this case respondent, the complainant below, charges that he was denied employment 'because of his involvement in civil rights activities' and 'because of his race and color.' Petitioner denied discrimination of any kind, asserting that its failure to re-employ respondent was based upon and justified by his participation in the unlawful conduct against it. Thus, the issue at the trial on remand is framed by those opposing factual contentions. The two opinions of the Court of Appeals and the several opinions of the three judges of that court attempted, with a notable lack of harmony, to state the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case. We now address this problem.

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. [FN13] In the instant case, we agree with the Court of Appeals that respondent proved a prima facie case. 463 F.2d 337, 353. Petitioner sought mechanics, respondent's trade, and continued to do so after respondent's rejection. Petitioner, moreover, does not dispute respondent's qualifications and acknowledges that his past work performance in petitioner's employ was 'satisfactory.'

> FN13. The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason

for the employee's rejection. We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire. Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection.[26] We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination.

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Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by s 703(a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext.

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In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.

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In sum, respondent should have been allowed to pursue his claim under § 703(a) (1). If the evidence on retrial is substantially in accord with that before us in this case, we think that respondent carried his burden of establishing a prima facie case of racial discrimination and that petitioner successfully rebutted that case. But this does not end the matter. On retrial, respondent must be afforded a fair opportunity to demonstrate that petitioner's assigned reason for refusing to re-employ was a pretext or discriminatory in its application. If the District Judge so finds, he must order a prompt and appropriate remedy. In the absence of such a finding, petitioner's refusal to rehire must stand.

The cause is hereby remanded to the District Court for reconsideration in accordance with this opinion.

So ordered.

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[26]Editor's Note: The reason provided by McDonnell Douglas for its failure to rehire Plaintiff was that Plaintiff had at one point been involved in a protest against McDonnell Douglas, for which he was arrested along with many others. Although the case goes into some detail on this issue its only relevance for this discussion is that McDonnell Douglas stated a legitimate non-discriminatory reason for the actions Plaintiff challenged as racially motivated, thereby meeting its burden of production and shifting the burden of proof back to Plaintiff. As a result, that lengthy discussion has been excluded from this material.

Remanded.

The three step process of *prima facie*, Legitimate Reason, and Pretext set forth in the *McDonnell Douglas* case is the model most often used to prove discrimination. The *prima facie* showing can be adjusted on a case by case basis. For example, where the issue is promotion, one must show that he is qualified for the position and that someone outside his protected class was hired; where the issue is termination, one must show that he was doing the work satisfactorily and someone outside his protected class replaced him. The first step of this method requires the plaintiff/applicant to produce a *prima facie* case showing that he or she was the victim of discrimination. That *prima facie* showing will be modified on a case by case basis to fit the claims asserted. Those modifications were demonstrated in a host of cases which followed, led by *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 which Justice Scalia relied upon heavily in his later opinion in *St. Mary's Honor Center v. Melvin Hicks*, 509 U.S. 502, 113 S. Ct. 2742 a discussion of which follows.

The Question of Burden Shifting Plus

The *McDonnell Douglas* approach proved useful in proving discrimination claims for many years. But in 1993, the Supreme Court threw a wrench in the works so to speak. In *St. Mary's Honor Center v. Melvin Hicks*, 509 U.S. 502, 113 S. Ct. 2742, the Court upheld a verdict by the trial court based on a finding by a judge after a bench trial that no discrimination had taken place even though the findings of fact included findings that the legitimate reasons provided by the Defendant for its actions were false. This appeared to be a reversal of the Court's ruling in *McDonnell Douglas.*

The appearance was that so long as a defendant posits a legitimate reason, the *prima facie* case cannot be persuasive of discrimination even if the plaintiff proves the legitimate reason to be false. Justice Scalia's opinion in *St. Mary's* created a great deal of uncertainty.[27] That uncertainty was so strong that a considerable dissent was prepared by Justice Souter and joined by Justices White, Blackmun, and Stevens which complains that after "two decades of stable law" the Court now abandons *McDonnell Douglas*'s "practical framework" for evaluating evidence of discrimination. In his words, the Court now

> holds that, once a Title VII plaintiff succeeds in showing at trial that the defendant has come forward with pretextual reasons for its actions in response to a prima facie showing of discrimination, the fact finder still may proceed to roam the record, searching for some nondiscriminatory explanation that the defendant has not raised

[27]When the opinion was released by the Court, I was in law school, and enrolled in a course in employment discrimination. My professor at that time indicated that she did not yet understand what the Court was saying, but this opinion certainly placed the viability of *McDonnell Douglas* as a method of proving discrimination in jeopardy.

and that the plaintiff has had no fair opportunity to disprove. *St. Mary's* at 525, 2757.

Justice Souter's dissent which is not included below, is reflective of the response of many Title VII plaintiff's attorneys across the nation.

ST. MARY'S HONOR CENTER v. MELVIN HICKS
Supreme Court of the United States (1993)
509 U.S. 502; 113 S. Ct. 2742

Justice SCALIA delivered the opinion of the Court.

We granted certiorari to determine whether, in a suit against an employer alleging intentional racial discrimination in violation of § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. § 2000e- 2(a)(1), the trier of fact's rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff.

I

Petitioner St. Mary's Honor Center (St. Mary's) is a halfway house operated by the Missouri Department of Corrections and Human Resources (MDCHR). Respondent Melvin Hicks, a black man, was hired as a correctional officer at St. Mary's in August 1978 and was promoted to shift commander, one of six supervisory positions, in February 1980.

In 1983 MDCHR conducted an investigation of the administration of St. Mary's, which resulted in extensive supervisory changes in January 1984. Respondent retained his position, but John Powell became the new chief of custody (respondent's immediate supervisor) and petitioner Steve Long the new superintendent. Prior to these personnel changes respondent had enjoyed a satisfactory employment record, but soon thereafter became the subject of repeated, and increasingly severe, disciplinary actions. He was suspended for five days for violations of institutional rules by his subordinates on March 3, 1984. He received a letter of reprimand for alleged failure to conduct an adequate investigation of a brawl between inmates that occurred during his shift on March 21. He was later demoted from shift commander to correctional officer for his failure to ensure that his subordinates entered their use of a St. Mary's vehicle into the official log book on March 19, 1984. Finally, on June 7, 1984, he was discharged for threatening Powell during an exchange of heated words on April 19.

Respondent brought this suit in the United States District Court for the Eastern District of Missouri, alleging that petitioner St. Mary's violated § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e- 2(a)(1), and that petitioner Long violated Rev.Stat. § 1979, 42 U.S.C. § 1983, by demoting and then discharging him because of his race. After a full bench trial, the District Court found for petitioners. 756 F.Supp. 1244 (E.D.Mo.1991). The United States Court of Appeals for the Eighth Circuit reversed and remanded, 970 F.2d 487 (1992), and we granted certiorari, 506 U.S. 1042, 113 S.Ct. 954, 122 L.Ed.2d 111 (1993).

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The District Court, acting as trier of fact in this bench trial, found that the reasons petitioners gave were not the real reasons for respondent's demotion and discharge. It found that respondent was the only supervisor disciplined for violations committed by his subordinates; that similar and even more serious violations committed by respondent's co-workers were either disregarded or treated more

leniently; and that Powell manufactured the final verbal confrontation in order to provoke respondent into threatening him. 756 F.Supp., at 1250-1251. It nonetheless held that respondent had failed to carry his ultimate burden of proving that *his race* was the determining factor in petitioners' decision first to demote and then to dismiss him. [FN2] In short, the District Court concluded that "although [respondent] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated." *Id.,* at 1252.

> FN2. Various considerations led it to this conclusion, including the fact that two blacks sat on the disciplinary review board that recommended disciplining respondent, that respondent's black subordinates who actually committed the violations were not disciplined, and that "the number of black employees at St. Mary's remained constant." 756 F.Supp. 1244, 1252 (E.D.Mo.1991).

The Court of Appeals set this determination aside on the ground that "[o]nce [respondent] proved all of [petitioners'] proffered reasons for the adverse employment actions to be pretextual, [respondent] was entitled to judgment as a matter of law." 970 F.2d, at 492. The Court of Appeals reasoned:

> "Because all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race." *Ibid.*

That is not so. By producing *evidence* (whether ultimately persuasive or not) of nondiscriminatory reasons, petitioners sustained their burden of production, and thus placed themselves in a "better position than if they had remained silent."

In the nature of things, the determination that a defendant has met its burden of production (and has thus rebutted any legal presumption of intentional discrimination) can involve no credibility assessment. For the burden-of-production determination necessarily *precedes* the credibility-assessment stage. At the close of the defendant's case, the court is asked to decide whether an issue of fact remains for the trier of fact to determine. None does if, on the evidence presented, (1) any rational person would have to find the existence of facts constituting a prima facie case, and (2) the defendant has failed to meet its burden of production--*i.e.,* has failed to introduce evidence which, *taken as true,* would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action. In that event, the court must award judgment to the plaintiff as a matter of law under Federal Rule of Civil Procedure 50(a)(1) (in the case of jury trials) or Federal Rule of Civil Procedure 52(c) (in the case of bench trials). See F. James & G. Hazard, Civil Procedure § 7.9, p. 327 (3d ed. 1985); 1 Louisell & Mueller, Federal Evidence § 70, at 568. If the defendant has failed to sustain its burden but reasonable minds could *differ* as to whether a preponderance of the evidence establishes the facts of a prima facie case, then a question of fact *does* remain, which the trier of fact will be called upon to answer.

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If, on the other hand, the defendant has succeeded in carrying its burden of production, the *McDonnell Douglas* framework--with its presumptions and burdens--is no longer relevant. To resurrect it later, after the trier of fact has determined that what was "produced" to meet the burden of production is not credible, flies in the face of our holding in *Burdine* that to rebut the presumption "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons." 450 U.S., at 254, 101 S. Ct. at 1094. The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture. *Id.,* at 255, 101 S.Ct., at 1094-1095. The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]" because of his race, *id.,* at 253, 101 S.Ct., at 1093. The fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case,

> suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is *required,*" 970 F.2d, at 493 (emphasis added). But the Court of Appeals' holding that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion." [Citations omitted.]

The *St. Mary's* opinion engendered a great deal of confusion over the following years. Title VII cases became very arduous task as plaintiff's lawyers pursued *McDonnell Douglas* style jury instructions and defense attorneys argued that without something beyond proof of pretext, they were entitled to directed verdicts.[28] The jury instructions themselves also tended to create confusion.[29]

But this kind of confusion seemed to surprise the Supreme Court. A reading of *St. Mary's* and Justice Scalia's response to the dissent (which was not included above) indicates that he felt he was perfectly clear that the ultimate question of whether discrimination took place was a jury question regardless of the proofs provided pursuant to *McDonnell Douglas*. An understanding of *St. Mary's* and its apparent inconsistency with *McDonnell Douglas* depends upon recognition of one major factor: while *McDonnell Douglas* was brought before the Supreme Court after summary judgment had issued, *St. Mary's* was in a different procedural posture – a full bench trial had already taken place.

In *Reeves v. Sanderson*, 530 U.S. 133, 120 S. Ct. 2097 (2000), the Supreme Court finally addressed these concerns. In this age discrimination case, the Plaintiff, having used a *McDonnell Douglas* approach had prevailed at trial and received a jury verdict in his favor. The Fifth Circuit Court of Appeals reversed the jury's verdict on the basis that the Plaintiff had failed to provide

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[28]A directed verdict is effectively a ruling by the Court in favor of a party taking the case away from the jury. "If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party...the court ... may grant a motion for judgment as a matter f law against that party." Fed. R. Civ. Pro. 50(a)(1). This is effectively a motion for summary judgment only now with regard to the evidence adduced at trial as opposed to during discovery.

[29]One example is a note sent by a member of the jury during deliberations in the case of *Thompson v. Altheimer & Gray*, 96 C 4319: "On page 10 of <u>The Essential Elements of Plaintiff's Claim</u>: If we agree on #1, #2, #3, #4, #5 [the *prima facie* case]. If we agree on 1-5 does that in and of itself prove that A+G was guilty of r<u>acial</u> discrimination — Pam Leiter" The jury in that case appeared to have found that a *prima facie* case had been made and that the legitimate reasons provided by the defendant were pretextual. (The verdict was reversed on appeal on our contention that Ms. Leiter was a biased juror. But the point remains that even the jury was confused by the instructions.)

anything beyond the *McDonnell Douglas* analysis. *Reeves* found its way to the Supreme Court in the opposite posture as *St. Mary's* – the latter was an appeal from a trial verdict by the District Court in favor of the employer while the former was an appeal from a jury verdict in favor of the employee.

ROGER REEVES V. SANDERSON PLUMBING PRODUCTS, INC.
Supreme Court of the United States (2000)
530 U.S. 133; 120 S. Ct. 2097

Justice O'CONNOR delivered the opinion of the Court.

This case concerns the kind and amount of evidence necessary to sustain a jury's verdict that an employer unlawfully discriminated on the basis of age. Specifically, we must resolve whether a defendant is entitled to judgment as a matter of law when the plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action. We must also decide whether the employer was entitled to judgment as a matter of law under the particular circumstances presented here.

I

In October 1995, petitioner Roger Reeves was 57 years old and had spent 40 years in the employ of respondent, Sanderson Plumbing Products, Inc., a manufacturer of toilet seats and covers. 197 F.3d 688, 690 (C.A.5 1999). Petitioner worked in a department known as the "Hinge Room," where he supervised the "regular line." *Ibid.* Joe Oswalt, in his mid-thirties, supervised the Hinge Room's "special line," and Russell Caldwell, the manager of the Hinge Room and age 45, supervised both petitioner and Oswalt. *Ibid.* Petitioner's responsibilities included recording the attendance and hours of those under his supervision, and reviewing a weekly report that listed the hours worked by each employee. 3 Record 38-40.

In the summer of 1995, Caldwell informed Powe Chesnut, the director of manufacturing and the husband of company president Sandra Sanderson, that "production was down" in the Hinge Room because employees were often absent and were "coming in late and leaving early." 4 *id.,* at 203-204. Because the monthly attendance reports did not indicate a problem, Chesnut ordered an audit of the Hinge Room's timesheets for July, August, and September of that year. 197 F.3d, at 690. According to Chesnut's testimony, that investigation revealed "numerous timekeeping errors and misrepresentations on the part of Caldwell, Reeves, and Oswalt." *Ibid.* Following the audit, Chesnut, along with Dana Jester, vice president of human resources, and Tom Whitaker, vice president of operations, recommended to company president Sanderson that petitioner and Caldwell be fired. *Id.,* at 690-691. In October 1995, Sanderson followed the recommendation and discharged both petitioner and Caldwell. *Id.,* at 691.

In June 1996, petitioner filed suit in the United States District Court for the Northern District of Mississippi, contending that he had been fired because of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.* At trial, respondent contended that it had fired petitioner due to his failure to maintain accurate attendance records, while petitioner attempted to demonstrate that respondent's explanation was pretext for age discrimination. 197 F.3d, at 692-693. Petitioner introduced evidence that he had accurately recorded the attendance and hours of the employees under his supervision, and that Chesnut, whom Oswalt described as wielding "absolute power" within the company, 3 Record 80, had demonstrated age-based animus in his dealings with petitioner. 197 F.3d, at 693.

During the trial, the District Court twice denied oral motions by respondent for judgment as a matter

of law under Rule 50 of the Federal Rules of Civil Procedure, and the case went to the jury. 3 Record 183; 4 *id.,* at 354. The court instructed the jury that "[i]f the plaintiff fails to prove age was a determinative or motivating factor in the decision to terminate him, then your verdict shall be for the defendant." Tr. 7 (Jury Charge) (Sept. 12, 1997). So charged, the jury returned a verdict in favor of petitioner.

***

The Court of Appeals for the Fifth Circuit reversed, holding that petitioner had not introduced sufficient evidence to sustain the jury's finding of unlawful discrimination. 197 F.3d, at 694. After noting respondent's proffered justification for petitioner's discharge, the court acknowledged that petitioner "very well may" have offered sufficient evidence for "a reasonable jury [to] have found that [respondent's] explanation for its employment decision was pretextual." *Id.,* at 693. The court explained, however, that this was "not dispositive" of the ultimate issue--namely, "whether Reeves presented sufficient evidence that his age motivated [respondent's] employment decision." *Ibid.*

***

McDonnell Douglas and subsequent decisions have "established an allocation of the burden of production and an order for the presentation of proof in ... discriminatory-treatment cases." *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). First, the plaintiff must establish a prima facie case of discrimination. *Ibid.; Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 252-253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). It is undisputed that petitioner satisfied this burden here.

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[T]he Court of Appeals concluded that petitioner "very well may be correct" that "a reasonable jury could have found that [respondent's] explanation for its employment decision was pretextual." 197 F.3d, at 693. Nonetheless, the court held that this showing, standing alone, was insufficient to sustain the jury's finding of liability: "We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated [respondent's] employment decision." *Ibid.* And in making this determination, the Court of Appeals ignored the evidence supporting petitioner's prima facie case and challenging respondent's explanation for its decision. See *id.,* at 693-694. The court confined its review of evidence favoring petitioner to that evidence showing that Chesnut had directed derogatory, age-based comments at petitioner, and that Chesnut had singled out petitioner for harsher treatment than younger employees. See *ibid.* It is therefore apparent that the court believed that only this additional evidence of discrimination was relevant to whether the jury's verdict should stand. That is, the Court of Appeals proceeded from the assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination.

In so reasoning, the Court of Appeals misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence. This much is evident from our decision in *St. Mary's Honor Center.* There we held that the fact finder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff. 509 U.S., at 511, 113 S.Ct. 2742. The ultimate question is whether the employer intentionally discriminated, and proof that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason ... is correct." *Id.,* at 524, 113 S.Ct. 2742. In other words, "[i]t is not enough ... to *dis* believe the employer; the fact finder must *believe* the plaintiff's explanation of intentional discrimination." *Id.,* at 519, 113 S.Ct. 2742.

In reaching this conclusion, however, we reasoned that it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Specifically, we stated:

> "The fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination." *Id.,* at 511, 113 S.Ct. 2742.
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> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. See *id.,* at 517, 113 S.Ct. 2742 ("[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination"). In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Wright v. West,* 505 U.S. 277, 296, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992); see also *Wilson v. United States,* 162 U.S. 613, 620-621, 16 S.Ct. 895, 40 L.Ed. 1090 (1896); 2 J. Wigmore, Evidence § 278(2), p. 133 (J. Chadbourn rev. 1979). Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Cf. *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978) ("[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with *some* reason, based his decision on an impermissible consideration"). Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.
>
> This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational fact finder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. See *Aka v. Washington Hospital Center,* 156 F.3d, at 1291-1292; see also *Fisher v. Vassar College,* 114 F.3d, at 1338 ("[I]f the circumstances show that the defendant gave the false explanation to conceal something other than discrimination, the inference of discrimination will be weak or nonexistent"). To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and we have reiterated that trial courts should not " 'treat discrimination differently from other ultimate questions of fact.' " *St. Mary's Honor Center, supra,* at 524, 113 S.Ct. 2742 (quoting *Aikens,* 460 U.S., at 716, 103 S.Ct. 1478).
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> Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law. See *infra,* at 2110-2111. For purposes of this case, we need not--and could not--resolve all of the circumstances in which such factors would entitle an employer to judgment as a matter of law. It suffices to say that, because a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination.

Does *Reeves* overturn *St. Mary's* or just explain it? How does this affect a Plaintiff's trial tactics? These are questions that will continue to evoke different answers from different practitioners for some time to come.

Proving Sexual Harassment Under Title VII

Title VII speaks in terms of discrimination. Sexual Harassment is not directly addressed. But if the act of discrimination is looked upon as being an adverse act based upon a protected classification, it is easy see how it fits. Here although the act itself may not be employment in nature (e.g. grabbing a woman's breasts)[30] it remains adverse. The only remaining question then is whether the act is motivated by her protected classification, i.e. her gender.

Where motivation becomes the center piece of discrimination claims, it tends to take a back seat in sexual harassment claims. Because of the sexual nature of such actions, motivation is presumed. A male supervisor who speaks lasciviously of a female employee's sexual organs or who tries to fondle them is presumed to be doing so because she has those organs, because we presume he gains some sexual arousal from it, in short, because she is female. It is as though the act itself is direct evidence of discriminatory intent. As a result, *McDonnell Douglas* no longer plays a role.

While this certainly makes the sexual harassment case easier to prosecute in that sense, unfortunately sexual harassment cases have a host of difficulties of their own. Proof of the fact of the acts are usually far more difficult, and there are certain standards that need to be met as not every act which we might find sexually offensive arises to the level of a constitutional violation. The key to a sexual harassment case is that the harassing acts alter "the terms or conditions of employment."

Generally speaking there are two kinds of sexual harassment: *Quid Pro Quo* and Hostile Environment. *Quid Pro Quo* sexual harassment occurs when an employer (or a supervisor) requests sexual favors in return for employment advantages; literally tit for tat, this for that. For example, a supervisor is considering promoting one of several people to a new position and he informs one female applicant that if she will have sexual relations with him, she will get the promotion or will have a stronger chance at that promotion. Employment advantages can include everything from nicer offices, to better hours, to better work to something as simple and obvious as a raise. And sexual favors are not limited to sexual intercourse. They can include such things as requests for oral-sexual stimulation, the opportunity to fondle the employee, kissing, or in some cases even something apparently so innocent as a date.[31]

Hostile Work Environment claims are complaints that the environment at the workplace is sexually charged in some manner making it literally an environment hostile to the woman harassed. Hostile environments can be created by requests for sexual favors, sexual comments, naked pictures,

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[30]Certainly sexual harassment can be had in the form of women harassing men or same sex harassment. However, since the majority of cases involve male harassers and female plaintiffs, we will assume that situation throughout.

[31]While social events and dating have generally not been considered severe enough in Hostile Environment claims (as will be discussed), in *quid pro quo* cases the courts tend to take a more favorable view toward the claim.

sexual discussions, unwanted sexual touchings and unwanted sexual advances to name a few. The primary distinction between these two kinds of harassment is that a hostile environment claim does not require an offer for some form of advancement. In *Meritor Savings Bank, FSB v. Mechelle Vinson, et al*, 477 U.S. 57, 106 S. Ct. 2399 (1986), the Supreme Court addressed the concern that the Hostile Environment claim did not include any economic injury as is often the case in *Quid Pro Quo* cases. The fact that an act of sexual harassment does not result in the loss of economic opportunity however, does not change the fact that the act affects the terms or conditions of employment, specifically the working environment.

One other important issue that *Meritor* addresses is the definition of unwanted sexual advances. The fact that a woman voluntarily complies with those advances does not mean that they were wanted. It may be a fact that she chooses to acquiesce for some prospective advantage even though the sexual advance was unwanted. Watch for these two discussions.

MERITOR SAVINGS BANK, FSB v. MECHELLE VINSON
Supreme Court of the United States (1986)
477 U.S. 57; 106 S. Ct. 2399

Justice REHNQUIST delivered the opinion of the Court.

This case presents important questions concerning claims of workplace "sexual harassment" brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*

I

In 1974, respondent Mechelle Vinson met Sidney Taylor, a vice president of what is now petitioner Meritor Savings Bank (bank) and manager of one of its branch offices. When respondent asked whether she might obtain employment at the bank, Taylor gave her an application, which she completed and returned the next day; later that same day Taylor called her to say that she had been hired. With Taylor as her supervisor, respondent started as a teller-trainee, and thereafter was promoted to teller, head teller, and assistant branch manager. She worked at the same branch for four years, and it is undisputed that her advancement there was based on merit alone. In September 1978, respondent notified Taylor that she was taking sick leave for an indefinite period. On November 1, 1978, the bank discharged her for excessive use of that leave.

Respondent brought this action against Taylor and the bank, claiming that during her four years at the bank she had "constantly been subjected to sexual harassment" by Taylor in violation of Title VII. She sought injunctive relief, compensatory and punitive damages against Taylor and the bank, and attorney's fees.

At the 11-day bench trial, the parties presented conflicting testimony about Taylor's behavior during respondent's employment. Respondent testified that during her probationary period as a teller-trainee, Taylor treated her in a fatherly way and made no sexual advances. Shortly thereafter, however, he invited her out to dinner and, during the course of the meal, suggested that they go to a motel to have sexual relations. At first she refused, but out of what she described as fear of losing her job she eventually agreed. According to respondent, Taylor thereafter made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours; she estimated that over the next several years she had intercourse with him some 40 or 50 times. In addition, respondent testified that Taylor fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions. These activities ceased after 1977, respondent stated, when she started going with a steady

boyfriend.

Respondent also testified that Taylor touched and fondled other women employees of the bank, and she attempted to call witnesses to support this charge. But while some supporting testimony apparently was admitted without objection, the District Court did not allow her "to present wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief, but advised her that she might well be able to present such evidence in rebuttal to the defendants' cases." *Vinson v. Taylor,* 22 EPD ¶ 30,708, p. 14,693, n. 1, 23 FEP Cases 37, 38-39, n. 1 (DC 1980). Respondent did not offer such evidence in rebuttal. Finally, respondent testified that because she was afraid of Taylor she never reported his harassment to any of his supervisors and never attempted to use the bank's complaint procedure.

Taylor denied respondent's allegations of sexual activity, testifying that he never fondled her, never made suggestive remarks to her, never engaged in sexual intercourse with her, and never asked her to do so. He contended instead that respondent made her accusations in response to a business-related dispute. The bank also denied respondent's allegations and asserted that any sexual harassment by Taylor was unknown to the bank and engaged in without its consent or approval.

The District Court denied relief, but did not resolve the conflicting testimony about the existence of a sexual relationship between respondent and Taylor. It found instead that

> "[i]f [respondent] and Taylor did engage in an intimate or sexual relationship during the time of [respondent's] employment with [the bank], that relationship was a voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution." *Id.,* at 14,692, 23 FEP Cases, at 42 (footnote omitted).

The court ultimately found that respondent "was not the victim of sexual harassment and was not the victim of sexual discrimination" while employed at the bank. *Ibid.,* 23 FEP Cases, 43.

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The Court of Appeals for the District of Columbia Circuit reversed. 243 U.S.App.D.C. 323, 753 F.2d 141 (1985). Relying on its earlier holding in *Bundy v. Jackson,* 205 U.S.App.D.C. 444, 641 F.2d 934 (1981), decided after the trial in this case, the court stated that a violation of Title VII may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment. The court drew additional support for this position from the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 CFR § 1604.11(a) (1985), which set out these two types of sexual harassment claims. Believing that "Vinson's grievance was clearly of the [hostile environment] type," 243 U.S.App.D.C., at 327, 753 F.2d, at 145, and that the District Court had not considered whether a violation of this type had occurred, the court concluded that a remand was necessary.

The court further concluded that the District Court's finding that any sexual relationship between respondent and Taylor "was a voluntary one" did not obviate the need for a remand. "[U]ncertain as to precisely what the [district] court meant" by this finding, the Court of Appeals held that if the evidence otherwise showed that "Taylor made Vinson's toleration of sexual harassment a condition of her employment," her voluntariness "had no materiality whatsoever." *Id.,* at 328, 753 F.2d, at 146. The court then surmised that the District Court's finding of voluntariness might have been based on "the voluminous testimony regarding respondent's dress and personal fantasies," testimony that the Court of Appeals believed "had no place in this litigation." *Id.,* at 328, n. 36, 753 F.2d, at 146, n. 36.

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In accordance with the foregoing, the Court of Appeals reversed the judgment of the District Court and remanded the case for further proceedings. A subsequent suggestion for rehearing en banc was

denied, with three judges dissenting. 245 U.S.App.D.C. 306, 760 F.2d 1330 (1985). We granted certiorari, 474 U.S. 1047, 106 S.Ct. 57, 88 L.Ed.2d 46 (1985), and now affirm but for different reasons.

***

Respondent argues, and the Court of Appeals held, that unwelcome sexual advances that create an offensive or hostile working environment violate Title VII. Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex. Petitioner apparently does not challenge this proposition. It contends instead that in prohibiting discrimination with respect to "compensation, terms, conditions, or privileges" of employment, Congress was concerned with what petitioner describes as "tangible loss" of "an economic character," not "purely psychological aspects of the workplace environment." Brief for Petitioner 30-31, 34. In support of this claim petitioner observes that in both the legislative history of Title VII and this Court's Title VII decisions, the focus has been on tangible, economic barriers erected by discrimination.

We reject petitioner's view. First, the language of Title VII is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent " 'to strike at the entire spectrum of disparate treatment of men and women' " in employment. *Los Angeles Dept. of Water and Power v. Manhart,* 435 U.S. 702, 707, n. 13, 98 S.Ct. 1370, 1375, n. 13, 55 L.Ed.2d 657 (1978), quoting *Sprogis v. United Air Lines, Inc.,* 444 F.2d 1194, 1198 (CA7 1971). Petitioner has pointed to nothing in the Act to suggest that Congress contemplated the limitation urged here.

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Of course, as the courts in both *Rogers* and *Henson* recognized, not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. See *Rogers v. EEOC, supra,* at 238 ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant degree to violate Title VII); *Henson,* 682 F.2d, at 904 (quoting same). For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." *Ibid.* Respondent's allegations in this case--which include not only pervasive harassment but also criminal conduct of the most serious nature--are plainly sufficient to state a claim for "hostile environment" sexual harassment.

The question remains, however, whether the District Court's ultimate finding that respondent "was not the victim of sexual harassment," 22 EPD ¶ 30,708, at 14,692-14,693, 23 FEP Cases, at 43, effectively disposed of respondent's claim. The Court of Appeals recognized, we think correctly, that this ultimate finding was likely based on one or both of two erroneous views of the law. First, the District Court apparently believed that a claim for sexual harassment will not lie absent an *economic* effect on the complainant's employment. See *ibid.* ("It is without question that sexual harassment of female employees in which they are asked or required to submit to sexual demands as a *condition to obtain employment or to maintain employment or to obtain promotions* falls within protection of Title VII") (emphasis added). Since it appears that the District Court made its findings without ever considering the "hostile environment" theory of sexual harassment, the Court of Appeals' decision to remand was correct.

Second, the District Court's conclusion that no actionable harassment occurred might have rested on its earlier "finding" that "[i]f [respondent] and Taylor did engage in an intimate or sexual relationship ..., that relationship was a voluntary one." *Id.,* at 14,692, 23 FEP Cases, at 42. But the fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." 29 CFR §

1604.11(a) (1985). While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact, the District Court in this case erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.

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In sum, we hold that a claim of "hostile environment" sex discrimination is actionable under Title VII, that the District Court's findings were insufficient to dispose of respondent's hostile environment claim.

In *quid pro quo* case wherein the plaintiff provides the sexual favors requested the fact that she voluntarily acquiesces, therefore, does not mean that the advances are not unwanted. But where the plaintiff does not acquiesce to the advances, the argument for a hostile environment is that much more poignant. Therefore, although the Court has set forth Hostile Environment as a separate kind of sexual harassment, the two will almost always overlap. Thus, the two theories are often argued in a single case.

But not every case arises to a violation of Title VII. The fact is that most couples meet in the workplace. While one might argue that asking for a date could be sexual in nature, to find that it rises to the point of sexual harassment could have serious deleterious effects on society. Most people would be unable to begin relationships, and procreation might come to an end. (Okay, perhaps this is a bit of an exaggeration, but the principle remains the same.)

Meritor contained a fairly extensive discussion (not provided in this material) about what it takes to amount to an actionable hostile environment. This issue has been addressed by various of the circuit courts. The Seventh Circuit's opinion in the case of *Baskerville v. Culligan International*, 50 F. 3d 428 (7th Cir. 1995) is a typical example. Here the Court explains that in order to be actionable under Title VII, the harassment must rise to a certain level seriousness or pervasiveness, or a combination of both.

VALERIE BASKERVILLE v. CULLIGAN INTERNATIONAL COMPANY
United States Court of Appeals for the Seventh Circuit (1995)
50 F. 3d 428

Before POSNER, Chief Judge, and CUMMINGS and KANNE, Circuit Judges.

POSNER, Chief Judge.

A jury awarded Valerie Baskerville $25,000 in damages under Title VII of the Civil Rights Act of 1964, as amended, for sexual harassment by her employer, Culligan International Company. Although reluctant to upset a jury verdict challenged only for resting on insufficient evidence, we have concluded that the facts, even when construed as favorably to the plaintiff as the record permits, do not establish a case of actionable sexual harassment.

Baskerville was hired on July 9, 1991, as a secretary in the marketing department of Culligan, a manufacturer of products for treating water. A month later she was assigned to work for Michael

Hall, the newly hired Western Regional Manager. Baskerville testified, we assume truthfully, to the following acts of sexual harassment of her by Hall between the date of his hire and February 1992, a period of seven months:

1. He would call her "pretty girl," as in "There's always a pretty girl giving me something to sign off on."

2. Once, when she was wearing a leather skirt, he made a grunting sound that sounded like "um um um" as she turned to leave his office.

3. Once when she commented on how hot his office was, he raised his eyebrows and said, "Not until you stepped your foot in here."

4. Once when the announcement "May I have your attention, please" was broadcast over the public-address system, Hall stopped at Baskerville's desk and said, "You know what that means, don't you? All pretty girls run around naked."

5. He once called Baskerville a "tilly," explaining that he uses the term for all women.

6. He once told her that his wife had told him he had "better clean up my act" and "better think of you as Ms. Anita Hill."

7. When asked by Baskerville why he had left the office Christmas Party early, Hall replied that there were so many pretty girls there that he "didn't want to lose control, so I thought I'd better leave."

8. Once when she complained that his office was "smokey" from cigarette smoke, Hall replied, "Oh really? Were we dancing, like in a nightclub?"

9. When she asked him whether he had gotten his wife a Valentine's Day card, he responded that he had not but he should because it was lonely in his hotel room (his wife had not yet moved to Chicago) and all he had for company was his pillow. Then Hall looked ostentatiously at his hand. The gesture was intended to suggest masturbation.

We do not think that these incidents, spread over seven months, could reasonably be thought to add up to sexual harassment. The concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women. (Sexual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not also be actionable in appropriate cases.) It is not designed to purge the workplace of vulgarity. Drawing the line is not always easy. On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures. *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 67, 106 S.Ct. 2399, 2405-06, 91 L.Ed.2d 49 (1986); *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, ----, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993); *Carr v. Allison Gas Turbine Division,* 32 F.3d 1007, 1009-10 (7th Cir.1994). On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers. *Meritor Savings Bank v. Vinson, supra,* 477 U.S. at 61, 106 S.Ct. at 2402-03; *Rabidue v. Osceola Refining Co.,* 805 F.2d 611, 620-21 (6th Cir.1986); *Katz v. Dole,* 709 F.2d 251, 256 (4th Cir.1983). We spoke in *Carr* of "the line that separates the merely vulgar and mildly offensive from the deeply offensive and sexually harassing." 32 F.3d at 1010. It is not a bright line, obviously, this line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other; and when it is uncertain on which side the defendant's conduct lies, the jury's verdict, whether for or against the defendant, cannot be set aside in the absence of trial error. Our case is not within the area of uncertainty. Mr. Hall, whatever his qualities as a sales manager, is not a man of refinement; but neither is he a sexual harasser.

He never touched the plaintiff. He did not invite her, explicitly or by implication, to have sex with him, or to go out on a date with him. He made no threats. He did not expose himself, or show her dirty pictures. He never said anything to her that could not be repeated on prime time television. The comment about Anita Hill was the opposite of solicitation, the implication being that he would get into trouble if he didn't keep his distance. The use of the word "tilly" (an Irish word for something added for good measure, and a World War II British slang term for a truck) to refer to a woman is apparently an innovation of Hall's, and its point remains entirely obscure. Some of his repartee, such as, "Not until you stepped your foot in here," or, "Were we dancing, like in a nightclub?," has the sexual charge of an Abbott and Costello movie. The reference to masturbation completes the impression of a man whose sense of humor took final shape in adolescence. It is no doubt distasteful to a sensitive woman to have such a silly man as one's boss, but only a woman of Victorian delicacy--a woman mysteriously aloof from contemporary American popular culture in all its sex- saturated vulgarity--would find Hall's patter substantially more distressing than the heat and cigarette smoke of which the plaintiff does not complain. The infrequency of the offensive comments is relevant to an assessment of their impact. A handful of comments spread over months is unlikely to have so great an emotional impact as a concentrated or incessant barrage. *Dey v. Colt Construction & Development Co.,* 28 F.3d 1446, 1456 (7th Cir.1994); *Doe v. R.R. Donnelley & Sons Co.,* 42 F.3d 439, 444 and n. 3 (7th Cir.1994).

We are mindful of the dangers that lurk in trying to assess the impact of words without taking account of gesture, inflection, the physical propinquity of speaker and hearer, the presence or absence of other persons, and other aspects of context. Remarks innocuous or merely mildly offensive when delivered in a public setting might acquire a sinister cast when delivered in the suggestive isolation of a hotel room. So too remarks accompanied by threatening gestures or contorted facial features, or delivered from so short a distance from the listener's face as to invade the listener's private space. Cf. Erving Goffman, *The Presentation of Self in Everyday Life* (1959). Even a gross disparity in size between speaker and listener, favoring the former, might ominously magnify the impact of the speaker's words.

It is a little difficult to imagine a context that would render Hall's sallies threatening or otherwise deeply disturbing. But we need not test the breadth of our imagination. Hall and Baskerville were never alone outside the office, and there is no suggestion of any other contextual feature of their conversations that might make Hall a harasser. We conclude that no reasonable jury could find that Hall's remarks created a hostile working environment.

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The judgment for the plaintiff is reversed with instructions to enter judgment for the defendant.

REVERSED.

Hostile Environment Sexual Harassment claims after *Baskerville* do present a certain problem. Without a doubt, a single incident of rape would qualify. Similarly, were a supervisor to ask an employee about her preferences for sexual attention several times per day for a month long period would also qualify. The former example would be very serious and the latter very pervasive. But what about the sliding scale for the two? If a supervisor were to pinch an employee's nipple once, certainly that is more serious than asking her about her sexual preferences. On the other hand, this is not the same as doing so several times per day for a month. How many times must she be pinched before it rises to the level of actionable sexual harassment? Unfortunately, this can only be addressed on a case by case basis.

Finally, there remains a serious question about vicarious liability for an employer for sexual

harassment under Title VII. In *EEOC v. AIC Securities*, 55 F.3d 1276 (7th Cir. 1995), the Seventh Circuit determined that an individual cannot be held liable under the Americans With Disabilities Act (ADA) or Title VII. At the same time, is it really fair for the employer to be subject to liability because of the activities of a rogue supervisor? What if the harasser is not even a supervisor, but merely a co-employee? If the plaintiff can only sue the employer and not the particular harasser however, the Court is left with a conundrum. Is no one liable?

In 1998, the Supreme Court addressed this problem in the case of *Ellerth v. Burlington Industries*, 524 U.S. 742, 118 S.Ct. 2257. Where there are no tangible job injuries, the Court found, an employer could avoid liability by proving as an affirmative defense that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that employee unreasonably failed to take advantage of any preventive or corrective opportunities provided or to avoid harm otherwise. Since victims of sexual harassment are often loathe to report it until it has reached the point of intolerability, their cases are often compromised by this fact.

THE COST OF PROGRESS

Our legal system and our society have come a long way in changing their views and handling of race and sex discrimination. Where at one time southern conservatives felt they could block an anti-race discrimination bill by adding sex as a protected classification, that same bill, now a law, by judicial construction addresses sexual harassment as well as sex discrimination. Where in 1964 it was questionable whether the law would pass, today the idea that it would have opposition seems foreign to our way of thinking.

But the fight for civil rights and for equality under the law is far from over. Where there are laws to address discrimination Plaintiffs face substantial barriers to success. And in spite of news reports reflecting huge verdicts against such entities as Mitsubishi Motor Corporation and Coca-Cola, the truth is that the vast majority of these cases do not result in plaintiff verdicts.

In addition, our anti-discrimination laws remain narrow. Until *Baker v. Village of Niles*,[32] the Illinois Human Rights Act, while mirroring the American's With Disabilities Act, did not provide for a cause of action for disability harassment. The Illinois Senate passed a bill to add sexual

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[32]In that case, we waited nearly a year for an opinion from the Human Rights Commission while it deliberated over whether harassment on the basis of disability stated a cause of action under the Illinois Human Rights Act. As attorneys, when we pursued that case, we knew that we were taking a gamble. But these kinds of gambles are necessary if we are going to expand the law to cover what it should cover.

orientation as a protected classification out of committee earlier this year, with eight out of twelve senators indicating that they would not support it on the Senate floor. Yet cases of discrimination against homosexuals run rampant. And certainly the United States Congress is not ripe for consideration of a bill against such discrimination.

Finally, even where we have made legislative gains on behalf of minorities in the area of discrimination, each individual case must be prosecuted. To do so takes armies of talented attorneys– attorneys who, in order to pursue such claims, will take a comparative vow of poverty. Major corporations can afford to pay and will pay huge sums of money to defend these cases, and the individuals who bring them are rarely people of substantial means.

Progress is being made every day. But there can be no rest or set backs will just as quickly occur. Meanwhile, there remains much to do.