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.

— 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.

— 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 Rights 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.”

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.” The Dowdy Amendment failed by a 115-43 vote. 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.” 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

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.” 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

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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).

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.” 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.” 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 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.

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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)**

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,” 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.” 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.” 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 short, by any reading of the legislative history, the BFOQ exception was expected to be so broad as

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10110 Cong. Rec. 2,718 (1964). (Emphasis added.)

11110 Cong. Rec. 2,718 (1964). (Emphasis added.)
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 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.

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

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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.
17 Diaz supra at 388.
purpose of authenticity or genuineness." 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." 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.

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. 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.

Dothard v. Rawlinson 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

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20Wilson supra at 301.


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

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.

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. As a result, plaintiffs will need another

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24From 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
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. 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 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 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.”
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.
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.

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.

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. 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’ “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 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.

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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

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.
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.


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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

28A 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.

29One 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 The Essential Elements of Plaintiff’s Claim: 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 racial 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
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 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.

contention that Ms. Leiter was a biased juror. But the point remains that even the jury was confused by the instructions.)

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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.

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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.

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_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 disbelieve 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.

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. Chadburn 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
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.

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 to see how it fits. Here although the act itself may not be employment in nature (e.g. grabbing a woman’s breasts) 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 centerpiece 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

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30Certainly 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.
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, 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

31While 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.
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.

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. Oseola 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.

***

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*, 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 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.
Part IV

Consisting of Excerpts from Court Documents
Describing the Facts of Real Cases
that Will Be Discussed in Monday’s Class
IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION  

Nasser Akel,  
Plaintiff,  

v.  
Officer Floyd Eppling, Officer William Peterson, Digby Detective Agency, City of Chicago, Standard Parking, Stephen Bednaryczk, and Shanalle Dixon  
Defendants.  

FIRST AMENDED COMPLAINT  

The Plaintiff, Nasser Akel, by and through his attorneys, Aaron B. Maduff and Deanne S. Medina of Maduff & Maduff, for his complaint against the Defendants, Digby Detective Agency, City of Chicago, Standard Parking Corporation, Officer Stephen Bednaryczk, Officer Floyd Eppling, Officer William Peterson and Shanalle Dixon, alleges and states as follows:  

**Introduction**  

1. This Complaint is for Excessive Force and False Arrest in violation of 42 U.S.C. § 1983 and for Illinois Common Law Assault, Battery, False Imprisonment and Intentional and Reckless Infliction of Emotional Distress resulting from actions taken by Officer Stephen Bednaryczk, Officer Floyd Eppling, Officer William Peterson, Shanalle Dixon, Standard Parking Company, City of Chicago, and Digby Detective Agency. The Complaint results from an incident on October 28, 2001 in which Plaintiff, a Limousine Driver, was preparing to leave a parking lot at O’Hare International Airport, had paid the Livery fee required by the airport and was refused a tax stamp on his pre-arranged ticket by Dixon. As a result, Plaintiff was unable to leave because to do
so would have been a violation of law and because Defendant Dixon refused to lift the gate to allow him to leave. Defendant Dixon then called security and Defendants Eppling, Bednarcyzk and Peterson appeared on the scene. Plaintiff was then subjected to verbal harassment based upon his religious background, Muslim, and beaten and arrested without probable cause.
Plaintiff had filed three charges with the EEOC, one for sexual harassment and two more for retaliation. The EEOC made a determination in Plaintiff’s favor on the sexual harassment charge and was unable to conciliate with Defendant. Apparently, EEOC forwarded the file to the United States Department of Justice which is considering filing an action on it. As a result, Plaintiff has been provided a Notice of Right to Sue on her retaliation charges, but not on her sexual harassment charge and this complaint does not yet include the Title VII count for sexual harassment. In the event that the Department of Justice chooses to file an action, Plaintiff intends to intervene. If the Department of Justice issues her a Notice of Right to Sue, Plaintiff intends to amend the complaint to include a sexual harassment count.
alleges and states as follows:

Introduction

2. This complaint begins with the hostile environment created by Defendant Leo Pulido for the Plaintiff, Johanna Santiago, which grew to include quid pro quo sexual harassment, arising from numerous comments by Defendant Pulido including but not limited to: “She likes it when guys does it in her ass like that.”; “You are a fuckin’ whore”; “…why don’t you work on me.”; “Do you like it in the ass? Because I can help you with that”; “Do you want your check now? If so come and get it” (accompanied by dropping his pants); and “You know Johanna, if you fuck me you might become a monthly attendant here.” In addition, Defendant Pulido made several requests for such things as blow-jobs and “fast ones”. Defendant Pulido also touched Plaintiff’s buttocks and grabbed her breasts at one point asking if her boobs had grown.

3. As a result of this kind of harassment, Plaintiff complained to Defendant Pulido, his superior, Human Resources, and even Legal Investigations (of the Park District). No action was taken to curtail this harassment, and in April of 2001, Plaintiff filed a complaint of sexual harassment and retaliation with the United States Equal Employment Opportunity Commission (hereinafter “EEOC”).

4. Thereafter, Defendant Nancy Flores began a campaign of retaliatory harassment against the Plaintiff including having several vehicles follow her on city streets and highways, camp out outside her home, and interfered with her work duties.

5. In August of 2001 Plaintiff filed a second charge with the EEOC alleging retaliation. Following the second charge, Defendant Richard Dowling, began following her, sitting outside her home, watching her movements at all hours of the night, and using a zoom lense to view the inside of her home.
Events

18. Johanna began working as an attendant for the Defendant Park District in or about May of 1999.

19. Plaintiff reported to Defendant Pulido who reported to the Area Supervisor.

The Pregnancy

20. Sometime in early 2000, Johanna became pregnant; she was told by her doctor of her condition on or about April 22, 2000.

21. On April 25, 2000, Johanna provided Defendant Pulido with a note from her doctor explaining that she was pregnant and that she had certain limitations.

22. Defendant Pulido told Johanna that her doctor’s note was no good and ordered her to do work in violation of her doctor’s orders.

Sexual Harassment

23. On April 25, 2000, the same day he was informed of Johanna’s pregnancy, Defendant Pulido began a campaign of sexual harassment designed to intimidate Plaintiff, and ultimately to obtain her acquiescence to his sexual advances. This campaign included, but was not limited to the following:

a. On April 25, 2000, an individual known as Monk commented that Plaintiff’s knees were dirty, Carlos Martinez is probably hitting you in the ass. Defendant Pulido who was standing there began to laugh and stated “You know, Monk, she likes it when guys does it in her ass like that.”
b. On or about May 2, 2000, Pulido was standing around watching Johanna working outside the field house when a youth (possibly 13) called her a whore; Pulido did nothing. When Johanna asked Pulido why he did not intervene on her behalf he stated “Well you are a fuckin’ whore.”

c. On or about May 3, 2000, Pulido told Johanna to clean up the art room and to call him when she got there. Thinking that he wanted some tables moved and was going to have to help her, she did call him down to the art room. Pulido entered the room and said “I can help you with this, but you know, you gotta help me out too.” (Meaning sexually.)

d. On or about May 4, 2000, Pulido approached Johanna and asked her if she wanted to go to the auditorium and give him “a fast one”.

e. On May 9, 23, and 31 2000 Pulido made requests of Johanna for a “blow-job”.

f. On or about May 16, 2000, Pulido told Johanna that if she wanted to leave work unfinished, “...why don’t you work on me.”

g. On or about May 17, 2000 at a full staff meeting Pulido announced his upcoming vacation and turned to Johanna and said “If you mess-up while I am gone, when I come back I am going to get on your ass, literally on your ass.”

h. On or about June 21, 2000, Defendant Pulido said to her “Do like it in the ass? Because I can help you with that.” That same day he also said to Plaintiff “How about three-some? Do you and your husband like that too?” Later that day, in front of Johanna’s husband who had come to get her car, Defendant Pulido began stroking Johanna’s shoulders, and touching and squeezing her buttocks. Johanna tried to physically remove Defendant Pulido’s hands from her body.

i. Upon hearing Plaintiff’s unequivocal complaint to the comments and rejection
of any intended sexual advance, Defendant Pulido shouted “What’s your fuckin’ problem?”

j. On or about June 30, 2000 -- a pay day -- Defendant Pulido said to Plaintiff, “Do you want you check now? And if so come and get it.” Defendant Pulido then placed Johanna’s pay check down his shorts.

k. Later that day, Defendant Pulido again approached Plaintiff and said “Do you want to come and get it?” and then began making hand gestures imitating stroking his penis for sexual gratification.

l. On or about July 18, 2000, Defendant Pulido told Plaintiff “I can perform you real good if you want.” Again, Plaintiff unequivocally conveyed her distress with the comment stating “Leo, you’re a married man and I don’t like to be talked to that way.”

m. In early August, again in front of Johanna’s husband, Defendant Pulido grabbed Johanna’s breast and asked “Are your boobs growing?”.

n. On or about August 22, 2000, Defendant Pulido approached Plaintiff and stated “I like to eat out women, if you like some too” and began dramatically licking his mouth and lips.

o. On or about September 6, 2000 Defendant Pulido approached Plaintiff and stated “You know Johanna, if you fuck me you might become a monthly attendant here.”

24. The list of comments and actions described in paragraph 23 above is not exhaustive, but rather representative of comments that were made by Defendant Pulido on a daily basis, often more than once per day for a period of time running from approximately April 25, 2000 through February 13, 2001 a few days before Johanna transferred to another park.

25. Accompanied with most of these acts by Pulido was his warning to Johanna that “If you tell on me you’ll be fired, so keep quiet or you’ll be fired.
26. Because of what he had seen and heard, by June of 2000, Johanna’s husband had begun to suspect, wrongly, that Johanna was having an affair with Defendant Pulido.

27. Between June and October of 2000, Johanna and her husband had numerous arguments over Defendant Pulido, the harassment, and the suspected affair.

28. Finally, by October of 2000, the pressure on their relationship became unbearable and Johanna’s husband left her.

29. On or about May 20, 2000, Defendant Flores came to the park with her husband and children and introduced herself as the new Area Supervisor. (On information and belief, the prior Area Supervisor had been under investigation for some manner of illegal activity and was terminated.)

30. On June 1, 2000, Johanna went to Defendant Flores’ office at Gage Park and over a 20 minute period complained of all the harassment she had been suffering at the hands of Defendant Pulido over the prior month plus.

31. Defendant Flores’ response to Johanna was to laugh and say that “Leo isn’t that kind of guy.”
IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Gerald P. Lampley, Plaintiff,
v. Onyx Acceptance Corporation, Defendant.

No. 00 C 3901
Judge Hibbler

Magistrate Judge Levin

(Title VII of the Civil Rights Act of 1964),
(Section 704(a) of Title VII of the Civil Rights Act of 1964)\(^{34}\)

Plaintiff, Gerald P. Lampley, by and through his attorney, Aaron B. Maduff, of Maduff & Maduff, for his complaint against Onyx Acceptance Corporation alleges and states as follows:

Introduction

1. This action results from racial discrimination in employment and retaliatory termination occasioned by the acts of Michael Strater as Chicago Branch Manager of Defendant Onyx Acceptance Corporation and Supervisor to Plaintiff. Those acts include denial of increased buying authority, and retaliatory termination following the filing of an EEOC charge.

Parties

2. The Plaintiff, Gerald P. Lampley, is a citizen of the State of Illinois and resides within the territorial limits of the United States District Court for the Northern District of Illinois, Eastern Division. Plaintiff is of African-American descent.

3. On information and belief, Defendant, Onyx Acceptance Corporation (hereinafter

\(^{34}\)This second amended complaint is being filed by leave of Court. It eliminates claims against the individual Defendant, Michael Strater, which claims have been settled between the parties. It also waives the § 1981 count against Defendant Onyx for the purpose of simplifying the issues to be tried. Finally, it narrows the complaint to eliminate the claims of racial harassment which Plaintiff has not pursued. This complaint is amended to conform to the expected proofs pursuant to Fed. R. Civ. Pro. 15.

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“Onyx”) is a corporation licensed and doing business within the territorial limits of the United States District Court for the Northern District of Illinois, Eastern Division. On information and belief Onyx Acceptance Corporation employs more than 500 persons.

Jurisdiction


5. On November 30, 1999, Plaintiff filed a second charge with the EEOC against Defendant Onyx (for retaliation for the filing of the prior charge), No. 210A00807.

6. On March 30, 2000, the EEOC mailed a Notice of Right to sue relating to Charge Number 210A00807 and a separate Notice of Right to Sue relating to Charge Number 210A00779, both by certified mail. Both of these letters were received by Plaintiff several days thereafter.

7. This action is brought for violations of 42 U.S.C. § 2000e et seq., (Title VII of the Civil Rights Act of 1964), (hereinafter “Title VII”). Jurisdiction of this Court is founded upon 28 U.S.C. § 1343(a)(3) and (4).

Venue

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) as, on information and belief, all Defendants reside in this District and the facts giving rise to this cause of action occurred in this District.

Events

9. Defendant Onyx is an indirect auto lender. Its business consists of purchasing loans from automobile dealers and then servicing those loans.

10. In early 1998 plaintiff had been a finance manager for an automobile dealer when one of Defendant’s account sales managers called on Plaintiff and encouraged him to apply for a position with Defendant. Plaintiff applied for that position and was hired and began working for Defendant Onyx on February 2, 1998.

11. In this position, Plaintiff’s job was to purchase for the company automobile loans made by various automobile dealerships.

12. Plaintiff accomplished this task by visiting the premises of various automobile dealers
where he would review the loans, decide which ones he would offer to purchase, and negotiate with the dealership to purchase the loan.

13. However, in most cases Plaintiff built a relationship between himself and a particular dealership, so that dealership would send a facsimile transmission to Defendant’s offices showing loans that it had made and wanted to sell. Plaintiff’s partner would review those loans from the office and might purchase them in that manner. This method of purchasing is referred to herein as “in-house purchasing”.

14. Plaintiff’s compensation was in part based on salary and in part on bonuses based on his loan purchases. As a result, the monthly income earned by Plaintiff was dependant upon the number and quality of his loan purchases.

15. Plaintiff was Defendant’s only account sales manager of African-American descent in its Chicago Branch.

Race Based Discrimination

16. Plaintiff started his employment with Defendant with no buying authority and after approving 50 deals (which were counter-approved by someone with appropriate authority), was granted Level I buying authority.

17. Level I buying authority allowed Plaintiff to approve loans of up to $15,000.

18. Level II buying authority, which permits the account manager to buy loans of up to $20,000, is normally granted after an account manager approves a second 50 loans.

19. Plaintiff had approved that second 50 loans not later than August of 1998.

20. From approximately September of 1998 going forward, Plaintiff had been inquiring about being given Level II buying authority, but his inquiries were consistently rebuffed by Michael Strater.

21. For several reasons, Plaintiff came to believe that the Mr. Strater’s refusal to grant him Level II buying authority was based on Plaintiff’s race. These included the facts that:

   a. Other account managers who were white were granted Level II buying authority as a matter of course, and some of those account managers had not performed as well as Plaintiff;

   b. On one occasion a power failure required Plaintiff and others to climb seven
flights of stairs with flashlights to help their co-workers. Joe Long, a co-worker, told Plaintiff that he had not seen Plaintiff walking up the stairs behind him. At that point, Defendant Strater, Defendant Onyx’s Chicago Regional manager, obviously referring to Plaintiff’s race, stated, “Joe, you didn’t see Jerry because he wasn’t smiling.” This indicated to Plaintiff that Mr. Strater had some racial bias.

c. On another occasion, Plaintiff was sitting at his desk and Defendant Strater was nearby holding a blue sweatshirt. A co-worker asked why Strater had not bought sweatshirts for the employees. Strater looked straight at Plaintiff and stated, “They only had this color and black and you know I don’t like black because I’m prejudiced.” Plaintiff turned to Strater and said, “Mike, that’s horrible; that’s not right.” Strater silently looked at Plaintiff and then, with an evil grin on his face, simply walked away. This incident also gave Plaintiff the impression that Strater had some racial bias.

22. From September, 1998 to September, 1999, Plaintiff continued to periodically ask Strater for Level II buying authority. Each time Strater put him off with comments like “you’re doing a good job, keep at it, keep buying deals, it’ll come.”

23. Finally, at the end of September of 1999, Plaintiff again approached Mr. Strater and requested Level II buying authority. This time Mr. Strater assured Plaintiff that he would get Level II buying authority if during October, 1999, he met the following goals:
   a. Actually cash/fund $400,000 worth of loans;
   b. Process the paperwork for $400,000 worth of loans (a task never assigned to an account manager at all);
   c. Actually cash/fund loans from at least 40 different dealerships;
   d. Bring in applications from at least 80 different dealers;

These goals were far beyond anything ever required of any white account manager.

24. During the month of October, 1999, Plaintiff met and exceeded the extraordinary goals set by Mr. Strater for Plaintiff to receive Level II buying authority.

25. On or about November 1, 1998, Plaintiff was ordered by Defendant Strater to stay in the office and do paperwork only. As a result, the number of loans that Plaintiff purchased decreased substantially which in turn resulted in a substantial decrease in his commissions and compensation.
26. Having met these extraordinary goals, Plaintiff, several times during the month of November, 1999, pressed Mr. Strater for Level II buying authority, but again his requests were rebuffed. At first, Plaintiff was told “be patient”, or “there is a computer glitch”.

27. On November 24, 1999, in response to one of those inquiries, Mr. Strater told Plaintiff that “these things take time”.

Retaliation

28. On Friday, November 26, 1999, Plaintiff went to the Chicago Office of the EEOC to file a charge of discrimination relating to the aforementioned discrimination.

29. While waiting for the EEOC investigator to prepare the final version of his charge of discrimination (No. 210A00779), Plaintiff received a page on his beeper and used his cell phone to return the call to his boss, Strater, branch manager of the Defendant named herein and named in the charge he had just filed.

30. Strater inquired as to Plaintiff’s whereabouts and Plaintiff informed Strater that he was at the EEOC. In response to further questioning by Strater, Plaintiff informed him that he had just filed a charge of racial discrimination against Defendant Onyx.

31. Strater became very angered and demanded that Plaintiff be in his office first thing Monday morning.

32. On Monday morning, November 29, 1999, Plaintiff went into Strater’s office as demanded. Strater stated “Being as you went to the EEOC, I can’t have you working here.”

33. Strater then informed Plaintiff that he (Plaintiff) should resign or else he would be fired immediately. Plaintiff refused to provide a resignation and was immediately terminated by Strater.

34. No complaint was ever made to Plaintiff regarding his performance.
Count I

Demand for Relief for
Race Based Harassment and Discrimination in Employment
In Violation of Title VII of the Civil Rights Act of 1964
Against Defendant Onyx Acceptance Corporation

35. Plaintiff restates and realleges paragraphs 1 through 34 as paragraph 35 of this Count I.

36. By virtue of the foregoing, Defendant, Onyx Acceptance Corporation has subjected Plaintiff to Discrimination in the terms and conditions of his employment based upon his race in violation of Title VII of the Civil Rights Act of 1964.

37. As a result of this violation, Plaintiff has suffered emotional distress, humiliation, degradation, loss of his job, and other damages of both a pecuniary and non-pecuniary nature.

38. In light of Defendant, Onyx Acceptance Corporation’s failure to take any remedial action at all, its conduct is wilful and malicious warranting the imposition of punitive damages.

WHEREFORE, Plaintiff, Gerald Lampley, respectfully requests that this Honorable Court enter judgment in his favor and against Defendant Onyx Acceptance Corporation for compensatory damages in an amount to be determined at trial, for lost wages (front and back pay), for punitive damages in an amount to be determined at trial, and for such other and further relief this Court deems just and equitable.

Count II

Demand for Relief for Retaliation in Violation of
§ 704(a) of Title VII of the Civil Rights Act of 1964
Against Defendant Onyx Acceptance Corporation

39. Plaintiff restates and realleges paragraphs 1 through 34 as paragraph 39 of this Count II.

40. By virtue of the foregoing, Defendant Onyx Acceptance Corporation has retaliated against Plaintiff because he made a charge or otherwise participated in an investigation, proceeding or hearing under Title VII of the Civil Rights Act of 1964, in violation of that act.

41. As a result of this violation Plaintiff has suffered emotional distress, humiliation, degradation, lost of his employment with Defendant Onyx Acceptance Corporation and other
damages of both a pecuniary and non-pecuniary nature.

42. The actions of Defendant Onyx Acceptance Corporation in retaliating against Plaintiff were taken with malice or with reckless disregard of Plaintiff’s rights warranting the imposition of punitive damages.

WHEREFORE, Plaintiff, Gerald Lampley, respectfully requests that this Honorable Court enter judgment in his favor and against Defendant Onyx Acceptance Corporation for compensatory damages in an amount to be determined at trial, lost wages (front and back pay), for punitive damages in an amount to be determined at trial, and for such other and further relief as this Court deems just and equitable.

PLAINTIFF DEMANDS A TRIAL BY JURY

Respectfully submitted,
Gerald P. Lampley

By: ________________________________
One of his attorney

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Plaintiffs’ Memorandum in Opposition to Defendants’ Motions
For Summary Judgment

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The facts set out below are almost entirely taken from Defendants’ own Statements of
Undisputed Fact:

On April 27, 1999, Plaintiffs were 8th grade boys, attending school at Marseilles Elementary
School. (Long SOUF 1, City SOUF 1, School SOUF 7.) They were in a gym class of about 30
to 35 boys. (City SOUF 3, Long SOUF 3, School SOUF 9.) While the boys were changing out
of their gym clothes and back into their street clothes, one of the boys, Plaintiff Jacob Caputo,
realized his wallet and about $61.50 was missing from his pants. (City SOUF 2 & 4, Long 2 & 4,
School 10-11.) His wallet was found, but without the money, which was found later in a vacant
locker. (School SOUF 13 & 16; Long SOUF 8; City SOUF 8.)

After Jacob Caputo reported his wallet and money missing, two other students reported they
were missing money. (Long SOUF 6; City SOUF 6; School SOUF 14.) The gym teacher,
Defendant Bradley Guilinger, told the students that they could not leave the locker room until the
money was found, and the Plaintiffs felt that they were unable to leave. (School SOUF 15; City
SOUF 10-11; Long SOUF 10-11.)

Mr. Guilinger called Defendant Christopher Mehochko, the Assistant Principal of the School,
who then came down to the locker room, and both of them then searched the lockers together and
did not find any money. (City SOUF 9 & 12; Long SOUF 9 & 12; School SOUF 17, 19 & 20.)
They called Defendant James Bagley, the School Superintendent, who took over the situation and
decided to call in the local police. (City SOUF 13-14; Long SOUF 13-14; School SOUF 20 & 22.)

Officer Dale Long anticipated when he went to the school that he would search individual
students. (School SOUF 28.) He addressed the boys who were seated in the locker room, and said
words to the effect of “Hi ladies . . . money is missing and we have to find it.” (School SOUF 26-
27.) Specifically drawing the students’ attention to his uniform and his gun (which he insisted on
wearing when he attended the boys’ depositions in this case, Plaintiffs SOUF), Officer Long stated “Some of you know me and know what a hard ass I can be” and words to the effect of: “turn the money over now!” and “If you help me now I will remember that you did and a few years from now when you have driver’s licenses and I stop you on Highway 6, I will let you off; you scratch my back and I’ll scratch yours” (Plaintiffs’ SOUF.) He asked them who was responsible for the monies missing and asked for the return of the money, and none of the students responded, so he searched the lockers again for the missing money along with Defendants Guilinger (the gym teacher) and Mehochko (the Assistant Principal). (City SOUF 19-21; Long SOUF 19-21.)

With the Assistant Principal and gym teacher in the locker room, Officer Long then searched the boys. He did so in an area in the locker room partitioned from the rest of the locker room by a four-foot by five-foot long privacy wall, which partially blocks the view of others. (City SOUF 25.)

He had them take off or lift their shirts; take off their socks and shoes; and empty their pockets. (Long SOUF 27; City SOUF 27.) He looked in the boys’ armpits. (School SOUF 32.) He told the boys to drop their pants. (Long SOUF 27; City SOUF 27; School SOUF 32.) In a few cases he also conducted a thumb-search of the waistband of the underwear on the first few students. (School SOUF 33.) The boys were absent from both their third and fourth period classes (Plaintiffs’ SOUF, Exhibit B.)

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35 At Joshua Daniels’ deposition, Officer Long was twice asked to stop fingering his gun during Mr. Daniels’ testimony (Plaintiffs’ SOUF, Daniels’ Tr. 142.)
IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION  

EMILY KAY SIMPSON,  
Plaintiff,  

v.  
CUPINOS RESTAURANT, JOSEPH CONSTANTINO, RAYMOND OLESZKIEWICZ, ROSIE CONSTANTINO, and FRANK CONSTANTINO  
Defendants.  

COMPLAINT FOR SEXUAL HARASSMENT  
IN VIOLATION OF 42 U.S.C. § 2000e,  
(TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AS AMENDED),  
ASSAULT, BATTERY, INTENTIONAL AND/OR RECKLESS  
INFLICTION OF EMOTIONAL DISTRESS, AND  
NEGLIGENT HIRING AND RETENTION  

Plaintiff, EMILY SIMPSON, complains of Defendants CUPINOS RESTAURANT, JOSEPH CONSTANTINO, RAYMOND OLESZKIEWICZ, ROSIE CONSTANTINO and FRANK CONSTANTINO as follows:  

Introduction  

1. Emily Simpson files this case upon failure of EEOC conciliation efforts attempted as a result of EEOC’s determination that Defendant Cupino’s is in violation of Title VII.  

2. Emily Simpson was 16 when she was hired by Cupino’s Restaurant and Pizzeria to take pizza orders and prepare condiments for pizzas at the establishment’s carry-out and delivery facility. During the 6 months that she worked for Cupino’s, Emily was subjected to a barrage of sexually harassing conduct, assault, battery, and numerous comments by the manager, Ray Oleszkiewicz, the owner’s son Joey Constantino (who is also the senior person in the pizzeria), and
physical acts by two co-workers, goaded by Ray and Joey.

3. There was a great deal of commentary by Ray and Joey about the size of these co-worker’s penises. The sexual conduct includes but is not limited to:

   a. On three occasions a co-worker took out his penis for viewing (even placed it on the food surfaces) and Emily was encouraged (by Ray and Joey) to examine them against her will.

   b. On several occasions attempts were made in clear view of both Ray and Joey by several co-workers to grab Emily’s breasts, along with comments about her “titty’s” or “chi-chi’s” as pronounced by some the her Hispanic co-workers. She was also kissed on the lips by one of those co-workers. Her complaints fell on deaf ears.

   c. Ray and Joey also held several conversations regarding their respective strategies for sexual gratification including the use of “Icy-Hot” on their penises and coaching in techniques for “giving head”.

   d. Other harassment of a purely sexual nature included Ray’s passing around pornographic magazines including requiring Emily to handle and transport them; sexual commentary by Ray and Joey regarding Emily’s body; sexual commentary (for the “benefit” of Emily) by Ray and Joey regarding the appearance of other female applicants for employment; and direction by Joey regarding Emily’s clothing implying that her jeans and tops were not tight enough.

   e. On at least one occasion, with Ray present, Emily was offered $5,000 to engage in sexual intercourse with one of her co-workers. When Emily complained to Ray his response was “Why don’t you do it?”
4. Emily complained to Joey, Ray, Frank (Joey’s father and owner and chief operator of the entire restaurant and pizzeria business), and Rosie (Joey’s mother and also a part owner and manager of the business) but, instead of appropriately addressing the situation, she was subjected to a barrage of personal criticisms, constant comments of a degrading nature including telling her that she was worthless, stupid, that she would forever be stuck doing menial work, and that she was overweight and lazy. In further response to her complaints, Ray and Frank told her that she had to transfer over to the restaurant side of the business – if there were a position for her – or be terminated. Rosie complained that she did not want to deal with this shit.

5. The emotional distress Emily suffered has resulted in a constructive discharge on April 26, 2001, the destruction of her grades (she had an A-B average); has forced her to seek counseling, psychiatric help, and medication.
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RHODDA THOMPSON

Plaintiff,

v.

ALTHEIMER GRAY,

Defendant.

96 C 4319

Magistrate Judge Morton Denlow

On Consent

(Taken from the Pre-Trial Order)

Schedule a
Statement of Uncontested Facts

6. Plaintiff Rhodda Thompson was employed by Defendant Altheimer & Gray from June 1991 through January 1993 and again from September 1993 to February 21, 1997.
7. Plaintiff was a secretary in Altheimer & Gray’s Legal Recruiting Department from April 14, 1994 to August 30, 1994.
8. From February 1987 to 1997, Kim Wongstrom was the Legal Recruitment Coordinator in the Legal Recruitment Department at Altheimer & Gray.
9. On June 1, 1994 Assistant Legal Recruitment Coordinator, Deborah Cusumano resigned her position.
10. Plaintiff requested of Wongstrom that she be considered for the position.
11. Plaintiff submitted a resume for consideration for the vacant Assistant Legal Recruitment Coordinator position.
12. Kim Wongstrom, with the approval of Audrey Selin and Robert Feldgreber, was the decision maker responsible for filling the vacant Assistant Legal Recruitment Coordinator Position.
13. Leslie Kern was hired to fill the Assistant Legal Recruitment Coordinator position.
14. Plaintiff was not hired to fill the Assistant Legal Recruitment Coordinator position.
15. Plaintiff was not interviewed by any representative of Altheimer & Gray for the position of Assistant Legal Recruitment Coordinator.

Schedule b(1)
Statement of Facts Asserted by Plaintiff and Contested by Defendant

16. Plaintiff, Rhodda Thompson, claims that she was not considered for the position of Assistant Legal Recruitment Coordinator at Defendant, Altheimer & Gray, because she is black, in violation of 42 U.S.C. 2000e (Title VII of the Civil Rights Act of 1964).
17. Plaintiff asserts that the individuals interviewed and selected for the position were not more qualified than she.
18. The three reasons provided by Defendant for neither interviewing nor hiring her for the position are false and nothing more than a pretext to hide their discrimination.

19. Plaintiff contends that as a result of this discrimination she was never interviewed for the position of Assistant Legal Recruitment Coordinator and was not given the job.

20. Plaintiff further contends that she was denied the opportunity for further advancement (for example to the full Recruitment Coordinator position) which advancement was attained by another applicant for the position and which resulted in increased financial rewards and career fulfillment that was attained by others not black.
IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Alfredo Aviles, 96 C 5989

v. Honorable Harry D. Leinenweber

Cornell Forge Company Magistrate Judge Ashman

Defendant.

FACTS

Defendant, Cornell Forge Company, through its agents, retaliated against Plaintiff, Alfredo Aviles, for filing a charge of discrimination with the Equal Employment Opportunity Commission by calling the police in the afternoon of May 26, 1994 and telling them that the Plaintiff was sitting in his car outside the plant and may be armed, resulting in the Bedford Park Police, entering the City of Chicago and accosting Plaintiff, thereby causing him injury.