No. 99-536

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

ROGER REEVES,

PETITIONER,

VS.

SANDERSON PLUMBING PRODUCTS, INC.,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF SUBMITTED BY THE HISPANIC NATIONAL BAR ASSOCIATION IN SUPPORT OF PETITIONER'S BRIEF SUPPORTING REVERSAL

(See inside front cover for list of counsel)

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INTEREST OF THE *AMICUS CURIAE*

This Brief is filed pursuant to Rule 37 of the Supreme Court Rules. Consent to file this amicus brief has been granted by counsel for both parties. Letters of consent have been filed with the Clerk of the Court. The Hispanic National Bar Association ("HNBA") monitors trends in the development of the law that may impact the rights of this country's Hispanic community. For example, nativist prejudice against immigrants from Mexico and other regions of Latin America often spills over to a general bias, conscious or subconscious, against anyone who is or looks Latino in origin, particularly in border states. The subconscious or otherwise covert discrimination against Hispanics provides our community with a great interest in the outcome of an appeal that could undermine proof of discrimination through indirect evidence.

Although *Reeves* is being brought under ADEA, there can be no doubt that the decision will be followed by lower courts in Title VII and § 1981 cases raising issues of race and national origin discrimination. Title VII of the Civil Rights Act of 1964 is of critical importance to the Hispanic community. It is of course the law that protects our community against discrimination in employment because of our race and, in some cases, our national origin. The reach of

the *Reeves* decision is therefore of great concern to the Hispanic community. This case goes to the very heart of employment discrimination law in this country as it has the potential to dramatically increase the difficulties of proof in employment discrimination cases. Additionally, Title VII precedents also influence the development of law under 42 U.S.C. § 1981 which is also vitally important to the Hispanic community.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Under the Age Discrimination in Employment Act, is direct evidence of discriminatory intent required to avoid judgment as a matter of law for the employer?

STATEMENT OF THE CASE

HNBA adopts the Statement of the Case set forth in the Brief of Petitioner Roger Reeves.

SUMMARY OF ARGUMENT

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), this Court adopted a "permissive pretext" approach for analyzing circumstantial evidence cases, because of the recognized difficulty of proving intentional discrimination through circumstantial evidence. The Court of Appeals erred by adopting a "pretext plus" test, which undermines a

plaintiff's ability to prove discrimination through anything but direct evidence.

ARGUMENT

I. UNDER THIS COURT'S DECISION IN ST. MARY'S HONOR CENTER V. HICKS, 509 U.S. 502 (1993), A *PRIMA FACIE* CASE COUPLED WITH A FINDING OF PRETEXT CONSTITUTES SUFFICIENT EVIDENCE TO INFER INTENTIONAL DISCRIMINATION, AND NO DIRECT EVIDENCE OF DISCRIMINATORY INTENT IS REQUIRED

Circumstantial evidence cases are uniquely difficult to prove in employment discrimination cases because many employers have learned to hide their discriminatory motives well. This Court has adopted a "permissive pretext" standard to allow plaintiffs to ferret out discrimination in difficult circumstantial evidence cases. *Hicks*, 509 U.S. at 511. Thus, if a plaintiff can convince the fact finder that the real reason for the employer's pretextual explanation is unspoken discrimination, *Hicks* permits -- though does not compel -- the fact-finder to infer intentional discrimination, and no additional evidence is required. The Court of Appeals decision ignored the holding in *Hicks*.

A. This Court Adopted a "Permissive Pretext" Approach for Analyzing Circumstantial Evidence Cases, Because of the Recognized Difficulty of Proving Intentional Discrimination Through Circumstantial Evidence

Circumstantial evidence cases are, by far, the most common form of discrimination cases brought by plaintiffs. Indeed, as this Court has stated "[t]here will seldom be 'eye witness' testimony as to the employer's mental processes." (*United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). Thus, "cases charging discrimination are uniquely difficult to prove and often depend upon circumstantial evidence." *Sheridan v. E. I. DuPont de Nemours & Co.*, 100 F. 3d 1061, 1070 (3rd Cir. 1996) (en banc), *cert. denied*, 521 U.S. 1129 (1997). "This is true in part because... discrimination... is often subtle." (*Id.*) "[A]n employer who knowingly discriminates... may leave no written records revealing the forbidden motive and may communicate orally to no one." (*See La Montagne v. American Convenience Products.*, 750 F. 2d 1405, 1410 (7th Cir. 1984)). This is the backdrop against which this Court issued its decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny.

The method of proof in employment discrimination cases involving circumstantial evidence -- relying on

presumptions and shifting burdens of articulation and production -- arose out of this Court's recognition that direct evidence of an employer's motivation will often be difficult to acquire or is simply unavailable. (*Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J. concurring) (("[T]he entire purpose of the *McDonnell Douglas*[1] *prima facie* case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by."); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the plaintiff has his day in court despite the unavailability of direct evidence.") (Internal quotation marks omitted).

In *McDonnell Douglas*, this Court first pronounced the framework for proving employment discrimination under Title VII. The three-stage *McDonnell Douglas* model requires a plaintiff first to make out a *prima facie* case of employment discrimination. To establish a *prima facie* case, a plaintiff must show that: (1) he or she belongs to a protected class; (2) he or she was qualified for the job at issue; (3) he or she suffered an adverse employment decision despite his or her qualifications; and (4) the circumstances give rise to an inference of unlawful discrimination.

[1] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

McDonnell Douglas, 411 U.S. at 805. The plaintiff who establishes a *prima facie* case creates a rebuttable presumption of discrimination.

The burden of production then shifts to the employer to articulate non-discriminatory reasons for its actions. If the employer meets this requirement, the burden shifts back to the plaintiff to prove that the reasons given by the defendant "were in fact a cover-up" for a discriminatory decision. *McDonnell Douglas*, 411 U.S. at 805. *See also Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981).

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), this Court expounded further on the issue of pretext, the third prong of the *McDonnell Douglas* test. *Hicks* held that the factfinder's disbelief of the defendant's proffered reason, together with the elements of the *prima facie* case, does not automatically entitle a plaintiff to prevail under Title VII. However, the trier of fact remains free to conclude, based on such evidence, that intentional discrimination occurred. *Hicks*, 509 U.S. at 511.

One scholar has dubbed this approach the "permissive pretext" standard. "Under this method, if the plaintiff establishes that the defendant's reasons are pretextual the trier of fact is permitted, but is not required, to enter judgment for the plaintiff. This technique allows a

permissive rather than a mandatory determination favoring the plaintiff." (Kenneth R. Davis, *The Stumbling Three-Step, Burden Shifting Approach in Employment Discrimination Cases*, 61 Brooklyn L. Rev. 703, 714-16 (1995).)

Discrimination is often insidious, and it is very difficult to obtain direct evidence of its existence through single overt acts or statements of its perpetrators. The "principal reasons for relying upon circumstantial evidence rather than direct evidence in employment discrimination cases is the virtually unanimous recognition that direct evidence of discriminatory intent is seldom available..." Charles A. Edwards, *Direct Evidence of Discriminatory Intent and the Burden of Proof: An Analysis and Critique*, 43 Wash. & Lee L. Rev. 1, 16 (1986).

Unfortunately, despite the passage of civil rights legislation nearly a generation ago, racial and gender stereotyping are still pervasive in both the workplace and society in general. Indeed, perhaps because our society officially opposes bigotry and racism, many individuals outwardly deny discriminatory beliefs, which they in fact subscribe to and act upon. *See generally* Mark Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary's Honor Center v. Hicks, Pretext, and the "Personality" Excuse*, 18 Berkeley J. Empl. & Lab. L., 183, 217, (1997). Yet, as Justice Powell

admonished in *McDonnell Douglas*, Title VII "tolerates no racial discrimination, subtle or otherwise." 411 U.S. at 802.

Employers have the best knowledge of, and access to, the true reason for a personnel decision. This makes it both sensible and fair to place on the employer the burden of articulating the non-discriminatory reason in response to the employee's *prima facie* case. This also justifies the inference that the employer's actions that cannot be explained are likely based in impermissible discriminatory factors. As then Justice Rehnquist remarked "we know from our experience that more often than not, people do not act in a totally arbitrary manner, especially in a business setting." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 570 (1978). Justice Rehnquist explained that the plaintiff's *prima facie* case of discrimination properly gives rise to an inference of discrimination "because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Id.*

B. The Court of Appeals Erred by Adopting a "Pretext-Plus" Additional Evidence Test

The Court of Appeals for the Fifth Circuit adopted a standard different than the standard announced in *Hicks*. The Court of Appeals held:

> To establish pretext, a plaintiff must prove not only that the employer's stated reason for its employment decision was false, but also that age discrimination had a determinative influence on the employer's decision-making process.
>
> *****
>
> Because Reeves failed to offer evidence sufficient to prove both that this reason is untrue and that age is what really triggered Reeves' discharge, argues Sanderson, it is entitled to judgment as a matter of law. We agree.

Reeves v. Sanderson Plumbing Products, Inc., 81 FEP Cases (BNA) 609 (5th Cir. 1999).

This requirement of additional proof of discrimination has been described as "pretext-plus." *See Kline v. Tennessee Valley Authority*, 128 F.3d 337, 343 (6th Cir. 1997). The "pretext-plus standard" imposes an additional burden: "The plaintiff must not only demonstrate that the employer's asserted reasons were pretextual, but the plaintiff also must introduce additional evidence of discrimination." *Id.* Based on this test, in this case, the Fifth Circuit deemed insufficient a *prima facie* case of discrimination coupled with evidence of pretext, *because* the petitioner, Reeves, had not introduced *additional* evidence of discrimination.

The Fifth Circuit's "pretext plus" additional evidence test undeniably creates an additional hurdle for a plaintiff to overcome in his or her attempt to establish that something is

a "pretext for discrimination." As a result, if the Fifth Circuit's "pretext plus" analysis is allowed to stand, lower courts will always require something more than a *prima facie* case and proof of pretext for a plaintiff to establish intentional discrimination -- even in close circumstantial evidence cases in which the jury might reasonably find discrimination on the basis of indirect evidence. Although the Court of Appeals does not explain what more is required, it unmistakably suggests that something more will *always* be required to prove discrimination. Faced with less than precise direction about the nature of the required additional proof, lower courts might seize on that language to require direct evidence of discriminatory intent whenever the employer articulates a nondiscriminatory reason, no matter how transparently pretextual. To thus require what amounts to direct proof in these circumstances often imposes an insurmountable burden on plaintiffs with meritorious claims. Moreover, the Fifth Circuit's approach seems to eliminate the possibility that a jury can continue to rely on indirect evidence once the employer articulates a nondiscriminatory reason, however false.

Indeed, *Reeves* well illustrates how requiring additional proof of discriminatory intent can impose an insurmountable burden. Despite showing that the reason for firing Petitioner Reeves was pretextual -- and that one of

three decision-makers made blatantly ageist comments[2] about Reeves just months before the termination decision -- the Court of Appeals still concluded that the evidence was insufficient under the pretext-plus standard.

Reeves demonstrates that, if the "pretext-plus" rule is adopted, it will become virtually impossible for civil rights attorneys to understand what constitutes enough evidence to get the case to the fact-finder. This will detrimentally affect the Hispanic community and all protected groups because civil rights attorneys assume much, if not all, of the risk in these civil rights cases through contingency fee arrangements. If "pretext-plus" becomes the law of the land, civil rights attorneys will decline many meritorious cases because they cannot prevail with circumstantial evidence alone, and because they cannot reliably assess how much

[2] According to the *Reeves* Court, statements of discriminatory bias are only relevant if made in the context of the adverse employment action. However, this Court has previously recognized that discriminatory statements evidence both intent and motive to discriminate. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989). Of course, discriminatory statements are "often the only proof of defendant's state of mind, and if it were excluded, plaintiff would have no means of proving that the defendants acted with discriminatory intent." *Garvey v. Dickenson College*, 763 F.Supp. 799, 801 (M.D. Pa. 1981), *citing Aikens*, 460 U.S. at 716. Moreover, the *Reeves* Court's analysis runs contrary to this Court's express recognition that age-based stereotyping must be demonstrated to establish a claim of age discrimination. *Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701, 1706 (1993) ("It is the very essence of age discrimination for an older employee, to be fired because the employer believes that productivity and competence decline with old age... Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment opportunities on the basis of inaccurate and stigmatizing stereotypes.")

additional evidence is required to survive summary judgment or judgment as a matter of law.

C. The Principal Justifications for the "Pretext-Plus" Standard Lack Merit

The advocates of "pretext-plus" justify their theory for three major reasons. The first is that the "permissive pretext" approach impermissibly shifts the burden of proof to the defendant-employer. The second is that "permissive pretext" interferes with an employer's business judgment. The third is that "permissive pretext" allows a plaintiff to prevail even where the reason for adverse employment action could be an unarticulated non-discriminatory reason. None of these arguments can withstand close scrutiny.

1. The "permissive pretext" approach does not shift the burden of proof away from the employee

"Pretext-plus" advocates claim that allowing proof of intentional discrimination to be inferred from pretext somehow impermissibly shifts the burden of proof from plaintiffs to defendants. Under this view, the defendant has an "almost impossible burden" of disproving its discriminatory motive if the trier of fact does not believe its explanation for its employment decision. *White v. Vathally*, 732 F.2d 1037, 1043 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984). This contention has no merit.

To begin with, this Court has made it clear that the ultimate burden of persuasion in a discrimination case "remains at all times with the plaintiff". *See Burdine*, 450 U.S. at 253. The defendant is only required to *articulate* non-discriminatory reasons for its decision. "The Defendant need not persuade [the fact-finder] that it was actually motivated by the proffered reasons" *Burdine*, 450 U.S. at 255.

Contrary to the arguments of the adherents of pretext-plus, the permissive pretext approach does not require a defendant to prove a non-discriminatory reason, rather it simply gives a plaintiff the opportunity to submit its case to a jury by establishing both a *prima facie* case and pretext. Since the plaintiff has the burden of proof, if he or she cannot convince the fact-finder that the defendant has lied, the plaintiff will lose. The defendant does not have to persuade the trier of fact that it has not lied in order to prevail. This is not a semantic distinction. Rather, it underscores the difference between the plaintiff's burden of *persuasion* with the defendant's burden of production. *See* Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 Hastings L.J. 57, 117-122 (1991); *Beck v. QuikTrip Corp.*, 708 F.2d 532, 535 (10th Cir. 1983) ("That the trial court believed [plaintiff]'s explanation of

[defendant]'s motivation for her discharge does not mean that it... erroneously shifted the burden of persuasion.")

The notion that the burden of proof shifts to the defendant if a plaintiff demonstrates pretext has no legal support. It is common to draw unfavorable inferences against a party who lies or whose testimony in court is successfully rebutted. Instead, if the fact-finder does not believe a defendant in an employment discrimination case, it may benefit the plaintiff, just as in any civil case. *See* Lanctot, 43 Hastings L.J. at 122.

2. The "permissive pretext" approach does not improperly interfere with an employer's business judgment.

Some "pretext-plus" courts express the concern that permitting plaintiffs to prevail when they successfully rebut defendants' stated justifications will impede employers from exercising business judgment about whom they hire or retain. These courts assert that a plaintiff who disproves an employer's stated reason only shows that the employer made a mistake in assessing the plaintiff's performance or qualifications. Such evidence, the argument goes, does not prove discrimination. *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 255 (1st Cir. 1986). The problem with this line of reasoning is that an employer's discredited explanation all too often is an excuse, or a pretext, for discrimination.

To be sure, an error in business judgment -- if it is nothing more than that -- does not amount to employment discrimination. Even courts that follow the "permissive pretext" rule accept this business judgment doctrine. Lanctot, 43 Hastings L.J. at 122-3. Yet as this Court pointed out in *Burdine*:

> The fact that a court may think that the employer misjudged the qualifications of an applicant does not in itself expose him to... liability, [but] this may be probative of whether the employer's reasons are pretexts for discrimination.

450 U.S. at 259. As one court noted, "Everyone can make a mistake, but if the mistake is large enough, we may begin to wonder whether it was a mistake at all." *Thornbrough v. Columbus G.R.R.*, 760 F.2d 633, 647 (5th Cir. 1985).

Ultimately, whether an employer's articulated reason is a mistake or a cover up for discrimination is a question of fact. "Pretext-plus" advocates apparently do not trust fact-finders to be able to sort out this issue. Yet intent is at the heart of many civil cases. Fact-finders should be permitted to draw the same inferences in discrimination cases.

3. The "pretext-plus" standard is not justified simply because some employers may choose not to articulate reasons for their actions which are nondiscriminatory but

nonetheless illegitimate or embarrassing.

Finally, a common justification for "pretext plus" arises where an employer's stated reason is found to be a lie, but it is allegedly advanced to conceal an unarticulated nondiscriminatory reason. One judge, for example, suggested an employer might offer a pretextual explanation to conceal nepotism rather than discrimination. *Sheridan*, 100 F.3d at 1086 n. 8 (Alito, J., dissenting). Under this rationale, the plaintiff who proves that the employer's articulated reason in pretextual has proven nothing because the personnel decision may still have been made for a concealed reason. *Id.* at 1085. This Court should soundly reject this line of reasoning.

To begin with, this argument is based on a rather cynical premise about a lack of honesty in our judicial system. As the majority in *Sheridan* noted:

> We routinely expect that a party give honest testimony in a court of law; there is no reason to expect less of an employer charged with unlawful discrimination. If the employer fails to come forth with the true and credible explanation and instead keeps a hidden agenda, it does so at its own peril. Under those circumstances, there is no policy to be served by refusing to permit the jury to infer that the real motivation is the one that the plaintiff has charged.

100 F.3d at 1069. The Third Circuit went on to point out that deliberately hiding the real reason for a personnel decision may violate Rule 11 of the Federal Rules of Civil Procedure. *Id.* at 1070.

The argument based on concealed nondiscriminatory reasons also runs counter to one of the central premises of *McDonnell Douglas* line of cases. The purpose of having the defendant articulate a legitimate, non-discriminatory reason is to "sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine* 450 U.S. at 255 n.9. Allowing a defendant to refrain from articulating the real reason for the employment action does not narrow, but instead widens, this critical inquiry. It also places on a plaintiff an insurmountable burden of attempting to disprove not only the employer's stated reasons, but somehow identifying and rebutting other unstated, but conceivable reasons. Lanctot, 43 Hastings L.J. at 129-30.

Once again, in other areas of the law, a fact-finder can infer guilt from a party's lack of credibility. Professor Lanctot observes "there is no rational reason for giving a defendant who has lied about the reasons for its actions a presumption that its lie does not conceal illegal conduct." *Id.* at 133. Moreover, just as in cases involving the employer's alleged business judgment, the fact-finder in a discrimination case is always free to conclude that an employer lied but did

not discriminate. "Pretext-plus" adherents, however, would unwisely take away that discretion away from juries and other fact-finders.

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals for the Fifth Circuit should be reversed. HNBA asks this Court to reaffirm its "permissive pretext" approach as announced in *Hicks*.

DATED this 5th day of January, 2000.

Respectfully submitted,

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