

1993

Pretext or Pretext-Plus: What Must a Plaintiff Prove to Win a Title VII Lawsuit? An Analysis of *St. Mary's Honor Center v. Hicks*

Barbara J. Fick

Notre Dame Law School, barbara.j.fick.1@nd.edu

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship



Part of the [Courts Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Barbara J. Fick, *Pretext or Pretext-Plus: What Must a Plaintiff Prove to Win a Title VII Lawsuit? An Analysis of St. Mary's Honor Center v. Hicks*, 1992-1993 Preview U.S. Sup. Ct. Cas. 356 (1992-1993).

Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/803

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Pretext or pretext-plus: What must a plaintiff prove to win a Title VII lawsuit?

by Barbara J. Fick

St. Mary's Honor Center

v.

Melvin Hicks
(Docket No. 92-602)

Argument Date: April 20, 1993

ISSUE

This case raises questions relating to proof issues and the structure of a disparate treatment case involving employment discrimination under Title VII of the Civil Rights Act of 1964. Specifically, the Court will decide whether, as a matter of law, the plaintiff prevails upon proof that the legitimate, non-discriminatory reasons advanced by the defendant as its motives for an adverse employment action are pretextual.

FACTS

Melvin Hicks, an African-American, was employed as a correctional officer at Missouri's St. Mary's Honor Center, a minimum security correctional facility, from 1978 to 1984. In 1980, he was promoted to shift commander. In 1983, the state official charged with overseeing St. Mary's began receiving numerous complaints about how that facility was being run. In January 1984, after an investigation, several of the managerial personnel (not including Hicks) were either transferred, demoted or terminated. John Powell, a white employee, became the new chief of custody.

Prior to 1984, Hicks had a consistently satisfactory employment record, and had never been disciplined. Once Hicks was placed under Powell's supervision, however, he was frequently disciplined. On April 19, 1984, Hicks was demoted. After being informed of his demotion, Hicks had a confrontation with Powell. Powell sought disciplinary action against Hicks based on this confrontation, and Hicks was eventually discharged.

Hicks filed a lawsuit in district court alleging that St. Mary's Honor Center violated, among other things, Title VII by demoting and discharging him because of his race. After trial, the district court found that Hicks had proven a *prima facie* case of employment discrimination—he was a black employee who had satisfactorily performed his job until

Powell became his supervisor; he was demoted and then discharged; and his job was subsequently filled by a white employee. This evidence created a presumption that he had been demoted and discharged because of his race. The court also found that St. Mary's Honor Center had produced evidence of a legitimate, nondiscriminatory reason for its actions: that since January 1984 Hicks had been involved in a series of violations of Center policy which were sufficiently severe to justify demotion, and that the accumulation of violations over a short period of time, coupled with the seriousness of the confrontation with Powell, justified discharge.

Hicks proved, however, that the employer's explanations were pretextual. According to the court, other employees had been involved in similar, and in some cases more serious, violations of Center policy and had not been disciplined. Moreover, the court found that Powell had "manufactured the confrontation between [Hicks] and himself in order to terminate" Hicks. The court held, however, that while Hicks had proven that he was treated more harshly than his co-workers, he had failed to prove that the reason was racially, rather than personally, motivated. Thus, while Hicks proved that the reasons given by St. Mary's for his demotion and discharge were pretextual, he still had the ultimate burden to prove that race was the reason. Since, in the court's view, Hicks failed to prove the demotion and discharge were motivated by race, it entered judgment in favor of St. Mary's. 756 F.Supp. 1244 (E.D. Mo. 1991).

Hicks appealed, and the Eighth Circuit reversed. 970 F.2d 487 (8th Cir. 1992). The appellate court ruled that "[o]nce plaintiff proved all of the defendants' proffered reasons for the adverse employment action to be pretextual, plaintiff was entitled to judgment as a matter of law." Having proving that all of the defendants' explanations were not true, the plaintiff had satisfied his ultimate burden of persuasion that the real reason was illegal discrimination. No additional proof of unlawful motive was required.

The Supreme Court granted certiorari to determine whether proof of pretext alone is sufficient to satisfy plaintiff's burden of proof in a disparate treatment case or whether plaintiff must prove pretext plus some additional evidence of unlawful motive.

BACKGROUND AND SIGNIFICANCE

Since 1973, the Supreme Court has been repeatedly called upon to define and refine the structure of an indirect-evidence disparate treatment case under Title VII. *Hicks* requires the Court to revisit the issue once again. The Court's

Barbara J. Fick is an associate professor of law at Notre Dame Law School, Notre Dame, IN 46556; telephone (219) 631-5864.

decision will have important repercussions on plaintiffs' and defendants' relative ability to win a Title VII lawsuit.

The central issue in a disparate treatment case is whether the employer is treating the plaintiff less favorably than other employees with regard to hiring, firing, terms and conditions of employment *because of* race, sex, religion, national origin or color. Motive is the key issue: is the employer's action motivated by an illegal consideration? But motive is rarely capable of proof by direct evidence. Seldom will the employer state that the reason for its decision is the plaintiff's race. Thus, the plaintiff is often required to use indirect evidence to prove the employer's motive.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Supreme Court held that a plaintiff could establish a *prima facie* case of employment discrimination by proving: 1) that he belonged to a protected class; 2) that he was satisfactorily performing his job; 3) that he was fired; and 4) that the employer hired another employee to fill plaintiff's job. This indirect evidence creates a presumption that the motive behind the employer's action is illegal discrimination because "when all legitimate reasons for [firing] an [employee] have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race." *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978).

The presumption of illegal motive created by the indirect evidence can be rebutted, however, if the employer presents evidence of a legitimate, nondiscriminatory reason for its actions. The employer "need not persuade the court that it was actually motivated by the proffered reasons." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Once the employer presents its reasons, the plaintiff, in rebuttal, has the opportunity to prove that the reasons advanced by the employer are not the real reasons for the employer's actions. This is known as pretext. "The burden [of proving pretext] now merges with the ultimate burden of persuading the court that [plaintiff] has been the victim of intentional discrimination." *Id.*

Hicks questions the nature of the plaintiff's burden in the rebuttal stage of the litigation. If the plaintiff proves pretext, does this mean, *a fortiori*, that the plaintiff has met the ultimate burden of persuading the court that he or she has been a victim of intentional discrimination? Or must plaintiff produce evidence to prove not only that the employer's reasons were pretextual but also additional evidence that illegal discrimination is involved?

In the *Burdine* case, the Court's opinion stated that the plaintiff could meet the ultimate burden of persuasion "either by directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." This language seemed to suggest that plaintiff's proof of pretext alone was sufficient to win a Title VII lawsuit. Indeed, Justices Blackmun and Brennan in a concurring opinion filed in *United States Postal Service Board of*

Governors v. Aikens, 460 U.S. 711 (1983), interpreted the passage from *Burdine* in this manner: "the *McDonnell Douglas* framework requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates that the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision." This is the analysis applied by the Eighth Circuit in the *Hicks* case.

Several circuit courts of appeal, however, have not read the *McDonnell Douglas-Burdine* line of cases in this manner. For example, the Seventh Circuit has held that proof of pretext, while strong evidence of discriminatory intent, does not compel the conclusion that the employer acted for a discriminatory reason. The court "may conclude after hearing all the evidence that neither discriminatory intent nor the employer's explanation accounts for the decision." *Benzies v. Illinois Dept. of Mental Health and Dev. Disabilities*, 810 F.2d 146 (7th Cir. 1987). Thus, upon proof of pretext a court *may* find for the plaintiff but is not *required* to do so. In fact, this is the analysis used by the district court in the *Hicks* case.

Should the Supreme Court adopt the analysis advanced by the Seventh Circuit and the district court in *Hicks*, an additional hurdle will be placed in the paths of plaintiffs attempting to prove disparate treatment under Title VII. The purpose served by the employer's defense is "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Burdine*. Under the Seventh Circuit's analysis, if the employer has a reason for its action which it fails to disclose, thus depriving plaintiff of his full and fair opportunity to rebut, the employer may still prevail. The plaintiff will be in the position of guessing at other motives the employer may have had for its actions, and disproving them as well.

ARGUMENTS

For St. Mary's Honor Center (Counsel of Record, Gary L. Gardner, Assistant Attorney General, PO Box 899, Jefferson City, MO 65102; telephone (314) 751-3321):

1. The issue of motive is factual. When the employer rebuts the legal presumption raised by the plaintiff's *prima facie* case, the presumption of discrimination drops from the case and the court must look to all the facts to determine whether there is sufficient evidence to prove that the employer's motive was illegal. Proving that the reason given by the employer is a pretext does not prove that it is a pretext *for illegal discrimination*.
2. The court, in reviewing the entire record, may find other evidence of lawful reasons to support the employer's action even though the employer itself did not advance the evidence as the basis for its action. The employer does not have to persuade the court that it was in fact motivated by the reasons which it advances. The burden of persuasion is on the plaintiff to prove the employer's motive is an illegal one.
3. The decision of the Eighth Circuit misapprehends the nature of the legal presumption created by the *prima facie* case. The Eighth Circuit held that once the plaintiff

proves the employer's proffered reasons are pretext, the presumption of discrimination created by the *prima facie* case is resurrected; it is as though the employer had offered no evidence to rebut the presumption since the evidence it did offer turned out to be false. However, the Supreme Court in *Burdine* clearly held that once the *prima facie* case has been rebutted by the employer, the presumption drops from the case, and "the factual inquiry proceeds to a new level of specificity"—whether the employer intentionally discriminated against the plaintiff.

For Melvin Hicks (*Counsel of Record, Charles R. Oldham, 317 N. 11th Street, STE 1220, St. Louis, MO 63101; telephone (314) 231-0464*):

1. The purpose of the *McDonnell Douglas-Burdine* structure of proof is "progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine*. The purpose for requiring the employer to produce clear and reasonably specific evidence of its reasons is to narrow the possible explanations which the plaintiff must rebut. The litigation can then focus on the specific reasons advanced by the employer.
2. Allowing a court to base its decision on reasons not advanced by the employer deprives a plaintiff of his full and fair opportunity to prove his or her case.
3. The employer is in the best position to know its motives for its own actions. The adversarial system is based on the premise that the litigants will present the facts and arguments most favorable to their own case. The court should not give the employer the benefit of justifications on which the employer itself deliberately chooses not to rely. Such a rule would undermine the truth-seeking function of a trial and squander judicial resources.
4. In *Burdine* the Supreme Court held that if the employer offers no evidence of a legitimate, nondiscriminatory reason in response to the plaintiff's *prima facie* case, a court must enter judgment for the plaintiff. When the employer produces evidence of a particular reason, it creates an issue of fact with regard to that specific reason. Once plaintiff proves that reason to be a pretext, there is no longer any evidence to rebut the presumption of discrimination created by the *prima facie* case. An employer who advances a false reason should be in no better position than the employer who offers no reason at all.
5. Imposing a pretext-plus standard on plaintiffs in effect imposes a duty to prove disparate treatment cases by direct evidence. The *McDonnell Douglas-Burdine* line of cases clearly provides for proof of motive by indirect evidence. *Burdine* held that a plaintiff may demonstrate pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Those circuits adopting the pretext plus standard have effectively overlooked *Burdine*'s alternative of proof by either direct or indirect evidence. Instead they require plaintiff to prove

both that the employer's explanation is unworthy of credence (pretext) and that a discriminatory reason more likely motivated the employer (plus).

AMICUS BRIEFS

In Support of St. Mary's Honor Center

The Equal Employment Advisory Council (*Counsel of Record, Douglas S. McDowell; McGuinness & Williams, 1015 Fifteenth Street, NW, STE 1200, Washington, DC 20005; telephone (202) 789-8600*).

The Chamber of Commerce of the United States of America (*Counsel of Record, Mona C. Zeiberg, National Chamber Litigation Center, Inc., 1615 H Street, NW, Washington, DC 20062; telephone (202) 463-5337*).

Washington Legal Foundation and Equal Opportunity Foundation (*Counsel of Record, Richard A. Samp, Washington Legal Foundation, 1705 N Street, NW, Washington, DC 20036; telephone (202) 857-0240*).

The National Association of Manufacturers (*Counsel of Record, Glenn D. Nager; Jones, Day, Reavis & Pogue, 1450 G. Street, NW, Washington, DC 20005; telephone (202) 879-3939*):

Not only was the Eighth Circuit incorrect in holding that judgment for plaintiff was required by law, but if plaintiff has only proven that the employer's proffered motives were false without also proving the employer's real reason was illegal discrimination, judgment must be entered for the employer. In a series of cases decided in 1986, the Supreme Court ruled that a party's failure to prove an essential element of its case, for which it bears the burden of proof, mandates the entry of summary judgment against that party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The substantive law of employment discrimination imposes on the plaintiff the burden of proof on the ultimate issue in the case: whether the defendant was motivated by illegal discrimination. Where the plaintiff only proves that the reason articulated by the defendant as its motive is untrue, the plaintiff has failed to establish an essential element of its case—that the real motive was a prohibited one. Thus, the court must enter judgment in favor of the defendant.

In Support of Melvin Hicks

National Employment Lawyers Association (*Counsel of Record, Janette Johnson, Law Offices of Janette Johnson, 3614 Fairmount Street, STE 100, Dallas, TX 75219; telephone (214) 522-4090*).

Lawyers Committee for Civil Rights Under Law, et al. (*Counsel of Record, Colleen McMahon; Paul, Weiss, Rifkind, Wharton & Garrison, 1285 Avenue of the Americas, New York, NY 10019; telephone (212) 373-3000*).

The United States (*Counsel of Record, William C. Bryson, Acting Solicitor General, Department of Justice, Washington, DC 20530; telephone (202) 514-2217*).