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Not Losing Sight of the Forest: The Fourth Circuit's Stand for Reasonableness

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NOT LOSING SIGHT OF THE FOREST: THE FOURTH CIRCUIT'S STAND FOR REASONABLENESS

Merritt v. Old Dominion Freight Lines, 601 F.3d 289, 294 (4th Cir. 2010)

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I. INTRODUCTION

Less than a year after the August 1963 March on Washington for Jobs and Freedom, Congress passed the Civil Rights Act of 1964, which President Lyndon B. Johnson promptly signed into law. Title VII of the Act was designed to protect from discriminatory employment practices on the basis of race, color, religion, sex, or national origin. This section proscribes hiring, firing, segregating, or classifying employees and potential employees in any way that would deprive them of equal employment opportunities.[1]

A portion of Title VII purports to establish guidelines for proving claims of employment discrimination.[2] Over the past five decades, the federal courts have struggled to consistently interpret and apply these guidelines to promote fair, consistent results for all parties. Providing any direct evidence of discrimination has been consistently difficult for plaintiffs despite having potentially legitimate claims. In addition, courts have struggled to reach consistent results based on indirect evidence that would only permit an inference of discrimination.

The Supreme Court took tentative steps to address this issue in 1970[3] and took bold strides in the seminal 1973 case, *McDonnell Douglas, Corp. v. Green*.[4]

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[1] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1964).

[2] *Id.* at §2000e-2(k)(1)(A) (1964).

[3] Phillips v. Martin Marietta, Corp., 400 U.S. 542, 1971.

[4] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *McDonnell Douglas* dealt with alleged discriminatory employment practices on the basis of race. Subsequent Title VII cases, however, have echoed the opinion's articulation of the prima facie elements for discrimination expanding them for use in claims on the basis of race, gender, national origin, and religion. In order to

In *McDonnell Douglas*, the Court articulated a burden-shifting framework to be used in cases where direct evidence was lacking. The *McDonnell Douglas* framework contemplates that for a plaintiff to be successful, 1) the plaintiff must first make out a prima facie case of discrimination, 2) the defendant employer must then assume the burden of production to articulate a "legitimate, non-discriminatory justification for the it allegedly discriminatory action,"[5] 3) the plaintiff must then bear the burden to "prove by a preponderance of the evidence that the neutral reason offered by the employer were not its true reasons but were a pretext for discrimination."[6] After this elaborate burden shifting, the primary issue is "whether the plaintiff was the victim of intentional discrimination"[7] like in any other Title VII employment discrimination case.

In 2010, the Fourth Circuit in *Merritt v. Old Dominion Freight Lines, Inc*.[8] addressed the proper role of the burden-shifting analysis and decided that it was merely a tool used to reach an appropriate outcome, but was not to be confused with the overarching goal of achieving justice. As a result, the decision in *Merritt* has the potential to free plaintiffs and courts from a cumbersome burden-shifting framework, thus allowing a court to analyze the core of an employment discrimination claim without engaging the intermediate inquiries. It is unclear, however, how courts will promote predictable outcomes in employment discrimination litigation without a highly structured evidentiary framework.

II. FACTUAL BACKGROUND

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establish a prima facie case for employment discrimination under Title VII for the Civil Rights Act of 1964, the complainant must show: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id*. at 793.

[5] Merritt v. Old Dominion Freight Lines, 601 F.3d 289, 294 (4th Cir. 2010) (internal citations omitted).

[6] *Id.* at 294 (internal citations omitted).

[7] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 135 (2000).

[8] *Id.*

Deborah Merritt was a truck driver for Old Dominion Freight Lines. She began her employment working as a Line Haul driver—a position that often required her to make long trips, thus keeping her away from her family on many nights and weekends. So that she might work more regular hours, Merritt hoped to transition to a Pickup and Delivery position that required much more heavy lifting. After almost two years and in the face of discouragement from superiors, she was hired for the desired position. Three months later, however, she was fired for supposedly failing a physical aptitude test (a "PAT").

Merritt sued Old Dominion for sex discrimination under Title VII, claiming that the circumstances surrounding her transition and firing gave rise to the allegation of discrimination in this case. Specifically, Merritt alleged that she was fired from her Pickup and Delivery position because her superiors believed that women could not perform the job. Old Dominion, however, defended its actions, claiming that she was fired after failing a PAT that was supposed to evaluate her ability to perform as a Pickup and Delivery driver in light of an ankle injury she had suffered several months earlier. It further stated that the requirement of a PAT after an injury was a consistently enforced procedure. Merritt claimed that requiring a PAT was a pretext to find that she was unfit for her job and to fire her. The district court granted summary judgment in favor of the defendant on the grounds that Merritt had failed to provide sufficient evidence that Old Dominion's non-discriminatory reason for her firing was only a pretext for discriminatory practices. Merritt appealed the summary judgment.

III. RATIONALE

On appeal, the Court of Appeals examined how the lower court had applied the burden of proof framework for establishing Title VII claims of employment discrimination (laid out in *McDonnell Douglas*[9]). It found that despite the framework's assignation of placing the final burden on the plaintiff, "Merritt ha[d] presented an issue of triable fact"[10] in rebutting the non-discriminatory reason for the firing and reversed the lower court's decision.

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[9] McDonnell Douglas Corp., 411 U.S. at 792.

[10] *Id.* at 291.

The appellate court found that the circumstantial evidence of gender discrimination was substantial. The court highlighted at least four distinct instances of possible gender discrimination committed against Merritt between May 2002 and February 2005, among them the inconsistent application of the PAT and the general animus on the part of management towards women drivers. It also considered the supervisors' negative comments regarding the role of women in that particular workplace. Most importantly, the court held that in spite of Old Dominion's articulation of a non-discriminatory motive for the firing, a fact-finder was at liberty to disregard the proffered motive.[11] Moreover, it found that the totality of the circumstances created "powerful evidence showing a discriminatory attitude at [her company of employment] toward female[s]."[12]

In the *Merritt* opinion, the Fourth Circuit removed a large and unnecessary hurdle for plaintiffs in Title VII suits. In its 1981 decision of *Texas Dept. of Community. Affairs v. Burdine*, the Supreme Court held that the defendant had *no* burden to persuade the court by a preponderance of the evidence that real, nondiscriminatory reasons for the questioned employment action existed.[13] In actuality, few employers would ever knowingly admit to outright discrimination, and under *Burdine*, producing direct evidence of discrimination would seem to have remained the plaintiff's only option to survive this step of the burden-shifting analysis. The *Merritt* Court found that Deborah Merritt had, despite the obstacles put in place by *Burdine*, produced enough indirect evidence to create a genuine issue of material fact: that the nondiscriminatory reasons offered were mere pretext.

Unlike the *Burdine* court, the Fourth Circuit took a more pragmatic approach in *Merritt* by recognizing the real-world challenges of Title VII litigation and responding with a holding supported by the cumulative circumstantial evidence of the case, whether or not it aligns perfectly with the burden-shifting framework or not. Often, opined the court, a "smoking gun" does not exist as proof of discrimination and only circumstantial evidence is

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[11] *Id.* at 300.

[12] *Id.* at 301.

[13] *See* Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981).

available.[14] Furthermore, lack of proof can be common in cases of this type, given the inevitable power disparity between potential and current employees and the naturally subjective nature of the hiring process. Most direct evidence of discrimination would have either occurred on the company's premises or belonged to the company in some other way. In most cases, the employee's access to this type of evidence is surely quite limited.

The ramifications of this ruling will most likely be widespread. First, the Merritt case on remand will most likely reach a jury that will weigh all of the circumstantial evidence. Given the weight of the circumstantial evidence, a finding of discriminatory employment practices would not be surprising. Second, the Fourth Circuit does not throw open the courthouse doors to spurious litigation—the plaintiff still must make a prima facie case and offer evidence to rebut a employer's articulation of a non-discriminatory motive for termination. It does, however, relax a rigid framework that could be used to grant summary judgment despite genuine instances of discrimination. At the same time, employers' concerns are notably present in the judges' minds; they caution that the opinion should not be construed as "setting tripwires whenever an employer fails to dot its 'i's' or cross its 't's,'"[15] but instead should offer guidance to courts to assess the *whole* picture and *all* relevant evidence. Although employers will most likely be wary of this opinion, the court does not appear to be playing frivolous games with companies that have neutral, legitimate policies in place. Future cases, however, will decide whether courts continue to follow the *McDonnell Douglas* framework or choose, in the words of the Judge Davis's concurrence in *Merritt*, not to "examine the trees so minutely that [they] lose sight of the forest."[16]

IV. CONCLUSION

[14] *Merritt* at 300 ("A plaintiff does not need a 'smoking gun' to prove invidious intent, and few plaintiffs will have one. Rather, '[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'") (quoting Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (citation and internal quotations omitted).

[15] *Merritt*, 601 F.3d at 301.

[16] *Id*. at 303.

In reversing and remanding the *Merritt* case, the Fourth Circuit Court of Appeals showed that it was interested in the concerns of employers, but also with plaintiffs attempting to prove employment discrimination cases. In its balanced opinion, the court cautioned against impractical rigidity in proving cases of this type and respected the spirit of Title VII—to protect those people who, more times than not, are outside the dominant group. After all, Title VII seeks to avoid the threat of "injustice everywhere" by avoiding "injustice anywhere,"[17] at least in the all-important realm of employment.

[17] MARTIN LUTHER KING, JR., LETTER FROM BIRMINGHAM JAIL (1963), *reprinted in* BLESSED ARE THE PEACEMAKERS: MARTIN LUTHER KING, JR., EIGHT WHITE RELIGIOUS LEADERS, AND THE "LETTER FROM BIRMINGHAM JAIL," 239 (S. Jonathan Bass ed., 2002).