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STRANGERS NO MORE: ALL WORKERS ARE ENTITLED TO "JUST CAUSE" PROTECTION UNDER TITLE VII

Alfred W. Blumrosen†

The ideal of tort law is reasonable conduct. When reasonable expectations comport with planned undertakings all is well. Tort and contract both are satisfied. What happens when this is not the case? The answer in the long run is that planned undertakings must accommodate themselves to reasonable expectations. . . . But this is far from true in the short run. . . . Indeed, in the nineteenth century the reverse was more nearly true. Contract then was the perfect paradigm of legal right. Constitutions enshrined its obligations. . . . Today, the scene has changed and the ideal of legal certainty has given way to the ideal of reasonable expectations.

Professor Thomas A. Cowan
Rule or Standard in Tort Law
13 Rutgers L. Rev. 141, 152-53 (1958)

The federal equal employment opportunity law—Title VII of the Civil Rights Act of 1964)—has eroded the century old common law rule that employment decisions are presumptively subject to the will of the employer. Yet tensions between statutory requirements and the common law tradition are reflected in the processing of individual claims of discrimination under Title VII. This paper will examine the work of administrative agencies and courts in processing such claims,

† Professor of Law, Rutgers University; B.A., J.D., University of Michigan; Chief of Conciliations, U.S. Equal Employment Opportunity Commission, 1965-67; government consultant and private advisor on equal opportunity matters, since 1967.

The underlying concepts of this article evolved over long years of association with the warmth and wisdom of Professor Emeritus Tom Cowan of Rutgers Law School. Many of the ideas in this paper were first explored with Rutgers Law School students Emily Alman, Brian Kessler, Jules Lobel, Michele Mixlan, Susan Raymond, Frank Rugg, Professors Gerard Moran, Robert Carter, Norman Cantor, Jose Rivera, and Alexander Brooks, and Prof. Ruth Blumrosen of the Rutgers Graduate School of Business Administration.

In 1977, the author became consultant to EEOC Chair Eleanor Holmes Norton. A draft of this article was utilized in staff discussions which culminated in reformation of the EEOC procedures and structure. For a discussion of the new procedure, see 42 Fed. Reg. 42034 (1977). The views in this paper are not necessarily those of any government agency.

and the decision of the Supreme Court in *McDonnell Douglas Corp. v. Green*,\(^2\) which has shaped legal thinking about individual discrimination cases.

My conclusion is that the common law rule of employer discretion has been superseded by the principle that personnel decisions must be based on just cause. The just cause standard arose initially under Title VII in connection with claims by minorities and women. The force of Title VII as interpreted by the Supreme Court requires that it be extended to whites and males as well. As a consequence, the just cause standard is applicable to all workers, and the arbitrary power of the employer recognized under the common law is extinguished. This basic change in the legal relation between worker and employer both reflects and is a part of the long-term shift from laissez faire to substantive regulation of the employment relationship.

### I

**THE EVOLUTION OF EMPLOYEE RIGHTS**

The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. . . . In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.

Harlan, J.

*Adair v. United States*

208 U.S. 161, 175-76 (1908)

We have moved far from the days when the employer, in his absolute judgment, without any accountability, could hire or fire at will.

Goldberg, J.

*East v. Romine, Inc.*

518 F.2d 332, 342 (5th Cir. 1975)

During the nineteenth and early twentieth centuries, the law provided little protection for the individual worker's interests in economic position, personal safety, or personal dignity. The law of tort, which protects such interests,\(^3\) recognized defenses of assumption of risk and contributory negligence, which insulated industry from the cost of industrial accidents.\(^4\) Similarly, the law of contract favored employers in their dealings with workers.\(^5\) Under a legal principle enunciated by


\(^3\) J. Stone, Social Dimensions of Law and Justice, ch. 5 (1966).


\(^5\) See, e.g., Combs v. Standard Oil Co., 166 Tenn. 88, 59 S.W.2d 525 (1932) (contract for "permanent" employment too vague, hence contract was at will); Blumrosen, Workers' Rights
H.G. Wood in 1877, the employment relation was at will unless the contrary was clearly stipulated. As a practical matter, the at will principle meant at the will of the employer, because few employees had bargaining leverage. Efforts of workers to take collective action were either made illegal or were severely restricted. Attempts by Congress and state legislatures to protect union activity were nullified by the Supreme Court under the theory that the inequalities of fortune between workers and employers were enshrined in the Constitution and could not be altered by legislation. Under the legal system of that time, employers were free to make decisions in accord with any prejudices they might have concerning workers of different sexes, races, national origins, and religions.

In the last half century, the law has shifted toward a more sensitive recognition of individual and group interests, including the interests of workers. This shift toward greater protection of workers has been accomplished largely through two waves of statutes: the New Deal legislation of the thirties, which dealt with unionization, minimum wages...
and pensions, and the legislation of the sixties, which dealt with civil rights and personal safety.

In the labor laws of the thirties, Congress modified the at-will rule by prohibiting "interference, restraint, coercion or discrimination" against employees in the exercise of their rights to unionize, bargain collectively, and strike. Once unions had been established, collective bargaining agreements came to require that the employer have a good reason for adverse personnel actions. Thus the rule of just cause supplanted the rule of employer discretion in unionized firms, and encouraged non-union employers to act fairly in order to avoid union organization of their employees. The labor laws, however, did not restrict employer freedom to discriminate on the basis of race, religion, sex, or national origin.

In the forties and fifties, the President, the Supreme Court, and some state legislatures attempted to prohibit employment discrimination. These efforts, however, did not give workers a judicially cogni-


13. In the evolution of the process, just cause has been defined, and the power to decide the issue has been given to the arbitrators. See generally, C. Updegraft, Arbitration and Labor Relations (1972).

14. For a discussion of the opposition of the NAACP to the Wagner Act on grounds that it did not protect minority workers, see H. Hill, Black Labor and the American Legal System, 93-162 (1977). Overtly discriminatory clauses have been removed from union constitutions, and most collective bargaining agreements prohibit discrimination on the grounds of race, sex, and national origin.

zable right to fair treatment. Rather, the enforcement was entrusted either to private institutions such as unions, which at that time were often uninterested in eradicating employment discrimination, or to state or federal administrative agencies, which were largely ineffective.

In contrast, Title VII of the Civil Rights Act of 1964 created an individual right to be free from discrimination on the basis of race, color, religion, sex, or national origin. The right created is personal to the victim of discrimination, and is not subject to control by any agency or organization. The right is enforceable in plenary proceedings before federal district courts, after an informal administrative processing by the Equal Employment Opportunity Commission (EEOC). Thus Congress has created a body of statutory tort law concerning employment discrimination, enforceable in individual judicial proceedings.

Title VII has been construed as a charter of economic liberty for minorities and women. Industrial relations systems which restrict employment opportunities have been declared illegal, and many recruitment, hiring, promotional, layoff, and termination practices have been modified to further the interests of previously excluded groups.

Group interests, class actions, and systems thinking have gone hand in hand into new perceptions of employment discrimination.

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18. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 44-45 (1974). Before Title VII claims may be enforced in the federal courts, an employee must file a written complaint with the EEOC and appropriate state agencies. The statute provides that upon receipt of a charge, the EEOC will investigate to determine the existence of "reasonable cause" to believe that illegal discrimination has occurred. If the Commission finds reasonable cause, it endeavors to eliminate the unlawful practice through conciliation. If conciliation fails, the EEOC may bring an action in federal district court. If the EEOC dismisses the charge, or fails to act within 180 days after filing the charge, the complainant has 90 days in which to bring a personal action in federal district court. 42 U.S.C. §§ 2000e-4 to 2000e-8 (1970 & Supp. V 1975).
Three theories identifying employment discrimination have emerged under Title VII. First, employment practices which have an adverse effect or impact on minorities or women are illegal unless justified by strict business necessity. Second, employers must provide equal treatment to similarly situated persons regardless of race, sex, religion, or national origin. Third, an employer must not deny an employment opportunity because of racial animus—a desire to suppress members of a disfavored group out of evil motive. This body of law requires that employers have a legitimate business justification for employment decisions which adversely affect minorities and women, thus nullifying the right to be arbitrary which the at will principle recognized.

The Supreme Court in *McDonald v. Santa Fe Trail Transportation Co.* held that Title VII prohibits racial discrimination against whites as well as blacks. Thus, the Court extended to all workers the law of discrimination which had been developed in cases involving discrimination against minorities and women. If a principle of just cause has emerged from the administrative and judicial actions under Title VII, that principle is now applicable to all workers.

**A. Administration of Title VII**

When Title VII was adopted in 1964, the experience of state antidiscrimination agencies suggested that perhaps 2,000 complaints might be filed with the EEOC in its first year. However, black pride and
female consciousness, galvanized by the passage of the Act, produced a massive demand that Title VII rights be translated into reality. Charges filed with the EEOC during its first decade enormously exceeded expectations and created a backlog that has since haunted the administrators of the Act.28

The vast majority of these claims sought individual relief in connection with a discharge, failure to hire, or failure to promote.29 In fiscal year 1975, for example, the Commission received 66,097 charges, of which nearly 48,000 or 71%, involved these three areas of grievance.30 The EEOC's processes were overloaded and delays mounted.31

28. Distribution of EEOC charges of June 30, 1976:

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Charges Filed</th>
<th>Charges Left Over</th>
</tr>
</thead>
<tbody>
<tr>
<td>1965</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>1966</td>
<td>8854</td>
<td>—</td>
</tr>
<tr>
<td>1967</td>
<td>8512</td>
<td>—</td>
</tr>
<tr>
<td>1968</td>
<td>11172</td>
<td>2219</td>
</tr>
<tr>
<td>1969</td>
<td>12148</td>
<td>3260</td>
</tr>
<tr>
<td>1970</td>
<td>14129</td>
<td>4245</td>
</tr>
<tr>
<td>1971</td>
<td>22920</td>
<td>5917</td>
</tr>
<tr>
<td>1972</td>
<td>32840</td>
<td>8114</td>
</tr>
<tr>
<td>1973</td>
<td>48899</td>
<td>18550</td>
</tr>
<tr>
<td>1974</td>
<td>54000</td>
<td>30812</td>
</tr>
<tr>
<td>1975</td>
<td>66097</td>
<td>46900</td>
</tr>
</tbody>
</table>

Data extracted from 5 U.S. COMM’N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974 529-33 [hereinafter cited as CRC REPORT] and U.S. GENERAL ACCOUNTING OFFICE, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAS MADE LIMITED PROGRESS IN ELIMINATING EMPLOYMENT DISCRIMINATION 9 (HRD-76-147, Sept. 28, 1976) [hereinafter cited as GAO REPORT]. State civil rights agencies have experienced a similar influx of claims because of the Title VII requirement that the states be given the first opportunity to deal with them. See note 18. For example, the New Jersey Division on Civil Rights received 1559 employment discrimination complaints in 1974-75, compared to 140 in 1962-63. Judith Musicant, Deputy Director of the New Jersey Division on Civil Rights, personal communication with the author.

This past decade should be fertile ground for a legal-historical-sociological study of the interrelationship between the passage of laws recognizing new claims and the responses of the beneficiaries in taking advantage of their claims. The massive individual assertions of equal opportunity claims during the decade after the passage of Title VII parallels the national experience of the rapid and massive unionization of the coal fields of West Virginia after the passage of the National Industrial Recovery Act. See I. BERNSTEIN, supra note 8, at ch. 2.

29. The figures here and in subsequent tables for fiscal year 1975 were supplied by the EEOC through Harold S. Fleming, Acting Director, Information Systems Division, in a letter to the author (July 8, 1976).

ACTIONABLE CHARGES FILED WITH EEOC FISCAL YEAR 1975

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>Race</th>
<th>Sex</th>
<th>Nat'l</th>
<th>Rel.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wrongful discharge</td>
<td>24241</td>
<td>14723</td>
<td>5838</td>
<td>2991</td>
<td>689</td>
</tr>
<tr>
<td>Refusal to Hire</td>
<td>12910</td>
<td>7032</td>
<td>4101</td>
<td>1495</td>
<td>2822</td>
</tr>
<tr>
<td>Failure to promote</td>
<td>10783</td>
<td>6015</td>
<td>3285</td>
<td>1347</td>
<td>136</td>
</tr>
<tr>
<td>Total</td>
<td>47934</td>
<td>27770</td>
<td>13224</td>
<td>5833</td>
<td>1107</td>
</tr>
</tbody>
</table>

30. Id.

31. See Note 28.
In addition, the federal district courts received thousands of cases which the EEOC had been unable to resolve. It thus became institutionally imperative to find effective ways of dealing with a large number of individual claims of unfair treatment.

Before 1977, the EEOC had investigated these charges through a formal and time-consuming process. The delays disadvantaged complainants, who needed timely relief, and respondents, who faced increased liability. In 1977, the Commission adopted a rapid charge processing system to speed investigation and encourage prompt, informal settlement of meritorious individual discrimination claims. The new approach included: (1) pre-charge screening of those claims which were not Title VII related; (2) obtaining a full statement from complainant at the time of filing; (3) drafting of the complaint to include the specifics of the individual grievance; (4) prompt service of the charge along with interrogatories to elicit the employer's explanation for the action complained of; and (5) early convening a factfinding con-

32. During the course of Title VII enforcement, federal district courts are receiving an accelerated workload. Consider the following figures:

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Title VII cases File in District Court</td>
<td>344</td>
<td>757</td>
<td>1015</td>
<td>1787</td>
<td>2472</td>
<td>3930</td>
</tr>
</tbody>
</table>

1975 Annual Administrative Office of United States Courts 233 (1976). Between July 1, 1972, and March 31, 1975, the EEOC failed in conciliation efforts in 11,203 cases (GAO REPORT, supra note 28, at 12); during that time, approximately 5,000 Title VII went on to the district courts.

33. The importance of encouraging settlement of Title VII claims cannot be overstated. The Congressional intent to encourage settlement is clear in the statutory language mandating conciliation. But the practical imperative is even more demanding. With a filing rate this year projected at more than 80,000 charges, no formal process can avoid being swamped. Therefore if the system is to function, it must use resolution techniques which do not require exhausting the entire process. Swamping of the process harms complainants and respondents alike and threatens the very existence of charge-processing as a system.

Thus we must vigorously pursue settlement as the primary method of administrative enforcement of the law and as the only technique which can secure a remedy for a significant number of complainants in a timely fashion. All of our procedures are being shaped with the objective of encouraging prompt and fair conciliations.

EEOC Chair Eleanor Holmes Norton, 42 Fed. Reg. 42035 (1977). The proposal most persistently made to deal with this and other problems has been to shift to an administrative trial-type hearing, such as is available before the National Labor Relations Board, and to give the EEOC cease and desist powers. While grant of such power to the Commission would relieve federal court congestion, it would only do so by transferring the problem. The EEOC would then have the same task of integrating its informal and formal processes that is the subject of this article.

34. See CRC REPORT and GAO REPORT, supra note 28. An exception was the EEOC program developed under the direction of Peter Robertson in the early 1970's to deal efficiently with discharge cases. See A. BLUMROSEN AND P. BLAIR, ENFORCING EQUALITY IN HOUSING AND EMPLOYMENT THROUGH STATE CIVIL RIGHTS LAW, ch. 9 (1972). With modifications it is now in use in several states. See Blumrosen, The Quality and Quantity of Justice: Reform in the Michigan Civil Rights Commission—1972, 28 AD. L. REV. 149 (1976).

ference at which both charging party and defendant are present. Initial results of the system were encouraging.

B. Judicial Procedure and the Substance of Individual Claims

The processing of individual discrimination claims in both the courts and the agencies has been heavily influenced by the 1973 decision of the Supreme Court in *McDonnell Douglas v. Green.* The Court there held that the claimant in a hiring discrimination case must establish a prima facie case consisting of: (1) minority status; (2) qualifications for the job; (3) rejection; and (4) a vacancy remaining after he or she was denied employment. The employer may then advance a legitimate non-discriminatory reason for the allegedly discriminatory action; the claimant may then respond that the reason is a pretext.

The rigidity of this formulation was recognized in *McDonnell Douglas* itself, and has since been softened. This problem aside, experience and reflection have identified two underlying difficulties with the formulation. First, the Court did not decide whether a finding concerning the motive of the employer was necessary at the close of all the evidence. Motive is not an element in a case based on adverse effect of employment practices on minorities or women. However, most individual discrimination cases are tried on a theory of denial of equal treatment rather than adverse effect, and the role of motive in the disparate treatment case was not clarified. Secondly, the Court assumed that one function of the prima facie case is to force out the employer's explanation for its actions when, in fact, the administrative process will identify the employer's justification long before a Title VII suit is filed.

These underlying problems, in turn, spawned several specific difficulties:

1. The order of proof suggests that a plaintiff may withhold some evidence until after the defendant has presented its case. This is contrary to the basic principles of trial and to the possibility that the

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37. Our discussion in *McDonnell Douglas Corp. v. Green,* 411 U.S. 791, 802 (1973), of the means by which a Title VII litigant might make out a prima facie case of racial discrimination is not contrary. ... As we particularly noted ... this “specification ... of the prima facie proof required ... is not necessarily applicable in every respect to differing factual situations.”
38. See notes 24, 25, and accompanying text.
pretextuality issue may be addressed during discovery, which takes place before trial.39

(2) The term "pretext" is not self-explanatory. It may mean intentional discrimination, or it may refer to any evidence of discrimination, involving intent or otherwise.40

(3) The consequence of establishing a prima facie case is not clear. Does it shift to the employer the burden of production of evidence, or the burden of persuasion?

(4) The opinion seems to require the plaintiff to establish qualifications before the employer is required to justify its action. Often, however, the question of qualifications will be the issue in the case. To require plaintiff to establish qualifications as part of the prima facie case in such a situation is unrealistic.41

In 1978, the Court addressed some of these difficulties in Furnco Construction Co. v. Waters,42 but it did not resolve them. They can best be analyzed after we have reviewed the administrative and judicial processing of individual complaints in light of McDonnell Douglas Corp. v. Green.

II

INDIVIDUAL CASES IN THE AGENCIES AND THE COURTS

It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC . . . . However, as the individual’s rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief.

Section-by-Section Analysis of Equal Employment Opportunity Act of 1972; (quoted in Occidental Life Ins. Co. v. EEOC 97 S. Ct. 2447, 2454 (1978))

In the spring of 1976, a seminar at Rutgers Law School43 studied

39. The Court suggested that a finding that the racial composition of a labor force is itself an indication of exclusionary practices could be made “after reasonable discovery.” 411 U.S. at 805 n.19. Discovery, of course, is concluded before trial.

40. The use of the term “pretext” in this context does not mean, of course, that the Title VII plaintiff must show that he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies; as the closing sentence to the quoted passage makes clear, no more is required to be shown than that race was a “but-for” cause.

41. Lower courts have tended to accept common sense evidence of qualifications to satisfy the prima facie case, and then permit the employer to demonstrate lack of qualifications. See, e.g., East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1975) (claimant presumptively qualified by long work experience); Warren v. Veterans Hosp., 382 F. Supp. 303 (E.D. Pa. 1974) (claimant disqualified at time of rejection by failure to take physical examination).

42. 98 S. Ct. 2948 (1978).

43. Student seminar participants are identified in the introductory footnote. Our initial concern was to explore whether the McDonnell Douglas formula had a differential impact on cases involving manual workers as compared to those in the white collar area. This issue was dropped as some of the problems discussed in this paper became apparent.
the processing of individual claims of employment discrimination by state and federal agencies. The seminar compared statistics on individual cases of failure to hire, failure to promote, and discharge from the EEOC and the New Jersey Division on Civil Rights. The seminar examined the judicial process by reviewing reported opinions in volumes 7 through 12 of the Bureau of National Affairs Fair Employment Practice reporter which dealt with individual claims.

A. Administrative Processing

EEOC statistics for fiscal year 1975 reveal that more than 70% of the complaints filed concerned hirings, dismissal, or promotion.\textsuperscript{44} The bulk of EEOC effort in these 46,268 cases was spent finding no cause of action (36,973—almost 80%) or dismissing cases administratively or for want of jurisdiction, (14,595—12%). Presumably, cause findings or their equivalent were made in 3,365 cases, as a prelude to settlement efforts. This is a cause-finding rate of 8% of the 40,338 cases investigated but only 6% of the nearly 55,000 cases which were either investigated or closed on administrative or jurisdictional grounds.\textsuperscript{45}

The statistics of the New Jersey Division on Civil Rights compared favorably with those of the EEOC.\textsuperscript{46} The Division investigated

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|}
\hline
Comment & Total & Discharge & Hire & Promotion \\
\hline
Charges filed & 47,934 & 24,241 & 12,910 & 10,783 \\
Closed administratively & 10,503 & 5,103 & 3,115 & 2,285 \\
No jurisdiction & 4,092 & 2,030 & 1,400 & 662 \\
Investigated & 42,696 & 21,546 & 11,797 & 9,353 \\
Investig. concluded & 40,338 & 21,677 & 10,852 & 8,909 \\
No cause & 36,973 & 19,095 & 9,848 & 8,030 \\
Settlement efforts & 3,365 & 2,582 & 1,004 & 879 \\
Successful & 2,582 & 1,178 & 753 & 651 \\
Unsuccessful & 783 & 304 & 251 & 228 \\
Right to sue notices & 215 & 83 & 61 & 71 \\
\hline
\end{tabular}
\caption{EEOC Statistics, Fiscal Year 1975}
\end{table}

Fleming, supra n.29.

\textsuperscript{45} In contrast, the “merit factor” in NLRB unfair labor practice cases—the percentage of charges which are either settled informally or in which complaints are issued—ranged from a high of 36.6% in 1966 to a low of 30.2% in 1975. 1975 N.L.R.B. Rep. Ann. 7 (1976).

\textsuperscript{46} Comparison Between EEOC and N.J. Div. on Civil Rights (Fiscal Year 1975)

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|c|c|c|c|}
\hline
& EEOC & DCR & EEOC & DCR & EEOC & DCR & EEOC & DCR \\
\hline
Charges Filed & 47,934 & 1,020 & 27,770 & 536 & 13,224 & 262 & 5,833 & 63 \\
Closed Administratively (incl. no jurisdiction) & 14,655 & 213 & 8,395 & 120 & 4,222 & 69 & 1,577 & 30 \\
Investigated & 40,338 & 447 & 23,023 & 261 & 11,316 & 123 & 5,066 & 63 \\
No Cause & 36,973 & 285 & 21,450 & 183 & 10,380 & 51 & 4,262 & 46 \\
Relief Obtained & 2,582 & 162 & 1,149 & 78 & 705 & 66 & 685 & 17 \\
Unsuccessful EEOC Conciliations & 783 & 426 & 231 & 119 & 7 & 7 & 7 & 7 \\
Cause as % of Investigated & 9 & 36 & 93 & 29 & 8 & 53 & 15 & 26 \\
Relief as % of Investigated & 6 & 36 & 5 & 30 & 6 & 54 & 13 & 26 \\
Administrative Closures as % of Work Load & 26 & 32 & 26 & 31 & 27 & 35 & 23 & 32 \\
\hline
\end{tabular}
\caption{Discharge, Promotion, and Hiring Complaints}
\end{table}
a slightly smaller proportion of all complaints than did the EEOC (68\% as against 74\%); yet the Division found cause to believe there was discrimination in four times as many of the cases investigated (36\% as against 9.3\%). The Division secured some relief for complainants in 36\% of the cases investigated as compared to only a 6\% figure for the EEOC.

There are several possible explanations for this difference between EEOC and Division performance. First, the Division's superior record could be attributed to the exercise of its cease and desist powers. This does not appear to be the reason, since in fiscal year 1975, the Division took only eight cases to public hearing and obtained relief in seven. The remainder of the relief came in the form of satisfactory adjustments (100 cases), or consent orders and decrees (55 cases). Second, the easier cases may have been resolved at the state level. Thus, fewer cases which had merit would reach the EEOC. Third, there may be conscious or unconscious biases in the agencies. By taking a "pro civil rights" public stance, the EEOC may have alienated the respondent employer class; but by its failure to secure significant relief for the complainants, it may also have alienated the complainant class, making individual plaintiffs unwilling to settle.\footnote{47} Fourth, the agencies may be using different standards to determine probable cause.\footnote{48} Another reason for the variation between EEOC and Division rates of probable cause findings could be the different methods of processing cases. The Division, by reaching cases more quickly, may have been able to settle matters which could not be settled after a long delay. Where there is long delay, many complainants drop out.\footnote{49} Those who remain con-

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\footnote{47. See GAO Report, supra note 28.}

\footnote{48. One way to test these hypotheses would be to conduct a comparison of enough raw case files to make an informed judgment on these and related hypotheses. The extensive changes in EEOC procedure introduced in 1977 will allow some statistical comparisons to be made in the next few years. See 42 Fed. Reg. 42022 (1977).}

\footnote{49. The unwillingness or unavailability of the charging party is the major reason for administrative closure of EEOC claims. [W]e analyzed 441 charges closed administratively by a failure to proceed in October 1974 by 5 EEOC district offices. The results follow.}

<table>
<thead>
<tr>
<th>Reasons for Closure</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charging party failed to respond to EEOC's request for information</td>
<td>151</td>
</tr>
<tr>
<td>Unable to locate charging party</td>
<td>142</td>
</tr>
<tr>
<td>Charging party did not wish to proceed (no reason specified)</td>
<td>63</td>
</tr>
<tr>
<td>Private litigation being pursued by charging party</td>
<td>35</td>
</tr>
<tr>
<td>Complaint resolved by employer</td>
<td>22</td>
</tr>
<tr>
<td>No jurisdiction</td>
<td>15</td>
</tr>
<tr>
<td>Resolved by state or local fair employment practices agency</td>
<td>3</td>
</tr>
<tr>
<td>Other</td>
<td>10</td>
</tr>
<tr>
<td>Total</td>
<td>441</td>
</tr>
</tbody>
</table>
cerned are unlikely to accept the relatively small sums involved in the Division settlements, and the respondents are unlikely to be willing to pay the larger back-pay claims which accumulate. In addition, in early settlement efforts, the complex texture of events is still clear. When years have passed, memories tend to crystallize into an abstract and relatively simple accounting of events. For these reasons, many cases which can be settled if reached quickly become impossible to resolve once time has passed. Thus, the EEOC backlog itself and the policy of resolving claims on a first in, first out basis may have contributed to the low settlement rate.

Additionally, the Division was using an interrogatory method to investigate many of the cases examined in our study. This approach requires the employer to state in writing the reasons for the adverse personnel action promptly upon the filing of a complaint. The technique may have contributed to a sharpening of the issues and the rapid identification of those cases where prudence would lead an employer to immediate settlement. Finally, the modest settlements at the Division may mean that Division personnel are encouraging complainants to take lesser amounts than EEOC personnel recommend. It was impossible to pursue this analysis, however, as we were denied the opportunity to sample EEOC files.

The seminar students did examine Division files; their impressions provide a perspective on how the Division processed claims. First, the Division functions as a screening device; people who are upset can file a complaint and then let it drop. Second, there were a small proportion of "genuine misunderstanding" cases, in which the Division was able to improve communications between the parties and thereby assist the complainant. Third, complainants lost in large numbers of cases because their complaints lacked merit.

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GAO REPORT, supra note 28, at 11. New Jersey Division on Civil Rights statistics report that for fiscal year 1975, 122 complaints were withdrawn by complainants (57% of the cases closed administratively). Musicant, supra note 28.

50. See note 37.

51. See table at note 49. The range of reasons for the dropped complaints is infinite. For an early study that has not been replicated, see Zeitz, Survey of Negro Attitudes Toward Law, 19 RUTGERS L. REV. 288 (1965).

52. Examples: (1) Complainant believes he has been rejected; respondent says it is waiting for a vacancy to offer complainant. (2) Complainant is rejected but does not know why; respondent tells Division the reason; Division tells complainant, who is able to satisfy respondent on the point and gets the job.

53. Examples: (1) A truck driver applicant is denied employment because his drivers license has been revoked. (2) A Puerto Rican female is refused a counter job in a dry cleaners because she fails a simple math test. (3) A black male is not promoted because he has a poor work record and poor attendance, and because other workers, including blacks, are in line for the promotion.
The students noted that employers usually prevailed where the employment statistics showed inclusion of persons of the complainant's class. When credibility is at stake, the investigators tend to credit employer explanations with respect to poor performance or lack of qualifications. Finally, the investigators seemed to apply adverse effect, disparate treatment, and evil motive approaches to discrimination, though the denial of equal treatment was the dominant theme in the cases in which probable cause was found.

The quality of the agency process was evaluated by examining the relief obtained in those cases that were reported as satisfactorily adjusted by the Division. The sample consisted of employment case files taken at random, spanning a three year period of recently closed files. Our sample contained a higher proportion of "relief" cases than did the actual performance of the Division for the 1975 fiscal year.

The seminar approached this problem with skepticism, due to a previous study of 17 employment cases settled during 1962-1963. That study concluded thus:

[The settlements appear weak . . . stipulations of settlement or consent orders required the respondent to offer complainant the next available job or housing facility on the terms prevailing at the time of the discrimination. If there were no available openings, the complainant did not receive any immediate relief. Back pay or compensatory damage awards were not provided. Thus, the complainants, whose patience in the housing and employment cases may have worn thin by passage of time, often did not even secure personal vindication for their]

54. These three theories of discrimination are discussed in the text accompanying notes 24 and 25.
55. The judicial approach was similar. See notes 75 and 76.
56. Seminar members attempted to examine EEOC files, but were denied access.
57.

<table>
<thead>
<tr>
<th>Sample:</th>
<th>Relief</th>
<th>No Relief</th>
<th>%</th>
<th>Relief</th>
<th>No Relief</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discharge</td>
<td>15</td>
<td>35</td>
<td>22</td>
<td>7</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>Refusal to Hire</td>
<td>42</td>
<td>66</td>
<td>38</td>
<td>33</td>
<td>33</td>
<td>33</td>
</tr>
<tr>
<td>Failure to Promote</td>
<td>7</td>
<td>14</td>
<td>14</td>
<td>29</td>
<td>29</td>
<td>29</td>
</tr>
</tbody>
</table>

58. See Blumrosen, Anti-Discrimination Laws in Action in New Jersey: A Law-Sociology Study, 19 Rutgers L. Rev. 189 (1965). The content of 17 employment cases which the Division had reported as satisfactorily adjusted was examined, with the results showing:

| Complainant offered employment or re-employment | 14 cases, In nine of these, employment was accepted; in three a settlement stipulation was signed. |
| Stipulation of settlement only                  | 1 case                                                   |
| No relief stated                                | 2 cases                                                  |
In contrast to the results found in this earlier study, in 1975 the Division had obtained for complainants jobs, money, or both. Thus, we can conclude from this rough comparison that by 1975 the Division was securing relief for individuals of a tangible quality unknown a decade earlier. Unfortunately, we cannot assess the performance of the EEOC on a comparable scale, since we were denied access to EEOC files.

The delay in processing cases under the EEOC system in effect before 1977 probably contributed to its poor record. This conclusion is supported by the experience of the New York City Human Rights Commission (NYCCHR), which was the basis of the EEOC procedural reforms in 1977. In 1975, the NYCCHR scrapped the traditional formal investigative process, in which government officials interview each side separately, in favor of a fact-finding conference which is scheduled to take place within weeks of the filing of a complaint. Each party presents evidence in the presence of the other. The conferences average two and a half hours, and produce as much information as the time-consuming traditional investigative methods. One of the objectives of the conference is to seek a settlement without further formal processing. If this cannot be done, the official conducting the conference attempts to make a finding of cause or no cause on the basis of the evidence presented. If that is not possible, the matter is referred to a more traditional investigation. The NYCCHR process has substantially reduced the number of cases which are fully investigated. The time required for processing complaints has been greatly reduced, staff output and the settlement rate have increased, and administrative clos-


60. The New Jersey record for 54 resolved cases in 1975 shows:

<table>
<thead>
<tr>
<th>Amount</th>
<th>Money Award</th>
<th>Money and Job</th>
<th>Job Only</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than $500</td>
<td>13</td>
<td>2</td>
<td>34</td>
</tr>
<tr>
<td>$500-$999</td>
<td>3</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>$1000-$1999</td>
<td>3</td>
<td>1</td>
<td>—</td>
</tr>
<tr>
<td>$2000-$2999</td>
<td>1</td>
<td>1</td>
<td>—</td>
</tr>
<tr>
<td>$3000-$3999</td>
<td>1</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>$4000-$4999</td>
<td>—</td>
<td>1</td>
<td>—</td>
</tr>
<tr>
<td>More than $10,000</td>
<td>1</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Amount not given</td>
<td>—</td>
<td>3</td>
<td>—</td>
</tr>
<tr>
<td>Totals</td>
<td>22</td>
<td>8</td>
<td>34</td>
</tr>
</tbody>
</table>

Musicant, supra note 28.

61. The EEOC could not tell us whether, in cases which were satisfactorily adjusted, the complainant had received employment, cash, or both. We received access to the Division files through the courtesy of Director Vernon Potter.
ings have decreased.\textsuperscript{62} Thus the New York experience supported the use of informal early settlement techniques which were adopted by the EEOC.

But informal settlement techniques were not new to the anti-discrimination field. Such efforts had characterized the work of state fair employment practice agencies in the 1950's and early 1960's. The informal settlement approach was sharply criticized at that time because of the inadequate "cosmetic" settlements which resulted.\textsuperscript{63} On the basis of this experience, the EEOC, at its inception in 1965, adopted for-

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|}
\hline
 & \textbf{3 Months from} & \textbf{6 Months from} & \\
 & \textbf{Date of Filing} & \textbf{Date of Filing} & \\
\hline
\textbf{Complaints Filed in June 1974} & 17\% & 83\% & 43\% & 57\%* \\
\textbf{Complaints Filed in June 1975} & 45\% & 55\% & 73\% & 27\% \\
\textbf{Complaints File in Sept 1975} & 60\% & 40\% & - & - \\
\hline
\end{tabular}
\caption{Aging of Complaints}
\end{table}

\* 10\% of the cases are still open 19 months after they were filed. It took 18 months to complete the other 90\%.

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|}
\hline
 & \textbf{No Probable} & \\
 & \textbf{Settlement} & \textbf{Cause} & \textbf{Withdrawals} & \textbf{Administration} \\
\hline
\textbf{Pre-reorganization} & 20\% & 37\% & 12\% & 32\% \\
\textbf{Post-reorganization} & 42\% & 38\% & 13\% & 6\% \\
\hline
\end{tabular}
\caption{Reasons for Closing}
\end{table}

\textsuperscript{62} (Eleanor Holmes Norton, then Director of the NYCCHR and currently Chair of the EEOC, provided the above information on the NYCCHR experience and added the following commentary:) Chart I shows that the time required for processing complaints has been drastically reduced. While previously 17\% of the complaints were completed within 3 months of filing—and some were still open 18 months later—now 60\% of the cases are being completed within 3 months of filing. This means a 250\% increase in agency efficiency in closing cases.

In addition, staff productivity has increased; while the number of staff carrying out the new investigative method is 38\% less than the staff which investigated cases in the traditional way, their monthly output of cases has increased by 53\%.

Reasons for closing cases indicate that the new system, in addition to being more efficient, is a more productive and effective one for complainants. Traditionally, cases have taken an inordinate amount of time to investigate, go to hearing, and reach the stage where a decision and order is issued. The new procedures save valuable investigative and legal time because of (1) the greater efficiency of the face-to-face complainant and respondent factfinding conference technique as against more formal investigative techniques, such as interrogatories and field visits; and (2) the introduction of settlement as a possibility, at the time of the factfinding conference, and consistently and diligently at every other step along the way. The settlement rate has shown dramatic improvement—from 20\% to 42\% of all resolutions.

Chart II illustrates a critically important change flowing from the new method of case processing. It has afforded a remedy to many complainants who formerly received no relief after filing. Under the old system the agency had to close many cases, often after extensive staff investigative time, for administrative reasons unrelated to the merits of complaints.

One-third of complaints handled previously had to be closed because, for example, the complainant had moved and could not be reached. Now, because the fact-finding conference takes place within 2 or 3 weeks after the complaint is filed, such administrative problems are eliminated. As a result, only 6\% of the complaints are being closed administratively as compared with 32\% before.

\textsuperscript{63} See Blumrosen, \textit{supra} note 58; M. Sovern, \textit{supra} note 59, at 46-53; Hill, \textit{supra} note 15.
mal procedures in order to lay a foundation for meaningful settlements. Conciliation efforts were to be undertaken only after full investigation and formal written findings of reasonable cause. In informal settlement efforts at the investigative stage were discouraged. While the formalism of the early period did contribute to substantial settlement agreements, it also led to extensive delay which undermined effective settlement efforts. Thus, the formal procedures became self-limiting and ultimately self-defeating. In the early 1970's the Commission began to relax its formality and permit settlement during investigation. Finally, in 1977 the Commission abandoned its original position and adopted procedures which pressed for settlement at the earliest possible stage.

Two factors probably account for the current success of informal procedures in contrast to the pre-1965 experience: the state of the law of discrimination, and the risk of potential litigation. In 1965, the legal definition of "discrimination" was uncertain, and the consequences of a finding of liability were unclear. Under those circumstances, employers could only be persuaded to enter into cosmetic settlements which, for example, promised consideration for the next available job as the full relief in a refusal to hire case. There was virtually no risk of litigation over such claims in the pre-1965 period. The major state agencies had held only 62 public hearings between 1946 and 1962.

By the late 1970's, the law of discrimination had clarified the employer's obligation. The risk of a major class action arising from an individual complaint was significant. The costs associated with defending such a proceeding were considerable, in addition to the back pay and attorney fee liability if plaintiff prevailed.

The clarification of the law, with its concomitant increase in the risk of liability, provided an incentive to settlement which had not existed in 1965. In 1977, the employer could assess the risk of liability without a formal decision from the EEOC, and expect a settlement which was meaningful to the complainant, yet limited costs, restricted specific relief to the complainant, and avoided the risk of a class action. Thus the formal administrative findings by the EEOC were no longer necessary in order to obtain meaningful settlements.

64. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 83-89 (1971).
65. Id., ch. 8.
66. The procedures (see note 35 and discussion in text) were modelled after the New York City practice (see note 62 and discussion in text).
67. "Whether an employer has discriminated is a subtle factual question made especially difficult by uncertainties in the very meaning of discrimination, a term the statutes do not define. . . . The statutes are quite general and litigation has been so infrequent that the courts have had little occasion to supply guidance." M. SOVERN, supra note 59, at 42-43.
The new EEOC procedures lend themselves to the administration of the general standard of just cause in the same way as do the grievance and arbitration procedures which have emerged in collective bargaining. The formality of the older procedures emphasized questions of legal rights; the informality of the new procedures will probably lead the parties to focus on underlying questions of fairness. A careful study of the workings of the new EEOC process may illuminate this connection between substance and procedure.

B. Judicial Processing

The seminar examined all federal district court and courts of appeals opinions dealing with the merits of individual discrimination claims involving hire, promotion, and discharge that were reported for 1973 through 1975. Plaintiffs prevailed in a little more than 33% of these cases. This was approximately the plaintiff success rate in fiscal year 1975 before the New Jersey Division of Civil Rights, and is much higher than their rate of success in securing informal settlements before the EEOC.

The review of lower court interpretations of *McDonnell Douglas* revealed several principles which sometimes depart from a literal reading of the opinion. The three-stage trial in which plaintiff puts on a prima facie case, defendant justifies, and plaintiff rebuts on grounds of pretext, should not be taken literally. Plaintiff must initially put in all evidence or risk adverse judgment at the close of his or her case; additionally, there may be no right to a rebuttal.

Statistics concerning the participation of minorities and women were most influential in the decisions. Where statistics showed inclusion of minorities or women in the labor force, employers usually pre-

<table>
<thead>
<tr>
<th>Dispute</th>
<th>Total</th>
<th>Plaintiff Wins</th>
<th>Defendant Wins</th>
</tr>
</thead>
<tbody>
<tr>
<td>Refusal to hire</td>
<td>33</td>
<td>12</td>
<td>21</td>
</tr>
<tr>
<td>Failure to promote</td>
<td>42</td>
<td>16</td>
<td>26</td>
</tr>
<tr>
<td>Discharge</td>
<td>58</td>
<td>17</td>
<td>41</td>
</tr>
</tbody>
</table>

69. Our analysis revealed the following:

70. See Rich v. Martin Marietta Corp., 522 F.2d 333, 346-48 (10th Cir. 1975). This case and the cases cited in notes 71-79 were decided before the Supreme Court began the explication of *McDonnell Douglas* which culminated in *Furnco*.

Where the statistics showed exclusion of minorities or women, employers usually lost. Where adverse effect was shown by statistics, the prima facie case standard was met, and the employer was required to justify its actions.

Many courts believed that most Title VII cases turned on evidence of denial of equal treatment. Evidence comparing the complainant's treatment with that of other employees is viewed as the heart of such cases. When such comparative evidence is introduced, the courts have stated that the burden of proof remains on the plaintiff, but they scrutinize this comparative evidence closely. If, for example, the qualifications of the complainant are questioned, the courts will determine whether the qualifications of others were better than those of complainant, and whether the qualifications themselves are job related. The courts have also applied evil motive and absence of just cause theories in identifying discrimination.

The lower court decisions in individual cases reflect the fact that the McDonnell Douglas opinion left several issues unsettled. Much of this uncertainty remains even after the 1978 decision in Furnco Con-

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Indeed, the District Court found that persons of Mexican ancestry make up more than 96% of those doing the work for which Mrs. Espinoza applied. While statistics such as these do not automatically shield an employer from a charge of unlawful discrimination, the plain fact of the matter is that Farah does not discriminate against persons of Mexican national origin with respect to employment in the job Mrs. Espinoza sought.

414 U.S. at 93. See also, Jimerson v. Kisco, Co., 542 F.2d 1008, 1009 (8th Cir. 1976); Taylor v. Safeway Stores, Inc., 524 F.2d 263, 272 (10th Cir. 1975); Simmons v. Schlesinger, 398 F. Supp. 1327, 1331 (E.D. Va. 1975); Garrett v. Mobile Oil Corp., 395 F. Supp. 117, 123 (W.D. Mo. 1975), aff'd, 531 F.2d 892 (8th Cir. 1976). In Furnco, the court noted that statistics showing inclusion of minorities are admissable on the issue of employer intent. 98 S. Ct. at 2951.


76. 518 F.2d at 339.


79. See East v. Romine, Inc., 518 F.2d 332, 339-42 (5th Cir. 1975). The requirement that the employer prove a legitimate business purpose was confirmed in Furnco. 98 S. Ct. at 2950.

80. See notes 37 through 41 and discussion in text.
struction Co. v. Waters, which was intended to clarify McDonnell Douglas. These issues include whether motive is a necessary ultimate fact in an individual Title VII case, the meaning of pretextuality, the nature and effect of a prima facie case, and the necessity for a three-stage trial. To analyze these issues, we turn to the decision in McDonnell Douglas Corp. v. Green.

III

McDonnell Douglas v. Green Examined

Griggs was rightly concerned that childhood deficiencies in education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives.

Powell, J.

McDonnell Douglas Corp. v. Green
411 U.S. 792, 806 (1973)

Green, a black, was employed as a mechanic by McDonnell Douglas from 1958 until he was laid off in 1964. He was president of a local civil rights organization. On July 2, 1965, the effective date of Title VII, he participated in a “stall-in” around the company plant in St. Louis, which blocked access to the plant for a short time. His organization conducted a “chain-in” at the company office in downtown St. Louis and may have picketed the home of the company president, protesting alleged discriminatory employment practices. Green and other participants in the “stall-in” were arrested and fined for traffic violations.

Shortly thereafter, McDonnell Douglas advertised for mechanics. Green applied. The company refused to re-employ him. Green complained to the EEOC and other governmental agencies. He alleged both racial discrimination and retaliation for his civil rights activities. The EEOC found reasonable cause to believe the retaliation claim, but made no finding on the general discrimination claim. Conciliation failed, and Green sued on both grounds under Title VII. The district court dismissed the general discrimination claim because the EEOC had made no finding. The court decided the retaliation issue against Green, holding that McDonnell Douglas had lawfully refused him employment because of his illegal disruptive activities.\textsuperscript{81} Green appealed. The court of appeals reversed, holding that the general discrimination claim should have been heard on the merits,\textsuperscript{82} and gave instructions to

\textsuperscript{82} Green v. McDonnell Douglas Corp., 463 F.2d 337 (8th Cir. 1972). The holding that an EEOC reasonable cause finding is not a condition precedent to a Title VII suit was affirmed by the Supreme Court, 411 U.S. at 802. It is in accord with the proposition that Title VII rights are
the district court in anticipation of retrial.

The instructions stated that an inference of discrimination arose upon proof of rejection of a qualified black, and that the employer’s justification, based on “illegal and disruptive acts” was not entitled to significant weight because it was “subjective” and not clearly “job-related.” Judge Johnson dissented, arguing that the majority opinion virtually required an employer to hire one who had committed serious unlawful acts against it.83

The employer sought certiorari.84 The Supreme Court construed the petition as raising two issues: (1) How should the district courts process individual Title VII litigation? (2) May an employer refuse to hire or retain workers who protest alleged discrimination by unlawful acts which seriously disrupt production?85

The opinion discussed the order and nature of proof in an individual Title VII case.86 The order of proof is: (1) complainant establishes a prima facie case; (2) employer then must “articulate a legitimate non-discriminatory reason” for the action complained of; (3) complainant may then show that the reason given is a pretext for discrimination.87

In considering the nature of proof in individual cases, the Court discussed the elements of a prima facie case, whether the reason offered by the employer was legitimate, and how the complainant might establish pretextuality.

A. Motive Not Part of the Prima Facie Case

The elements of a prima facie case were stated to be: (1) respondent belonged to a racial minority; (2) respondent was qualified; (3) respondent was rejected; and (4) that after respondent’s rejection the position remained open and the employer continued to


83. Green v. McDonnell Douglas Corp., 463 F.2d 337, 350 (8th Cir. 1972): “[W]hat the court has held can therefore, in my opinion, only mean that McDonnell is being required to rehire Green.”

84. McDonnell Douglas raised the following issues:
1. Under Title VII of the 1964 Civil Rights Acts, is an employer’s right to refuse to hire a job applicant who has committed illegal and unprotected acts against the employer nullified or circumscribed merely because the applicant is Black?
2. In Civil Rights cases involving allegedly discriminatory acts, should the defendant be precluded from offering subjective evidence to explain his motivation for those acts?


85. 411 U.S. at 798-99.

86. Powell, J., for the Court, stated that certiorari was granted “to clarify the standards governing the disposition of an action challenging employment discrimination.” 411 U.S. at 798. He also noted that “[t]he critical issue before [the Court] concerns the order and allocation of proof in a private, non-class action challenging employment discrimination. 411 U.S. at 800.

87. 411 U.S. at 802.
seek applicants with complainant's qualifications. The Court noted that the listing was subject to variation depending on the facts of each case, and in subsequent opinions has emphasized the illustrative character of the elements. However, the listing is most important because of one item which is omitted. The employer had argued that proof of improper motive was critical to the plaintiff's prima facie case under Title VII; the above list of elements rejects that argument.

To understand the problem of motive, we must examine the 
McDonnell Douglas case in the court of appeals. That court had concluded (1) that the facts gave rise to an inference of discrimination, and (2) that the employer was obligated to justify its action on grounds that related to the requirements of the job. This latter requirement, that the employer justify for job-related reasons, was withdrawn by the court in its final opinion. Here is the relevant statement of the court of appeals, with the material later withdrawn in italics:

When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job which continued to remain open, we think he presents a prima facie case of discrimination and that the burden passes to the employer to demonstrate a substantial relationship between the reasons offered for denying employment and the requirements of the job. (emphasis supplied).

This italicized language and its deletion gave rise to differing arguments in the Supreme Court. Green and the government argued that a prima facie case shifted only the burden of going forward, while McDonnell Douglas argued that the court of appeals had improperly shifted the burden of persuasion, by not requiring Green to establish evil motive.

Underlying McDonnell Douglas' argument was the assumption that the legal definition of discrimination included the element of evil motive, and that the burden was on the plaintiff to make some showing of intent in order to establish a prima facie case. The original court of

88. 411 U.S. at 802.
89. See note 45.
90. Petitioner's brief, at 24. "As indicated in our main brief, the search in an employment discrimination case if for the employer's real motive . . . an attempt to determine the employer's principal, dominant, or controlling reason." Petitioner's Reply Brief, at 14.
91. 463 F.2d at 344.
92. Brief for the United States, at 11; Petitioner's Brief, at 19-25; Petitioner's reply brief, at 5-6; Respondent's Brief, at 20-21.
93. The argument reproduced at note 90 was then coupled with the suggestion that race was put forward by the court of appeals as a substitute for "motive."

Color alone, the court held, can create a presumption of discrimination, and the employer must then come forward to prove the absence of a discriminatory animus. A white applicant plaintiff in identical circumstances would not survive a motion for a directed verdict on such a meager showing, but a black plaintiff is said to be entitled to a presumption simply because of his color.

Petitioner's Brief, at 22.
"JUST CAUSE" PROTECTION

Just cause protection had clearly rejected this interpretation. Once a prima facie case had been established, the employer's rebuttal had to be on the grounds of a legitimate business justification, not on the absence of evil motive. While cast in procedural terms, the withdrawn language did in fact eliminate the element of evil motive from the entire case.\(^9\)

This consequence did not go unnoticed. Judge Johnson argued in dissent that a motive requirement was necessary to preserve the right of the employer to refuse to hire a black who disrupted the operation.\(^9\)

By withdrawing the phrase from its opinion, the court of appeals avoided the underlying issue of whether motive was an ultimate fact to be established in an individual case of employment discrimination. The Supreme Court clarified the matter somewhat when it omitted motive from the elements of a prima facie case. But at that point, clarification stopped, and confusion set in. After the prima facie case was established, the employer was required to “articulate a legitimate non-discriminatory reason” for its action.\(^9\)

Once the reason was presented,

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\(^9\) This analysis is confirmed by other language in the majority opinion. Part V of the original opinion began:

The record shows that McDonnell has taken the position that it has the right under Title VII to make subjective hiring judgments which do not necessarily rest upon the ability of the applicant to perform the work required. . . . We need to evaluate this position in light of our cases dealing with job discrimination based on race.

Our prior decisions make clear that in cases presenting questions of discriminatory hiring practices, employment decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination. (emphasis added)

463 F.2d at 343. The italicized phrase was removed in the modified opinion. 463 F.2d at 352.

95. Johnsen, J., maintained his dissent because the majority, in his view, indicated that Green's unlawful acts would not justify his discharge even though no racial motivation was involved, and even though a similarly situated white person would be discharged. Accepting the distinction between racial motivation and disparate treatment, he argued that the majority had gone beyond equal treatment. He concluded that the majority had provided minority workers engaged in disruptive actions with an immunity from discharge. 463 F.2d at 355.

96. The court of appeals in McDonnell Douglas had suggested that the employer's stated reason for refusing to hire Green—his participation in disruptive and unlawful activities—was subjective, not job-related, and entitled to little weight at retrial. 463 F.2d at 343. The Supreme Court clearly affirmed the right of employers to take economic sanctions against persons who engage in such illegal activities. Two years after McDonnell Douglas, the court expanded this principle by holding that self-help in protesting employment discrimination is not protected under the National Labor Relations Act.

The potential for conflict between minority and other employees in this situation [boycott to enforce demand for separate bargaining by minority group over issues of employment discrimination] is manifest. With each group able to enforce its conflicting demands—the incumbent employees by resort to contractual processes and the minority employees by economic coercion—the probability of strike and deadlock, is high; the likelihood of making headway against discriminatory practices would be minimal.


In the turbulent atmosphere of the late 1960's and early 1970's McDonnell Douglas was intended to restrict worker self-help in connection with discrimination claims. The Court considered the situation analogous to the sitdown strikes of the 1930's, citing NLRB v. Fansteel Metallurgical Co., 306 U.S. 240 (1939). See I. Bernstein, Turbulent Years 678-80 (1971). At the same time, the Court did not want to provide the employer with an excuse which could be used for a discriminatory purpose. The discussion of pretextuality can best be understood as a
the claimant could challenge it on grounds that the reason given was a pretext for discrimination; but use of the term "pretext" does not dispose of the question of motive.

B. Pretextuality and "Motive" Distinguished

The term "pretext" has two possible meanings in the context in which it was used in the opinion. The term could have been used in its dictionary sense of "a purpose or motive alleged, or an appearance assumed in order to cloak the real intention or state of affairs." This suggests deliberate concealment, covering up the illicit. What is covered up, of course, is purposeful discrimination. But "pretext" might have been used to characterize the claimant's right to rebut the employer's "legitimate non-discriminatory reason." A claimant might show not only that the reason given was not the real reason, and thus a pretext in the sense first mentioned, but that even if it was the real reason, it was not a legitimate reason under Title VII.

In showing that a reason is not legitimate, the claimant might invoke the Griggs principle that practices which adversely affect minorities or women are discriminatory if not justified by business necessity. The complainant might apply the Phillips v. Martin-Marietta Corp. principle that the employer is required to give equal treatment to members of different groups unless a justification for dissimilar treatment exists. Neither of these two principles requires a showing of evil motive. The Court was most explicit on the point in Griggs, where it said:

"Good intent or absence of discriminatory intent does not redeem employment practices or testing mechanisms that operate as "built in headwinds" for minority groups and are unrelated to measuring job

judicial warning to employers that they should not abuse the disciplinary power which the opinion recognized.

There is language in McDonnell Douglas that might be construed as authorizing employer action based on business convenience. 411 U.S. at 806 n.21. However, subsequent developments have made clear that this was neither the intent nor the consequence of the McDonnell Douglas decision. Business necessity, not business convenience, has continued to be the test employed in subsequent decisions. See Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

Washington v. Davis, 426 U.S. 229 (1976), is not inconsistent with this view. That case holds either that the test in question was validated for the entry level job of police trainee, or that it is appropriate to consider the effect of the totality of the employer's recruitment and hiring programs in determining if an "adverse effect" exists under the Griggs principle. See Blumrosen, Developments in Equal Employment Opportunity Law—1976, 36 FED. B.J. 55, 61-64 (1977).

97. While Title VII does not, without more, compel rehiring of [Green], neither does it permit the employer to use [Green's] conduct as a pretext for the sort of discrimination prohibited by Sec. 703(a)(1). On remand, [Green] must, as the court of appeals recognized, be afforded a fair opportunity to show that the employer's stated reason for Green's rejection was in fact pretext.

411 U.S. at 804.

98. WEBSTER'S NEW INTERNATIONAL DICTIONARY (3rd ed. 1968).


 capability . . . . The Company’s lack of discriminatory intent is suggested by special efforts to help the undereducated employees . . . but Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.101

Similarly, Phillips involved a company policy denying employment to women with pre-school aged children. 70-75% of the applicants and 75-80% of those hired in the job which Ms. Phillips sought were women; the Court recognized that no question of bias against women as such was presented. Nevertheless, the statute was construed by the Court to cover these situations: “persons of like qualifications [must] be given employment opportunities irrespective of their sex. The court of appeals therefore erred in reading this section 703 (2) as permitting one hiring policy for women and another for men—each having pre-school age children.”102 Thus the Court refused to entertain a motive defense under § 703, where unequal treatment was shown.

After the McDonnell Douglas decision pretextuality was next applied by the Court in Albermarle Paper Co. v. Moody103 as a means of rebuttal, not in the sense of intent. There, the Court stated that if an employer had not adopted testing procedures with the least adverse impact compatible with its business needs, this would be evidence of pretextuality. In such a case, of course, the employer would simply have failed to establish the business necessity defense of Griggs which has no motive requirement.

Thus the consideration of pretext in McDonnell Douglas appears to encompass any rebuttal to the employer’s “legitimate non-discriminatory reason.” An examination of the evidence which the decision stated would bear on pretextuality supports the conclusion that the Court used the term in reference to rebuttal rather than in the sense of “intent.”

In text and footnote, the McDonnell Douglas opinion describes evidence which might be introduced on the issue of pretextuality.

Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the “stall-in” were nevertheless retained or hired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner’s treatment of respondent during his prior term of employment; petitioner’s reaction if any, to respondent’s

101. 401 U.S. at 432.
102. 400 U.S. at 544. The Court noted that the employer might raise a “bona fide occupational qualification” defense.
103. 422 U.S. 405 (1975).
legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks.\(^{104}\) (emphasis added)

[Note 19] The District Court may, for example, determine, after reasonable discovery that "the (racial) composition of defendant's labor force is itself reflective of restrictive or exclusionary practices." \ldots We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusal to rehire."\(^{105}\)

The facts suggested in the first paragraph quoted above—white employees committed equally serious offenses but were not punished as severely—would show a denial of equal treatment. The evidence suggested in the second paragraph above goes to either evil motive—if proof of attempt to suppress civil rights activities is adduced—or to adverse effect. When the Court stated that statistics showing a "general pattern of restrictions or exclusion of minorities" may establish "discrimination against blacks," it was defining facts relevant under the adverse effect test.\(^{106}\) Thus the evidence which would demonstrate pretextuality is evidence of discrimination in any of its three forms.

From this, it is clear that the Court was not using the concept of pretextuality in the limited sense of evil motive but within the broader sense of rebuttal.\(^{107}\) The requirement of equal treatment (italicized in the above quotation) makes the point most vividly. Motive appears irrelevant. In McDonald the union sought to justify different treatment of similarly situated employees as a good faith part of the collective bargaining process. The Court rejected the defense:

Local 988 argues that as a matter of law it should not be subject to liability under Title VII in a situation, such as this, where some but not all culpable employees are ultimately discharged on account of joint misconduct, because in representing all the affected employees in their relations with the employer, the Union may necessarily have to compromise by securing retention of only some. We reject the argument. The same reasons which prohibit an employer from discrimination on the basis of race among the culpable employees apply equally to the

\(^{104}\) 411 U.S. at 804-05.

\(^{105}\) 411 U.S. at 805 n.19.

\(^{106}\) See Dothard v. Rawlinson, 433 U.S. 321 (1977); Blumrosen, supra n.24. Brennan, J., dissenting in General Electric Corp. v. Gilbert, 429 U.S. 125, 153 n.6 (1976), commented that "McDonnell went far in allowing proof of 'effect' even in the setting of an individualized rather than group claim of discrimination."

\(^{107}\) But see, B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1153-54 (1976), which concludes from the use of term "racially premised" in McDonnell Douglas that motive and intent are the ultimate issue in a single-employee case based on disparate treatment.
"JUST CAUSE" PROTECTION

Union; and whatever factors the mechanisms of compromise may legitimately take into account in mitigation discipline of some employees, under Title VII race may not be among them.\textsuperscript{108}

The McDonald opinion is the clearest illustration that the concept of pretext in McDonnell Douglas prescribes effective discrimination whether motive is involved or not.

In Furnco Construction Co., the Supreme Court again considered, inter alia, whether a court may find an employer guilty of racial discrimination in employment due to alleged disparate treatment in hiring without a finding of discriminatory intent or motive. In Furnco, the foreman hired from a list of qualified white workers and under an affirmative action plan designed to produce a significant percentage of black employees. No employees, black or white, were hired at the gate. Plaintiffs were three qualified black employees who had applied at the gate and been rejected. The lower courts found no adverse effect from the hiring process, since an effective affirmative action plan was in effect. There was no unequal treatment, because no one, black, or white, was hired at the gate. The Supreme Court held, however, that since plaintiffs had made a prima facie case, the employer was required to prove a legitimate non-discriminatory reason for their rejection, and that the employer could introduce statistics concerning the operation of its affirmative action plan to support its good intent.

The case continues the confusing insistance on viewing disparate treatment and evil motive concepts of discrimination as if they were the same, yet analysis makes clear that they are different. The hiring statistics established absence of adverse impact; there was apparently no denial of equal treatment. There remained only evil motive. The employer had introduced its "legitimate non-discriminatory business reason"—the need to be assured that persons when hired were experienced and competent—and the statistics made clear that the reason given was not an excuse to avoid hiring blacks. Thus the statistics were helpful to the employer under both the adverse effect theory (as negating the effect of the foreman's hiring practices) and under the evil motive theory (as negating the inference that the employer did not want black workers). But the statistics would not have helped the employer if the plaintiff had proven a denial of equal treatment. If the employer had hired qualified whites at the plant gate but had refused to hire qualified blacks who applied there, its own hiring practices would have refuted its claim of business necessity. The statistics concerning the hiring of other minority members would not have defeated the claim of those who were turned away at the gate. As the Court said in Furnco, "[T]he obligation imposed by Title VII is to provide an

\textsuperscript{108} 427 U.S. at 284-85.
equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionally represented in the work force."\textsuperscript{109}

Therefore, it is confusing and inappropriate to consider the unequal treatment and evil motive cases as if they were the same. The confusion of theories may, however, result in subsuming the issue of employer motive within the question of whether there was a legitimate non-discriminatory business reason for the action. If this happens, as was suggested in \textit{Furnco}, then there is simply no room under Title VII for the employer's common law right to be arbitrary.

\section*{C. Good Motive Not a Title VII Defense}

Further support for this analysis comes from an examination of the cognate question of whether an employer showing of good faith can provide either a defense to a Title VII action or a justification for reduced back pay liability. A good faith defense, of course, depends on motive being an element in the plaintiff's case. As \textit{Griggs} shows, good faith is not a defense to a Title VII proceeding based on adverse effect.\textsuperscript{110} Nor, said the Court in \textit{Albemarle Paper Co. v. Moody}, would it reduce back pay liability.

If back pay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the "make whole" purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in "bad faith." Title VII is not concerned with the employer's "good intent or absence of discriminatory intent" for "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."\textsuperscript{111} (citations omitted)

\section*{D. Motive Not Required in Class Actions}

In the related area of class actions under Title VII, the confusion engendered by uncertainties concerning motive and pretextuality do not exist. The order and nature of proof have been clearly worked out; proof of evil motive is not required. The district court first determines if the plaintiff has established business necessity or some other affirmative defense. The burden of persuasion on the defense issues is on the employer.\textsuperscript{112}

Once the pattern of discrimination has been established, the courts presume that all members of the class were harmed by it. In second

\textsuperscript{109} 98 S. Ct. at 2950.
\textsuperscript{110} See note 101 and accompanying text.
\textsuperscript{111} 422 U.S. at 422.
stage back-pay proceedings, the employer must show that the individual worker suffered no harm, or that any harm suffered is attributable to factors other than the employer's action.\textsuperscript{113} This applies to claims that the employee was not qualified and to arguments that there were no vacancies—the very issues which \textit{McDonnell Douglas} stated were part of the individual worker's prima facie case.\textsuperscript{114} The contrast between the clarity of the proof requirements in the class actions and the uncertainty in the individual cases is due to continuing ambiguity about motive in the individual cases.\textsuperscript{115}

\textbf{E. Motive and Legal Policy in Equal Treatment Cases}

Since most individual claims are based on a theory that claimant was treated less favorably that similarly situated members of another group,\textsuperscript{116} we should examine the policy considerations with respect to the motive issue in that type of case. It is difficult to identify considerations which would lead to recognition of a motive defense in such a case. By definition, a guilty employer has acted in an internally inconsistent manner. The employer's own conduct has demonstrated that it can operate normally without the more stringent standard which it applied to the minority or female claimant.\textsuperscript{117} Furthermore, all of the activity on which the claimant's case is based lies within the control of the employer. In the \textit{Griggs} type case, the employer has failed to take external social and economic forces into account in making its employment decisions. \textit{Griggs} requires that it do so.\textsuperscript{118} But in the disparate treatment case, all decisions are made by employees, arising as a result of either improperly motivated personnel actions or unconscious responses to prejudices. The psychological factors operating in the decisional process of those who administer industrial relations systems are not external forces for which the employer can avoid responsibility. \textit{Respondeat superior} forecloses—for good and sufficient reasons—any attempt to absolve the employer from responsibility for those who do its bidding, particularly where the personnel actions lie at the heart of the job which supervisors are hired to perform. The implementation of

\begin{itemize}
\item \textsuperscript{113} Teamsters v. United States, 431 U.S. 324 (1977); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2nd Cir. 1971).
\item \textsuperscript{114} International Brotherhood of Teamsters v. United States, 431 U.S. 324, 360 n.46 (1977).
\item \textsuperscript{115} \textit{Contrast} notes 431 U.S. at 358 n.44 and 431 U.S. at 359 n.45; \textit{compare} Poter v. Goodwill Industries, 518 F.2d 864 (6th Cir. 1975) (plaintiff in an individual Title VII case need not prove motive, since \textit{McDonnell Douglas} formula does not refer to it) \textit{with} Shack v. Southworth, 521 F.2d 51 (6th Cir. 1975) (absent evidence of evil motive, \textit{McDonnell Douglas} does not apply).
\item \textsuperscript{116} See notes 55 (administrative agencies), 75 and 76 (judicial proceedings), and discussion in text. \textit{See also} B. SCHLEI & P. GROSSMAN, supra n.107, at 510.
\item \textsuperscript{117} There is a hint of this reasoning in \textit{Griggs}. 401 U.S. at 432.
\item \textsuperscript{118} Noted by the Court in \textit{McDonnell Douglas}, 411 U.S. at 801.
\end{itemize}
equal employment opportunity law is not the occasion to reconsider or relax this basic doctrine.

If motive is not an element in an adverse effect case, then it is difficult to see why it should be an element in a disparate treatment case. The Supreme Court decisions on the issue have not required proof of motive, as we have seen in Phillips, McDonald and the pretextuality section of McDonnell Douglas. In fact, since the business necessity defense is normally not available in a disparate treatment case because of the employer's internally inconsistent conduct, the only function of the motive requirement is to protect an interest in arbitrary non-business related decision-making. This interest is too speculative to warrant the complex burdens which the motive issue injects into the typical disparate treatment case. Thus proof of a denial of equal treatment should be viewed as discrimination, not merely as evidence on the "ultimate fact" of evil motive.\(^1\)

This same confusion, as previously noted, was maintained in the Furnco case. But there, the issues of evil motive and legitimate business reason were tied so closely together as to constitute but a single question, thus eliminating the separate element of good motive. Justice Rheinquist wrote:

>[W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when 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, whom we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.\(^2\)

The foregoing comment was made in a case where there was neither adverse impact nor a denial of equal treatment; it is therefore applicable to the situation where plaintiff is attempting to prove his case on the third or evil motive theory.

There the matter stands. I believe the foregoing analysis establishes that motive is not an element in an individual Title VII case unless the plaintiff chooses to make it an issue. Individual cases based either on adverse impact or unequal treatment theories establish discrimination if they are proved, without making necessary the additional step of inferring improper employer motive.

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\(^{119}\) There are footnotes in Teamsters v. United States which take a different view, stating that unequal treatment is only evidence on the intent issue, not discrimination \textit{vel non}. These footnotes suggest that the \textit{McDonnell Douglas} formula for a prima facie case provides a basis for drawing an inference of evil motive. 431 U.S. at 335 n.15, 358 n.44.

\(^{120}\) 97 S. Ct. at 2950.
F. Griggs Theory in Individual Cases

Some have tried to square the Griggs and McDonnell Douglas cases by assuming that the Griggs adverse effect analysis is available only in class actions, and that in individual actions the prima facie case/pretextuality analysis of McDonnell Douglas is to be used. Furthermore, because of the confusion which we have discussed concerning pretextuality, it is sometimes assumed that the McDonnell Douglas analysis excludes consideration of the adverse effect test and requires proof under an unequal treatment or evil motive theory.121 These assumptions, while understandable, are in error.

All three theories of discrimination are available to a plaintiff in any individual case. As the Supreme Court has indicated, the appropriate theory of discrimination is the one which will effectively analyze the facts of a given case.122 A plaintiff may argue that an employer's policy has an adverse effect in violation of the Griggs principle,123 challenge the application of the policy on grounds of unequal treatment, or base the charge upon evil motive, depending on the facts. The Supreme Court opinion in Furnco illustrates how all three theories can be asserted in a McDonnell Douglas type “one on one” case.124 Any rule restricting individual cases to the disparate treatment or evil motive variety would virtually force a plaintiff to bring a class action if an employer's rule were to be challenged on the grounds that it adversely affected minorities or women and was not justified by business necessity.

The hesitancy to abandon the motive requirement has two roots. First, the traditional definition of discrimination did involve the concept of moral reprehensibility. But Griggs established that this is not a limitation on Title VII—a view confirmed by Congress in 1972. Secondly, and perhaps more deeply imbedded in lawyers' thoughts, is the fact that the motive requirement preserves the employer's freedom of action first expressed in the “at will” rule of the common law. Without

121. See note 107. Compare 431 U.S. at 358 n.44, with 359 n.45.
122. 431 U.S. at 335 n.15.
124. Plaintiff sought to make out an adverse impact case based on alleged policy of hiring from list of friends of superintendent who were largely white. He failed on the facts, as the court took the employer's affirmative action program into account in deciding that the overall hiring policy—superintendent's acquaintances plus the affirmative action hirees—did not have an adverse impact. 98 S. Ct. at 2951 n.9. Compare Justice Marshall's dissent, 98 S. Ct. at 2953. Plaintiff had no disparate treatment case arising out of the refusal to hire at the plant gate because no one was hired at the gate, black or white. 98 S. Ct. at 2947. There remained only the evil motive theory. On that issue, the court held the employer's affirmative action results were admissible on the issue of evil motive. 98 S. Ct. at 2951. Thus all three theories were available to plaintiff in this “one on one” case.
some such requirement, every personnel decision concerning a minority or woman would be subject to examination on its merits, and the hegemony of employer discretion would be at an end.

G. The Comparable Labor Law Experience

We faced a similar problem under the National Labor Relations Act (NLRA). That Act limits the power of employers to adversely affect employees who have engaged in union activities, and therefore also involves a conflict with the “at will” principle of the common law. In the early years under the Act, the courts wished to preserve the freedom of the employer, except for restrictions necessary to protect employee rights under the labor laws. Therefore, they insisted on establishment of the evil motive of the employer concerning union activities at the close of all the evidence. Even in the early days, however, the courts held that participation in union activity followed by an adverse personnel action permitted an inference of illegal discrimination unless rebutted by the employer. Thus the courts required less evidence to make a prima facie case in the anti-union context than McDonnell Douglas requires in the race context.

In the mid 1960's, the motive test in labor law was replaced with a determination whether employer interference, restraint, coercion, and discrimination effectively weakened employee rights to organize and bargain. The clearest statement on the use of the effect test under the NLRA appears in NLRB v. Fleetwood Trailer Co.:

[In NLRB v. Great Dane Trailers . . . we held that proof of antiunion motivation is unnecessary when the employer's conduct "could have adversely affected employee rights to some extent" and when the employer does not meet his burden of establishing "that it was motivated by legitimate objectives . . . ." Great Dane Trailers determined that payment of vacation benefits to nonstrikers and denial of those payments to strikers carried "a potential for adverse effect upon employee rights . . . ." because "no evidence of a proper motivation appeared in the record," we agreed with the Board that the employer had committed an unfair labor practice . . . . A refusal to reinstate striking employees, which is involved in this case, is clearly no less destructive of important employee rights than a refusal to make vacation payments.

126. See, e.g., Martel Mills Corp. v. NLRB, 114 F.2d 624 (4th Cir. 1940); NLRB v. United Brass Works, Inc., 287 F.2d 689, 693 (4th Cir. 1961).
127. "Granting that an inference may be drawn from the mere fact of participation followed by discharge that such participation was its cause, the inference disappears when a reasonable explanation is presented that participation in the strike was not the cause of their discharge." Ohio Ass'd Tel. Co. v. NLRB, 192 F.2d 664, 666 (6th Cir. 1951). Even the employer-favored Tex-O-Can rule repudiated in NLRB v. Walton Mfg. Co., 369 U.S. 404 (1962), held that the unexplained discharge of a union member would suffice to infer illegal discrimination.
And because the employer here has not shown "legitimate and substantial business justification," the conduct constitutes an unfair labor practice without reference to intent.\textsuperscript{128}

Thus, the motive test has given way to an evaluation of the legitimacy of the employer action under labor law principles.\textsuperscript{129}

The Supreme Court has frequently drawn on NLRA experience in its interpretation of Title VII.\textsuperscript{130} That practice should be followed in connection with the question of employer motive. We should build upon, rather than replicate, experience under the NLRA, particularly since the rights guaranteed by Title VII are more protective of individual worker interests than are the labor act rights.\textsuperscript{131} If the \textit{McDonnell Douglas} formula had required the plaintiff to show that he was a minority group member who had been rejected and then had shifted the burden to the employer to "articulate his legitimate non-discriminatory reason," Title VII interpretation would have paralleled that of labor law. The inclusion of the vacancy and qualification standards makes Title VII more restrictive than the labor acts.

\textbf{H. The Disregard of Administrative Process in Shaping Individual Title VII Litigation}

In 1977, the Supreme Court explained the vacancy and qualification requirements of \textit{McDonnell Douglas} in a footnote:

The \textit{McDonnell Douglas} case involved an individual complaint seeking to prove one instance of unlawful discrimination. An employer's isolated decision to reject an applicant who belongs to a racial minority

\textsuperscript{128} 389 U.S. 375, 380 (1967). The Court had stated in a previous case:

\begin{quote}
From this review of our recent decisions, several principles of controlling importance here can be distilled. First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to \textit{some} extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.
\end{quote}


\textsuperscript{130} \textit{See}, e.g., Teamsters v. United States, 431 U.S. 324, (1976).

does not show that the rejection was racially based. Although the McDonald Douglas formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.\textsuperscript{132} (emphasis added).

This explanation was elevated to the text in the \textit{Furnco} decision.\textsuperscript{133} It is hardly persuasive, since the employer's reason will be presented in the administrative processing of the discrimination claim long before litigation takes place. There is no need to use the prima facie case concept to force out the employer's explanation. Furthermore, a requirement that a plaintiff negate defenses which have not been raised is unusual. If an employer has refused to explain its actions in the administrative process, the inference should be drawn that the explanation would have been adverse, and this should establish a violation.\textsuperscript{134} The decision to use the prima facie case as a tool of discovery appears to be the result of the analogy of Title VII to a common law tort action and the consequent disregard of the administrative process.

The concept of a prima facie case emerged in \textit{McDonnell Douglas} in much the same way that the doctrine of \textit{res ipsa loquitur} emerged in the law of torts. The court of appeals, after stating the facts, summarized them in a general way and stated its conclusion thus: "When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job, we think he presents a prima facie case of racial discrimination."\textsuperscript{135} The Supreme Court opinion converted this statement into a general formula defining the conditions which justify such an inference. This transformation of an inference based on facts into formal elements of proof parallels the emergence of the doctrine of \textit{res ipsa loquitur} which began, innocently enough, as a statement that a particular set of facts gave rise to an inference of negligence. Over time, the conditions under which an inference of negligence would arise were crystallized in rules concerning proof of negligence.\textsuperscript{136} Indeed, in \textit{Furnco}, Justice Rehnquist used the language of \textit{res ipsa loquitur} formula in explaining how the \textit{McDonnell Douglas}

\textsuperscript{132} 431 U.S. at 358 n.44.
\textsuperscript{133} See text at note 120.
\textsuperscript{135} 462 F.2d at 343.
formula gave rise to an inference of discrimination.\textsuperscript{137}

\section*{I. Statutory Duty to Present Evidence}

Congress determined the circumstances under which the defendant is required to justify its conduct. It did not require a complainant to establish a prima facie case before a respondent was obligated to justify the actions complained of. Title VII provides:

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . the Commission . . . shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires . . . . If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge . . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods . . . .\textsuperscript{138}

In all such investigations, the employer will be asked to explain his actions, and can be required to do so by compulsory process. Thus, Congress has determined that a complaint filed with the agency is sufficient to require the employer to explain his actions. The Commission prescribed the form of complaint as "a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of."\textsuperscript{139} Furthermore, EEOC rules specifically provide employers with an opportunity to make a written statement.\textsuperscript{140} Under these circumstances the employer's "legitimate non-discriminatory reason" will have been articulated, evaluated, and reviewed long before the matter reaches the federal courts. At the minimum, the EEOC investigation acts as presuit discovery of the reason given by the employer.

This was true in \textit{McDonnell Douglas}. The employer had, from the outset, asserted that Green's unlawful disruptive acts were the reason why he was not hired. In sum, in Title VII litigation, the defendant's reason is known prior to suit; the prima facie case concept is not necessary to compel the presentation of that reason.

\textsuperscript{137} Compare the language quoted in text at note 132 with the Restatement of the principle of \textit{res ipsa loquitur}, \textit{Restatement (Second) of Torts} § 328(D) (1967).
\textsuperscript{139} 29 C.F.R. §§ 1601, 1601.11(b) (1977).
\textsuperscript{140} As part of each investigation, the Commission will accept any statement of position or evidence with respect to the allegations of the charge which the person claiming to be aggrieved, the person making the charge on behalf of such person, if any, or the respondent wishes to submit. 29 C.F.R. § 1601.14 (1977).
J. The Prima Facie Case, Burden of Proof, and Three Stage Trial

The fact that defendant's explanation is known prior to suit illuminates the problems listed above—particularly the question of whether the existence of a prima facie case shifts the burden of persuasion or merely the burden of going forward with the evidence. This latter definition is virtually meaningless where the defendant employer has already come forward with its explanation prior to suit. Plaintiff will, almost invariably, put on evidence which addresses the reason which the employer has given; the defendant will of necessity produce evidence of justification.

The interchangeable use of the words "prove" and "articulate" in Furnco in connection with the employer's burden tends to support the conclusion that the time of meaningful assessment is at the end of the entire case rather than after plaintiff has put in evidence. For example, in the district court trial of Furnco, the defense as to some plaintiffs was that they had not applied at all. The judge believed the defendant.

At the close of the evidence, the court must sort out the facts and apply the law. The facts concerning employment practices and the defendant's conduct toward the plaintiff are obviously best known to the defendant, who also has the greatest incentive to present that information in a favorable light. Since the defendant has this superior knowledge, it is appropriate that the court expect its explanation to be cogent and convincing. Similarly, the plaintiff will know best about the circumstances of application for employment, and about background facts concerning qualifications; the court can expect clarity on these issues also. Whether this analysis is simply another way of describing a burden of persuasion is beside the point; it is the most appropriate way for a decision-maker to gather information about an employer's practices.

In assessing these practices once they have been identified, the legal theory becomes essential. The adverse effect theory suggests the relevance of statistics, as does the evil motive theory. The disparate treatment theory focusses on internally inconsistent employer practices. At the close of all the evidence that the court will determine what happened and apply the law, frequently without resort to general propositions concerning the burden of persuasion. If evidence on certain key points is balanced, the court may wish to rely on the above analysis of

141. See Causey v. Ford Motor Co., 516 F.2d 416 (5th Cir. 1975), and Davis v. Washington, 512 F.2d 956 (D.C. Cir. 1975), rev'd on other grounds, 426 U.S. 229 (1976), which support the proposition that once adverse effect is established, the employer has a heavy burden to show a justification.


143. See Teamsters v. United States, 431 U.S. at 359 n.45.
which party is in the best position to be convincing. This analysis may leave the burden of persuasion on the employer to justify the denial of an employment opportunity. But this flows from the combination of the forementioned considerations and Congressional judgment that the employer's reason should be presented in the administrative process, not from a doctrinaire application of rules concerning burdens of proof.

In cases where a court is uncertain, *McDonnell Douglas* suggests that general practices with respect to employment of minorities or women are useful in assessing the employer's justification.\(^{144}\) Thus, where employment statistics or other evidence establish the restriction or exclusion of minorities or women, the justification should be viewed with skepticism. Conversely, as *Furnco* suggests, where the employer has provided significant opportunities for minorities and/or women, the court should respect this demonstration, at least in the adverse effect and evil motive situations.\(^{145}\) The explanation given by the employer thus becomes more or less credible depending on the objective evidence relating to equal employment opportunity.

This approach accords with what the courts and agencies do in practice,\(^{146}\) with the probabilities in specific situations, and with the national policy of enhancing minority and female employment opportunity. An employer with a high proportion of female supervisors is not as likely to have discriminated against a female who sought a supervisory position as one who has had only male supervisors. In the latter situation, it is likely to be difficult for a minority member or woman to receive fair treatment or consideration. Thus it is sensible to impose on the employer who has not afforded opportunities to minorities or women a heavier burden of justification.

This analysis is particularly important in disparate treatment cases, where the question is whether the qualifications of the plaintiff are equal or superior to those of the person allegedly preferred. The employer's effort to show that the person preferred had superior qualifications may appear either as hair splitting or meritorious, depending on its prior record in utilizing members of plaintiff's race, sex, or ethnic group.\(^{147}\)

The above analysis is not only a matter of common sense, it also provides a meaningful incentive to the employer to take affirmative action to improve employment opportunities for previously excluded groups. For it suggests that an employer who complies with the na-

\(^{144}\) 411 U.S. at 804-805.

\(^{145}\) See note 109 and discussion in text.


\(^{147}\) *Furnco Constr. Co. v. Waters*, 98 S. Ct. at 2951.
tional policy of enhancing opportunities for minorities and women will have greater freedom in making individual employment decisions than one who does not.\textsuperscript{148} I believe that this analysis underlies the decision of the Supreme Court in \textit{Washington v. Davis}, where the Supreme Court upheld the use of an employment test which in itself had adverse effects on minorities, although the overall recruitment and hiring process produced substantial minority employment.\textsuperscript{149}

These considerations also illuminate the problem of the so-called "ping pong game"—the three-stage trial in which plaintiff establishes a prima facie case, defendant justifies its action, and plaintiff challenges on the grounds of pretext. If the function of the prima facie case is to compel the employer to produce its justification, then there could not be judgment for the defendant at the close of a prima facie case, because the court would not yet have the justification before it. But if the explanation of the employer is already before the court at the time plaintiff puts on his/her case, then the plaintiff's proofs should be directed to that justification. Under these circumstances, plaintiff's own evidence may confirm the justification offered by the employer. If this happens, the court should be free to award judgment for the employer at the close of plaintiff's case.\textsuperscript{150}

This analysis demonstrates that it should be left to the discretion of the trial judge to order the trial in response to the way in which the particular case develops. Since in most cases the employer's explanation will have been developed in the administrative investigation, the plaintiff can flesh out that explanation by pre-trial discovery, including requests that the defendant admit the facts developed in the administrative process. The court can then determine the order of trial in light of the issues before it. In most cases, the justification offered will be that just cause existed for the action taken, and the case will revolve around the validity of that reason.\textsuperscript{151} Cases raising this type of issue are the grist for the mill of labor arbitration under just cause provisions

\textsuperscript{148} The question of what statistics should be used in the individual case is not simple. \textit{McDonnell Douglas} set the correct standard by suggesting that the court might act after reasonable discovery. 411 U.S. at 805 n.19. The statistics used must be manageable and relevant to the situation before the court. Examples might include the EEO-1 form (to illuminate the exclusion of minorities or women from the class of jobs in question), comparisons of general employer statistics (to determine if the employer's performance in various job classifications is below that of others in the same labor market), individual employer statistics, and individual employer personnel actions concerning similarly situated employees. I sense a tendency to escalate statistical analysis to a level of complexity not initially intended by the courts. See \textit{Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal}, 89 HARV. L. REV. 387 (1975).


\textsuperscript{150} See note 71 and discussion in text.

\textsuperscript{151} This, of course, was the position of McDonnell Douglas—that it had a good reason not to rehire Green. See note 96.
of collective bargaining agreements. The procedures developed in labor arbitration may illuminate the order of trial problem facing district courts in these Title VII cases.

K. The Labor Arbitration Experience

As late as the 1950's, there was some uncertainty among the arbitrators as to how the just cause provision should be administered. But by the 1960's, the matter had been clarified to the point where one of the deans of labor arbitration described the processing of discharge and discipline cases as follows:

Often in a discipline case, layoff or discharge, the union's spokesman will not know all the facts on which the company intends to justify the discipline imposed. If compelled to proceed first, the union might introduce a staggering amount of evidence in a more or less blind effort to prove a negative, namely that no sufficient cause for the discipline existed. When the company's evidence later comes in it may be apparent that most of the union's evidence was immaterial, and the time taken with the examination of its witnesses largely wasted. In such case, the parties get down to the real issue only on the union's rebuttal. Where the arbitrator can see at the outset, or shortly after, that this is likely to be the situation, he should avoid it by requesting the company to open, and if necessary requiring it to open. Even though the company is represented by an attorney, no objection is likely to be raised to this if the purpose is properly explained and the assurance given that no ruling on burden of proof is involved.

Thus the arbitrators have evolved a system of jurisprudence which, for practical reasons, requires the employer to present its evidence first.

L. The Obsolescence of the Employers Right To Be Arbitrary

The acceptance of the just cause principle under collective bargaining agreements is testimony to its workability and to the absence of contemporary utility in the common law right of employers to be arbitrary. This right is of no real interest to an employer such as McDonnell Douglas, except as an argument against government regulation in general. Companies such as McDonnell Douglas are the epitome of planned production; the modern jet aircraft, military and civilian, which bear the McDonnell Douglas name come from a world of high level technology. Such employers have no need to act on grounds unrelated to sound business practices.

154. See Gorske, Burden of Proof in Grievance Arbitration, 43 Marq. L. Rev. 135, 151-52 (1959), for a discussion of this point as made by labor arbitrators.
The right to be arbitrary implies the ability to rely on personal predilections which may be influenced by deep-seated and perhaps unconscious prejudices. Many still wonder whether the black can "cut the mustard" or the woman "carry the load." Cross examination cannot ferret out these feelings, if for no other reason than the sheer volume of claims. The inquiry into motive, which the right to be arbitrary demands, can produce only frustration of the enforcement process and perpetual confusion. The right to be arbitrary has virtually no currently recognized social utility, as long as the employer can present and have evaluated its business reason for the challenged action.

The obsolescence of the common law "at will" rule is further demonstrated by the care which Congress has taken to preserve the right of an employer to take actions against employees for just cause. For example, Section 10(c) of the National Labor Relations Act provides, "No order of the board shall require the reinstatement of any individual . . . who has been suspended or discharged . . . if such individual was suspended or discharged for cause." Similarly, the Age Discrimination in Employment act provides, "[i]t shall not be unlawful . . . to discharge or otherwise discipline an individual for good cause." The concept of cause, while not defined in the act, "is understood to refer to work-related justifications for discipline which would ordinarily be accepted as such under general industrial usages." Similarly, the Age Discrimination in Employment act provides, "[i]t shall not be unlawful . . . to discharge or otherwise discipline an individual for good cause." The bill which became Title VII began with similar language, but was amended to provide that "[n]o order of the court shall require . . . the hiring, reinstatement or promotion of an individual . . . if such individual was . . . refused employment or advancement or was suspended or discharged for any reason other than discrimination . . . " Rep. Cellar explained that his amendment was intended to exclude from liability those cases in which "the discharge might be based, for example, on incompetence, or a morals charge or theft." He did not assert the right of an employer to be arbitrary, but only to act on reasons justifiable by basic business considerations.

155. See the articles cited at note 129. See also Brown, Givelber & Subrin, supra n.134, at 13 n.132.
156. See discussion in text at note 120.
158. R. GORMAN, BASIC TEXT ON LABOR LAW 139 (1976).
163. The only reference to the right of an employer to act for any reason, good or bad, provided only that the individuals may not be discriminated against, appears in the "Clark/Case" interpretive memorandum. 110 CONG. REC. 7212-15. This memorandum explicitly refers to the
The Supreme Court has faced similar problems in connection with claims that government employees have been adversely affected because they exercised First Amendment rights of free speech. In *Mount Healthy School District Board of Education v. Doyle*, the district court had stated that the employee should be reinstated if his protected conduct played a substantial part in the decision against him. The Supreme Court reversed, stating:

The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision. (emphasis added)

Even in a case involving the Fourteenth Amendment, where obligations imposed on government are narrower in scope than under Title VII, the Court was concerned to protect the governmental employer only where it had just cause. In connection with statutory obligations, the rule is that an adverse personnel action is unlawful if the proscribed basis played any substantial or determining part in the decision.
The operational effect of these legislative and judicial approaches is to require the employer to demonstrate just cause, good cause, or a sound reason to take an adverse personnel action. But the notion that it may act at will nevertheless lingers. Ghosts such as the crisp and definitive at will rule are not easily exorcised. And in any individual employment discrimination case, the ghost of the common law right of the employer is apt to haunt the court house. So it was when McDonnell Douglas petitioned for certiorari. It argued:

It has always been the law of labor relations and of civil rights, that an employer has the right to refuse to hire a prospective employee "for good reason, bad reason or no reason," absent discrimination . . . The effect of the Court of Appeals' decision in this case is to repudiate this precept as regards minorities and to permit an employer to refuse to hire a person "for good reason, bad reason or no reason, unless he is black," in which case the employer will be presumed to have discriminated . . . A white applicant plaintiff in identical circumstances would not survive a motion for a directed verdict on such a meager showing, but a black plaintiff is said to be entitled to a presumption simply because of his color."167

There are two straight forward responses to this argument. First, it is in part correct; Title VII does abolish the freedom of employers from judicial scrutiny in their dealings with minorities and women.168 The procedural ramifications of this legislative purpose place the burden of demonstrating a good reason on the employer, and foreclose its reliance on arbitrary reasons. It might, in retrospect, have been better had some party in McDonnell Douglas adopted this frontal attack on the employer's argument.

The second response requires the benefit of hindsight. In 1976, the Supreme Court held in McDonald that the requirement of equal treatment applied to both whites and blacks. If an employer is required by the operation of Title VII to have good reasons for its personnel actions with respect to minorities and women, then, under McDonald it must apply the same principle and standards to its white male employees. The result is a de facto substantive law rule requiring the employer to produce good reasons or just cause for adverse personnel actions. Thus the common law rule is abolished in toto.

167. Petitioner's Brief, at 6, 19, 20-22.
168. Title VII is a vital instrument in the long struggle to establish the right of prospective employees to be hired on the basis of merit and not turned away at the hiring gate by the scourge of racial or sex discrimination. We have moved far from the days when the employer, in his absolute judgment, without any accountability, could hire or fire at will. East v. Romine, Inc., 518 F.2d 332, 342 (5th Cir. 1975).
IV.

THE JUST CAUSE STANDARD

When the prima facie standard is understood in the light of the opinion in McDonnell Douglas, it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race.

Justice William Rheinquist
Furnco Construction Co. v. Waters
98 S. Ct. 2943, 2950 (1978)

We have now cleared the way for a definition of discrimination in individual cases which will relate the national policy of equal employment opportunity to the procedural and substantive problems previously examined. It is this: discrimination consists of conduct which adversely affects employment opportunities of individual minorities or women, without just cause.

This formulation is largely a rephrasing of matters considered in McDonnell Douglas, and builds on the actual performance of the courts and agencies studies. The simplicity of this formulation is important because of the great number of Title VII claims which now exist and which may be filed under the expanded concept that Title VII protects all employees. The formulation will be used by the lower courts, by administrative agencies, by employers and their counsel, and by employees and their counsel. Any standard which the Court articulates will be injected into the entire enforcement system, and therefore should be capable of wide, diverse application.

The focus on just cause requires that the employer's position be fully examined at one time. The analysis should take the following form:

(1) Does the reason given have an adverse impact on minorities/women? The employer justification will almost always take the form of a rule; i.e., a blanket rejection of excessive absentees, slow learners, or applicants unqualified by certain experience or educational standards. If the rule has an adverse impact, it is illegal unless required by business necessity, and even then may be illegal if there is a means of accomplishing the same end with lesser adverse impact. Uncertainties concerning the business necessity defense are to be resolved against the employer.

169. For an administrative attempt to cope with the McDonald Douglas decision in an investigative context, see HEW Office of Civil Rights, Manual for investigation of allegations of employment discrimination at institutions of higher education, 12/31/75 CCH 1817.

170. On this concept, see Lasswell, Toward a Continuing Appraisal of the Impact of Law on Society, 21 Rutgers L. Rev. 645 (1967); Blumrosen, supra n.34.
(2) Was the rule applied equally to other similarly situated employees? Proof may be difficult on this question. For example, if an employer adopts a rule requiring discharge of absent employees who fail to phone in, and then applies the rule to blacks only, there may simply be no evidence of the failure of whites to phone it. Unless a black plaintiff knows of occasions when whites failed to phone in and were not discharged, the plaintiff will not be able to establish a denial of equal treatment. To meet this problem the employer should normally be expected to demonstrate that persons of all groups have in fact been subjected to the rule on which it relies. If an employer cannot make such a showing or explain its absence, then the rule appears to have been applied primarily or exclusively to minorities/women. Such a rule is suspect on all levels of analysis.

In this connection, the just cause concept might have yielded a different outcome in McDonnell Douglas. After the Supreme Court decision, the matter was remanded to the district court. There, Green established that certain wildcat strikers had been reinstated by the company, despite their disruptive breach of a no-strike clause. Green argued that this showed unequal treatment of those who committed illegal disruptive acts against the company. Both the district court and the court of appeals rejected this argument, in part on the grounds that the evidence did not establish evil motive. The reinstated strikers included both blacks and whites; therefore, there was no evidence of total racial discrimination. If the issue on which the evidence was considered had been not racial animus but the business justification for refusing to employ those who had been disruptive, the reinstatement of the wildcat strikers might have been viewed as inconsistent with the employer's claim. This type of consideration is commonly examined under just cause provisions of collective bargaining agreements.

(3) Does the application of the rule give rise to an inference of evil motive? In this analysis, the quest is for the intention to exclude minorities or women, even if some whites/males are also excluded.

(4) Was the employer's action otherwise without justification based on sound business practices? Here, the body of arbitration decisions on just cause may be consulted along with comparable court decisions. This aspect of the analysis rejects the employer's right to make arbitrary decisions. Another way of putting the question is to ask if the employer's action was too harsh as measured by modern business practices.

This approach to the issue of reasonableness of the employer's action does not necessarily resolve some of the difficult issues which will emerge. Sometimes, cases will involve far reaching considerations in which complex policy variables must be carefully weighed. But it does focus the attention of the court and parties on the issue of fairness without the filtering effect of the common law rule.

V

APPLICATION TO WHITE WORKERS UNDER MCDONALD

It remains to demonstrate the application of the just cause concept to white male workers under the doctrine of McDonald. The application is straightforward. McDonald is based on the equal treatment requirement of the laws; if an employer must show just cause in dealing with minorities and women, it can do no less for white males. If an employer must be as objective as possible in the promotional process to remedy past discrimination against blacks, it must show the same objectivity toward whites. If an employer is precluded from using a height and weight requirement as to females, it may not be used for white males. If an employer may not impose a high school diploma requirement for blacks, neither may it do so for whites. In short, equal treatment means that the principles of the anti-discrimination laws, forged in the struggle for minority and female civil rights, will benefit white male employees as well.

The application of civil rights laws to white male workers will not restrict the scope of effective action to remedy past discrimination against minorities and women. Effective remedies may require goals, timetables for hiring and promotion of minority and/or female employees, and other specific actions including promotional opportunities and retroactive seniority. None of these remedies are affected by the concept that Title VII is applicable to all workers. Furthermore, an employer who adopts such programs voluntarily in a reasonable effort to avoid liability under Title VII should be shielded from liability to whites by the business necessity defense available to it under Title VII. The concept that white males must be treated justly need not water down the protections of the statute for members of those groups whose plight gave rise to its passage. The EEOC has recognized this concept

173. Some cases permit employer discipline or discharge of employees who have become emotionally caught up in civil rights concerns to the point that it seriously interferes with their work. Hochstadt v. Worcester Foundation For Exp'l Biol., 545 F.2d 222 (1st Cir. 1976); Doe v. AFL-CIO, 405 F. Supp. 389 (D. Ga. 1975). This is allowed even though it is clear that the emotional upset itself is a product of the history of subordination of minorities and women. These cases, like McDonnell Douglas, draw the line for adverse effect at the point where the employee conduct is considered a product of free will.
in its proposed guidelines protecting employers who take reasonable affirmative action. 174

But more important for the purposes of this paper is the fact that most claims of white male workers simply do not conflict with those of minorities or females. These are the run-of-the-mill situations which involve a direct dispute between the employer and the employee; the typical claim of unfair dismissal is an example. The white male who claims he was treated unjustly as compared to the treatment of minorities or women is not objecting to the treatment of those groups; he simply wants the same treatment for himself. 175

McDonald established that the phrase "the same rights as whites" in 42 U.S.C. 1981 was not simply descriptive of any treatment which an employer hands out to a white employee. Rather it refers to the rights which all employees ought to have, irrespective of their race. Thus, the apparently descriptive language of the statute turns out to be a prescriptive standard. The content of that standard, as McDonald makes clear, was the treatment given to black employees. To overcome the effects of slavery and subordination, civil rights laws require a higher standard of conduct of employers toward minorities and women than did the common law at will principle. This higher standard, in turn, becomes applicable to all workers. This then is the legacy of the tortured and complex history of civil rights legislation in employment: a legacy benefitting all workers. Professor Summers has suggested that "there ought to be a law" requiring just cause. 176 That law exists, forged in the last decade, giving meaningful content to the concept of equal employment opportunity.

VI

CONCLUSION

Individuals, if they wish, may become the fulcrum for a class action which will change the operation of industrial relations systems so that they no longer discriminate. This is an opportunity provided by the network of decisions following the Griggs principle. But not all wish to be private attorneys general. For many, the quest for justice is highly personal and individualized. Many will seek justice in situations of personal involvement without undertaking major social reform. The concept that Title VII rights are personal entitles the holders of this view to a procedure which will provide for redress of

176. See note 9.
individual grievances. A generation of experience in labor arbitration has established that such a procedure must be relatively simple and easily managed. The just cause concept has worked in that field, and may prove equally servicable, in tandem with the simplified EEOC procedures, in the discrimination field.

If the thesis suggested here is adopted, and the principle of just cause applied to all workers, then the cumulative effect of these individualized claims to justice in the work place will indeed be the remaking of the legal framework which has permitted unfairness in industrial relations systems. Once it is recognized that the just cause principle is applicable to all workers, we will still have much work ahead in determining what cause is just. But, at least, around the centennial year of the publication of Wood's work on master and servant, we can say that his rule that employment is presumptively at the will of the employer no longer governs the American law of employment relations.

VII

A PERSONAL EPILOGUE

One of my interests as a law professor has been to challenge the at will rule and the arbitrary power it protected. The rule of just cause accomplishes that objective, but it generates another set of problems. Will we now judicialize or bureaucratize all personnel decisions? Will management lose needed flexibility because it claimed unlimited power? Will workers who challenge a management decision and lose be branded as inept, incompetent, or worse? These consequences are all possible under the rule of just cause, and, in contemplating them, one can hear an echo of Wood's laughter: "Have you but replaced my monster with another which is more vicious because it is more refined?"

If there is a way to avoid these consequences, it lies in informal procedures which emerge as a reaction to the formality of law. Grievance procedures, mediation, conciliation, and arbitration must blunt the raw edges of the rule of law, lest it become grotesque.177 In 1955, as I began my career as a law professor, Harry Shulman published his seminal work on arbitration under collective bargaining agreements, in which he was concerned about some of these problems. His solution

177. In 1977, the EEOC established an office of special projects to develop a variety of new procedures, including the possibility of individual employee/employer arbitration of Title VII claims in a context which did not involve collective bargaining. In 1978, the American Arbitration Association proposed rules dealing with such cases. For a general treatment of this subject, see Blumrosen, Individual Worker-Employer Arbitration Under Title VII, 31 N.Y.U. CONF. ON LAB. 331 (1978).
was to exclude the law, but not the lawyers.\textsuperscript{178} The just cause principle demands the sensitive attention of both.\textsuperscript{179}

**ADDENDUM**

As this paper was nearing publication, the Supreme Court decided *Board of Trustees of Keane College v. Sweeney*, (77-1792, Nov. 13, 1978, reversing and remanding 569 F.2d 169 (1st Cir., 1978). The Court divided five to four on the meaning of the *Furnco* decision thus confirming the view that the continued emphasis on proof of motive in equal treatment cases is "confusing," *supra*, pp. 541, 545, 548. The per curiam majority opinion stated that "articulation of a non-discriminatory reason for rejection" would meet the prima facie case of discrimination. But this statement is incomplete in light of *Teamsters*. If the prima facie case creates an inference of discrimination as *Teamsters* suggests, then the employer's statement of a non-discriminatory reason would meet that case only if the employer's statement is believed by the trial court. Otherwise, the inference remains, and plaintiff may prevail.

The four member dissent came close to stating that *Furnco* eliminated the issue of motive when it noted that a showing of a "legitimate non-discriminatory reason . . . simultaneously demonstrat[es] that the action was not motivated by an illegitimate factor such as race."


\textsuperscript{179} In 1972, struck by the coincidence of the play "Kismet" in my life and the circumstances of the black workers in Eden, North Carolina, I titled an article *Strangers in Paradise: Griegs v. Duke Power Co. and the Concept of Employment Discrimination*. In 1978, "Kismet" has been revived as "Timbuctu", a black musical, and the just cause concept should mean that worker and employer will, as the last line of the song suggests, "be strangers no more."