

“Enemies or Allies?”: Widening the Scope of Conflict

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Professor Gray's characterization of title VII case law involving universities is generally correct: colleges and universities have been the big winners; individual challengers to hiring, promotion, and tenure decisions have been the big losers.¹ However, this pattern is not very different from the outcomes of individual treatment cases generally, and specifically of cases involving so-called “higher level” jobs: plaintiffs win very few.²

The reasons for this pattern are not hard to find. Current title VII law allocates the burdens of proof in individual disparate treatment, *McDonnell Douglas*³-type cases in ways that give the defendant the upper hand. The plaintiff has the ultimate burden of proving discriminatory intent, and, according to the Supreme Court's *Burdine* decision,⁴ a court must evaluate a defendant's response against a backdrop of broad employer discretion.⁵ Employers can set job qualifications as high as they wish, as long as the criteria are applied evenhandedly. They are free to select from among equally qualified candidates, as long as their decisions are based on legitimate, nondiscriminatory grounds. The decisions may even be based on largely subjective considerations, such as the ability of a preferred candidate to “get along” better in the job setting.⁶

Professor Gray's observation that disparate impact, *Griggs*⁷-type

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1. See Gray, *Academic Freedom and Nondiscrimination: Enemies or Allies?*, 66 TEXAS L. REV. 1591, 1596 (1988).

2. See Barthelet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 959 (1982) (noting “that the courts have generally granted upper level employers significant immunity from title VII scrutiny”).

3. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The *McDonnell Douglas* Court held that a title VII complainant must show:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802.

4. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

5. *Id.* at 256-57.

6. See *id.* at 251 (containing supervisor's testimony that employees were dismissed because they did not work well with other employees).

7. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The *Griggs* Court held that an employer's

cases against universities have not fared well⁸ also applies readily to other situations involving jobs that require a high degree of skill and discretion. A much-cited Ninth Circuit decision in a national origin discrimination case involving accountants and auditors adopted an exceedingly liberal reading of Supreme Court precedent on the nature of the employer's burden in ruling against a group of Mexican-American plaintiffs.⁹ Nevertheless, because disparate impact cases place a heavier burden of justification upon employers than disparate treatment cases, disparate impact cases still represent the most effective challenges to employment discrimination in nonacademic settings.

Any change in the law will most likely come from the Supreme Court in a case involving a bank's promotion practices.¹⁰ The case presents the question of whether disparate impact analysis can be used to challenge subjective employment practices. Most federal courts have allowed *Griggs*-type challenges only when discrimination is claimed to be the result of neutral, *objective* employment practices.¹¹ The Court should allow plaintiffs to challenge subjective employment practices in order to prevent employers from shielding their personnel practices from effective judicial scrutiny even when such practices discriminate significantly. This can be done without leaving employers bereft of a defense to such claims, despite protests to the contrary.¹² Employers need not be re-

requirement of a diploma or satisfactory intelligence test results was discriminatory. *Id.* at 431-32, 436.

8. Gray, *supra* note 1, at 1600-02.

9. See *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1275-80 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). The Supreme Court's opinion in *Griggs* characterized the employer's burden as one of proving that the employment screening device was required by "business necessity" or shown to be "job-related." *Griggs*, 401 U.S. at 431. The Court defined the burden as "showing that any given requirement [has] a manifest relationship to the employment in question." *Id.* at 432. *Dothard v. Rawlinson* also suggested another test: that the challenged practice "be shown to be necessary to safe and efficient job performance." 433 U.S. 321, 332 n.14 (1977). The *Contreras* court, however, stated that the foregoing formulations reflected implicit Supreme Court approval of an employer's burden requiring a showing only that the challenged practices "significantly serve, but are neither required by nor necessary to, the employer's legitimate business interests." *Contreras*, 656 F.2d at 1280.

10. *Watson v. Fort Worth Bank & Trust*, 798 F.2d 791 (5th Cir. 1986), *cert. granted*, 107 S. Ct. 3227 (1987).

11. See, e.g., *Talley v. United States Postal Serv.*, 720 F.2d 505, 507 (8th Cir. 1983) (noting that a subjective decision-making process cannot by itself form the foundation for a discriminatory impact claim); *EEOC v. Federal Reserve Bank*, 698 F.2d 633, 639 (4th Cir. 1983) (holding that a disparate impact claim requires a showing of an automatically applied objective standard, such as a height or diploma requirement). *But see Griffin v. Carlin*, 755 F.2d 1516, 1523 (11th Cir. 1985) (holding that the subjective elements of a selection process can be challenged).

12. See, e.g., *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1485 (9th Cir. 1987) ("The defendants argue that the burden placed on an employer in an impact case is somehow made unduly onerous when the practices identified as having a disparate impact are subjective in nature."). *But see Pouncy v. Prudential Ins. Co.*, 668 F.2d 795, 801 (5th Cir. 1982) ("Identification by the aggrieved party of the specific employment practice responsible for the disparate impact is necessary so that the employer can respond by offering proof of its legitimacy."); *Hunt & Pazuniak, Special*

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quired to establish by way of formal validation that their subjective practices are "job-related" or required by "business necessity."¹³ Moreover, some subjective criteria *can* be formally validated.¹⁴

Such a ruling might require colleges and universities whose selection, promotion, or tenure processes have had a disproportionately negative impact upon women and minorities to develop probative justifications for employment decisions for the first time in title VII cases. This process might be difficult, but it will ultimately contribute to the general improvement of university personnel policies and to the goal of nondiscrimination in academic appointments.

Professor Gray focuses upon courts' resistance to claims of sex discrimination in academic personnel matters.¹⁵ However, that pattern is not unique to cases involving college and university selection, promotion, and tenure. It is consistent with courts' historic treatment of sex discrimination cases as being less serious than, say, race discrimination cases. Early procedural rulings on "bona fide occupational qualifications,"¹⁶ pregnancy discrimination,¹⁷ and sexual harassment¹⁸ evidenced this judicial distinction between sex discrimination and other forms of discrimination. In fairness to the courts, the lack of any meaningful legislative history in the 1964 Civil Rights Act on sex discrimination hindered application of title VII to sex discrimination claims.¹⁹ Some contend that

Problems in Litigating Upper Level Employment Discrimination Cases, 4 DEL. J. CORP. L. 114, 123-34 (1978) (arguing that employers cannot defend subjective selection procedures when validation, showing job relatedness, is not technically feasible); Note, *Evaluation of Subjective Selection Systems in Title VII Employment Discrimination Cases: A Misuse of Disparate Impact Analysis*, 7 CARDOZO L. REV. 549, 577-82 (1986) (arguing that use of disparate impact analysis to challenge subjective selection systems is "unfairly fatal" to employers because justifying subjective criteria is impossible).

13. See generally B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 191-205 (1983) (describing ways in which subjective practices can be successfully defended).

14. See Bartholet, *supra* note 2, at 987-88.

15. See Gray, *supra* note 1, at 1596-97.

16. See *Dothard v. Rawlinson*, 433 U.S. 321, 335-37 (1977) (suggesting that being male is a bona fide occupational qualification for prison guards in Alabama's violent, disorganized maximum security prisons); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (*per curiam*) (suggesting that lack of conflicting family obligations may be a bona fide occupational qualification justifying differential treatment of male and female applicants).

17. See *Nashville Gas Co. v. Satty*, 434 U.S. 136, 143 (1977) (holding that exclusion of pregnancy from sick-leave compensation plan does not constitute discrimination against women); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976) ("[A]n exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all."). In 1978 Congress amended title VII to reverse the *Gilbert* and *Satty* rulings. See *Pregnancy Discrimination Act*, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e (1982)); H.R. REP. NO. 948, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4749.

18. See, e.g., *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123, 124 (D.D.C. 1974) (holding that sexual harassment is not sex discrimination), *rev'd sub. nom. Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977). See generally C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 57-99 (1979) (discussing the incoherence of opinions about whether sexual harassment is sex discrimination).

19. Writing for the Court in *Gilbert*, Justice Rehnquist argued that "[w]hen Congress makes it

this vacuum exists because some members of Congress added "sex" to title VII in an ill-fated, last-ditch effort to torpedo the entire provision.²⁰ These legislators incorrectly thought in 1963 that banning sex discrimination in employment was such an outrageous proposition that significant numbers of their colleagues would rise up in opposition to title VII. Assuming that they still hold antediluvian views, these members of Congress might gain some satisfaction today from the strange, grudging way in which women's rights have developed, thanks in part to their eleventh-hour tactics.

Courts did not seem to treat sex discrimination claims with the seriousness they deserve, even after 1972, when Congress amended title VII, and even after 1978, when it added the Pregnancy Discrimination Act²¹ to title VII. One would have thought that congressional concern about limited opportunities for women in academe, as expressed in the 1972 amendments to title VII that extended its provisions to colleges and universities²² and in the 1972 Education Amendments to title IX that prohibited sex discrimination by federally funded institutions,²³ would have suggested to judges the need to be especially sensitive to claims of employment discrimination based upon sex.

One area that Professor Gray discusses does appear to be unique to employment discrimination suits against colleges and universities: whether any privilege should attach to deliberations resulting in an adverse decision in selection, promotion, or tenure. No other group of employers has been successful in getting courts to recognize such a

unlawful for an employer to 'discriminate . . . because of . . . sex . . .,' without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant." *Gilbert*, 429 U.S. at 145. More recently, in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), Justice Rehnquist, again writing for the Court, observed that as the amendment making sex discrimination illegal "was added to Title VII at the last minute on the floor of the House of Representatives . . . we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'" *Id.* at 63-64.

20. See Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 310-12 (1968) (noting that sex discrimination was added to title VII to block passage of the entire act and not to protect the employment rights of women).

21. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e (1982)).

22. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (codified at 42 U.S.C. § 2000e-1 (1982)). The Senate Report on the bill specifically mentioned the situation of women in educational institutions: "Women are similarly subject to discriminatory patterns. Not only are they generally underrepresented in institutions of higher learning, but those few that do obtain positions are generally paid less and advanced more slowly than their male counterparts." S. REP. NO. 415, 92d Cong., 1st Sess. 12 (1971). In House debate on the bill, Representative Abzug stated that the bill "would also extend coverage to teachers by eliminating the 'educational institution' exemption under title VII. This may well be the most important provision in terms of its effect on women." 117 CONG. REC. 32097 (1971) (statement of Rep. Abzug).

23. Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 373 (codified at 20 U.S.C. § 1681 (1982)).

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privilege. Courts have not allowed even religious institutions, which title VII specifically exempts from liability for making personnel decisions on a religious basis, to shield their practices from agency investigations seeking to determine if an employer made a challenged decision on a prohibited basis such as sex.²⁴ This approach has been adopted even though scrutiny of a religious institution's personnel decisions presents far clearer constitutional problems, under the free exercise clause of the first amendment, than an examination giving rise to claims of academic freedom. Law firms have fared no better. In a suit by a female associate claiming that her denial of partnership was the result of sex discrimination, the Court held that a law firm's partnership selection process was covered by title VII.²⁵ The Court rejected the firm's claim that the principle of associational freedom and the unique role of law firms in our system of self-government entitled it to special consideration under title VII.²⁶

I agree with Professor Gray's position that courts should not give colleges and universities special treatment in this respect.²⁷ In particular cases, academic employers should be able to show that protective orders are warranted. But a blanket, generalized privilege is not necessary or appropriate in title VII cases, given the public policy concerns underlying that legislation.

I realize that the American Association of University Professors (AAUP) has suggested a compromise position on confidentiality to the courts; the proposal has produced some positive response.²⁸ Although I appreciate the goals of the AAUP's proposal, the recommendation unfairly restricts plaintiffs' ability to conduct lawsuits as they see fit, abridging a privilege afforded to all other title VII plaintiffs. The proposal is also premised on an unrealistic conception of how disparate treatment cases are actually prosecuted. The three-stage *McDonnell Douglas* order of proof is, by the Supreme Court's own standards, more an analytical construct for evaluating evidence in discrimination cases than a formula for determining how the trial should proceed.²⁹ Plaintiffs need to know

24. See *EEOC v. Mississippi College*, 626 F.2d 477, 485 (5th Cir. 1980) (affirming verdict in favor of white female's suit to uphold the EEOC's right to investigate the faculty hiring practices of a religious college accused of discrimination against blacks and women), *cert. denied*, 453 U.S. 912 (1981).

25. See *Hishon v. King & Spalding*, 467 U.S. 69, 77 (1984).

26. *Id.* at 77-78.

27. Gray, *supra* note 1, at 1600, 1615.

28. See American Ass'n of Univ. Professors, Committee on Academic Freedom and Tenure, *A Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments*, 67 *ACADEME* 27, 27-28 (1981). The Second Circuit adopted the AAUP approach in *Gray v. Board of Higher Educ.*, 692 F.2d 901, 907 (2d Cir. 1982).

29. See *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (stating

all they can *before* putting on their case and should not have to await the employer's claim of legitimate nondiscriminatory justifications before seeking additional disclosure through discovery.³⁰

Finally, I want to address "hostile environments" in the academic setting, an issue Professor Gray raises at the end of her essay.³¹ Title VII plaintiffs in academic cases should be able to claim that they are effectively denied equal employment opportunity because the work environment presents hostility to them directly or to people of similar sex, race, national origin, or other protected classes. Such hostility has an indirect but significant impact upon the plaintiff's ability to function. The question is whether the "robust" character of academic discourse—provocative, iconoclastic, and irreverent—can ever be "Exhibit A" in a case involving hostile environment employment discrimination.

Hostile environment claims might well arise in academic settings. Such actions might be aided by the current trend of courts to treat hostile environment allegations in nonacademic contexts in the same way they treat "fighting words" cases:³² a plaintiff must show that the insulting language or activity was sufficiently particularized and personalized to give her a reasonable basis for viewing it as an interference with job performance and a denial of equal opportunity.³³ This is not to say that courts have come out right on the merits in all hostile environment cases; I am only suggesting that the courts' analysis seems sensible. Consequently, I am less concerned than Professor Gray that the theoretical conflict she outlines between the robust nature of academic discourse and hostile environment discrimination suits will have much practical significance.

I have argued that the bleak picture for plaintiffs in title VII cases

that the *McDonnell Douglas* prima facie case method requires the defendant to offer evidence of the reason for the plaintiff's rejection and thereby allow the court to proceed to the factual inquiry of whether the defendant intentionally discriminated against the plaintiff); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (noting that the *McDonnell Douglas* test "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.").

30. For a more elaborate version of this argument, with examples, see DeLano, *Discovery in University Employment Discrimination Suits: Should Peer Review Materials be Privileged?*, 14 J.C. & U.L. 121, 138-42 (1987).

31. See Gray, *supra* note 1, at 1612-15.

32. See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 522-24 (1972) (outlining "fighting words" doctrine).

33. See, e.g., *Downes v. FAA*, 775 F.2d 288, 292-94 (D.C. Cir. 1985) (considering male supervisor's sexual remarks in context, and requiring plaintiff to demonstrate pattern of harassment directed at female employees or a particular employee); cf. *Moffett v. Gene B. Glick Co.*, 621 F. Supp. 244, 269-70 (N.D. Ind. 1985) (holding that racial derision, to be actionable, must be pervasive and demonstrate a concerted pattern of harassment); *Sand v. Johnson Co.*, 33 Fair Empl. Prac. Cas. (BNA) 716, 719-20 (E.D. Mich. 1982) (holding that explicit sexual conduct in the workplace does not violate title VII unless there is a nexus between the conduct and the employment situation).

against colleges and universities is not much different from that for individuals suing other types of employers. Despite the similarity of outcomes, however, the attitudes of judges differ markedly in cases involving academic and nonacademic settings. In cases involving nonacademic settings, courts have at least demonstrated some understanding of the source and nature of employment discrimination, of the way institutions work, of which criteria are relevant, and of what remedies are adequate in a particular situation. Examples of some judicial sensitivity to discrimination issues are numerous. Even though it articulated the disparate impact test, the Court decided *Griggs*³⁴ against a backdrop of racial discrimination in education and other programs for opportunity in North Carolina. The *McDonnell Douglas* decision on individual disparate treatment posited for purposes of title VII cases the existence of the rational employer or "utility maximizer," as my colleagues at Yale would say, who does not reject a qualified candidate unless discrimination is at work.³⁵ In the *Teamsters*³⁶ case, which involved class-action disparate treatment claims, the Court adopted a presumption that, all other things being equal, the percentage of minorities and women in an employer's work force should equal the percentage of eligible candidates from those groups in the labor pool.³⁷ *Franks*³⁸ creates a presumption in favor of "rightful place" or "make whole" remedies in the industrial context.³⁹

On the other hand, the Supreme Court has not addressed the merits of employment discrimination claims in the academic setting.⁴⁰ Consequently, the Court has not provided us with paradigms or models of appropriate employment practices for academic institutions. The Court has very little experience with cases involving admission, hiring, and governance in higher education. *Bakke*⁴¹ was the Court's first decision to address directly racial discrimination in higher education since *Hawkins*⁴² in 1956. Moreover, lower courts have brought to their consideration of such claims very little sense of the history of exclusionary

34. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

35. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (stating that "more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting").

36. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

37. *Id.* at 340 n.20 ("Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703(j) makes clear that title VII imposes no requirement that a work force mirror the general population.").

38. *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976).

39. *Id.* at 764-66.

40. See *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978) (involving college professor's sex discrimination claim and addressing only the question of the employer's burden in a disparate treatment case once a prima facie showing of discrimination had been made).

41. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

42. *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413, 413 (1956) (per curiam) (hold-

practices against women and minorities in higher education's selection, promotion, and tenure processes. Nor have they developed a great deal of understanding of what comprises the pools of eligible candidates for academic positions, of what procedures, standards, and criteria are generally utilized in making such decisions, and of which remedies would be effective and appropriate when discrimination is uncovered.

Now is not the time or place for me to describe an appropriate paradigm or world view with respect to academic employment, even if I could. One can certainly recognize, however, that the reconciliation of the tension between academic freedom and antidiscrimination norms will come from more, not less, judicial scrutiny of decisions regarding, to quote Justice Frankfurter, " 'who may teach.' " ⁴³

ing that blacks are entitled to admission to graduate professional schools under rules applicable to all other candidates).

43. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting a conference of scholars on academic freedom).