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Leon Friedman

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OTHER CIVIL RIGHTS DECISIONS IN THE OCTOBER 2005 TERM: TITLE VII, IDEA, AND SECTION 1981

*Leon Friedman**

I am going to talk about civil rights cases, including, Title VII,¹ the Individuals with Disabilities Education Act (“IDEA”)² and one § 1981³ case. In the October 2005 Term, there were three Title VII cases and the plaintiffs won all three, which is good for the

* Joseph Kushner Distinguished Professor of Civil Liberties Law, Hofstra University School of Law. A.B., LL.B., Harvard University. Professor Friedman is considered a leading scholar in subjects such as civil rights, civil procedure, criminal procedure and the First Amendment. This Article is based on a transcript of remarks from the Practising Law Institute’s Eighth Annual Supreme Court Review program in New York, New York.

¹ 42 U.S.C. § 2000e-2(a) (2000) provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual’s race, color, religion, sex, or national origin.

² 20 U.S.C. §§ 1400 et. seq. (2000) (providing that children with disabilities shall have a right to free public education and mandating that public schools make adequate accommodations for such children).

³ 42 U.S.C. § 1981(a) (2000) provides in pertinent part:

All persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

plaintiffs.⁴ The plaintiffs lost the two IDEA cases and the § 1981 case; so it is a three-to-three score when all is said and done.⁵

I. TITLE VII DECISIONS

A. Ash v. Tyson Foods, Inc.

The first Title VII case was a per curium called *Ash v. Tyson Foods, Inc.*,⁶ and it was a straight out application of the *McDonnell-Douglas Corp. v. Green*⁷ prima facie case.

Pursuant to *McDonnell*, in order to avoid summary judgment,

⁴ See *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195, 1197 (2006) (holding that the use of the term “boy” by an employer may be probative of racial discrimination and evidence that plaintiffs had superior qualifications could provide evidence that the employer’s stated reasons for failing to promote the plaintiffs were a mere pretext); *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414–15 (2006) (holding that the Title VII anti-retaliation provision is not limited to job related discrimination, but rather covers any employer actions which would be “materially adverse” to a reasonable employee); *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1238–39 (2006) (holding that the employee numerosity requirement of Title VII is a substantive element of the plaintiff’s case, and when a defendant fails to raise a challenge to that issue prior to a trial on the merits, it cannot again be raised during the litigation and is conceded).

⁵ See *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005) (holding that under the IDEA, a party challenging an Individualized Education Program has the burden of proof and not the school board); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2457 (2006) (holding that in an IDEA action, non-attorney expert fees are not costs recoverable from the state); *Domino’s Pizza, Inc. v. McDonald*, 126 S. Ct. 1246, 1252 (2006) (holding that in order to state a claim under section 1981, a plaintiff must have rights under an existing or proposed contract that he or she is planning on enforcing).

⁶ *Ash*, 126 S. Ct. 1195.

⁷ 411 U.S. 792, 802 (1973) stating:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (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. . . . The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.

get to a jury, or to uphold a jury verdict, you have to prove: (1) that you were within the protected class; (2) that you are qualified for the position; (3) that you suffered an adverse employment decision; and (4) that you were replaced by someone who was not in the protected class.⁸ Now, even if there is a *prima facie* case, all the employer has to do is come forward with a nondiscriminatory reason.⁹ To preserve a jury verdict or to avoid summary judgment you have to do more than a *prima facie* case; you either have to show some discriminatory motive on the part of the employer, or that neutral, non-race or gender-related reasons were a pretext.¹⁰

In the *Ash* case, the plaintiffs were black men who said that their supervisor called them “boy.” The plaintiffs argued that “boy” is a racially discriminatory term and therefore, they have shown discrimination. The district court set aside the jury verdict saying that the plaintiffs did not prove anything beyond the *prima facie* case, which you have to do in order to preserve the jury verdict. The Eleventh Circuit said that the supervisor did not say “black boy,” but just said “boy.” The district court said it is a benign phrase just to call someone a boy; it has no racial connotations. The Supreme Court disagreed, holding that “boy” is not benign depending on the context in which it was used.¹¹ I guess there are various ways you

⁸ *Id.*

⁹ *Id.*

¹⁰ *Ash*, 126 S. Ct. at 1197 (“[A] plaintiff’s *prima facie* case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.” (quoting *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 148 (2000))).

¹¹ *Id.* (stating that the word “boy” may be evidence of racial discrimination depending on the speakers meaning, which can be gleaned from “various factors including context, inflection, tone of voice, local custom, and historical usage”).

can say “boy,” which might indicate it does have some racial connotation.

The Supreme Court’s other justification was pretext.¹² Pretext exists when an employer fired an employee, did not hire a potential employee or replaced an employee with someone else, and the employee finds some nonracial reason why the employer acted the way he or she did. What the Eleventh Circuit said was that the pretextual reason, “must jump off the page and hit you in the face.”¹³ The Supreme Court did not think much of the “jump off the page test” either. Remember what happened—the district court took away a jury verdict because first, saying “boy” was not racially discriminatory; it did not show any animus, and second, the alleged pretext was not so obvious that it jumped off the page. The Supreme Court in a per curium said no, you cannot set aside a jury verdict, claiming that neither one of those met the required test, and remanded the case back to the Eleventh Circuit.¹⁴ The question on remand is: is the Court going to find some other reason for taking away the jury verdict?

B. Burlington Northern and Santa Fe Railway Co. v. White

The other major Title VII case was a retaliation case,

¹² *Id.* (discussing the fact that “qualifications evidence may suffice . . . to show pretext” and that the Eleventh Circuit “erred in articulating the standard for determining whether the asserted nondiscriminatory reasons for [the employer’s] hiring decisions were pretextual”).

¹³ *Ash v. Tyson*, 129 F. App’x 529, 533 (11th Cir. 2005) (“Pretext can be established through comparing qualifications only when ‘the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face.’ ” (quoting *Cooper v. Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004))).

¹⁴ *Ash*, 126 S. Ct. at 1198.

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Burlington Northern & Santa Fe Railway Co. v. White.¹⁵ Here is the issue: there are First Amendment¹⁶ retaliation cases dealing with public employees, and then there are First Amendment retaliation cases contained in all of the civil rights statutes including: Title VII, the Age Discrimination in Employment Act (“ADEA”),¹⁷ and the Americans with Disabilities Act (“ADA”).¹⁸ Both types of cases are different. Under Title VII you make a claim, a substantive claim, assume you do not win on the substantive claim, and that claim is rejected, you can still say that you suffered an adverse decision because he or she made a claim.¹⁹ Therefore, a person is protected under the statute from making the claim or supporting a claim. Now the question is: what kind of adverse decision do you have to show?

Let me switch to § 1983.²⁰ Suppose you are a public

¹⁵ *Burlington Northern*, 126 S. Ct. 2405.

¹⁶ U.S. CONST. amend. I provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

¹⁷ 29 U.S.C. § 623(a) (2000) provides in pertinent part:

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age

¹⁸ 42 U.S.C. § 12112(a) (2000).

¹⁹ See *Burlington Northern*, 126 S. Ct. at 2414 (“The anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm.”).

²⁰ 42 U.S.C. § 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the

employee. There is a famous statement by Justice Stevens in which he said that an employment action as small as failing to invite a public employee to a birthday party in retaliation for his or her First Amendment action may support a First Amendment claim.²¹ If you do not get a birthday party, but everyone else gets a birthday party, you may have a First Amendment claim if you are a public employee. Now, under Title VII a lot of the justifications overlap. Generally you have to show something that is job related.²² I do not know whether a birthday party is job related or not. I do not know whether that would justify a Title VII retaliation claim.

In *Burlington Northern* the woman was transferred to a less desirable position, and she was docked thirty-seven days in pay, although it is a fact that she got it back. The question that arises is: what do you have to show in order to prove that a decision is adverse?

There were three rules among the circuits. Some stated that the action had to be seriously adverse,²³ while others stated that the action had to be directly job related.²⁴ The most generous rule came

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

²¹ See *Rutan v. Republican Party*, 497 U.S. 62, 76 n.8 (1990) (“[T]he First Amendment . . . already protects state employees not only from patronage dismissals but also from ‘even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights.’” (quoting *Rutan v. Republican Party*, 868 F.2d 943, 954 n.4 (7th Cir. 1989))).

²² See generally 42 U.S.C. § 2000e-2.

²³ See *Hollins v. Atl. Co.*, 188 F.3d 652, 662 (6th Cir. 1999) (stating that in order to establish a claim for retaliation under Title VII the plaintiff must demonstrate a “materially adverse change in the terms and conditions of [plaintiff’s] employment”).

²⁴ See *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997) (holding that in order to bring an actionable Title VII retaliation claim, the plaintiff must show evidence of a

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out of the Seventh Circuit and then came out of the District of Columbia Circuit: what would have dissuaded a reasonable worker from making or supporting a charge of discrimination?²⁵ Under this ruling, if some action is taken by the employer that would discourage a reasonable worker from making or supporting a charge of discrimination, that discouragement is materially sufficient to uphold the Title VII claim. The Seventh Circuit decision, according to Justice Breyer, was quite generous in upholding retaliation claims under the Civil Rights Statute,²⁶ which was the test adopted by the Supreme Court.

C. Arbaugh v. Y & H Corp.

The last Title VII case is *Arbaugh v. Y & H Corp.*²⁷ There is a requirement under Title VII that before you can bring a Title VII claim, you must show that the employer has fifteen full-time employees.²⁸ There has been a lot of litigation on what meets the

discriminatory “ultimate employment decision”); *see also* *Dollis v. Rubin*, 77 F.3d 777, 782 (5th Cir. 1995) (stating that the Fifth Circuit will hear Title VII cases which address “ultimate employment decisions” where the discriminatory conduct relates to “hiring, granting leave, discharging, promoting, and compensating”).

²⁵ *See* *Washington v. Ill. Dep’t of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005) (“An employer’s action is not material under [the anti-retaliation clause] if it would not have dissuaded a reasonable worker from making or supporting a charge of discrimination.”); *see generally* *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006).

²⁶ *See Burlington Northern*, 126 S. Ct. at 2415. In an opinion by Justice Breyer, the Court stated “[w]e agree with the formulation set forth by the Seventh and District of Columbia Circuits. In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse” *Id.*

²⁷ *Arbaugh*, 126 S. Ct. 1235.

²⁸ *Id.* at 1238 (“In a provision defining 13 terms used in Title VII, 42 U.S.C. § 2000e, Congress limited the definition of ‘employer’ to include only those having ‘fifteen or more employees’ ”); *see also* 42 U.S.C. § 2000e(b) which states: “The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the . . . calendar year”

fifteen-person requirement.

Suppose the employer does not raise that as a defense, is it jurisdictional? If it is jurisdictional, can it be raised by the court? Can it be raised by a party after an answer or after the trial? Or suppose it can be raised by an appeal court at some point. So the question is: whether the fifteen-person requirement under the statute is jurisdictional or is it an affirmative defense or is it something that a jury has to decide as part of the plaintiff's case. In a decision by Justice Ginsburg, she said that the requirement is not jurisdictional; if the employer does not raise the numerosity requirement in a timely manner, the employer waives the numerosity defense.²⁹ So plaintiffs three, employers nothing.

II. IDEA: ATTORNEY'S FEES AND EXPERT'S FEES IN ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION V. MURPHY

Now I will discuss a couple of IDEA cases. First things first, what if a school district must create an Individualized Education Program ("IEP"), for a disabled student who cannot follow the regular curriculum, and the parents are unhappy with the IEP proposed by the school district? In 1988, the Supreme Court answered that question in *Honig v. Doe*³⁰ and held that the parents may request an impartial due process hearing on the adequacy of the

²⁹ *Arbaugh*, 126 S. Ct. at 1238-39 ("[T]he employee-numerosity requirement relates to the substantive adequacy of [a plaintiff's] Title VII claim, and therefore [cannot] be raised defensively late in the lawsuit, *i.e.*, after [defendant employer] had failed to assert the objection prior to the close of trial on the merits.").

³⁰ 484 U.S. 305 (1988).

program.³¹ Next, I will discuss whether you get attorney's fees for the program because fees are not really part of the lawsuit itself.³²

At any rate, who bears the burden of persuasion in that impartial IEP proceeding? In *Schaffer v. Weast*,³³ the Supreme Court held that in accordance with traditional plaintiff-defendant cases, the parents bear the burden of persuasion to show that the program was not adequate.³⁴

IDEA cases may also require expert testimony, which results in expert's fees. In 1991, the Supreme Court in *West Virginia University Hospital, Inc. v. Casey*,³⁵ held that in a § 1983 action the award of reasonable attorney's fees to the prevailing party does not include the authority to award expert's fees.³⁶

During the current Term, the Supreme Court held in *Arlington*

³¹ *Honig*, 484 U.S. at 311-12. The Individualized Education Program establishes procedural safeguards that give the parents a right to have input in the education of their children as well as a right to seek review. *Id.* One such mechanism for review is an "impartial due process hearing" concerning any complaints pertaining to their disabled child's education. *Id.* at 312. At the conclusion of the due process hearing the parents may seek further review or may file a civil action in state or federal court. *Id.*

³² In *Jason D.W. ex rel. Douglas W. v. Houston Independent Sch. Dist.*, the opinion stated that a court may award reasonable attorney's fees to a parent or guardian of a disabled child who is the prevailing party in the lawsuit. 158 F.3d 205, 208 (5th Cir. 1998). *See also* *G.M. ex rel. R.F. v. New Britain Bd. of Educ.*, 173 F.3d 77, 81 (2d Cir. 1999) (awarding reasonable attorney's fees because the guardian was a "prevailing party," meaning that a causal connection was shown between the relief obtained and what was sought in the litigation); *Goldring ex rel. Anderson v. Dist. of Columbia Pub. Sch.*, F.3d 70, 76 (D.C. Cir. 2005) (explaining that courts have "long allowed an IDEA prevailing party to recover expert fees").

³³ *Schaffer*, 126 S. Ct. 528.

³⁴ *Id.* at 535. Although the plain text of IDEA is silent on allocation of the burden of proof, the court adheres to the "default rule," which provides that the party seeking action bears the burden of proof on the elements of the claim. *Id.* at 534.

³⁵ 499 U.S. 83 (1991).

³⁶ *Casey*, 499 U.S. at 102. The Court held that the statute in question does not embrace the awarding of expert witness fees even though it allows an award for reasonable attorney's fees. *Id.* Since Congress did not place a provision in section 1988 for both expert fee and attorney's fee awards, the Court believed that Congress intended a more restrictive interpretation of the statute concerning expert fees. *Id.* at 99.

*Central School District Board of Education v. Murphy*³⁷ that the prevailing party is not entitled to recover costs for the services rendered by experts.³⁸ And then the question is: under the IDEA, is there any language that would place the expert's fees on one side rather than the other? The current answer appears to be "no."

III. SECTION 1981: RACIALLY DISCRIMINATORY CONTRACTS IN DOMINO'S PIZZA, INC. V. McDONALD

The last case, *Domino's Pizza, Inc. v. McDonald*,³⁹ is a § 1981 case that talks about racially discriminatory contracts. In this case, the owner of the corporation was black. The corporation had a contract with Domino's Pizza and Domino's Pizza violated the contract. The plaintiff said that Domino's violated the contract for racially discriminatory reasons. The issue in this case was whether the wholly-owned owner of a corporation could bring a case under § 1981? The plaintiff claimed that as owner of the corporation, he was the person with a real interest. The Supreme Court said no, the contract was not by you, it was by your corporation, and therefore the corporation could not bring a § 1981 case.⁴⁰ So it is three-to-three; plaintiffs won the three Title VII cases and lost the two IDEA cases and one § 1981 case.

As for now, those are the most recent civil rights cases

³⁷ *Arlington*, 126 S. Ct. 2455.

³⁸ *Murphy*, 126 S. Ct. at 2463 (dismissing clear legislative history and siding with the unambiguous language of the IDEA which grants award of reasonable attorney's fees to the prevailing party but makes no mention of awarding expert witness fees).

³⁹ *Domino's Pizza, Inc.*, 126 S. Ct. 1246 (2006).

⁴⁰ *Domino's Pizza Inc.*, 126 S. Ct. at 1252. The Court added that "a plaintiff cannot state a claim under section 1981 unless he has (or would have) rights under the existing (or proposed) contract that he wishes to 'make and enforce.'" *Id.* (quoting 42 U.S.C. § 1981).

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decided by the Supreme Court this Term.

