A COMMENTARY FOR HIGHER EDUCATION ON TWO INTERESTING RECENT SUPREME COURT DECISIONS

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16TH ANNUAL LAW & HIGHER EDUCATION CONFERENCE
Clearwater Beach, Florida
February 12-14, 1995

STETSON UNIVERSITY
COLLEGE OF LAW

16th Annual National Conference on
LAW AND HIGHER EDUCATION

February, 1995

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ST. MARY'S HONOR CENTER V. HICKS

I. BACKGROUND

In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, (1981), the United States Supreme Court set forth the framework for using indirect evidence to prove racial discrimination. This procedure was divided into the following three stages: (1) the plaintiff must establish a prima facie case of intentional discrimination, Burdine, 450 U.S. at 254, (2) the defendant must then articulate legitimate, nondiscriminatory reasons for the adverse action, McDonnell, 411 U.S. at 802, and (3) the plaintiff must then prove that the defendant's stated reason for the adverse action was pretext for discrimination, Burdine, 450 U.S. at 253. The plaintiff "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or

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* Our thanks to Stacey Duggan and James Mizgala, associate attorneys at the Firm of Reed Smith Shaw and McClay in Pittsburgh for their work in assembling the materials for this outline.

indirectly by showing that the employer's proffered explanation is unworthy of credence." Id. at 256. It is the interpretation of this quoted language from Burdine that has created confusion in the courts.

II. FACTS OF ST MARY'S HONOR CENTER V. HICKS

In 1978, Melvin Hicks was hired as a correctional officer for St. Mary's Honor Center, a halfway house operated by the State of Missouri. St. Mary's Honor Ctr. v. Hicks, 113 S.Ct. 2742, 2746 (1993). In 1980, Hicks was promoted to shift commander, one of six supervisory positions at the house. Id. In 1983, numerous complaints concerning conditions at St. Mary's led to an investigation which resulted in extensive supervisory changes, including the placement of John Powell as Hicks' immediate supervisor and the placement of Steve Long as the new Superintendent. Id. Hicks, who had a satisfactory employment record, retained his position as shift commander. Id.

In 1984, Hicks became the focus of repeated and increasingly severe disciplinary measures. Id. For example, on March 3, Hicks was suspended for the violation of institutional rules by his subordinates. Id. On March 19, he was demoted to correctional officer for his failure enter into the log book the use of a St. Mary's vehicle. Id. On March 21, he was reprimanded for his alleged failure to conduct an adequate investigation of a brawl between inmates. Id. Finally, on June 7, Hicks was terminated from St. Mary's for threatening Powell during an exchange of heated words on April 19. Id.

III. PROCEDURAL HISTORY

Hicks filed suit against St. Mary's in the United States District Court for the Eastern District of Missouri. Hicks alleged that St. Mary's violated § 703(a)(1)[1] of Title VII of the Civil Rights Act of 1964 and that Steve Long violated 42 U.S.C. § 1983[2] by demoting and then discharging him because of his race.

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1 Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides in relevant part: "It shall be unlawful employment practice for an employer-- (1) ... to 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 ...." 42 U.S.C. § 2000e-2(a).

2 Section 1983 provides in relevant part: Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State ... subjects, or causes to be subjected, any citizen ... to the deprivation of any rights, privileges,

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The District Court, following the McDonnell Douglas/Burdine analysis, found that Hicks had established by a preponderance of the evidence, a prima facie case of racial discrimination; that petitioners had rebutted that presumption by introducing evidence of two legitimate, nondiscriminatory reasons for their actions; and that petitioners' reasons were pretextual. St. Mary's Honor Center v. Hicks, 756 F. Supp. 1244 (E.D.Mo. 1991). It nonetheless found for St. Mary's because Hicks had failed to carry his ultimate burden of proving that the adverse actions were racially motivated. Id.

The United States Court of Appeals for the Eighth Circuit reversed and remanded both the Title VII claim against St. Mary's and the § 1983 claim against Long. 970 F.2d 487 (8th Cir. 1992). In setting aside the District Court's determination, the Court of Appeals held that Hicks was entitled to judgment as a matter of law once he proved that all of St. Mary's proffered reasons were pretextual. Id. The Supreme Court subsequently granted cert. 506 U.S. ____, 113 S.Ct. 954.

IV. SUPREME COURT'S DECISION

St. Mary's Honor Center v. Hicks presented the Supreme Court with the narrow issue of whether Hicks would be entitled to a judgment as a matter of law by merely disproving the St. Mary's tendered explanation for its actions. Justice Scalia, writing for the majority, found that a plaintiff can not prevail merely by disproving the defendant's tendered explanation. St. Mary's, 113 S.Ct at 2749.

The Court reasoned that the presumption of discrimination that arises when a plaintiff establishes a prima facie case becomes irrelevant once the defendant meets his burden of production by articulating a legitimate, nondiscriminatory reason for the adverse employment action. Id. at 2747-48. The subsequent rejection of the defendant's proffered reasons does not *compel* judgment for the plaintiff. Id. at 2749. Such a holding, Justice Scalia stated, would disregard "the fundamental principle of Rule 301 [of the Federal Rules of Evidence] that a presumption does not shift the burden of proof, and ignores [this Court's] repeated admonition that the Title VII plaintiff at all times bears the ultimate burden of persuasion." Id. The Court further stated that "nothing in law" allows a court to equate the finding that an employer's proffered reason was not believable with a

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or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law .... 42 U.S.C. § 1983 (1981).

finding of discrimination. Id. at 2751. The Court stated that "a reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason." Id. at 2752.

The majority rejected the dissent's argument that the St. Mary's decision will bring about dire practical consequences in that the holding would benefit employers who "have given false evidence in a court of law ... [by] exempting them from responsibility for lies." Id. at 2762 (Souter, J., dissenting). The majority argued that there is no justification for assuming that those defendants whose evidence is disbelieved are "perjurers and liars." Id. at 2754. In addition, the majority argued that even if some employers do lie, the dissent absurdly suggests that unless the Court enters judgment for the plaintiff, the Court would exempt defendant from responsibility for its lies. Id.

V. CASES SINCE ST. MARY'S HONOR CENTER V. HICKS

Numerous federal appellate courts have relied on the burden of proof analysis set forth by the Supreme Court in St. Mary's. The following describes several of the cases that have been decided in each of the circuits. A review of these cases should give some incite into the way the circuits have responded to the analysis set forth in St. Mary's.

1. First Circuit

The First Circuit has consistently cited St. Mary's for the proposition that after an employer rebuts the presumption of discrimination by articulating legitimate, nondiscriminatory reasons for the adverse employment decision, the plaintiff must produce sufficient evidence to show that such reasons constitute a mere pretext for unlawful discrimination. To meet this burden, the plaintiff must prove both that the employer's reason is false and that discrimination was the actual reason for its employment action. E.g. Woods v. Friction Materials, Inc., 30 F.3d 255 (1st Cir. 1994); Hoeppner v. Crotched Mountain Rehabilitation Ctr., 31 F.3d 9, 17 (1st Cir. 1994); Vega v. Kodak Caribbean, Ltd., 3 F.3d 476 (1st Cir. 1993).

In Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 720 (1st Cir. 1994), the court explained that the facts that comprised the plaintiff's prima facie case may be considered, but the inference of discrimination originally attributable to those facts no longer pertains. To carry the burden of persuasion on this ultimate issue, the plaintiff must identify probative evidence suggesting that the reason given by the employer for the employment action is pretextual, and moreover, that it is a pretext for discrimination. Id. Depending on the facts of the particular case, showing a defendant's articulated explanation for an employment decision to

be pretextual may or may not suffice to establish a showing of discrimination, "particularly if disbelief is accompanied by a suspicion of mendacity." Id. at 720 n. 8 quoting St. Mary's at 2749.

The court in Vega stated that a plaintiff must produce "some minimally sufficient evidence to support a jury finding" at both the prima facie stage and the pretext stage. 3 F.3d at 479. The court further noted that "the plaintiff must ordinarily do more than impugn the legitimacy of the employer's asserted justification; he must also adduce evidence of the employer's discriminatory animus." Id.

2. Second Circuit

In Saulpaugh v. Monroe Community Hospital, 4 F.3d 134, 140 (2d Cir. 1993), the Second Circuit recognized that St. Mary's had changed the way Title VII cases are tried. The Second Circuit noted that it would be compelled by St. Mary's to reverse the trial court's judgment for the plaintiff if the plaintiff had only offered proof that the defendant's stated reason for the discharge was false. Saulpaugh, 4 F.3d at 141. In addition, however, to proving that the defendant's reason was untrue, the plaintiff also provided further evidence of discrimination. Id. Based on this additional evidence, the court concluded that the plaintiff had satisfied her burden of proving she was subjected to a retaliatory discharge. Id.

Of course, the Second Circuit has recognized that additional proof of discrimination is not *required* and that the factfinder's disbelief of the reasons put forth by the defendant may, together with the elements of the prima facie case, suffice to show intentional discrimination. E.g., Cabrera v. Jakabovitz, 24 F.3d 372, 382 n. 9 (2d Cir. 1994).

To defeat a defendants motion for summary judgment, the court in Woroski v. Nashua Corp., 31 F.3d 105 (2d Cir. 1994), held that a plaintiff must show that there is a material issue of fact as to whether (1) the employer's asserted reason for discharge is false and (2) it is more likely than not that discrimination was the real reason for the adverse action. Id. at 110. After the defendants articulated a legitimate reason for the employee's discharge, the court held that the evidence established a nondiscriminatory motive for the discharge and although the plaintiff advanced some evidence of discrimination, this evidence was not sufficient to withstand the defendant's motion for summary judgment. Id. at 109-110

3. Third Circuit

The Third Circuit, relying on St. Mary's, has held that a finding that the employer's reason is unworthy of credence may lead to a reasonable inference of discriminatory motives, but it does not automatically compel a finding of discrimination. E.g., McKenna v. Pacific Rail Service, 32 F.3d 820 (3d Cir. 1994); Seman v. Coplay Cement Co., 26 F.3d 428, 432-33 (3d Cir. 1994); Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324, 329 n. 4 (3d Cir. 1993). The Third Circuit has further stated that St. Mary's does not hold that proving the defendants proffered reasons false will never suffice to support a decision for the plaintiff, it merely established that the plaintiff does not merit judgment as a matter of law once falsity is proven. McKenna, 32 F.3d at 829.

In Fuentes v. Perskie, 32 F.3d 759 (3d Cir. 1994), the court stated that to survive summary judgment, the plaintiff had to either (1) present sufficient evidence to cast substantial doubt upon the defendant's proffered reasons for the adverse action, (e.g., by painting the reasons as weak, implausible, inconsistent, incoherent or contradictory), or (ii) come forward with sufficient evidence from which a factfinder could reasonably conclude that an illegitimate factor more likely than not was a motivating or determinative cause of the adverse action (e.g., by showing that the defendant in the past had subjected him to unlawful discriminatory treatment, that the employer treated other, similarly situated persons not of his protected class more favorably, or that the employer had discriminated against other members of his protected class or other protected categories of persons). Id. at 765.

4. Fourth Circuit

In Mitchell v. Data General Corp., 12 F.3d 1310 (4th Cir. 1992), the Fourth Circuit, considering the defendant's motion for summary judgment, looked at (1) whether the plaintiff had presented evidence sufficient to establish a prima facie case and (2) whether the plaintiff had shown that there was a genuine issue as to material fact about defendant's proffered explanation for the adverse action. Id. at 1316. The court held that the employer's conclusory statements about performance, which were not expressly age-related, were not sufficient to raise a fact issue as to the employer's legitimate nondiscriminatory explanation. Id. The court reasoned that there was no direct evidence indicating that the plaintiff was discharged based on age and therefore the court affirmed summary judgment in favor of the employer. Id. at 1318.

5. Fifth Circuit

In Bodenheimer v. PPG Industries, 5 F.3d 955, 958 (5th Cir. 1993), the Fifth Circuit analogized the plaintiff's burden at summary judgment with the burden at trial. The court first noted that, at trial, the plaintiff must prove that the defendant's articulated reasons are a pretext for discrimination. Id. Since the plaintiff bears this burden at trial, the court stated that the plaintiff must also produce sufficient evidence to establish that the defendant's reasons were "pretexts for discrimination" in order to survive summary judgment. Id. The court further stated that a plaintiff who produces evidence establishing that the defendant's proffered reasons are merely pretext, rather than pretext for discrimination, might not be able to defeat a motion for summary judgment. Id. at 959 n. 8 .

In a notable Fifth Circuit case decided in late 1994, Rhodes v. Guiberson Oil Tools, 39 F.3d 537 (5th Cir. 1994), the court urged that the language in St. Mary's stating that the "factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination," St. Mary's, 113 S.Ct. at 2749, was obviously dicta and as such would not be important to the resolution of the case at hand. The court went on to find, although heavily criticized by the dissent, that the Supreme Court decision in Hazen Paper Company v. Biggins, ___ U.S. ___, 113 S.Ct 1701 (1993), which was decided two months before St. Mary's, was more relevant and determinative to this decision than St. Mary's. The reasoning was that because St. Mary's was a Title VII case, and Hazen Paper was an ADEA case, Hazen Paper should govern the present case which was also an ADEA case.

6. Sixth Circuit

In Manzer v. Diamond Shamrock Chem. Co., 29 F.3d 1078, 1083 (6th Cir. 1994) the Sixth Circuit found that St. Mary's clarified that "the only effect of the employer's nondiscriminatory explanation is to convert the inference of discrimination based upon the plaintiff's prima facie case from a mandatory one which the jury must draw, to a permissive one which the jury may draw, provided that the jury finds that the employer's explanation is unworthy of belief." The Manzer court stated that "every circuit court to address the impact of St. Mary's on the submissability of employment discrimination cases has reached this same conclusion." Manzer, 29 F.3d at 1083. Thus, it appears that even if the language in St. Mary's stating that the "factfinder's disbelief of the reasons put forward by the defendant. . . may, together with the elements of the prima facie case, suffice to show intentional discrimination," St. Mary's, 113 S.Ct. at 2749, were dicta, circuit courts faced with this precise issued since St. Mary's have followed this language.

7. Seventh Circuit

In Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124 (7th Cir. 1994), the Seventh Circuit explained that although St. Mary's established the plaintiff's requirements at trial, the plaintiff has a lesser burden at the summary judgment stage. The court reasoned that if the defendant's only reason for its action is a lie, a rational factfinder can draw an inference that the true reason is discrimination. Anderson, 13 F.3d at 1120. Because St. Mary's allows a finder of fact to draw such an inference, the evidence should be presented to the factfinder at trial. Id. The Anderson court affirmed summary judgment for the employer notwithstanding evidence creating a fact issue that the employer's nondiscriminatory reason was false. Id.

8. Eighth Circuit

The Eighth Circuit's decision in Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104 (8th Cir. 1994), illustrates the inference of discrimination approved by the Supreme Court in St. Mary's. In Gaworski, the court upheld a jury verdict that the employer discriminated against the plaintiff based on the plaintiff's age. Gaworski, 17 F.3d at 1107. The plaintiff established a prima facie case of age discrimination. Id. at 1109. The employer claimed that it terminated the plaintiff because he lacked the financial and computer skills required to adequately perform the job. Id. at 1110. The plaintiff, however, offered evidence that this was merely pretextual. Id.

The Eighth Circuit found that a reasonable jury could conclude that the employer's proffered reasons for termination were false. Id. at 1110. The court noted that, after St. Mary's, it did not have the power to reverse a jury finding of discrimination if the plaintiff established a prima facie case and produced sufficient evidence to allow the jury to reject the defendant's proffered reason. Id. at 1109. Since the plaintiff established a prima facie case and produced evidence that the employer's proffered reasons were false, the court held that the jury had sufficient evidence to infer that discrimination had occurred. Id. at 1110.

9. Ninth Circuit

In Washington v. Garrett, 10 F.3d 1421, 1424-27 (9th Cir. 1993), a Title VII race discrimination case, the plaintiff alleged that her employer abolished her position and demoted her because she was black. The plaintiff's allegations successfully established a prima facie case of racial discrimination. Id. at 1434. In response, the defendant stated that it took the adverse action in order to cut costs. Id. at 1429. The plaintiff then

produced evidence that this cost cutting plan was not the real reason for her termination. Id. at 1426.

The plaintiff, however, produced no evidence that the reasons for implementing the cost cutting plan were really pretext for discrimination. Id. at 1427. Due to this lack of evidence, the district court granted summary judgment for the defendant. Id.

The Ninth Circuit, however, recognized that, according to St. Mary's, the factfinder is allowed to draw an inference of discrimination based solely on the prima facie case and a showing that the defendant' s reasons are untrue. Id. at 1433. Since such an inference is allowed, the court held that the case should be presented to the factfinder so that the factfinder can decide whether to draw the inference of discrimination. Id. at 1433. Therefore, summary judgment was improper. Id.

10. Tenth Circuit

In Durham v. Xerox Corporation, 18 F.3d 836 (10th Cir. 1994), the Tenth Circuit cited St. Mary's for the proposition that when the employer tenders proof of a legitimate nondiscriminatory reason for not promoting the employee, "the presumption of discrimination from the employee's prima facie case simply drops out of the picture" and the trier of fact must then decide the ultimate question of intentional discrimination. The court concluded that summary judgment was appropriate because the employee had not offered sufficient evidence to support a finding that the employer's stated reason was a pretext for discrimination. Durham, 18 F.3d at 840.

11. Eleventh Circuit

In Howard v. BP Oil Co., Inc., 32 F.3d 520, 524 (11th Cir. 1994), the Eleventh Circuit emphasized that St. Mary's does not in any way alter the summary judgement burdens articulated in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct 2548 (1986). Instead, St. Mary's "merely indicates that evidence from which a jury could find that the articulated reasons are false is enough to create a genuine issue for trial." The court held that genuine issues of material fact as to whether the defendant's articulated reasons were false precluded summary judgment. Howard, 32 F.3d at 527-28.

VI. SUGGESTED ARTICLES

1. Shannon R. Joseph, Employment Discrimination: Shouldering the Burden of Proof after St. Mary's Honor Center v. Hicks, 29 Wake Forest L. Rev. 963 (1994).

2. Donna G. Goldian, New Reason to Lie: The End of Proving Discriminatory Intent by Proving Pretest only after St. Mary's Honor Center v. Hicks, 30 Williamette L. Rev. 699 (1994).

3. Joe Keith Windle, St. Mary's Honor Center v. Hicks: Is the Supreme Court's Definition of Pretext Beneficial or Detrimental to Title VII Plaintiffs?, 18 Am. J. Trial Advoc. 213 (1994).

4. Patrick M. Edwards, Civil Rights -- Title VII Employment Discrimination -- Proof of Employer Pretext does not Entitle Employee to a Decision without further Proof of Discrimination. St. Mary's Honor Center v. Hicks, 71 U. Det. Mercy L. Rev. 693 (1994).

5. Richard L. Alfred, Burden of Production and Proof in Employment Discrimination Cases: An Endangered Future for Summary Judgment Motions?, 38-Feb. B. B.J. 7, (1994).

6. Norman G. Whitis, St. Mary's Honor Center v. Hicks: The Title VII Shifting Burden Stays Put, 25 Loy. U. Chi. L.J. 269 (1994).

7. Professor Eileen Kaufman, Employment Discrimination: Recent Developments in the Supreme Court, 10 Touro L. Rev. 525 (1994).

8. Sherie L. Coons, Proving Disparate Treatment after St. Mary's Honor Center v. Hicks: Is Anything Left of McDonnell Douglas?, 19 J. Corp. L. 379 (1994).

9. Matthew D. O'Leary, St. Mary's v. Hicks: The Supreme Court Restricts the Indirect Method of Proof in Title VII Claims, 13 St. Louis U. Pub. L. Rev. 821 (1994).

10. Jody H. Odell, Between Pretext Only and Pretext Plus: Understanding St. Mary's Honor Center v. Hicks and its Application to Summary Judgment, 69 Notre Dame L. Rev. 1251 (1994).

11. Melissa A. Essary, The Dismantling of McDonnell Douglas v. Green: The High Court Muddies the Evidentiary Waters in Circumstantial Discrimination Cases, 21 Pepp. L. Rev. 385 (1994).

12. Nicholas W. Chase, Civil Rights-Employment Discrimination: Modifying Federal Standards to Reflect Principles of State Law: The North Dakota Supreme Court's Examination of the Hicks Rationale Prompts the Court to Customize its Own Standard to. . . , 70 N.D. L. Rev. 207 (1994).

13. Joshua B. Levy, The Shifting Burdens of Proof in Employment Discrimination Laws, 66-Dec Wis. Law 16 (1993).

14. Robert C. Cadle, Burdens of Proof: Presumption and Pretext in Disparate Treatment Employment Discrimination Cases, 78 Mass. L. Rev. 122 (1993).

15. Archangela M. DeSilva, Supreme Court Refines Burden of Proof in Discrimination Cases, 11 No. 4 ACCA Docket 88 (1993).

16. Mark A. Schuman, The Supreme Court in Transition: Consensus Building or Ducking the Issues and Other Developments in Urban, State and Local Government, 25 Urb. Law. 697 (1993).

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IMPACT OF *HARRIS V. FORKLIFT SYSTEMS, INC.*

I. Summary of the Case

The roots of Harris v. Forklift Systems, Inc.[3] can be traced to the United States District Court for the Middle District of Tennessee. There, Teresa Harris had sued her former employer, Forklift Systems, Inc., under Title VII of the Civil Rights Act of 1964. Harris claimed that Charles Hardy, Forklift's president, had created an abusive work environment for her because of her gender.

Declaring this to be a "close case," the District Court found, among other things, that Hardy often insulted Harris because of her gender and often made her the target of unwanted sexual innuendos. The District Court, however, concluded that the conduct in question did not create an abusive environment because it was not "so severe as to . . . seriously affect [Harris'] psychological well-being" or lead her to "suffe[r] injury." The

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3 _____ U.S. _____, 114 S.Ct. 367, 126 L.Ed. 2d 295 (1993).

United States Court of Appeals for the Sixth Circuit affirmed in a brief, unpublished decision.[4]

A unanimous United States Court reversed these earlier decisions, holding that conduct need not seriously affect an employee's psychological well-being or lead the employee to suffer injury to be actionable as "abusive work environment" harassment.

In the process of reaching this result, the Supreme Court first reaffirmed that Meritor Savings Bank v. Vinson[5] provides the applicable standard for "abusive work environment" harassment claims. Pursuant to Meritor, Title VII is violated when the workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a hostile or abusive working environment. The Court next expanded upon Meritor by requiring that the workplace environment be both objectively, i.e., from the perspective of a reasonable person, and subjectively, i.e., from the perspective of the victim, hostile or abusive. The Court then held that determining whether an environment is "hostile" or "abusive" requires looking at all relevant circumstances, including:

1. the frequency of discriminatory conduct;

2. the severity of discriminatory conduct;

3. whether the discriminatory conduct is physically threatening or humiliating or merely an offensive utterance; and

4. whether the discriminatory conduct unreasonably interferes with an employee's work performance.

Lastly, the Court noted that while the effect of discriminatory conduct on an employee's psychological well-being may be relevant in determining whether the employee found the environment abusive, neither it nor any other factor is absolutely required.

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4 976 F.2d 733 (6th Cir. 1992).

5 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed. 2d 49 (1986).

II. **Effect of the Decision**

A. On the Supreme Court:

Reference to Harris has been relegated to footnotes in two subsequent Supreme Court decisions.[6]

B. On the Circuit Courts:

1. Second Circuit: In Karibian v. Columbia University,[7] the Second Circuit cited Harris for the following propositions:

   a. that sexual harassment in the workplace violates Title VII's broad rule of workplace equality; and

   b. that a hostile work environment exists "when the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment."[8]

2. Third Circuit: In Spain v. Gallegos,[9] the Third Circuit followed Harris in reversing a district court's dismissal of a Title VII claim. After examining all of the circumstances, the Third Circuit was satisfied that the plaintiff offered evidence sufficient to demonstrate that she had been exposed to a hostile work environment, causing her to suffer both objective and subjective harm.

3. Fourth Circuit: In Beardsley v. Webb,[10] the Fourth Circuit applied the Harris requirement of looking at all circumstances to determine whether a working environment is hostile and found that a supervisor's sexual innuendos and proposals together with his other

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6 See Landgraff v. USI Film Products, 114 S.Ct. 1483, 1491-92 n. 7 (1994); J.E.B. v. Alabama Ex Rel. T.R., 114 S.Ct. 1419, 1425 n. 6 (1994).

7 14 F.2d 772 (2d Cir. 1994).

8 This proposition represents Harris' reaffirmation of Meritor.

9 25 F.2d 439 (3d Cir. 1994).

10 30 F.3d 524 (4th Cir. 1994).

discriminatory conduct were sufficiently severe and pervasive to establish a sexual harassment claim.

4. Fifth Circuit: The Fifth Circuit has recognized that Harris provides the standard by which the existence of a "hostile" or "abusive" workplace environment is determined.[11] The Fifth Circuit has also noted, however, that Harris does not support the proposition that in all "hostile workplace environment" cases will the employer be held liable for a violation of Title VII.[12]

5. Sixth Circuit: In the Sixth Circuit, from which Harris arose, reference to Harris is strangely sparse.

6. Seventh Circuit: In the wake of Harris, the Seventh Circuit has abandoned its requirement of proof that harassment caused such anxiety and debilitation to the victim that working conditions were poisoned.[13] Instead, the Seventh Circuit now methodically applies Harris in order to determine whether a plaintiff has a "hostile workplace environment" claim.[14] Thus, the Seventh Circuit looks to all circumstances to determine whether the workplace environment was both objectively and subjectively "hostile" or "abusive."[15]

7. Eighth Circuit: The Eighth Circuit has pointed to Harris as providing the key issue in analyzing a hostile work environment claim -- whether members of one sex are exposed to

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11 See Carmon v. Lubrizol Corp., 17 F.3d 791 (5th Cir. 1994) (per curiam); Nash v. Electrospace System, Inc., 9 F.3d 401 (5th Cir. 1993) (per curiam).

12 Nash, 9 F.3d at 404 (stating employer liability requires that the employer knew or should have known of the harassment and failed to take prompt remedial action).

13 Saxton v. American Tel. & Tel. Co., 10 F.3d 526 (7th Cir. 1993).

14 Dey v. Colt Const. & Development Co., 28 F.3d 1446 (7th Cir. 1994); Saxton, 10 F.3d 526.

15 Id.

disadvantageous terms or conditions of employment to which members of the other sex are not exposed.[16]

8. Ninth Circuit: In reversing a district court's grant of summary judgment against the plaintiff, the Ninth Circuit recognized that Harris provides a "middle path" approach in hostile work environment cases.[17] Thus, sexual or gender-based conduct that is abusive, humiliating or threatening violates Title VII even if it does not cause diagnosed psychological injury to the victim.[18]

9. Eleventh Circuit: In Cross v. Alabama, the Eleventh Circuit recognized that, pursuant to Harris, a claim for hostile work environment sexual harassment does not require the conduct affect the employee's psychological well-being.[19]

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B. Leah R. McCaslin, Harris v. Forklift Systems, Inc.: Defining the Plaintiff's Burden in Hostile Environment Sexual Harassment Claims, 29 Tulsa L.J. 761 (1994).

C. Marren Roy, Comment, Employer Liability for Sexual Harassment: A Search for Standards in the Wake of Harris v. Forklift Systems, Inc., 48 SMU L. Rev. 263 (1994).

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16 Schneider v. U.S., 27 F.3d 1327 (8th Cir. 1994); Kopp v. Samaritan Health System, Inc., 13 F.3d 264 (8th Cir. 1993).

17 Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994).

18 Id.

19 1994 WL 424303, *18 (11th Cir. Aug. 30, 1994).

NEW EVIDENTIARY RULES FOR SEXUAL HARASSMENT CASES

Sec. 40141. SEXUAL HISTORY IN CRIMINAL AND CIVIL CASES

(a) Modification of Proposed Amendment. -- The proposed amendments to the Federal Rules of Evidence that are embraced by an order entered by the Supreme Court of the United States on April 29, 1994, shall take effect on December 1, 1994, as otherwise provided by law, but with the amendment made by subsection (b).

(b) Rule -- Rule 412 of the federal Rules of Evidence is amended to read as follows:

"Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

"(a) EVIDENCE GENERALLY INADMISSIBLE. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

"(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior,

"(2) Evidence offered to prove any alleged victim's sexual predisposition.

"(b) EXCEPTIONS.

"(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

"(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

"(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

"(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

"(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim to admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

"(c) PROCEDURE TO DETERMINE ADMISSIBILITY.

"(1) A party intending to offer evidence under subdivision (b) must --

"(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

"(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

"(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise."

(c) TECHNICAL AMENDMENT. -- The table of contents for the Federal Rules of Evidence is amended by amending the item relating to rule 412 to read as follows:

"412 Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition;

"(a) Evidence generally inadmissible.

"(b) Exceptions.

"(c) Procedure to determine admissibility."

This New Federal Rule of Evidence--What does it mean?

--The formal legislative history is virtually nonexistent.

--Commentary Circulated by Senator Biden on the "Biden Violence Against Women Law."

> The new law "extends 'rape shield law' protections to civil cases (e.g., sexual harassment) and to all criminal cases (current law applies only to sexual assault cases to bar embarrassing and irrelevant inquiries into a victim's sexual history at trial."

--Congressional Record August 16, 1994, S 11854:

> "Extends 'rape shield law' protections to civil cases and to all criminal cases to bar irrelevant inquiries into a victim's sexual history." (Sen. Biden.)
>
> "It encourages women to prosecute their attackers by extending 'rape shield' protections to bar irrelevant inquiries into a victim's sexual history." (Sen. Kennedy.) (August 25, 1994; S. 12526.)

--Comments of the Advisory Committee on Evidence Rules are more moderate as to the scope and impact of this new rule, but others argue that this moderate view was rejected by Congressional, rather than Supreme Court, enactment of the new rule. Minutes of Meeting of May 6-7, 1993.

--For an outline of the Plaintiff's bar's view, see Pittsburgh Legal Journal, Vol. 120, Nov. 1, 1994, p. 1.