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FACTS

In August 1989, Mary Washington College (MWC) hired Anthony E. Jiminez, a black English-speaking native of Trinidad, as an assistant professor of economics.[1] He would be eligible for tenure after six years of satisfactory performance.[2] In May 1993, MWC notified Jiminez that because his performance had been unsatisfactory, he would not be granted tenure, and would be terminated in one year unless he met certain conditions.[3] MWC attributed its action to Jiminez's consistently poor student evaluations, failure to earn his Ph.D., and failure to produce scholarly work.[4] Jiminez did not reapply, but instead filed a Title VII action against MWC.[5]

MWC tracks its teachers' performance in three areas: "(1) teaching effectiveness (mostly based on student evaluations); (2) service to MWC; and (3) scholarship or professional activity."[6] The annual reports on Jiminez's covering 1989-1991 generally indicated his "skills as a professor were lacking."[7] The reports were based on poor student evaluations and his failure to earn his Ph.D.[8] In February 1992, the other professors in the Economics Department unanimously recommended that Jiminez be given a termination contract.[9]

Jiminez's student evaluations "substantially improved" in his last three semesters.[10] Some students wrote letters on behalf of Jiminez to Philip Hall, Vice President of MWC. The letters indicated that "Jiminez was a caring man and a good professor."[11] Some letters suggested that a group of students "collaborated" to give Jiminez poor evaluations in his early semesters.[12] One letter stated that a student evaluation requesting MWC "hire a professor who speaks English," was "discrimination in its truest form."[13]

The district court, in a bench trial, ruled in favor of Jiminez and awarded compensatory damages of $15,000.[14] The district court found that Jiminez had established a *prima facie* case of race and national origin discrimination. MWC rebutted Jiminez's *prima facie* case, but Jiminez then demonstrated that MWC's stated reasons for terminating him were "pretextual and unworthy of credence" to the court's satisfaction.[15] The district court concluded that because Jiminez proved MWC's explanation was a pretext, he had carried his burden of proving that he was the victim of invidious discrimination.[16]

The district court rejected MWC's rebuttal for several reasons. The district court found that letters written by students on Jiminez's behalf suggested that he "was the victim of concerted effort of racial discrimination by some MWC students to have him terminated via poor teacher evaluations."[17] Specifically, the court found that Jiminez's first five semesters of student evaluations were "tainted by collusion and racial and national origin animus," and should have been ignored by MWC.[18] The district court also found that MWC knew the evaluations were tainted, yet failed to take corrective measures.[19] Based on this taint, the district court disregarded

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[1] *Jiminez v. Mary Washington College*, 57 F.3d 369, 372 (4th Cir. 1995).

[2] *Id.* at 373-75 In 1989 MWC offered Jiminez his position on condition he earn his Ph.D. Id. at 372. Jiminez failed to earn his Ph.D. by May of 1993. *Id.* at 383.

[3] *Id.* at 375-76. Jiminez's terminal contract allowed him to reapply on condition of "(1) substantial improvement in student evaluations; (2) favorable evaluations by colleagues in the Economics Department. . .; (3) defense of his doctorate dissertation; and (4) presentation of a paper at an economics conference." *Id.*

[4] *Id.* at 379.

[5] *Id.* at 376. 42 U.S.C. § 2000e-2 states:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or 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, 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.

[6] *Id.* at 373.

[7] *Id.*

[8] *Id.* at 375 Jiminez received poor evaluations from students in his first two years, and this continued into his fifth semester, the fall of 1991. "Jiminez's student evaluations were the lowest of approximately forty tenure-track faculty members" for four of the five semesters, and the other semester he was thirty-seventh. *Id.*

[9] *Id.* This recommendation was based on (1) his consistently poor student evaluations, (2) his failure to earn his Ph.D., (3) his occasional failure to cover all the material, (4) his lack of faculty support, and (5) a self-conducted survey of the Economics Department in which seventeen of twenty negative comments related to Jiminez. *Id.*

[10] *Id.* at 375.

[11] *Id.* at 373.

[12] *Id.* at 373-74.

[13] *Id.* at 374.

[14] *Id.* at 372, 376.

[15] *Id.* at 372.

[16] *Id.* at 376.

[17] *Id.* at 373.

[18] *Id.* at 376.

[19] *Id.* at 382.

the student evaluations from Jiminez's first five semesters. It concluded that the more favorable evaluations proved the earlier student evaluations were tainted, and that only the evaluations from the last three semesters were accurate.[20]

The district court also pointed to another professor in the Economics Department, Steve Greenlaw, who did not earn his Ph.D. until his fourth year at MWC but had been given tenure.[21] The district court concluded, based on Greenlaw's tenure, that MWC's reliance on Jiminez's failure to obtain his Ph.D. was mere pretext.[22] The district court found that because Jiminez had established a *prima facie* case of race and national origin discrimination and that MWC's proffered reasons for his termination were a pretext, then Jiminez was entitled to judgment in his favor.[23]

MWC appealed, contending that Jiminez was not the victim of invidious discrimination, but was in fact terminated because he was an incompetent professor.[24] Jiminez cross-appealed, claiming his damages were inadequate.[25]

HOLDING

The Fourth Circuit Court of Appeals reversed the district court. The court of appeals found the district court's factual findings were clearly erroneous and that Jiminez had failed to prove he was the victim of invidious discrimination.[26] Moreover, it said the district court misapplied the test from *St. Mary's Honor Center v. Hicks*.[27] The Fourth Circuit pointed out that under *St. Mary's*, even if the plaintiff establishes a *prima facie* case and the defendant's proffered reason for the adverse action is found to be pretextual, the plaintiff still has the burden of proving that the reason for the action was discriminatory. [28] The court decided that Jiminez had not proven that MWC discriminated against him.[29]

ANALYSIS/APPLICATION

I. DISTRICT COURT'S FINDINGS OF FACT

The Fourth Circuit cited several cases establishing a deferential standard of reviewing findings of fact below. The district court's findings of fact must be "clearly erroneous" to be disregarded.[30] The appellate court should not "exercise plenary review" or "substitute [its] version of the facts."[31] The court concluded that the findings below should be "conclusive" unless "plainly wrong."[32]

However, the court pointed out that not all district court findings are "sacrosanct."[33] The court of appeals will reverse a factual finding as being clearly erroneous if the court "is left with the definite and firm conviction that a mistake has been committed."[34] The Fourth Circuit then pointed out the district court's findings of fact may be rejected if:

> (1) the district court labored under an improper view or misconception of the appropriate legal standard; (2) the district court's factual determinations are not supported by substantial evidence; (3) the district court disregarded substantial evidence that would militate a conclusion contrary to what is reached; and (4) the district court's conclusion is contrary to the clear weight of the evidence considered in light of the entire record.[35]

The court of appeals added that this list was not complete; for example the appellant could overturn the findings by "demonstrating pitfalls in the avenue by which the district court arrived at its factual findings."[36]

The court cited several recent Fourth Circuit decisions which overturned the district court's findings of fact in Title VII cases.[37] Under the Fourth Circuit's reading of the facts, Jiminez was a poor teacher and was fired

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[20] *Id.* at 379-80.
[21] *Id.* at 376.
[22] *Id.* at 383.
[23] *Id.* at 372.
[24] *Id.* at 376.
[25] *Id.*
[26] *Id.* at 384
[27] 113 S. Ct. 2742 (1993) (holding that trier of fact's rejection of employer's asserted legitimate, nondiscriminatory reasons for its challenged actions does not entitle employee to judgement as matter of law under *McDonnel Douglas* scheme applicable to discriminatory treatment cases).
[28] *Jiminez*, 57 F.3d at 378.
[29] *Id.*
[30] *Id.* (citing *Anderson v. Bessemer City*, N.C., 470 U.S. 564 (1985) and FED.R.CIV.P 52(a)).
[31] *Id.* (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)).
[32] *Id.* at 379.
[33] *Id.* (citing *Wileman v. Frank*, 979 F.2d 30 (4th Cir. 1992) (concluding that factual findings by district court in Title VII suit were clearly erroneous and accordingly reversed)).
[34] *Id.* (citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).
[35] *Id.* (citing *Miller v. Mercy Hosp., Inc.*, 720 F.2d 356 (4th Cir. 1983)).
[36] *Id.*
[37] *Id.* (citing *Wileman v. Frank*, 979 F.2d 30 (4th Cir. 1992) (concluding that factual findings by district court in Title VII suit were clearly erroneous and accordingly reversed); *Lilly v. Harris-Teeter Supermarket*, 842 F.2d 1496 (4th Cir.1988) (same); *Miller v. Mercy Hosp., Inc.*, 720 F.2d 356 (4th Cir. 1983)(same), *cert. denied*, 470 U.S. 1083, 105 S.Ct. 1841, 85 L.Ed.2d 141 (1985). The cases cited by the court was not an all-inclusive list. There have been other recent cases in which the court found the findings of the district court to be erroneous and reversed or remanded a finding for the plaintiff in the district court. *See e.g. Moore v. City of Charlotte*, 754 F.2d 1100

due to his poor performance, not because of his race. The court of appeals pointed out that MWC offered Jiminez a job despite a divided recommendation from the Economics Department, "inauspicious evaluations" from the University of New Mexico (UNM), the fact that he only met MWC's minimal standards, and "even though he was not the most qualified applicant."[38] Additionally, Jiminez had not yet earned his Ph.D., although on his application he indicated that he would receive his doctorate degree in economics in June 1989 from UNM.[39] MWC offered Jiminez a job, in part "to increase the number of blacks on its faculty."[40]

The Fourth Circuit Court of Appeals rejected the district court's determination that the student evaluations for Jiminez's first five semesters should be disregarded.[41] The court of appeals decided that the district court erred in finding that the early student evaluations were tainted by a racial conspiracy. The Fourth Circuit pointed to the testimony and letters of students supporting the conspiracy as "nothing but rank speculation" and "far too insubstantial" to be the basis for disregarding the early evaluations.[42]

For example, the Fourth Circuit Court of Appeals pointed out that the district court, in finding the evaluations tainted, had relied on a letter from one student that referred to another student's statement that "[MWC should] hire a professor who speaks English." The student's letter called the statement "the truest form of discrimination." The court of appeals characterized this as an absurd bald assertion; "requiring that a professor speak the native tongue in order to convey his ideas is not any form of discrimination, invidious or otherwise."[43]

The Fourth Circuit Court of Appeals admonished the district court for failing to consider the evaluations for Jiminez's first five semesters on an individual basis, rather than making separate findings with respect to each semester.[44] The district court should have given credence to the student evaluations because "student reaction is a legitimate nondiscriminatory factor on which to evaluate tenure candidates."[45] The court of appeals pointed out that the student evaluations showed that "Jiminez was an inferior instructor, disorganized, confused, experienced difficulty in explaining concepts and answering questions."[46] While the district court found that MWC knew the student evaluations were tainted, the Fourth Circuit decided that the testimony did not support such a finding.[47] The Fourth Circuit concluded that the district court made a mistake by disregarding the evaluations.[48]

Jiminez had claimed, and the district court agreed, that his last three semesters' student evaluations improved because "the students understood that no more discriminatory collaboration would be tolerated."[49] The Fourth Circuit agreed with MWC that the improvement was due to Jiminez's students' grades "dramatically" improving.[50] Also, his class size dropped in 1992 and 1993 to an average of ten students, while the department averaged twenty-six students per class.[51]

The district court also erred, according to the Fourth Circuit, in finding that the college used Jiminez's failure to earn his Ph.D. as a pretext, based on the career of another professor. The other professor, Steve Greenlaw, had been hired in 1982; at that time a Ph.D. was not a requirement for promotion, nor was it made a condition of his continued employment.[52] In 1989 when Jiminez was hired, the faculty handbook stated that a terminal degree (in most cases a Ph.D.) was required for promotion to assistant professor. There was no such requirement stated when Greenlaw was hired.[53]

II. APPLICATION OF THE LAW

In *St. Mary's*, the Supreme Court affirmed that in a Title VII case the plaintiff has the burden of establishing, by a preponderance of the evidence, a *prima facie* case of discrimination.[54] By establishing the *prima facie* case, the plaintiff creates a "presumption" that produces " a required conclusion in the absence of explanation."[55] This "presumption places upon the defendant the burden of producing an explanation to rebut the *prima fa-*

(4th Cir. 1985); *Lewis v. Tobacco Worker's International Union*, 577 F.2d 1135 (4th Cir. 1978). The Fourth Circuit Court of Appeals addressed the issue of error in the findings of fact in eight Title VII cases. In two cases the district court found for the Title VII defendant and the court of appeals affirmed. *Pope v. City of Hickory*, 679 F.2d 20 (4th Cir. 1982); *Friend v. Leidinger*, 588 F.2d 61 (4th Cir. 1978). In five cases the district court had ruled in favor of the Title VII plaintiff, but the court of appeals found error and found for the defendant. Cases cited *supra* this note. In only one case did the court of appeals affirm findings of fact from the district court in favor of the plaintiff. *Stastny v. Southern Bell Telephone and Telegraph Co.*, 628 F.2d 267 (4th Cir. 1980).

[38] *Jiminez*, 57 F.3d at 372.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 379-80.

[42] *Id.* at 380.

[43] *Id.* at 378.

[44] *Id.* at 381.

[45] *Id.* (citing *Brousard-Norcross v. Augustana College Assoc.*, 935 F.2d 974, 976 (8th Cir. 1991)).

[46] *Id.*

[47] *Id.* at 382.

[48] *Id.*

[49] *Id.* at 375.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 383.

[53] *Id.* at 372.

[54] *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2746 (1993).

[55] *Id.* at 2747 (citing 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 67, at 536 (1977).

cie case—i.e., the burden of 'producing evidence' that the adverse employment actions were taken 'for a legitimate, nondiscriminatory reason.'"[56] Once the defendant offers reasons for its actions that show that unlawful discrimination was not the reason for the actions, and if the evidence of those reasons is "believed by the trier of fact," then the defendant has rebutted the presumption.[57] However, if the defendant is not believed by the trier of fact, the plaintiff has not yet won. The important point, according to the Court in *St Mary's*, is that the presumption created by a *prima facie* case shifts the burden of production to the defendant, *but* the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[58] In other words, after the plaintiff has proven a *prima facie* case, and the trier of fact has not accepted the defendant's proffered reason, the plaintiff must still prove discrimination.

The Fourth Circuit explained that in an appeal from a case where the *prima facie* Title VII claim was established, the issue is narrowed to whether there was discrimination or not.[59] On appeal, the court should narrow its inquiry to the "specific proofs and rebuttals of discriminatory motivation the parties have introduced."[60] Thus, the Fourth Circuit explains, the ultimate issue on appeal is whether the plaintiff has proved that the "defendant intentionally discriminated against the plaintiff."[61]

The *Jiminez* court next explained that under *St. Mary's* the term "pretext" refers to "'pretext for discrimination,' not whether the defendant's articulated reason for the challenged action is false."[62] Thus the plaintiff does not automatically prevail by showing that the defendant's proffered explanation is not true.[63] Ultimately the plaintiff, under this rule, "must prove '*both* that the reason was false *and* that discrimination was the real reason' for the challenged conduct.[64] To summarize, the Fourth Circuit explained that after the plaintiff has made a *prima facie* case and the defendant has offered a rebuttal:

> the plaintiff is not automatically entitled to judgement because the fact-finder may determine that the challenged conduct is pretextual, but does not constitute invidious discrimination. Accordingly, rejection of the defendant's proffered reason—standing alone—does not compel the ultimate conclusion that the defendant unlawfully discriminated against the plaintiff, thus creating liability under Title VII, but rather this factor may enter the calculus for determining this conclusion.[65]

The Fourth Circuit concluded that the district court applied the *St. Mary's* standard improperly. Even if MWC's proffered reasons (poor teaching performance) were pretextual, Jiminez still had to prove that MWC's termination of Jiminez was due to invidious discrimination.[66] The court of appeals found that, based on its reversal of the district court's findings of facts, "Jiminez failed to satisfy his ultimate burden of proving he was the victim of invidious discrimination."[67]

CONCLUSION

Jiminez confirms the fears of some commentators that *St. Mary's* has made it much more difficult for plaintiffs to prevail in Title VII cases.[68] Employers have nothing to lose and everything to gain by offering reasons to justify their actions, whether true or not. If believed, the employer has won by rebutting the plaintiff's *prima facie* case. If not believed, the employer still has a chance of winning, because the burden once again shifts to the employee to prove that the true reason for the challenged action was invidious discrimination. Only if the employer offers no explanation, or impermissible explanations, will the plaintiff win by making a *prima facie* case. Effectively, this rule means that employers will almost always offer a permissible reason for their actions, even if untrue. Once the employer has offered the reason, the plaintiff has the burden of both showing that the reason is pretextual and that the real reason is invidious discrimination.

It is also worth noting that the Fourth Circuit exhibited little restraint in *Jiminez* in overturning the findings of fact from the district court. The court was quick to read the transcript and interpret the testimony in light

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[56] *Id.* (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

[57] *Id.*

[58] *Id.* (citing *Burdine*, 450 U.S. at 253). The Burdine Court also pointed out that this is the same standard as Rule 301 of the Federal Rules of Evidence:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

[59] *Jiminez*, 57 F.3d at 377 (citing *United States Postal Serv. v. Aikins*, 460 U.S. 711, 714-16 (1983)).

[60] *Id.* (citing *St. Mary's* 113 S. Ct. at 2752).

[61] *Id.* (citing *Burdine*, 450 U.S. at 253,256).

[62] *Id.* (citing *St. Mary's* 113 S. Ct. at 2752).

[63] *Id.* (citing *St. Mary's* 113 S. Ct. at 2752).

[64] *Id.* at 378 (citing *St. Mary's* 113 S. Ct. at 2752 (emphasis in original)).

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *See generally* Kristin T. Saam, *Rewarding Employers' Lies: Making Intentional Discrimination Under Title VII Harder to Prove*, 44 DEPAUL L. REV. 673 (1995).

very favorable to the defendant.[69] Prior cases in the Fourth Circuit indicate a trend to find for the defendant in Title VII cases.[70]

This case demonstrates the difficulty created by *St. Mary's*, both for plaintiffs and also for courts attempting to apply Title VII. First, courts, such as the district court here, mechanically apply the requirements of shifting the burden of proof at each stage, but fail to remember that the ultimate issue is whether or not there was discrimination. Second, when applied properly, the rule in *St. Mary's* makes the plaintiff's job much more difficult. Under *St. Mary's*, the plaintiff must establish a *prima facie* case of discrimination, show the reason proffered by the defendant to be untrue or a pretext, and still ultimately prove invidious discrimination. Even if the Fourth Circuit had accepted the district court's factual findings, it probably still would have remanded the case to require Jiminez to meet his burden of proving invidious discrimination.

Summary and Analysis Prepared by:
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[69] *Jiminez*, 57 F.3d at 380 (describing letters and testimony of students suggesting conspiracy as "rank speculation and . . . far too insubstantial to. . .[infer] collusive discrimination," finding that criticism of professor's English was racist was absurd "bald assertion,"and finding that testimony did not indicate presence of alleged racial conspiracy).

[70] *See supra* note 37.