



10-1982

United States Postal Service Board of Governors v. Aikens

Lewis F. Powell Jr.

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Intent is necessary - 4

Prima facie case - 5

Need not
be "better
qualified" - 5

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

The IT's proof must ~~show~~ ^{infer} ~~discrimination~~ ^{inference of discrimination} - 5

Syllabus

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS v.

McDonnell standard ~~not~~ ^{inflexible} - n 6

BURDINE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-1764. Argued December 9, 1980—Decided March 4, 1981

Respondent filed suit in Federal District Court, alleging, *inter alia*, that her termination of employment with petitioner was predicated on gender discrimination in violation of Title VII of the Civil Rights Act of 1964. The District Court found that the testimony for petitioner sufficiently had rebutted respondent's allegation of gender discrimination in the decision to terminate her employment. The Court of Appeals reversed this finding, holding that the defendant in a Title VII case bears the burden of proving by a preponderance of the evidence the existence of legitimate, nondiscriminatory reasons for the employment action and also must prove by objective evidence that those hired were better qualified than the plaintiff, and that the testimony for petitioner did not carry either of these burdens.

Held: When the plaintiff in a Title VII case has proved a prima facie case of employment discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions. Pp. 4-11

(a) As set forth in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, the basic allocation of burdens and order of presentation of proof in a Title VII case, is as follows. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.*, at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. The defendant need not persuade the court that it was actually motivated by the proffered

Syllabus

reasons, but it is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. Pp. 4-6.

(b) The Court of Appeals erred by requiring petitioner to prove by a preponderance of the evidence the existence of nondiscriminatory reasons for terminating respondent. By doing this, the court required much more than is required by *McDonnell Douglas*, *supra*, and its progeny: it placed on petitioner the burden of persuading the court that it had convincing, objective reasons for preferring the chosen applicant above the respondent. Limiting the defendant's evidentiary obligation to a burden of production will not unduly hinder the plaintiff. Pp. 7-9.

(c) The Court of Appeals also erred in requiring petitioner to prove by objective evidence that the person hired was more qualified than respondent. It is the plaintiff's task to demonstrate that similarly situated employees were not treated equally, but the Court of Appeals' rule would require the employer to show that the plaintiff's objective qualifications were inferior to those of the person selected, and if it cannot, a court would, in effect, conclude that it has discriminated. The Court of Appeals' views can also be read as requiring the employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. But Title VII does not obligate an employer to accord this preference. Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. Pp. 9-10.

608 F. 2d 563, vacated and remanded.

POWELL, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 79-1764

Texas Department of Community Affairs, Petitioner,
v.
Joyce Ann Burdine. On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March 4, 1981]

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to address again the nature of the evidentiary burden placed upon the defendant in an employment discrimination suit brought under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* The narrow question presented is whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed.

I

Petitioner, the Texas Department of Community Affairs (TDCA), hired respondent, a female, in January 1972, for the position of accounting clerk in the Public Service Careers Division (PSC). PSC provided training and employment opportunities in the public sector for unskilled workers. When hired, respondent possessed several years' experience in employment training. She was promoted to Field Services Coordinator in July 1972. Her supervisor resigned in November of that year, and respondent was assigned additional duties. Although she applied for the supervisor's position of Project Director, the position remained vacant for six months.

PSC was funded completely by the United States Depart-

ment of Labor. The Department was seriously concerned about inefficiencies at PSC.¹ In February, 1973, the Department notified the Executive Director of TDCA, B. R. Fuller, that it would terminate PSC the following month. TDCA officials, assisted by respondent, persuaded the Department to continue funding the program, conditioned upon PSC reforming its operations. Among the agreed conditions were the appointment of a permanent Project Director and a complete reorganization of the PSC staff.²

After consulting with personnel within TDCA, Fuller hired a male from another division of the agency as Project Director. In reducing the PSC staff, he fired respondent along with two other employees, and retained another male, Walz, as the only professional employee in the division. It is undisputed that respondent had maintained her application for the position of Project Director and had requested to remain with TDCA. Respondent soon was rehired by TDCA and assigned to another division of the agency. She received the exact salary paid to the Project Director at PSC, and the subsequent promotions she has received have kept her salary and responsibility commensurate with what she would have received had she been appointed Project Director.

Respondent filed this suit in the United States District Court for the Western District of Texas. She alleged that the failure to promote and the subsequent decision to terminate her had been predicated on gender discrimination in violation of Title VII. After a bench trial, the District Court held that neither decision was based on gender discrimination. The court relied on the testimony of Fuller that the employment decisions necessitated by the commands of the Depart-

¹ Among the problems identified were overstaffing, lack of fiscal control, poor bookkeeping, lack of communication among PSC staff, and the lack of a full-time project director. Letter of March 20, 1973 from Charles Johnson to B. R. Fuller, reprinted in App., at 38-40.

² See *id.*, at 39.

ment of Labor were based on consultation among trusted advisors and a nondiscriminatory evaluation of the relative qualifications of the individuals involved. He testified that the three individuals terminated did not work well together, and that TDCA thought that eliminating this problem would improve PSC's efficiency. The court accepted this explanation as rational and, in effect, found no evidence that the decisions not to promote and to terminate respondent were prompted by gender discrimination.

The Court of Appeals for the Fifth Circuit reversed in part. 608 F. 2d 563 (1979). The court held that the District Court's "implicit evidentiary finding" that the male hired as Project Director was better qualified for that position than respondent was not clearly erroneous. Accordingly, the court affirmed the District Court's finding that respondent was not discriminated against when she was not promoted. The Court of Appeals, however, reversed the District Court's finding that Fuller's testimony sufficiently had rebutted respondent's prima facie case of gender discrimination in the decision to terminate her employment at PSC. The court reaffirmed its previously announced views that the defendant in a Title VII case bears the burden of proving by a preponderance of the evidence the existence of legitimate nondiscriminatory reasons for the employment action and that the defendant also must prove by objective evidence that those hired or promoted were better qualified than the plaintiff. The court found that Fuller's testimony did not carry either of these evidentiary burdens. It, therefore, reversed the judgment of the District Court and remanded the case for computation of backpay.³ Because the decision of the Court of Appeals as to the burden of proof borne by the defendant conflicts with interpretations of our precedents adopted by other courts of appeals,⁴

³ The Court of Appeals also vacated the District Court's judgment that petitioner did not violate Title VII's equal pay provision, 42 U. S. C. § 2000e-2 (h), but that decision is not challenged here.

⁴ See, e. g., *Lieberman v. Gant*, 630 F. 2d 60 (CA2 1980); *Jackson v. U. S. Steel Corp.*, 624 F. 2d 436 (CA3 1980); *Ambush v. Montgomery*

we granted certiorari — U. S. — (1980). We now vacate the Fifth Circuit's decision and remand for application of the correct standard.

II

In *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment.⁵ First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.*, at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.*, at 804.

The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff. See *Board of Trustees of Keene State College v. Sweeney*, 439 U. S. 24, 25, n. 2 (1979); *id.*, at 29 (STEVENS, J., dissenting). See generally 9 Wigmore, Evidence § 2489 (3d ed. 1940) (the burden of persuasion "never shifts"). The *McDonnell Douglas* division of intermediate evidentiary burdens serves to

County Government, 22 FEP Cases 1101 (CA4 1980); *Loeb v. Textron, Inc.*, 600 F.2d 1003 (CA1 1979). But see *Vaughn v. Westinghouse Elec. Corp.*, 620 F.2d 655 (CA8 1980), cert. pending, No. 80-276.

⁵ We have recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes. See *McDonnell Douglas, supra*, 411 U. S., at 802, n. 14; *Teamsters v. United States*, 431 U. S. 324, 335-336, and n. 15 (1977).

bring the litigants and the court expeditiously and fairly to this ultimate question.

The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position, for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.⁶ The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection. See *Teamsters v. United States*, 431 U. S. 324, 358 & n. 44 (1977). As the Court explained in *Furnco Construction Co. v. Waters*, 438 U. S. 567, 577 (1978), the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption,

⁶ In *McDonnell Douglas, supra*, we described an appropriate model for a prima facie case of racial discrimination. The plaintiff 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 qualification, 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." 411 U. S., at 802.

We added, however, that this standard is not inflexible, as "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect in differing factual situations." *Id.*, at 802, n. 13.

In the instant case, it is not seriously contested that respondent has proved a prima facie case. She showed that she was a qualified woman who sought an available position, but the position was left open for several months before she finally was rejected in favor of a male who had been under her supervision.

*inference of
discrim.*

*intent
necessary*

Heard

the court must enter judgment for the plaintiff because no issue of fact remains in the case.⁷

The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. See *Sweeney, supra*, at 25. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.⁸ To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.⁹ The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of produc-

⁷ The phrase "prima facie case" may denote not only the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. 9 Wigmore, Evidence § 2494 (3d ed. 1940). *McDonnell Douglas* should have made it apparent that in the Title VII context we use "prima facie case" in the former sense.

⁸ This evidentiary relationship between the presumption created by a prima facie case and the consequential burden of production placed on the defendant is a traditional feature of the common law. "The word 'presumption' properly used refers only to a device for allocating the production burden." F. James & G. Hazard, Civil Procedure § 7.9, at 255 (2d ed. 1977) (footnote omitted). See Fed. Rule Evid. 301. See generally 9 Wigmore, Evidence § 2491 (3d Ed. 1940). Cf. J. Maguire, Evidence, Common Sense and Common Law, 185-186 (1947). Usually, assessing the burden of production helps the judge determine whether the litigants have created an issue of fact to be decided by the jury. In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.

⁹ An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel.

tion, the presumption raised by the prima facie case is rebutted,¹⁰ and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See *McDonnell Douglas, supra*, at 804-805.

III

In reversing the judgment of the District Court that the discharge of respondent from PSC was unrelated to her sex, the Court of Appeals adhered to two rules it had developed to elaborate the defendant's burden of proof. First, the defendant must prove by a preponderance of the evidence that

¹⁰ See generally J. Thayer, Preliminary Treatise on Evidence 346 (1898). In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

legitimate, nondiscriminatory reasons for the discharge existed. 608 F. 2d, at 567. See *Turner v. Texas Instruments, Inc.*, 555 F. 2d 1251, 1255 (CA5 1977). Second, to satisfy this burden, the defendant "must prove that those he hired . . . were somehow *better* qualified than was plaintiff; in other words, comparative evidence is needed." 608 F. 2d, at 567 (emphasis in original). See *East v. Romine, Inc.*, 518 F. 2d 332, 339-340 (CA5 1975).

A

The Court of Appeals has misconstrued the nature of the burden that *McDonnell Douglas* and its progeny place on the defendant. See Part II, *supra*. We stated in *Sweeney* that "the employer's burden is satisfied if he simply 'explains what he has done' or 'produc[es] evidence of legitimate nondiscriminatory reasons.'" 439 U. S., at 25, n. 2, quoting *id.*, at 28, 29 (STEVENS, J., dissenting). It is plain that the Court of Appeals required much more: it placed on the defendant the burden of persuading the court that it had convincing, objective reasons for preferring the chosen applicant above the plaintiff.¹¹

The Court of Appeals distinguished *Sweeney* on the ground that the case held only that the defendant did not have the

burden of proving the absence of discriminatory intent. But this distinction slights the rationale of *Sweeney* and of our other cases. We have stated consistently that the employee's prima facie case of discrimination will be rebutted if the employer articulates lawful reasons for the action; that is, to satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus. The Court of Appeals would require the defendant to introduce evidence which, in the absence of any evidence of pretext, would *persuade* the trier of fact that the employment action was lawful. This exceeds what properly can be demanded to satisfy a burden of production.

The court placed the burden of persuasion on the defendant apparently because it feared that "[i]f an employer need only *articulate*—not prove—a legitimate, nondiscriminatory reason for his action, he may compose fictitious, but legitimate, reasons for his actions." *Turner v. Texas Instruments, Inc.*, *supra*, at 1255 (emphasis in original). We do not believe, however, that limiting the defendant's evidentiary obligation to a burden of production will unduly hinder the plaintiff. First, as noted above, the defendant's explanation of its legitimate reasons must be clear and reasonably specific. *Supra*, at 5-6. See *Loeb v. Textron, Inc.*, 600 F. 2d 1003, 1011-1012, n. 5 (CA1 1979). This obligation arises both from the necessity of rebutting the inference of discrimination arising from the prima facie case and from the requirement that the plaintiff be afforded "a full and fair opportunity" to demonstrate pretext. Second, although the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation. Third, the liberal discovery rules applicable to any civil suit in federal court are supplemented in a Title VII suit

¹¹ The court reviewed the defendant's evidence and explained its deficiency:

"Defendant failed to introduce comparative factual data concerning Burdine and Walz. Fuller merely testified that he discharged and retained personnel in the spring shakeup at TDCA primarily on the recommendations of subordinates and that he considered Walz qualified for the position he was retained to do. Fuller failed to specify any objective criteria on which he based the decision to discharge Burdine and retain Walz. He stated only that the action was in the best interest of the program and that there had been some friction within the department that might be alleviated by Burdine's discharge. Nothing in the record indicates whether he examined Walz' ability to work well with others. This court in *East* found such unsubstantiated assertions of 'qualification' and 'prior work record' insufficient absent data that will allow a true *comparison* of the individuals hired and rejected." 608 F. 2d, at 568.

by the plaintiff's access to the Equal Employment Opportunity Commission's investigatory files concerning her complaint. See *EEOC v. Associated Dry Goods Corp.*, — U. S. — (1981). Given these factors, we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext. We remain confident that the *McDonnell Douglas* framework permits the plaintiff meriting relief to demonstrate intentional discrimination.

B

The Court of Appeals also erred in requiring the defendant to prove by objective evidence that the person hired or promoted was more qualified than the plaintiff. *McDonnell Douglas* teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally. 411 U. S., at 804. The Court of Appeals' rule would require the employer to show that the plaintiff's objective qualifications were inferior to those of the person selected. If it cannot, a court would, in effect, conclude that it has discriminated.

The court's procedural rule harbors a substantive error. Title VII prohibits all discrimination in employment based upon race, sex and national origin. "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions." *McDonnell Douglas*, *supra*, at 801. Title VII, however, does not demand that an employer give preferential treatment to minorities or women. 42 U. S. C. § 2000e-2 (j). See *Steelworkers v. Weber*, 443 U. S. 193, 205-206 (1979). The statute was not intended to "diminish traditional management prerogatives." *Id.*, at 207. It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired. *Furnco Construction Co. v. Waters*, 438 U. S., at 577-578.

"The views of the Court of Appeals can be read, we think, as requiring the employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. But Title VII does not obligate an employer to accord this preference. Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination. *Loeb v. Textron, Inc.*, *supra*, at 1012, n. 6; see *Lieberman v. Gant*, 630 F. 2d 60, 65 (CA2 1980).

IV

In summary, the Court of Appeals erred by requiring the defendant to prove by a preponderance of the evidence the existence of nondiscriminatory reasons for terminating the respondent and that the person retained in her stead had superior objective qualifications for the position.¹² When the plaintiff has proved a *prima facie* case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions. The judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

¹² Because the Court of Appeals applied the wrong legal standard to the evidence, we have no occasion to decide whether it erred in not reviewing the District Court's finding of no intentional discrimination under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52 (a). Addressing this issue in this case would be inappropriate because the District Court made no findings on the intermediate questions posed by *McDonnell Douglas*.

CT 104-129

Grant

meb 01/19/82

CADC erred in applying
McDonnell Douglas & Burdick
& there is a conflict

Mary's
Cert
memo
-very
help-
ful

CADC held that a prima facie
case was made when an employee
shows he was a minority member
of a pool of qualified employees
& was not promoted to the
one vacancy that was to be filled

CA5 agrees but CA9 & 10
are to the contrary.

We remanded this case on
Burdick - but
to no avail.

PRELIMINARY MEMORANDUM

March
February 19, 1982 Conference
List 1, Sheet 2

No. 81-1044

Cert to CADC
(Wilkey, Wald, Edwards)
(Wilkey, dissenting)

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS

v.

LOUIS H. AIKENS

Federal/Civil Timely

1. SUMMARY: Did the CADC err in holding that a prima facie case under Title VII is established when an employee shows that he is a member of a minority group, applied for a promotion, possessed the minimum qualifications for the position, but the promotion went to someone else, not a member of a minority.

Grant. CA DC (and CA5) have mechanically applied
The McDonnell Douglas prima facie case in promotion (over)

Response received.
Adds nothing -
see back - Mary.

*Resp.
Ref. refusal
several promotions*

2. FACTS AND DECISION BELOW: Resp, a black retired Postal Service employee, brought this suit in DCDC on Feb., 1977, alleging that his employer had discriminated against him on the basis of race by denying him certain details and promotions in violation of Title VII. The trial court found that resp had been offered and refused several promotions and lateral transfers between 1966 and 1974. For example, resp explained at trial that he had refused the position of Director of Personnel because he would "hate to have to start boning up on personnel in order to take over a new division." The trial judge found that the experiences resp might have gained in the positions he refused would have given him a considerable advantage in being considered for other positions.

Resp claimed that he was denied four promotions or "details" between Jan. 17, 1973, and Jan. 12, 1974. The trial judge concluded that resp had

"produced no evidence that he was treated any differently because of his race. During the period in question, other blacks as well as whites were promoted or detailed to positions above resp. A black was selected for the position of Postmaster of the District of Columbia in January, 1974, a position which plaintiff contends he was not selected for because of his race.

*DC
Trial
judge
Post-
master*

"During the period covered by this complaint and continuing to the present, there was a considerable increase in the number of black employees occupying high level positions in the District of Columbia Post Office. At the present time almost all high level positions are held by blacks."

The trial court noted that resp had produced no "evidence of specific acts of discrimination against him" and "that resp produced no credible evidence that he was as qualified or more qualified than other individuals who were detailed or promoted above

DC

him." The trial judge concluded that resp had failed to establish a prima facie case.

Over Judge Wilkey's dissent, the CADC reversed, holding that a Title VII pltf, establishing a Title VII case, need not show that he is as qualified or more qualified than the person actually selected for a promotion. Instead, a pltf need only show that (1) he was a member of a minority; (2) he applied for, and was denied, a promotion for which he was qualified; and (3) the promotion went to someone who was not a minority.

The SG filed a petn for cert, requesting that the judgment be vacated and the case remanded in light of Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). On June 29, 1981, the Court (Justices Brennan and Marshall dissenting) granted the petn, vacated, and remanded in light of Burdine. *We remanded on Burdine*

On Sept. 8, 1981, in a per curiam, the CADC reaffirmed its earlier holding, though it noted that the "minimum" qualifications would not be sufficient if the employer indicated he preferred or required additional qualifications. The CADC remanded to the DC for it to determine whether petr had the qualifications desired by the employer (if so, a prima facie case had been established).

3. CONTENTIONS: The SG argues that the CADC's decision is inconsistent with this Court's decisions developing the prima facie, including Burdine, and creates a split between the CADC and the CA9 & CA10. The SG begins by noting that this Court first considered the elements of a prima facie case under Title VII in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), in which the Court held that the pltf had successfully established a prima facie *yes*

case by showing that he was a member of a class protected by Title VII, that he had applied and was rejected for a job for which he was qualified and for which the employer was seeking applicants, and that the employer thereafter left the position unfilled while continuing to seek applicants with the pltf's qualifications. Id., at 802.

In Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), the Court explained the principle behind the McDonell Douglas rule--in the situation described in McDonell Douglas, an inference of discrimination may be drawn because "we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting." And, as the Court noted in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 (1977), the evidence necessary to establish a prima facie case depends upon the particular context.

Next, the SG explains why he sought a remand on Burdine, which held that the pltf's showing of a prima facie case shifts only a burden of production, not proof, to the deft. In Burdine, the Court reaffirmed the rationale of McDonell Douglas and Furnco by emphasizing that a Title VII pltf must establish a prima facie case, not by invocation of a formalistic test, but by showing that he was rejected "under circumstances which give rise to an inference of discrimination." 450 U.S., at 253. The Court explained that such evidence must be sufficient to "create[] a presumption that the employer unlawfully discriminated against the employee," id., at 254. And the Court specified: "[i]f the trier of fact believes the

McDonnell-Douglas

pltf's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." Ibid. An accompanying footnote explained that "[t]he phrase 'prima facie case' is intended in this context to 'denote ... the establishment of a legally mandatory, rebuttable presumption.'" Id., at 254 n.7.

The SG criticizes the CADC for mechanically applying the prima facie case described in McDonnell Douglas, a hiring case, in which the employer continued to seek workers with the pltf's qualifications after turning down the pltf, to a promotion situation, in which an employer can give a promotion to only one of a group of qualified employees. The SG notes that the inference that can be drawn from passing over a qualified applicant in the McDonnell Douglas situation simply cannot be drawn in the promotion situation. By focusing entirely on whether McDonnell Douglas requires a showing of minimal qualifications of equal or greater qualifications, the CADC failed to realize that the last prong of the McDonnell Douglas test--turning an applicant away and continuing to seek other applicants with equivalent qualifications--is entirely missing in the promotion situation, in which one person will be selected from a pool of current employees who are qualified for the position. The SG argues that the resp has failed to show that he was rejected under circumstances such that an inference can be made that the rejection was motivated by discrimination, the standard established by this Court in McDonnell Douglas, Furnco, and Burdine.

The Difference

4. DISCUSSION: The CA5 agrees with the CADC. See McWilliams v. Escambia County School Bd, 658 F. 2d 326 (CA5 1981);

Simon v. Honeywell, Inc., 642 F. 2d 754 (CA5 1981). The CA9 and the CA10 are to the contrary. See Hagans v. Andrus, 651 F. 2d 622 (CA9), cert. denied, No. 81-41 (Oct. 5, 1981); Olson v. Philco Ford, 531 F. ed 474 (CA10 1976).

This Court's decisions have repeatedly indicated that the McDonnell Douglas prima facie case is grounded on the reasonable inference that can be drawn in the hiring situation described in McDonnell Douglas. No similar inference can be drawn merely from the fact that a minority member has been passed over in a situation in which only one person can be promoted from a pool of qualified employees.

Essentially for the reasons given by the SG, I recommend calling for a response with an eye towards a grant.

01/19/82

Becker

Opin in petn

New Note

Respondent tries to support the decision below by arguing ~~that~~ from the Record, not the holding of the CADC. (He argues that there is undisputed evidence in the record that shows more than just the presence of the McDonald-Douglas factors.) I doubt that there is such undisputed record evidence, but if it is there, it is not relevant to the CADC's decision, which was clearly not limited to the existence of such factors.

✓
Mary

situation. But that a minority member was passed over in choosing one person to promote from a pool of qualified applicants (employees) does not raise (in itself) any inference of discrimination. The CA 9 + CA 10 disagree. This case was remanded on Burdine, but the CADC was unable to perceive its relevance.

Mary

March 19, 1982

Court
 Argued, 19...
 Submitted, 19...

Voted on, 19...
 Assigned, 19...
 Announced, 19...

No. 81-1044

U.S. POSTAL SERV.

vs.

AIKENS

*BRW Hinder is
 important case. or
 statement in op. or
 to prove fact case is
 wrong.*

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.													
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓	✓										
O'Connor, J.		✓											

Join 3

drk 11/08/82

Reviewed 11/9

BENCH MEMORANDUM

To: Mr. Justice Powell

November 8, 1982

From: Rives

No. 81-1044, United States Postal Service v. Aikens

Question Presented

The issue is whether a prima facie case of employment discrimination is made out by showing that an applicant was a member of a protected minority, that ~~he~~ applied for a promotion for which he was minimally qualified, that he was denied the promotion and that a non-minority candidate was hired in his place.

I. Background.

There was a full trial

The case arises in an unusual posture. After resp put on his case below, the DC refused the government's motion to dismiss and directed the government to articulate its reason for refusing to hire resp. At the end of a full trial, the DC made findings of fact which bear on the ultimate issue of whether resp had been discriminated against. One of these findings states, "[resp] has produced no credible evidence that he was as qualified or more qualified than other individuals who were detailed [given temporary assignments] or promoted during the period in question." App. to Pet. for Cert. 54a. The DC concluded, however, that resp "has failed to present a prima facie case of racial discrimination in that [resp] failed to prove that he was as qualified or more qualified than the individuals who were promoted or detailed." App. to Pet. for Cert. 59a. It is odd that the DC would not have made a finding after a full trial on the ultimate issue to be proved. *DC's findings*

Although petr originally contended that the DC's finding that the prima facie test had not been proved represented a conclusion on the ultimate issue of discrimination, it has abandoned that contention. See Gov't's Brief 5 n.3. *It is odd*

The DC's factual conclusion is also somewhat troubling. During the trial, the DC ruled that it would not allow resp's witnesses to compare resp's qualifications with the people who received the jobs resp sought. According to the DC, the only credible evidence could come from supervisors who had worked with both applicants. Additionally, resp's qualifications seem impressive. He holds a Master's Degree and has progressed towards a *Resp's qualifications*

3.
Ph.D. At the time he sought the postal positions, he had a great deal of seniority in the Post Office. He had attended training sessions and progressed through a number of levels in the service. There is no indication that his work was unsatisfactory. In 1968 he was rated as "outstanding."

Of the four white supervisors who were given the jobs that resp sought, two did not finish high school. One of the two who did finish high school completed eight months of college. Although petr may have had legitimate reasons for its choice, the DC's statement that resp offered no credible evidence that he was "as qualified" as the other applicants seems clearly erroneous on the basis of the candidates' paper credentials. If petr prevails on the issue raised here, the case might be remanded to the CA to allow it to examine the accuracy of the DC's fact finding.

DC's curious finding

we might remand

First appeal to CA

The first time that this case was appealed to the CA, the CA held that to establish a prima facie test under Title VII a plaintiff only had to show that: he belongs to a protected minority; that he applied and was minimally qualified for a job for which the employer was seeking applicants; that despite his qualifications he was rejected; and that the petition remained open. The CA found that the first, third and fourth criteria were met. The only question was whether resp were qualified for the job he sought. The CA found that he was qualified (a point which the government concedes) and that the DC had erred in determining that resp had not established a prima facie case. It noted alternatively that the DC should be reversed for requiring resp to show that he was as qualified or more qualified than the other applicants for the job.

This is conceded by SG

Judge Wilkey dissented. He reasoned that a court should not apply McDonnell Douglas mechanically. Showing that an applicant was minimally qualified for a job does not necessarily raise an inference of discrimination. The more complex the job the less likely it is that minimal qualifications would be sufficient to raise a legally mandatory presumption that an employer had discriminated against a minority applicant. In choosing a person for a supervisory position, the employer necessarily makes a comparative decision. In such a situation, the disgruntled applicant should be required to show that he was as qualified as the person who was hired.

On Remand The case was ^{we} GVR'd in light of Texas Department of Community Affairs v. Burdine, 450 U.S. 248. On remand, the CADC *adhered to its position* adhered to its position. In a per curiam decision for a unanimous panel, the CA essentially restated applicable law. It then stated in an apparent bow to Judge Wilkey's former position, "At the prima facie stage, as noted above, the plaintiff may be required to go beyond a showing of "minimum" qualifications to demonstrate that he possesses whatever qualifications or background experiences the employer has indicated are important." App. to Pet. for Cert. 8a. *CADC on remand*

II. Discussion

The McDonnell Douglas v. Green, 411 U.S. 792, standard for a prima facie case is well established, as are the second and third stages of proof required by McDonnell. The Court, however, has never addressed directly the issue of what the prima facie test requires. In McDonnell Douglas, the Court listed the four part *not yet addressed*

test. It stated, however, that the facts will vary with each Title VII case and that the application of the prima facie test would vary accordingly. See 411 U.S. at 802 n.13.

Imp. point
✓ Teamsters v. United States, 431 U.S. 324, shed further light on the meaning of the prima facie case. It recognized that the standard was designed to place on the rejected applicant the burden of presenting evidence that would establish an inference of discrimination. Teamsters noted that "an employer's isolated decision to reject an applicant who belongs to a racial minority does not show that the rejection was racially based." Id., at 358 n.44. The McDonnell Douglas test requires that the applicant create an inference of discrimination by showing that the two most common reasons for rejecting an applicant were not present: "an absolute or relative lack of qualifications or the absence of a vacancy in the job sought." Ibid.

✓ In Furnco Construction Corp. v. Waters, 438 U.S. 567, the Court restated the McDonnell test. According to Furnco, McDonnell made "clear that a Title VII plaintiff carries the burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.'" Id., at 576. Finally in Burdine, the Court once again explained the way in which a plaintiff may establish a legally mandatory presumption that shifts the burden of production, but not persuasion to the defendant. In so doing, it reviewed the previous decisions in the area. Burdine did not, however, concentrate on

settled by prior cases

establishing a prima facie case. In Burdine, as in previous cases, that inquiry was not central to the task before the Court.

The preceding opinions indicate that the CA erred in applying the McDonnell Douglas test mechanically. The prima facie test is, as Burdine indicated, a model which is not fixed but which provides a general guide to be adapted to varying factual situations. In determining the requirements for a prima facie case, the previous cases indicate that two considerations should be kept in mind. First, the facts proved must be sufficient to establish an inference of discrimination. Second, the burden on a plaintiff at the first stage should not be so onerous ~~that~~ the third stage is rendered unnecessary. Both sides to this argument fail to strike a balance between these two propositions.

The SG's argument effectively would eliminate the third stage envisioned by McDonnell Douglas and Burdine. The SG would require a minority applicant to show as part of the prima facie case that he was "more qualified" than the non-minority applicant chosen for the job. See Gov't's Brief at 22. Alternatively, the SG would require the minority applicant to show evidence of racially discriminatory hiring practices and anecdotal evidence which would indicate the possibility of racial bias. Placing this burden on the plaintiff at the initial stages would require essentially that he anticipate the employer's response and offer evidence in advance that the employer's decision was pretextual.

The SG's argument is based on the proposition that discrimination in the workplace is no longer pervasive. Thus, when an employer chooses an equally qualified white applicant over an

equally qualified black applicant, there is no basis for inferring that the employer's choice was racially motivated. The SG's argument is extremely plausible with respect to the ultimate determination to be made. See Burdine, 450 U.S. at 259. The initial burden it places on a Title VII plaintiff is, however, inconsistent with the congressional findings on discrimination. The resp argues persuasively that in amending the Civil Rights Act in 1972, Congress took notice of the pervasive nature of discrimination. To require that a plaintiff establish, as part of his prima facie case, that he was more qualified than other applicants undercuts Congress' assessment. Moreover, the SG's position is inconsistent with Teamsters' recognition that a prima facie case could be made by showing that there was no "relative lack of qualifications."

yes

It does not seem that allowing an applicant to establish a prima facie case by showing that he is as qualified as the other applicants will increase the burden on the employer in a significant respect. Most frequently employer-defendants move for involuntary dismissal, under Rule 41(b), Fed. R. Civ. P., for failure to establish a prima facie case at the close of the plaintiff's evidence. The employer thus will already have been put to the expense and trouble of going to trial. Making the prima facie case more difficult to establish might discourage litigants from bringing frivolous Title VII suits in the first instance. It would seem, however, that this disincentive is already built into the system since the applicant retains the ultimate burden of persuasion and the employer has only to articulate a legitimate reason to carry its

yes

burden of production. Moreover, courts may assess attorney's fees against litigants who bring frivolous suits. Although this provision may not be exercised frequently, it does provide employers with some protection against such suits.

The government's position is too extreme as it would result in a substantial modification of the McDonnell Douglas test by collapsing the first and third prongs of the test. Correspondingly, the petr's position, and that of the CA's, imposes too little a burden on the plaintiff to establish a prima facie case. The second factor in the McDonnell Douglas prima facie test is that the applicant was qualified for the job for which the employer was seeking applicants. Teamsters, supra, at 358 n.44, indicated that if there were a relative lack of qualifications one of the most common reasons for not hiring an applicant would remain. Thus, the Title VII plaintiff, who demonstrated that he was minimally qualified, would not have adduced evidence that would raise an inference of discrimination. The mere failure to hire a minority candidate is not sufficient by itself to raise such an inference.

The two primary reasons for allowing an applicant to establish a prima facie case by showing that he was minimally qualified are that it promotes the congressional goal of eliminating discrimination and that it allows the plaintiff a way of procuring evidence that would be hard to obtain during discovery. Neither of these arguments offers, however, a basis for reducing the plaintiff's initial burden.

*Both
parties
wrong*

With respect to the first argument, Congress goal was to eliminate discrimination. It would contravene that goal to adopt a test that allowed a plaintiff to present evidence that was insufficient to raise a legally mandatory presumption of discrimination. When the plaintiff cannot show that he was as qualified as the applicant who received the job there is simply no reason to presume that discrimination was the basis for the employer's rejection.

The second argument made by Title VII plaintiffs is that requiring a plaintiff to show only that he is minimally qualified is desirable since it places the burden of production on the party who has the evidence. Requiring the plaintiff to show that he is as qualified as the successful candidate would make him responsible for proving facts that he cannot obtain. The difficulty with this proposition is two fold. First, the purpose of requiring the employer to articulate a legitimate, non-discriminatory reason is to frame the issues so that the plaintiff will be able to show, at the third stage, that such reasons are pretextual. The McDonnell Douglas allocation of burdens does not contemplate that the employer will be a source of evidence helpful to the plaintiff. Although employers often offer such evidence at the second stage of the proceeding, nothing requires them to do so. Indeed, it would seem to be poor trial strategy for a Title VII to wait until the middle of trial to find out what the employer's evidence is going to be. If the employee has not already engaged in discovery prior to trial, he will be in a poor position to show that the employer's reasons are pretextual when the trial reaches that stage. Thus, it would

yes

seem that the discovery rationale is inconsistent with the preparation that a responsible litigant would take.

The second difficulty with this argument is that it presumes that discovery is inadequate. If an employer is not forthcoming with information, the applicant can always seek sanctions against the employer. Alternatively, a DC might consider the employer's failure to release information in determining whether the employee had made out a prima facie case. Absent some showing that discovery is ineffective, there seems to be little reason to structure the prima facie test to aid Title VII plaintiffs in this manner.

Conclusion

*what does
this mean?*

yes I would recommend taking a middle course between the government and resp's position. The plaintiff who seeks to prove a prima facie case should be required to establish facts that raise an inference of discrimination. Requiring that he show that he was as qualified, or relatively qualified, would raise such an inference. In situations where the job is menial, most workers who are minimally qualified would also be as qualified to do the job as the person hired. Where the job is more complex, there is a greater variance between the skills sought and greater need to go beyond minimal qualifications to raise an inference of discrimination.

Must show

Rever

81-1044 U.S. POSTAL SERVICE v. AIKENS

Argued 11/9/82

Resp. claims Title VII discrimination
when not promoted ~~to~~ to a position he
wanted in Wash. Postal Dept.

Wallace (SG)

Rule 41(b) - motion to Dismiss - in way most of these VII ~~can~~ prima facie cases arise.

In this case, however, there was a full trial. At end of full ev. the DC ruled, however, that TT ~~has~~ had not made out a prima facie case.

It is indeed!

WHR noted that it is most unusual for a DC to try a case & then rule "no prima facie case". Wallace says confusion ~~has~~ exists in CADC Circuit because of its application of McDonnell analysis indiscriminately. But M'D. analysis was addressed to facts in that case - the 4th element ~~is~~ was appropriate there.

When the 4th element is neutralized (as in this case of promoting) the TT must show more than the remaining 3 elements.

→ | SG's position is that employer is free to select from people equally qualified.

Discriminatory intent is necessary in these cases

Wallace (cont)

S O' L asked about Wilkey's opinion.

If the TT were ~~more~~ "better qualified", the case would be different.

Wallace argues that DC's findings as to "qualified" were not rejected by CADC. J.P.S. thinks there is language in CADC op. rejecting DC's findings.

In a disparate treatment case, there must be proof of intent.

The sum of the DC's factual findings require reversal even if DC's view of law was erroneous.

DC erroneously thought there must be direct ev. of ~~discriminatory~~ intent, ^{but} this error of law doesn't affect the ~~the~~ deference of IT's ev.

Greenberg (Resk)

IT made prima facie case in four dif. ways. Beall

1. ~~Beall~~ (Beall) - who controlled the promotion - was a racist.
2. Gross disparity bet. whites & blacks in positions of importance.

Greenberg (Cont)

BRW asked whether a prima facie case can be made out on basis of statistics. (I think not)

Intent may be demonstrated from circumstantial ev. Not necessary to prove specific ~~not~~ intent.

Greenberg said "yes" - I think.

This is my view

{ (CADE erred in ~~says~~ saying that discriminatory intent need not be shown in this type of case)

Relied on n7 in Burdick that prima facie case creates a rebuttable presumption of discrimination.

Burdick involved a black woman claiming denial of a promotion.
Greenberg.

3. The TT here was superbly qualified - better than others.

(BRW observed that DC findings to contrary. See finding 17.)*

Greenberg said 17 rests on misapprehension as McDonnell.

→ McDonnell is extremely imp. to preserve.

4. The sum total of other three.

CADE said also there was lack of ev. as to ~~relevant~~ relative qualifications.

Greenberg (cont)

B R W asked what if judge ~~said~~ "found" can't find any dif. bet. the two candidates. (I think Greenberg)

Wallace (Reply).

SG is concerned about the "standard" for a prima facie case ~~It is~~ applied in CADC. It is contrary to Burdick

It must show (i) he was better qualified or (ii) there was actual discriminatory intent.

Only presumption applied in VII cases is where Δ puts on no rebuttal ev.

Actually, Π - by discovery - knows what Δ will say in defense. Thus, cases are not tried in the order of McDonnell analysis.

A prima facie case can be shown in other ways than by showing he was better qualified.

8 PS's
quest
infr.

81-1044 ^{Discrimination} US Postal Service

Included to ^{Rev} Remand for
application of ~~the~~ proper standard
by DC

1. DC's finding that Resp.
was not "as qualified" in
respect (may be clearly
erroneous). DC excluded
test. by Resp's witnesses
as to comparative qualifications.

^{Correct}
2. Standard - stated in
Burdine

(i) "as qualified,"

(ii) not promoted,

(iii) under circumstances
^{intent} that give rise to
inference of
discrimination

No. 81-1044

U.S. Postal Service v. Aikens

Conf. 11/12/82

The Chief Justice

Reverse Remand
Aff & Remand

Votes not clear

Only WGB, TM & HAB
agree with CADC

Rev
Remand

Intent must be shown either actual or
implied from ~~actual~~ objective facts

CADC applied wrong standard.

Not enough that white persons got job

CADC was confused about 4th step
in McDonnell

Reaffirm Burdine standard. (9 agree)

Justice Brennan

Aff'm

Doesn't agree with Wallace (SG)

Agrees with TM's dissent from
our previous remand of this case.

CADC applied McDonnell correctly

Justice White

Reverse & Remand

CADC was wrong in saying
intent need not be proved.

Also wrong in saying prima facie
case is made by showing minimum
qualification.

Justice Rehnquist

Rev & Remand

There was a promotion - not a hiring
- so no job remaining open.

Common sense inferences may
be drawn.

CADC op. is wrong.

Justice Stevens

Affirm the judg - but case should go back to DC
If we want to DC to reexamine, should
affirm & state in op that CADC's reasoning
was wrong - tho JPS doesn't think CADC
was wrong.

Could hold there was a prima facie
case.

Need not ~~to~~ prove that applicant
was "as qualified" - only need prove
qualified.

Even so ~~does~~ think CADC's op is wrong.

Justice O'Connor

Remand?

There was enough ev. of desc. intent
& DC was wrong.

CADC opinion also was wrong.

Case should go back to DC

Justice Marshall

Aff'm

Agrees with WQB

Justice Blackmun

Aff'm judg & remand

Postal Service here in DC is a mess.

McDonnell is procedural device -
the evidence comes at third stage.

Wallace's ~~is~~ would have main
trial at first stage.

Justice Powell

Reverie + Remand with instruction to send it
back to DC
See my notes

Carroll
~~copy~~
W

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

L.F.P.

From: Justice Rehnquist
DEC 9 1982

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER *v.* LOUIS H. AIKENS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[December —, 1982]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Louis Aikens filed suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e *et seq.*, claiming that petitioner, the United States Postal Service, discriminated against him on account of his race. Aikens, who is black, claimed that the Postal Service had discriminatorily refused to promote him to higher positions in the Washington, D.C. Post Office where he had been employed since 1937. After a bench trial, the District Court entered judgment in favor of the Postal Service, but this judgment was reversed by the Court of Appeals. 642 F. 2d 514 (CA DC 1980). We vacated the judgment of the Court of Appeals and remanded for reconsideration in the light of *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981). 453 U. S. 902 (1981). On remand, the Court of Appeals reaffirmed its earlier holding that the District Court had erred in requiring Aikens to offer direct proof of discriminatory intent. 665 F. 2d 1057, 1058 (CA DC 1981) (*Per Curiam*). We granted certiorari to consider the assessment of proof of racial discrimination when an employer has selected among applicants for a higher managerial position¹. — U. S. — (1982).

¹ We have consistently distinguished disparate treatment cases from cases involving facially neutral employment standards that have disparate impact on minority applicants. See, *e. g.*, *Texas Department of Commu-*

The Court of Appeals, in its second opinion, held not only that the District Court erred in requiring Aikens to offer direct proof of discriminatory intent², but also that it erred in requiring Aikens to show, as part of his *prima facie* case, that he was "as qualified or more qualified" than the people who were promoted. The Postal Service insists that an employee who has showed only that he was black, that he had applied for a promotion for which he possessed the minimum qualifications, and that the Postal Service selected a non-minority applicant has not established a "*prima facie*" case of employment discrimination under Title VII.

Since the case has been fully tried on the merits in the District Court, one might at first blush wonder why the parties are still arguing about the nature of a *prima facie* case. Indeed, to the untutored this case, tried to the District Court in January, 1979, might seem to be one that could have been disposed of in a relatively short span of time (according to judicial lights) with the District Court making the necessary essential findings of fact and conclusions of law, and the Court of Appeals reviewing those findings and conclusions under the appropriate standard³. But we take the case as it comes to us.

We think that some statements in the briefs of the parties and of the *amici*, urging us either to "adhere" to, modify, or reconsider, the line of cases beginning with *McDonnell Douglas*

nity Affairs v. Burdine, 450 U. S. 248, 252, n. 5 (1981); *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802, n. 14 (1973).

²As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves. Thus, we agree with the Court of Appeals that the District Court should not have required Aikens to submit direct evidence of discriminatory intent. See *International Brotherhood of Teamsters v. United States*, 431 U. S. 324, 358, n. 44 (1977) ("[T]he *McDonnell Douglas* formula does not require direct proof of discrimination.")

³See *Pullman Standard v. Swint*, — U. S. —, — (1982).

Yes

las v. Green, 411 U. S. 792 (1972), reveal a misunderstanding of that line of cases. Because this misunderstanding may have been shared in part by the District Court and by the Court of Appeals in the present case, we take the liberty of setting forth the facts as well as the law in the principal cases in the McDonnell-Douglas line.

In *McDonnell-Douglas* itself, the defendant employer ran a newspaper advertisement seeking qualified mechanics. The plaintiff, a qualified mechanic who had been laid off by the defendant, applied for reemployment. The defendant declined to rehire him, even though it continued to hire other applicants who responded to the advertisement after the plaintiff. The plaintiff's Title VII suit was dismissed by the District Court, but the Court of Appeals for the Eighth Circuit reversed. That court held that the reason given by the defendant for refusing to rehire plaintiff—plaintiff's participation in a "stall in" and "lock-in" at defendant's place of business—was a "subjective" criterion that carried little weight in rebutting charges of discrimination. The Court of Appeals set forth its version of a *prima facie* case of discrimination under Title VII.

Our opinion described the now familiar elements of a *prima facie* case:

"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." *Id.*, at 802.

We immediately added, however, that "[t]he facts necessarily will vary in Title VII cases, and the specifications above of

*McDonnell -
Douglas*

*facts will
vary*

the *prima facie* proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.*, at 802, n. 13.

We returned to the same question in *Furnco Construction Corp. v. Waters*, 438 U. S. 567 (1978). The employer's business was the rehabilitation of steel mill blast furnaces with "fire brick." The employer did not maintain a permanent force of bricklayers; instead, it hired a superintendent for each project, and then delegated to him the task of securing a competent work force. The superintendent who declined to hire the plaintiff did not accept applications at the job site, but hired only persons he knew to be experienced and competent in this work or who had been recommended to him as similarly skilled. The employer claimed this policy was established to ensure that only experienced and highly qualified fire bricklayers were employed, because untimely work could result in substantial losses both to the steel mill operator and to the contractor-employer. *Id.*, at 569-572.

We agreed with the Court of Appeals that the black plaintiffs had made out a *prima facie* case. We disagreed, however, with its conclusion that the reasons for the employer's hiring practices were illegitimate. In discussing the showings required of the parties to Title VII suits, we pointed out:

"The central focus of the inquiry in a case such as this is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.' *Int'l. Brotherhood of Teamsters v. United States*, *supra*, [431 U. S.,] at 335, n. 15. The method suggested in *McDonnell-Douglas* for pursuing this inquiry, however, 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." 438 U. S., at 577.

of course

Furnco

yes

Finally, in *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981), plaintiff, a woman, claimed that the employer's failure to promote her and its later decision to terminate her had both resulted from gender-based discrimination. The District Court found after a bench trial that neither decision was discriminatory. *Id.*, at 251. The Court of Appeals for the Fifth Circuit upheld the decision of the District Court as to the promotion, but reversed its finding on the termination.

Burdine

We reviewed only the part of the case that had been reversed by the Court of Appeals, and stated more clearly the consequences of the plaintiff's success in making the showing required by *McDonnell Douglas*. The *prima facie* case in a Title VII action is not merely the minimum showing that will justify a verdict for the plaintiff, it "creates a presumption that the employer unlawfully discriminated against the employee." *Id.*, at 254, n. 7. If the employer does not rebut this presumption by "clearly set[ting] forth, through the introduction of admissible evidence" a legitimate nondiscriminatory reason for his action, *id.*, at 255, the district court "must enter judgment for the plaintiff." *Id.*, at 254 (emphasis supplied).

}

?

The justification for this seemingly drastic rule can be found in *Furnco*:

?

no

"A *prima facie* case under *McDonnell-Douglas* raises an inference of discrimination only because we presume these acts, if otherwise explained, are more likely than not based on the consideration of impermissible factors. . . . And we are willing to presume this largely because we know that from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant had been eliminated as possible reasons for the employer's actions, it is more likely than not the em-

←

ployer, whom we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race." 438 U. S., at 567.

More succinctly phrased, a *prima facie* case "eliminates the most common non-discriminatory reasons for the plaintiff's rejection." *Burdine, supra*, at 254. For this reason, we have held that an un rebutted *prima facie* case is sufficiently compelling to require a judgment for the plaintiff as a matter of law. OK

OK { In the present case, both the District Court and the Court of Appeals apparently thought that Aikens' claim against the Postal Service fits into the pattern of the *McDonnell-Douglas* line of cases. We disagree. The first and third elements of *McDonnell-Douglas* are undoubtedly present; Aikens belongs to a racial minority, and he applied for the promotions in question but was denied them. The fourth element, however, is entirely absent; the position did not remain open, as it did in *McDonnell-Douglas*, but was filled by the applicant chosen in preference to Aikens. Indeed, where an employer seeks to fill a single managerial position, the position will by definition not be open after one of the applicants has been chosen. you

The second *McDonnell-Douglas* element—the showing that the plaintiff was "qualified" for the job—is more problematic. There is no doubt that Aikens had an impressive resume. He has a Masters Degree and has completed three years of residence towards a Ph.D. He has been rated as "an outstanding supervisor whose management abilities are far above average." App. 8. There was no derogatory or negative information in his Personnel Folder. He had more supervisory seniority and training and development courses than all but one of the white persons who were promoted above him. It is clear that his qualifications were sufficient, in the eyes of the Postal Service, to merit serious consideration. you

At this point, however, agreement between the parties, and between the courts that have considered this factual issue, breaks down. It is argued that Aikens must show he is "as qualified" as the person actually chosen, "better qualified" than the person actually chosen, "relatively qualified," or merely "qualified" for the jobs he sought. We believe that this contest of comparatives ultimately proves self-stultifying.

?? no
reframe

The fair reading of the *McDonnell-Douglas* advertisement for qualified mechanics is that there was a known, reasonably objective basis for determining who was a qualified mechanic, and that applicants would be hired on a first come, first served basis until the employer had obtained the number of mechanics it needed. But where one managerial position is open, there may be no totally objective measure of who is "qualified," and the employer certainly does not undertake to promote more than one applicant. Employers consider a wide range of factors, such as each applicant's understanding of the organization's goals, ability to work effectively with particular superiors and subordinates, maturity, originality, initiative, and decision making ability. It will rarely, if ever, be possible to quantify all the relevant criteria and tally them up on a score card.

yes

In these circumstances, the question is not whether we will "follow" the *McDonnell-Douglas* line of cases, but whether the principles established in those cases were ever meant to apply to a situation so far removed from their factual context. If those principles do not provide the district courts with a "sensible, orderly way to evaluate the evidence in light of common experience," *Furnco, supra*, at 577, they are inapplicable under the terms of those decisions. *Burdine, supra*, at 253, n. 6; *Furnco, supra*, at 575-576; *International Brotherhood of Teamsters v. United States*, 431 U. S. 324, 358 (1977); *McDonnell Douglas, supra*, at 802, n. 13.

principles ?

Why
reject
as
inapplicable?

McDonnell-Douglas and *Furnco* both dealt with entry

level jobs, one in a large manufacturing industry and the other in the construction industry. In those cases, if the plaintiff could meet the four elements of the *McDonnell-Douglas prima facie* case—that he belonged to a racial minority, that he applied and was qualified for a job for which the employer was seeking applicants, that he was rejected, and that after his rejection the employer continued to seek similarly qualified applicants—the plaintiff has in effect negated the principal broadly applicable reasons that would show that the employer's refusal to hire him was not based on a discriminatory animus.

But that simply is not true in the present case. There were several applicants for each position, and only one could be chosen. The "qualifications" for the position as laid down by the Postal Service, while not appearing as clearly from the record as might be, were by no means as easy to assess as the qualifications for a "mechanic" advertised for in *McDonnell-Douglas*. We simply do not think that Aikens' showing that he is black, that he was sufficiently qualified to be seriously considered, and that he was not chosen, "eliminates the most common non-discriminatory reasons" for his rejection. *Burdine, supra*, at 254 (emphasis supplied).

Were we to attempt to revise the *McDonnell-Douglas* case to fit the facts of Aikens' case, we would be obliged to hold that Aikens, merely by showing he was a member of a minority, that he was qualified for a vacancy, and that the Postal Service promoted another of several applicants for the single vacancy, judgment should be entered for Aikens in the absence of any rebutting evidence on the part of the Postal Service. This we are unwilling to do; such a showing in these circumstances does not justify the presumption that the employer's acts "if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco, supra*, at 577.

Although Aikens' showing does not justify a presumption

*I don't
say this*

*create
an
inference
of discrimination*

of discrimination, it is sufficient to support an inference of discrimination. That is, if the District Court were to conclude that the Postal Service did treat Aikens less favorably than others because of his race, we surely could not say, on the basis of the record before us, that such a finding would be clearly erroneous. Aikens showed that white persons were consistently promoted and detailed over him and all other black persons between 1966 and 1974. Aikens had substantially more education than the white employees who were advanced ahead of him; of the 12, only 2 had any education beyond high school and none had a college degree. Aikens introduced testimony at trial that the person responsible for the promotion decisions at issue had made numerous derogatory comments about blacks in general and Aikens in particular.

We believe that the District Court, which is able to perceive the attitude and demeanor of witnesses, and to evaluate their credibility and the weight that should be placed on their testimony, is in a far better position than this Court to decide whether the Postal Service discriminated against Aikens. The District Court should decide this case in the same manner as it decides questions of fact in the myriad other kinds of litigation before it.

We therefore hold that in a case such as this, where no standardized *prima facie* case can be made out, the district court should evaluate all the admissible evidence and then decide the factual question of discrimination. Thus, plaintiffs may seek to obtain the benefit of the Burdine presumption by making out a *McDonnell Douglas prima facie* case, and may also seek to prove their case in the ordinary way⁴. Of

⁴A rough analogy may be found in the law relating to *res ipsa loquitur* in negligence actions. In some circumstances a showing of circumstances sufficient to raise *res ipsa* creates a rebuttable presumption like the *Burdine* presumption. See Prosser, Torts 229-230 (1971). A tort plaintiff can seek to show negligence directly without abandoning the benefit of

course, a plaintiff who fails to make out a *McDonnell Douglas prima facie* case will not survive a motion for judgment at the close of his case under Fed. R. Civ. P. 41(b) unless he has presented evidence from which the district court can infer that he was discriminated against. See *Teamsters, supra*, at 358. This case presents one example of that sort of evidence.

All courts have recognized that the questions facing triers of fact in discrimination cases are both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. In any Title VII case, regardless whether the *prima facie* case device is available to the plaintiff, the ultimate question is "whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" *Furnco, supra*, at 577 (quoting *Teamsters, supra*, at 335, n. 15). There will seldom be "eyewitness" testimony as to the employer's mental processes, but this does not mean that courts should treat the question of discrimination differently from other questions of fact. The law often obliges finders of fact to inquire into a person's state of mind. As Lord Justice Bowen said in treating this problem in an action for misrepresentation nearly a century ago:

"The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much as fact as anything else." *Eddington v. Fitzmaurice*, 29 Ch. Div. 459, 483 (1885).

The judgment of the Court of Appeals is vacated and the case is remanded with directions to remand to the District Court for further proceedings consistent with this opinion.

It is so ordered.

res ipsa. Id., at 231-232.

drk 12/09/82

To: Mr. Justice Powell

From: Rives

Re: No. 81-1044, U.S. Postal Service v. Aikens

I do not disagree with the basic idea behind Justice Rehnquist's opinion but I find it troubling for its lack of clarity. My first problem is that he rejects the application of the McDonnell Douglas prima facie test to the situation presented in this case because proof of its factors does not eliminate the most common non-discriminatory reasons for the employee's rejection. The opinion does not make clear, however, what those reasons are. Two different reasons are suggested. See pages 7-8. The first is that McDonnell Douglas does not apply because the considerations in hiring a white collar worker are less easily quantifiable than those involved in hiring factory workers. The second is that this case involves a promotion, in which the job is filled, rather than a situation in which the job is kept open after the Title VII plaintiff is rejected. Because the opinion does not make clear why it finds the McDonnell Douglas prima facie test inapplicable, it leaves it unclear when it should be applied or whether DC's, in most situations, should look at the facts of each case to determine whether there is an inference of discrimination. I do not think that the latter choice is inconsistent with McDonnell Douglas's

recognition that its application will vary with the facts of each case. It seems, however, that the opinion should give the lower courts some guidance on this point.

My second problem is that I do not understand the distinction that the opinion draws between presumptions and inferences. See pages 8-9. I had understood Burdine as stating that the McDonnell Douglas test raises an inference of discrimination and that that is sufficient to create a legally mandatory rebuttable presumption. If Aikens' facts are sufficient to support an inference of discrimination, I do not understand why that would not result in a rebuttable presumption. The opinion appears to draw a distinction between the two situations and the method of proof in each. If a plaintiff can establish the McDonnell Douglas prima facie test, then the McDonnell Douglas shift of the burden of production to the employer is applicable. If a plaintiff cannot establish a prima facie test under McDonnell Douglas, the opinion suggests that he then should establish an inference of discrimination and a more traditional approach is applicable. If I am reading the opinion correctly, this seems to be a fairly radical change. Although I am unsure of your position on this matter, I would have some reservations about joining the opinion until it was clearer what it was doing and the extent to which it limited McDonnell Douglas and Burdine.

yes

not
209

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL



December 9, 1982

Re: No. 81-1044 - United States Postal Service Board of
Governors v. Aikens

Dear Bill:

In due course I hope to circulate a dissent.

Sincerely,

T.M.

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 9, 1982

Re: 81-1044 - United States Postal Service
v. Aikens

Dear Bill:

Please join me.

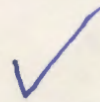
Respectfully,

JPH

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
JUSTICE BYRON R. WHITE

December 15, 1982

Re: 81-1044 - United States Postal
Service Board of Governors v. Aikens

Dear Bill,

I agree.

Sincerely yours,

Justice Rehnquist

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

Revis
What do
you think?
I've not read this

December 15, 1982

Re: No. 81-1044 U.S. Postal Service v. Aikens

Dear Lewis:

After reading your letter of today's date, and then talking to you on the phone about it, I have a feeling that little, if anything, separates us in our view of this case.

You said in your letter, and also on the phone, that you are primarily troubled by my reading of Burdine. When I joined your opinion in McDonnell-Douglas I had no idea that the Court was talking about anything other than the normal "inference" of one fact that a trier of fact draws from other facts which will support the inference. And, as you said on the phone, I am not sure that I knew of any very precise distinction between an "inference" and a "presumption." To the extent that there is any of the kind of tension you refer to in your letter between the "inference analysis" and the "presumption analysis," I think it comes from your footnote 7 in Burdine, 450 U.S. at 254. There the Court clearly states that it is not merely an inference, but a "legally mandatory, rebuttable presumption" which arises from the plaintiff's proving his prima facie case under McDonnell-Douglas. I confess I paid no attention to the footnote when I joined your opinion, and I also confess that I wish the footnote weren't there. But it is, and as we agreed on the phone I don't think the difference between a "legally mandatory, rebuttable presumption," and an "inference" makes much difference in the great majority of garden variety employment discrimination cases in which a plaintiff will try to establish the four elements described in McDonnell-Douglas.

Where it would make a difference is in a case like this, where at least one and probably two of the McDonnell-Douglas elements are not present. In this sort of a case,

*I don't
say this*

if we were to bob-tail McDonnell-Douglas, and say that even though only two of the four McDonnell-Douglas elements are present, nonetheless a "legally mandatory, rebuttable presumption" arises, I think the point the government makes in their brief is well taken: for a member of a minority group to simply show that he was one of several considered for a promotion to a managerial job, and that a non-minority applicant was chosen in preference to him, should not without more give rise to a presumption of discrimination.

This conviction is what led me to write the opinion the way I hope I did; to leave the four element test of McDonnell-Douglas absolutely intact, and doubtless governing 95% of the employment discrimination litigation in this country. But when the plaintiff is unable to prove two of the elements of McDonnell-Douglas, as this plaintiff was, I think it would be a great mistake to try to "bob-tail" McDonnell-Douglas and create a new type of "legally mandatory rebuttable presumption" into which his case might fit. I think it much better to say that where the four elements of the McDonnell-Douglas prima facie case can't be made out, the plaintiff is simply remitted to proving discrimination the way one proves any other factual element in a disputed lawsuit. Triers of fact are still permitted to draw reasonable inference from the facts adduced by the parties, and the decision of the trier of fact will be affirmed unless a Court of Appeals thinks it is clearly erroneous.

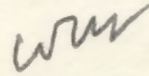
This is by no means to say that McDonnell-Douglas "doesn't apply" or isn't a "starting point"; it is simply to say that when one begins with McDonnell-Douglas and finds that one or more of the four elements required by that decision for the plaintiff's prima facie case is lacking, one may not have the benefit of the rebuttable presumption flowing from the prima facie case. This is not a rejection of McDonnell-Douglas, but an application of it.

I realize from your letter and our telephone conversation that the opinion does not say all this quite as clearly as I would like it to.

If it would accommodate the concern which you expressed in your letter, I would like to insert the following separate paragraph before the first full paragraph beginning on page 10 of the first draft: "McDonnell-Douglas thus remains the starting point for all Title VII employment discrimination case trials. In the great majority of Title VII cases, either the plaintiff will be able to make out the

four elements of the prima facie case described in McDonnell-Douglas, or will have no alternative method of proving the necessary factual allegations to support a recovery. Where, as in this case, the plaintiff does not make out a McDonnell-Douglas prima facie case, but can present 'enough evidence to permit the trier of fact to infer' that the defendant has engaged in illegal discrimination, Burdine, supra, at 255, n. 7, the trier of fact should permit the plaintiff to proceed as with all other contested factual issues, and of course without the benefit of the presumption described in Burdine."

Sincerely,



Justice Powell

December 15, 1982

81-1044 U.S. Postal Service v. Aikens

Dear Bill:

I agree that the McDonnell-Douglas prima facie test does not apply to the situation presented in this case. The fourth element (the position remains open) is absent in every case where only a single position is being filled.

The McDonnell-Douglas second element (the applicant was qualified) also should not apply literally where only a single position is at issue. As you state, in a case such as the present one, there may be a number of applicants who fairly can be viewed as "qualified". It is essential, from management's viewpoint, that the best qualified person be selected. The initial burden on a Title VII claimant should be to show that he was at least as "well qualified" as any other applicant. Your opinion generally is consistent with the foregoing, although I think we should retain McDonnell-Douglas as the starting point in these cases.

I am troubled primarily by your reading of Burdine. My opinion in that case stated that when the McDonnell test is met, it creates an inference of discrimination. When the facts proved by a plaintiff are sufficient to support such an inference, Burdine said this would result in a rebuttable presumption. Your opinion, as I understand it, suggests some tension between the inference analysis and a presumption. In my view, the facts must be adequate to justify an inference of discrimination. In that event, a rebuttable presumption exists and the burden of going forward shifts to the employer. The ultimate burden of persuasion remains, of course, on the plaintiff.

Perhaps I didn't make this clear in Burdine, although this was my understanding of it at the time. I would hesitate to join a different understanding now, as it seems to me this would create more than a little confusion.

Sincerely,

Justice Rehnquist

lfp/ss

drk 12/16/82

To: Mr. Justice Powell

From: Rives

Re: No. 81-1044, U.S. Postal Service v. Aikens

Justice Rehnquist's opinion states that whenever a plaintiff's case does not fit precisely within the McDonnell Douglas mold the three stage procedure is inapplicable. His letter states that the effect of his opinion will be minimal since 95% of employment discrimination will fit this pattern. Only those cases that involve promotion will fall outside the pattern and be dealt with under the regular two step procedure. The primary question I have is the extent to which his opinion will limit the application of McDonnell Douglas.

I would not have guessed that only 5% of the Title VII cases involve promotion. Nor would I have thought that the remainder of the cases fit precisely the McDonnell Douglas pattern. As McDonnell Douglas recognizes, each case will involve differing facts. To the extent that a plaintiff's case does not fit precisely within the pattern, it seems Justice Rehnquist's opinion could be read as saying that McDonnell Douglas is inapplicable. Or to the extent a plaintiff attempts to offer additional evidence at the initial stage of the trial, his case would appear to fall outside of the McDonnell Douglas framework.

Thus, there is a risk that trial judges either will abandon McDonnell Douglas in a large number of cases or try to incorporate the two schemes in one trial.

Although I think the paragraph proposed in Justice Rehnquist's letter reaffirms the McDonnell Douglas test verbally, I am less clear that it would resolve the tension that underlies his opinion. It seems to me the simplest way to resolve the tension is to get rid of the inference/presumption distinction. His opinion could state that in promotion cases the traditional McDonnell Douglas criteria do not apply strictly. The question of whether the plaintiff has established an inference of discrimination (and thereby a legally, mandatory rebuttable presumption) will be left to the trier of fact, who will be guided by the criteria listed in McDonnell Douglas. The employer could then come back and rebut the presumption, as he now can, by articulating a legitimate business reason. The plaintiff may choose to rest on his prima facie case as proof that the employer's reason is pretextual or he may offer additional proof in response to the reason given by the employer. This is just a suggestion but it may accomodate Justice Rehnquist's concerns (although I have my doubts) and preserve McDonnell Douglas. My analysis may easily be faulty. The opinion may have only a limited effect and the proposed paragraph more than sufficient to limit the damage. I am not sure, however, that that is the case. Nor is it clear to me that the opinion can be limited easily as long as the inference/presumption distinction remains.

*This letter was
not sent
to Justice Rehnquist*

December 20, 1982

81-1044 U.S. Postal Service v. Aikens

Dear Bill:

I am afraid we are farther apart than I had supposed. I have reread your opinion, as well as McDonnell-Douglas and Burdine.

For me, the principal negative with your opinion is the way it distinguishes McDonnell-Douglas and Burdine. It can be read as creating an entirely new analysis applicable to promotions. I see no necessity for doing this, and I am afraid that your opinion would invite courts to depart from what has become a familiar mode of analysis in these cases.

Your concern over fn. 7 in Burdine puzzles me. The text of Burdine repeatedly refers to the rebuttable presumption. See, e.g., pp. 254, 255. The role of the presumption is described more fully in fn. 8 and 10. In the former, we state that the relationship between "the presumption created by a prima facie case and the consequential burden of production placed on the defendant is a traditional feature of the common law", and that the term "presumption" properly used "refers only to a device for allocating the production burden".

In what respect would your preference for using only the term "inference" differ in result? Surely, under McDonnell-Douglas, Furnco and Burdine, when a prima facie case is made the burden of production - and only that burden - shifts to the defendant.

I think this case could be written in a straightforward manner by starting as you do (p. 3, 4) with the statement in McDonnell-Douglas that the facts necessarily will vary in Title VII cases and "the specifications [set forth in McDonnell-Douglas for] the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations". Then, as your opinion does, point out the factual distinction between

a promotion case and the employment situation involved in McDonnell-Douglas and Burdine. In a case such as this where only a single executive position is to be filled, the elements of a prima facie case - in addition to the applicable ones of McDonnell-Douglas - include a showing that the plaintiff is at least as well qualified as the person who was given the promotion. I like your discussion of factors to be considered in determining whether the plaintiff in a promotion case was at least as well qualified.

In addition, where - as in this case - there may have been several candidates equally well qualified, it would not be inappropriate to require some evidence of discriminatory intent other than the fact that the plaintiff was not chosen. In making judgments to fill high executive positions, subjective considerations customarily enter into the decisions. There may be two candidates whose education and experience appear to qualify them both equally well. A judgment rationally could be made in favor of one with no intent whatever to discriminate against the other.

If there is a discriminatory intent, there usually will be some evidence of it. As your opinion notes, there was abundant evidence here to create a strong inference of discrimination. All of our cases have required a showing sufficient to create such an inference.

I regret creating a problem for you, but as the author of McDonnell-Douglas and Burdine I simply cannot agree to an opinion that seems to me to unsettle a good deal of what I think we have accomplished by those decisions. If you think it inadvisable to revise your opinion substantially along the above lines (and I would, of course, fully understand if you decline to do so), I will circulate these views to the Conference.

Sincerely,

Justice Rehnquist

lfp/ss

lfp/ss 12/30/82

Full

MEMORANDUM

TO: Justice Rehnquist DATE: Dec. 29, 1982

FROM: Lewis F. Powell, Jr.

81-1044 U.S. Postal Service v. Aikens

You suggested that I indicate specifically why I am hesitant to join your opinion. I am with you, of course, through the first four pages.

My difficulty commences with the second full paragraph on page 5. There, you emphasize primarily a part of what was said in Burdine about a presumption being created by a prima facie case. I agree that a "presumption" and "inference" do not necessarily have the same consequences. But Burdine defines the consequences in cases of this kind. The two are used in conjunction: once a prima facie case is established, a rebuttable presumption arises. You mention only footnote 7. Actually, the text of Burdine repeatedly refers to the presumption. See, e.g., pp. 254, 255. Its role is described more fully in fn. 8 and 10. In the former, we state the relationship between the presumption and the prima facie case, and also expressly state that the term "presumption" properly used "refers only to a device for allocation of the production burden". Also, you used the word "presume" in Furnco in substantially the same sense: a result from the establishment of a prima facie case.

I am afraid substantial confusion will result from the way this paragraph is now written. And, certainly, I

would not describe our precedents as creating a "seemingly drastic rule".

If you revise page 5 substantially along the above lines, possibly some conforming changes would have to be made in the first two sentences (beginning "More succinctly phrased . . .) of your text on page 6.

I have no difficulty with the two full paragraphs on page 6, but again become uneasy with what you seem to say primarily on pages 7 and 8. As I read your opinion, you reject the principles of the prior cases as being wholly inapplicable to a promotion case. This seems unnecessary.

This case could be written in a straightforward manner by starting, as you do (p. 3,4), with the statement in McDonnell-Douglas that the facts necessarily will vary in Title VII cases and "the specifications [set forth in McDonnell-Douglas for] the prima facie proof required from respondent are not necessarily applicable in every respect to differing factual situations". Then, as your opinion does, point out the factual distinction between a promotion case and the employment situations involved in McDonnell-Douglas and Burdine. In a case such as this, where only a single executive position is to be filled, the elements of a prima facie case - in addition to the applicable ones of McDonnell-Douglas - include a showing that the plaintiff is at least as well qualified as the person who was given the promotion.

I would agree also that, in a promotion case, establishing that the plaintiff is at least as well qualified may not be sufficient to create a prima facie case. Prior decisions, particularly Burdine, have emphasized that an inference of discrimination must be shown to make out a prima facie case. Where only a single executive position is to be filled, a showing of "at least as well qualified" does not necessarily create this inference. You state good reasons for this view.

In making judgments to fill executive positions, subjective considerations customarily enter into the decisions. There may be two exceptionally well qualified candidates whose education and experience appear to qualify them both equally well. A choice between them must be made, and this may be done with no intent whatever to discriminate against the other. If there is a discriminatory intent, there usually will be some evidence of it. As your opinion notes, there was abundant evidence here to create a strong inference of discrimination, and therefore a rebuttable presumption that shifts the burden of going forward to the defendant.

On pages 8 and 9 you refer unnecessarily, as I view it, several times to the "presumption", characterizing it as "the Burdine presumption". I doubt that I can go along with changing the emphasis in these cases, and treating the result of a prima facie case here as different from that in McDonnell-Douglas and Burdine.

As we said in McDonnell-Douglas: "The critical issue before us concerns the order and allocation of proof" in a Title VII case. The terms prima facie and presumption have been used only for this purpose. The plaintiff must make a prima facie case. This requires a sufficient showing to create an inference of discrimination. If this is done there is a presumption which if unrebutted would justify judgment for the plaintiff. But its effect merely is to shift to the defendant the burden of going forward with rebutting evidence. The burden of ultimate persuasion, of course, remains on the plaintiff.

L.F.P., Jr.

SS

lfp/ss 12/30/82

MEMORANDUM

TO: Justice Rehnquist DATE: Dec. 29, 1982
FROM: Lewis F. Powell, Jr.

81-1044 U.S. Postal Service v. Aikens

You suggested that I indicate specifically why I am hesitant to join your opinion. I am with you, of course, through the first four pages.

My difficulty commences with the second full paragraph on page 5. There, you emphasize primarily a part of what was said in Burdine about a presumption being created by a prima facie case. I agree that a "presumption" and "inference" do not necessarily have the same consequences. But Burdine defines the consequences in cases of this kind. The two are used in conjunction: once a prima facie case is established, a rebuttable presumption arises. You mention only footnote 7. Actually, the text of Burdine repeatedly refers to the presumption. See, e.g., pp. 254, 255. Its role is described more fully in fn. 8 and 10. In the former, we state the relationship between the presumption and the prima facie case, and also expressly state that the term "presumption" properly used "refers only to a device for allocation of the production burden". Also, you used the word "presume" in Furnco in substantially the same sense: a result from the establishment of a prima facie case.

I am afraid substantial confusion will result from the way this paragraph is now written. And, certainly, I

would not describe our precedents as creating a "seemingly drastic rule".

If you revise page 5 substantially along the above lines, possibly some conforming changes would have to be made in the first two sentences (beginning "More succinctly phrased . . .) of your text on page 6.

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This case could be written in a straightforward manner by starting, as you do (p. 3,4), with the statement in McDonnell-Douglas that the facts necessarily will vary in Title VII cases and "the specifications [set forth in McDonnell-Douglas for] the prima facie proof required from respondent are not necessarily applicable in every respect to differing factual situations". Then, as your opinion does, point out the factual distinction between a promotion case and the employment situations involved in McDonnell-Douglas and Burdine. In a case such as this, where only a single executive position is to be filled, the elements of a prima facie case - in addition to the applicable ones of McDonnell-Douglas - include a showing that the plaintiff is at least as well qualified as the person who was given the promotion.

I would agree also that, in a promotion case, establishing that the plaintiff is at least as well qualified may not be sufficient to create a prima facie case. Prior decisions, particularly Burdine, have emphasized that an inference of discrimination must be shown to make out a prima facie case. Where only a single executive position is to be filled, a showing of "at least as well qualified" does not necessarily create this inference. You state good reasons for this view.

In making judgments to fill executive positions, subjective considerations customarily enter into the decisions. There may be two exceptionally well qualified candidates whose education and experience appear to qualify them both equally well. A choice between them must be made, and this may be done with no intent whatever to discriminate against the other. If there is a discriminatory intent, there usually will be some evidence of it. As your opinion notes, there was abundant evidence here to create a strong inference of discrimination, and therefore a rebuttable presumption that shifts the burden of going forward to the defendant.

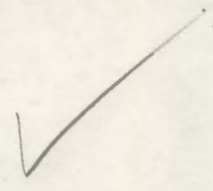
On pages 8 and 9 you refer unnecessarily, as I view it, several times to the "presumption", characterizing it as "the Burdine presumption". I doubt that I can go along with changing the emphasis in these cases, and treating the result of a prima facie case here as different from that in McDonnell-Douglas and Burdine.

As we said in McDonnell-Douglas: "The critical issue before us concerns the order and allocation of proof" in a Title VII case. The terms prima facie and presumption have been used only for this purpose. The plaintiff must make a prima facie case. This requires a sufficient showing to create an inference of discrimination. If this is done there is a presumption which if unrebutted would justify judgment for the plaintiff. But its effect merely is to shift to the defendant the burden of going forward with rebutting evidence. The burden of ultimate persuasion, of course, remains on the plaintiff.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE



December 28, 1982

Re: No. 81-1044, U.S. Postal Service v. Aikens

Dear Bill:

I join.

Regards,

Justice Rehnquist

Copies to the Conference

Supreme Court
Washington, D.C. 20543

December 30, 1982

81-1044 Postal Service v. Aikens

Dear Bill:

I have reread your opinion, as well as McDonnell-Douglas and Burdine. I am afraid we are farther apart than I had supposed.

The enclosed memorandum, responding to your suggestion prior to Christmas, makes specific suggestions.

I will, of course, understand if you find these unacceptable. In that event, I will join your judgment but write separately.

Sincerely,

Justice Rehnquist

lfp/ss
Enc.

January 3, 1983

81-1044 Postal Service v. Aikens

Dear Bill:

Sorry we cannot be together. In due time I will try my hand at an opinion concurring at least in the judgment.

Sincerely,

Justice Rehnquist

lfp/ss

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: JAN 11 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER *v.* LOUIS H. AIKENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January —, 1983]

JUSTICE MARSHALL, dissenting.

In *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973), a unanimous Court established the framework for proving employment discrimination under Title VII. The structure of proof set out in *McDonnell Douglas* and succeeding cases fairly takes into account both the difficulty of proving discriminatory motive and the importance of discouraging nonmeritorious suits. The Court today holds that the "principles established" in "the *McDonnell-Douglas* line of cases" were never "meant to apply to" claims of discrimination against applicants for "higher managerial" positions. *Ante*, at 2-3, 7. This conclusion surely comes as a surprise, for the *McDonnell Douglas* principles have been applied in the managerial context not only by the lower courts, but also by this Court in *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981). In my view, the distinction now drawn between managerial and nonmanagerial cases is untenable.¹ Moreover, even if it were proper to apply a dif-

¹The distinction is also unwieldy. The majority opinion indicates at various points that its new analytical framework applies to "higher managerial" or "managerial" positions, *ante* at 1, 7, but the majority does not even attempt to define these terms. Future courts will initially have to determine whether the *McDonnell Douglas* structure of proof applies to the position to which a plaintiff applied, and this will inevitably prompt ad-

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ferent structure of proof to managerial cases, I believe that respondent introduced sufficient evidence to establish a presumption of discrimination as a matter of law. For these reasons, I dissent.

I

Until today, this Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973), governed "the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment." *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981).² *McDonnell Douglas* and its progeny established a three-step inquiry for analyzing the proof in a Title VII case:

"First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' [411 U. S.], at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.*, at 804." *Texas Department of Community Affairs v. Burdine*, 450 U. S., at 252-253.

Critical to the *McDonnell Douglas* framework is the employer's duty to "explain[] clearly the nondiscriminatory rea-

ditional litigation. In the labor law area, the definition of the analogous concept of supervisory status "has spawned an immense amount of litigation, generating controversy in hundreds of cases before courts and thousands of cases before the National Labor Relations Board." Note, *The NLRB and Supervisory Status: An Explanation of Inconsistent Results*, 94 Harv. L. Rev. 1713, 1713 (1981).

² See *Teamsters v. United States*, 431 U. S. 324, 335-336, n. 15 (1977).

sons for its actions.” *Id.*, at 260.³ To be sure, the employer’s duty is a minimal one: it need only explain what it has done or produce evidence of legitimate nondiscriminatory reasons. The burden of persuasion on the issue of discrimination remains with the plaintiff. *Id.*, at 256–257. Nevertheless, the employer’s explanation is essential to “bring the litigants and the court expeditiously and fairly to” the question of intentional discrimination. *Id.*, at 253. In particular, the employer’s presentation of a reason for its action “frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.” *Id.*, at 255–256.

When an employer fails to carry its burden of articulating a nondiscriminatory reason for its employment decision or

³ The employer’s burden here is simply one of production, rather than persuasion. See *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248, 256 (1981); *Board of Trustees of Keene State College v. Sweeney*, 439 U. S. 24, 25, n. 2 (1978). This burden of production serves two important functions. It eliminates most of the virtually limitless number of considerations upon which the employer might have relied in making its employment decision. The *McDonnell Douglas Corp.* analysis thereby focuses the issue to be tried in the case. The second important function of the employer’s burden of production is that it elicits material information from the party that is in control of the information. A Title VII plaintiff can be expected to show that he applied for the job or promotion, he was qualified according to the employer’s enunciated qualifications, and he was rejected in favor of a nonminority candidate. But he cannot know the contents of the employer’s personnel files or on what subjective ground the employer decided to hire someone else over him. Similarly, the workings of a subjective evaluation process are beyond the knowledge of a rejected plaintiff.

Even the most liberal civil discovery is not an adequate substitute for the employer’s burden of production. The *McDonnell Douglas Corp.* standard requires an employer to state in court what legitimate reason it had for rejecting the plaintiff. “An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel.” *Burdine*, 450 U. S., at 255, n. 9.

proffers an explanation that is “unworthy of credence,” *id.*, at 256, a Title VII plaintiff obtains the benefit of the rebuttable presumption of discrimination that arises once a *prima facie* case is established under *McDonnell Douglas*. In this situation, the plaintiff is entitled to prevail as a matter of law.

The threshold showing required to establish the rebuttable presumption has never entailed more than simply adducing evidence that gives rise to an inference of discrimination. The Court made this clear in *Teamsters v. United States*, 431 U. S. 324, 358 (1977), when it cited *McDonnell Douglas* for the “general principle that any Title VII plaintiff must carry the initial burden of offering evidence *adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.*” (emphasis added). We reaffirmed this principle in *Burdine*, where we stated, “The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances *which give rise to an inference of unlawful discrimination.*” 450 U. S., at 253 (emphasis added). See also *Furnco Construction Corp. v. Waters*, 438 U. S. 567, 576 (1978).

The Negro plaintiff in *McDonnell Douglas*, like Aikens, submitted proof that he was rejected for an available position for which he was qualified. This evidence created an *inference* of discrimination because in the absence of a legitimate business reason for the employer’s decision, it is more likely than not that the applicant’s race was a factor in the employer’s decision. “As the Court explained in *Furnco Construction Corp. v. Waters*, 438 U. S. 567, 577 (1978), the *prima facie* case ‘raises an inference of discrimination only because we presume these acts, *if otherwise unexplained*, are more likely than not based on the consideration of impermissible factors.’” *Burdine*, 450 U. S., at 254.⁴

⁴Thus, in order to warrant a presumption of discrimination, *McDonnell Douglas* does not require a plaintiff to eliminate all conceivable, or even all common, nondiscriminatory reasons for his rejection. If the applicant

I do not see why these considerations are any less applicable when this showing is made by an applicant for a managerial position than by applicants for nonmanagerial positions. The Court correctly observes that in making its promotion decisions the Postal Service may have considered any among "a wide range of factors." *Ante*, at 7. Undoubtedly, many legitimate factors are subjective. Yet employers commonly rely on subjective considerations in making employment decisions outside the "higher managerial" context. In many cases such subjective considerations have been found legitimate.⁵ In others, they have been deemed pretextual.⁶ The majority's observation that managers and mechanics require different qualifications does not justify its conclusion that in this case the employer's acts, *if otherwise unexplained*, were somehow less likely to have been based on impermissible factors. Since Aikens' proof need only give rise to a presumption of discrimination in the *absence* of any legitimate, nondiscriminatory justification for the employment decision, it is irrelevant how many legitimate considerations could conceivably have justified the Postal Service's acts and whether those considerations might have been objective or subjective. What is relevant is the unlikelihood that the Postal Service would have denied Aikens' application for *no* reason. "We know from experience that people do not

were required to meet *this* burden at the outset, the employer's subsequent explanation of his employment decision would be superfluous. Rather, the plaintiff is required to do only what Aikens has easily done, which is to eliminate the two "*most common reasons*," *Burdine, supra*, at 254 (emphasis supplied), which may legitimately support a denial of employment—the unavailability of a position and the applicant's failure to satisfy stated qualifications.

⁵ See, e. g., *Shack v. Southworth*, 521 F. 2d 51, 55 (CA6 1975); *Causey v. Ford Motor Co.*, 516 F. 2d 416, 424 (CA5 1975); *Hochstadt v. Worcester Foundation*, 11 FEP 1426, 1436 (D Mass. 1976); *Van de Vate v. Boling*, 379 F.Supp. 925, 928 (ED Tenn. 1974).

⁶ See, e. g., *Causey v. Ford Motor Co.*, 516 F. 2d 416, 422-423 (CA5 1975); *Sabol v. Snyder*, 524 F. 2d 1009, 1012 (CA10 1975); *Rogers v. EEOC*, 11 FEP 416, 419 (CA9 1974).

act in a totally arbitrary manner, without any underlying reasons, especially in a business setting." *Furnco Construction Corp. v. Waters*, 438 U. S., at 577.

When an employer is unable to articulate any legitimate reason for hiring a white applicant over a qualified Negro applicant, it is reasonable to infer that decision was based at least in part on impermissible considerations. There is no reason to believe that discrimination is any less prevalent in hiring for supervisory positions than it is in hiring for lower level positions.⁷ While subjective considerations are rele-

⁷When Congress enacted the Employment Opportunity Act of 1972, which made Title VII fully applicable to federal agencies, it made clear its particular concern with the exclusion of minorities from high level positions. Both the Senate and House Reports cited the exclusion of Negroes from professional and managerial positions as evidence that they were "still far from reaching their rightful place in society." S. Rep. No. 92-415 (92d Cong., 1st Sess. 1971), p. 6; H. Rep. No. 92-238 (92d Cong., 1st Sess. 1971), p. 4. Congress recognized that the problems of racial discrimination addressed in the 1964 Civil Rights Act had proved to be more complex, deep rooted, and intractable than it believed in 1964:

"In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. It was thought that a scheme that stressed conciliation rather than compulsory processes would be most appropriate for the resolution of this essentially 'human' problem, and that litigation would be necessary on an occasional basis. Experience has proved this view to be false.

"Employment discrimination as viewed today is a far more complex and pervasive phenomenon." S. Rep. No. 92-415, *supra*, at 5.

With regard to the Government particularly, Congress found that the concentration of minorities and women in nonsupervisory positions was symptomatic of employment discrimination:

"Statistical evidence shows that minorities and women continue to be excluded from large numbers of government jobs, particularly at the higher grade levels. . . .

"This disproportionate distribution of minorities and women throughout the Federal bureaucracy and their exclusion from higher level policy-mak-

vant in hiring a supervisor, evaluations of such subjective criteria as the applicant's "ability to work effectively with particular superiors and subordinates," *ante*, at 7, are certainly more susceptible to illegitimate considerations than are evaluations of objective criteria.

"[P]rocedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate [supervisors] are a ready mechanism for discrimination against Blacks. . . . We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect nondiscriminatory action." *Rowe v. General Motors Corp.*, 457 F. 2d 348, 359 (CA5 1972) (citations omitted).

See *Castaneda v. Partida*, 430 U. S. 482, 497 (1977); *Albemarle Paper Co. v. Moody*, 422 U. S. 405, 433 (1975). If anything, it is particularly true with respect to the higher levels of employment that "when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not that the

ing and supervisory positions indicates the government's failure to pursue its policy of equal opportunity." H. Rep. No. 92-238, *supra*, at 23.

In the years that followed, Congress recognized the need for additional remedies for discrimination which remains pervasive on the highest as well as the lowest rungs of the employment ladder both inside and outside the Government. See, *e. g.*, 5 U. S. C. §§ 2302(d), 7201, 4313(5) (1978); *Fullilove v. Klutznick*, 448 U. S. 448 (1980) (discussing the set-aside provisions of the Public Works Employment Act of 1977). Only a few months ago, the U. S. Commission on Civil Rights concluded that gross inequalities in the labor force, which have been reduced only marginally over the past decade, must be explained by the "effect [of discrimination] on blacks, Hispanics and women in their struggle to find jobs commensurate with their qualifications and experience." U. S. Commission on Civil Rights, *Unemployment and Underemployment Among Blacks, Hispanics, and Women* (Nov. 1982), at 57.

employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race." *Furnco Construction Corp. v. Waters*, *supra*, at 577 (emphasis in original).

The irrelevance of the distinction now drawn between supervisory and nonsupervisory positions is clearly recognized in our past decisions. It is possible in any Title VII case that the employer had a legitimate subjective reason for its refusal to hire or promote the applicant. In *McDonnell Douglas* the employer asserted that in refusing to hire the plaintiff it had relied on *subjective* hiring judgments. 411 U. S., at 803; 463 F. 2d 337, 352 (CA8 1972). While we held that employers may rely on subjective criteria in rebutting charges of discrimination, 411 U. S., at 803-804, we certainly did not require the plaintiff to anticipate and rebut such justifications as part of his *prima facie* case. Rather, once the plaintiff set forth evidence that gave rise to an inference of discrimination in the absence of a nondiscriminatory justification for the employer's decision, the employer was required to articulate a legitimate business justification for its action.

Burdine reaffirmed the appropriateness of the *McDonnell Douglas* standard for *all* Title VII cases alleging discriminatory treatment. The plaintiff in *Burdine* sought a promotion to the supervisory position of Project Director in the Public Service Careers Division of the Texas Department of Community Affairs. She was denied the promotion and was subsequently discharged before being rehired to a position comparable that to which she had originally aspired. Certainly these decisions could have rested on the very factors that the majority deems relevant to this case, the applicant's "understanding of the organization's goals, ability to work effectively with particular superiors and subordinates, maturity, originality, initiative, and decision making ability." *Ante*, at 7. Yet the unanimous Court in *Burdine* made clear that the *McDonnell Douglas* "allocation of burdens and order of pres-

entation of proof" was fully applicable to that case. 450 U. S., at 252-256. I am at loss to see any distinction between this case and *Burdine*.

II

Even assuming that the prima facie case described in *McDonnell Douglas* does not, standing alone, justify an inference of discrimination in a suit involving a supervisory position, Aikens certainly introduced sufficient additional evidence to warrant such an inference.⁸ Since the majority gives only passing attention to the evidence, it is necessary to set out the stipulated or otherwise uncontroverted facts in some detail.

A

Aikens, a Negro male, was an employee of the United States Postal Service and its predecessor from 1937 until his retirement. He was promoted to his first supervisory position on October 1, 1952, and held various foreman positions until 1960, the highest being ranked PFS-7 under the Postal Service's old grading system. From 1960 through 1966,

⁸ I therefore believe that the majority errs in concluding that the presumption was unwarranted in this case. I am somewhat at a loss as to why the majority decides this issue. In this case the Postal Service did advance reasons below for denying promotions to Aikens. Petitioner contended that by turning down two lateral transfers that were offered to him, Aikens failed to acquire necessary experience and familiarity with the Postal Service. Since the District Court found that this explanation was not pretextual—a finding which was in my view clearly erroneous—its resolution of the question whether Aikens' initial showing gave rise to a rebuttable presumption was not necessary to the decision below. Rather than "tak[ing] the case as it comes to us," *ante*, at 2, the Court should never have taken this case at all. I believe that today's decision is an advisory opinion on an issue that is not properly before us. Nevertheless, I take the majority opinion as it comes to me and address my dissenting remarks to the merits.

Aikens received six promotions or lateral transfers, until he attained the position of Assistant Director for Transit Mails (PFS-15). He was the first Negro to reach that level.

From August 1966 to March 1973, there were only four positions higher than Aikens' in the Washington, D.C., post office: Director for Installation Services (PFS-17), Assistant Director for Operations Division for Distribution (PFS-16), Director for Operations Division (PFS-17), and Postmaster (PFS-18). During that period, seven white males—L.M. Lieb, L.V. Bateman, Jr., E.C. Ray, D.M. Barranca, M.G. Thomas, F.A. Miller, and Ellsworth Rapee—were promoted or detailed⁹ into one or more of these positions over Aikens a total of 29 times. The availability of promotions and details to high level jobs in the Service was not posted, and candidates were not notified as a matter of course that they were under consideration. D.C. Postmaster Carlton Beall apparently made all detail assignments until he was promoted to District Postal Manager in July 1971. After Beall's promotion, a promotion advisory board made one set of recommendations that resulted in Lieb's promotion to Assistant Director for Operations Division for Distribution and Rapee's

⁹ A promotion entails a permanent assignment to a position. A detail is a temporary assignment to a supervisory position. Under Postal Service procedure at the time, an employee had to file a Form 1717 in order to indicate that he or she wanted to be considered for a job. Aikens filed these forms for all of the jobs above his position. For a detail, a higher level supervisor with authority over the position assigned an employee by signing a Form 1723 Assignment Order. A detail normally lasted 89 days, but frequently was extended by the signing of another Assignment Order for a second 89-day period. Although details were to be renewed only once, the Postal Service often had employees who stayed on detail for years. The D.C. Postmaster and the District Postal Manager were the supervisors responsible for the positions in which Aikens indicated interest. Carlton Beall was the D.C. Postmaster until July 1971, when he was promoted to District Postal Manager. Ellsworth Rapee became D.C. Postmaster upon Beall's promotion. Detail assignments were made by Beall or by Rapee with the concurrence of Beall.

promotion to Director for Operations Division. In both cases, Aikens was the board's second choice.

In March of 1973, the Postal Service conducted a reevaluation of its grading system, called the Job Evaluation Program (JEP). Under the new grading, Aikens' position of Assistant Director for Transit Mails was rated as PES-20. Three other positions in the D.C. area that had been graded PFS-15 were upgraded to PES-23. Because of the regrading, several additional positions were rated above Aikens' position and several more junior white males received details or promotions above Aikens.¹⁰

After the regrading, Aikens was again passed over in favor of several junior white males. M.G. Thomas was detailed twice and F.A. Miller three times to the position of Assistant Director for Operations Division for Distribution. In addition, on September 29, 1973, A.J. Eckerl replaced D.J. Robertson as Manager of Personnel, a position that had been upgraded to PES-23. At the same time, Robertson was promoted to Employee and Labor Relations Specialist, a newly regraded PES-24 position for which Aikens was qualified. Other whites who were promoted over him included W.E. Hahn, J.J. Spelta, and C. Errico. In late 1973, Aikens also was passed over for the positions at issue in this lawsuit: Mail Processing Officer, Acting Mail Processing Representative, Director for Operations Division, and Customer Services Representative.¹¹ These positions were filled by Barranca, Miller, Rapee, and Thomas.

Aikens was undeniably qualified for the jobs to which

¹⁰ Aikens unsuccessfully appealed his regrading. In the appeal, he sought a PES-23 rating for his position in order to remain eligible for the D.C. Postmaster position. He objected to the anomaly of being graded lower than those over whom he had supervisory authority.

¹¹ Although Aikens was passed over continually during this period, he failed to file timely administrative complaints with regard to other instances of discrimination. 5 CFR § 713.214 (complaints must be filed within 30-days of discriminatory action).

white males were appointed instead of him. The Postal Service stipulated below that "there was no derogatory or negative information found in plaintiff's Official Personnel Folder to indicate that he had not fulfilled the requirements of his position." Joint Appendix, at 7 (stipulation of facts). "In 1968 Plaintiff was rated as 'an outstanding supervisor whose management abilities were far above average.'" *Id.*, at 8.

Indeed, Aikens' credentials appear to have been superior. Aikens' educational experience exceeded that of the white supervisors promoted over him. "Plaintiff has a Master's degree and completed 3 years residence on his Ph.D." *Id.*, at 7. Beall, the Postmaster and later District Postal Manager, had completed the tenth grade. Robertson had one and a half years of college. Barranca had eight months of college. Eckerl, Lieb, Thomas, Errico, and Hahn were high school graduates. Rapee, who was detailed as Postmaster, and Ray had completed the eleventh grade. Miller had completed his sophomore year in high school.¹² The educational background of Bateman and Spelta is not in the record. *Ibid.* In addition, Aikens had more experience in supervisory positions than any of the whites other than Spelta. He had more seniority in the Postal Service than even Spelta. Aikens had as many or more training courses and seminars as the whites. The promotions and detail records show that Aikens had as much or more experience in varied and specific supervisory positions than his white colleagues.

Aikens also introduced anecdotal evidence to show that Beall, who was primarily responsible for promotion decisions,

¹² Miller's lack of education was apparently a serious practical handicap. A coworker testified at trial that he had to "write all [of Miller's] letters for him because he couldn't write a decent report." Transcript, at 228. Despite this problem, however, Miller served as Mail Processing Representative, Tour Superintendent, and Assistant Director for Operations Division for Distribution.

was biased against Negroes. A Negro supervisor testified that the Postmaster had stated to him that "[a]ll they [Negroes] want to do is to lay around and breed like yard dogs and collect relief checks." Transcript, at 220. A white supervisor testified that Beall once told an all-white meeting: "You know, they don't have to set in the back of the bus anymore." *Id.*, at 250-251. Another Negro supervisor testified that Beall referred to Negroes nearly all the time as "that crowd," and often made sarcastic remarks about Aikens' educational achievements. *Id.*, at 252-254.

Finally, Aikens introduced statistical evidence of the underrepresentation of minorities at higher levels. As of February 7, 1974, one month after Aikens filed his Equal Employment Opportunity complaint, whites held a disproportionate number of high level supervisory positions in the Washington, D.C., post office. Although only 14.3% of the total workforce of 8,634 were white, 34.1% of PES-1 through PES-14 employees were white, and 48.4% of all categories PES-15 and higher were white. Aikens remained the only Negro at his level or higher until January 1974.

B

The Court acknowledges that *McDonnell Douglas* did not limit the means by which a prima facie case may be established. *Ante*, at 3-4. See *Furnco Construction Corp. v. Waters*, *supra*, at 577; *Teamsters v. United States*, *supra*, at 362. Indeed, the Government has argued at length to this Court in this very case that an applicant denied a supervisory position may make any number of alternative showings that suffice not only to compel his employer to articulate reasons for its actions, but also to compel entry of judgment in his favor "[i]f the trier of fact believes [his] evidence, and if the employer is silent in the face of" that evidence. *Burdine*, *supra*, at 254. See Brief for the Petitioner, at 21-30. I would hold that, as a matter of law, Aikens made such a showing in this case.

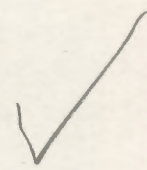
III

In *McDonnell Douglas Corp. v. Green* a unanimous Court established a fair procedure for proving all claims of discriminatory treatment. The fairness and appropriateness of this procedure had not been questioned by this Court in any of its subsequent opinions. Today, the Court nevertheless exempts a broad class of cases from the *McDonnell Douglas* framework on the basis of an entirely untenable distinction between supervisory and nonsupervisory positions. Those discriminated against in supervisory, professional and other positions to which subjective qualifications are often relevant, will no longer have the fair opportunity to recover that this Court previously assured. By making it more difficult for victims of discrimination at the higher levels of employment to seek redress, the Court undermines the unequivocal congressional purpose of eliminating discrimination from *all* the workplaces of this nation. I dissent.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM.J. BRENNAN, JR.

January 12, 1983



RE: No. 81-1044 U.S. Postal Service v. Aikens

Dear Thurgood:

Please join me in your dissent in the above.

Sincerely,

A handwritten signature, appearing to be "Bill", is written below the word "Sincerely,".

Justice Marshall

Copies to the Conference

drk 01/13/83

To: Mr. Justice Powell

From: Rives

*Rives - using my memo
to WTR will do a*

Re: No. 81-1044, U.S. Postal Service v. Aikens

*concerning
opinion*

I think Justice Marshall's dissent is well done, but it does not agree with your views as I understand them. As I read it, it adopts a low-level test for establishing a prima facie case. A Title VII plaintiff must show that "he was qualified according to the employer's enunciated qualifications." See p. 3 n. 3. Although the employer has the option of defining its job criteria narrowly, a minority applicant who met those criteria and was rejected for a job would have established a prima facie case.

Justice Marshall seems to add a new twist to the McDonnell Douglas test. The inference of discrimination does not arise from the plaintiff's level of proof but from the employer's failure to articulate a legitimate reason for refusing to hire him:

"When the employer is unable to articulate any legitimate reason for hiring a white applicant over a qualified Negro applicant, it is reasonable to infer that [his] decision was based at least in part on impermissible considerations." See page 6.

Thus, Justice Marshall focuses on the idea that even if the acts proved by the plaintiff alone would not establish discrimination, these same acts, if otherwise unexplained, do establish discrimination. This, however, would place too little emphasis on

the prima facie case since under Justice Marshall's view, any facts would suffice so long as they are not explained.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

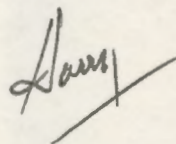
✓
January 13, 1983

Re: No. 81-1044 - U.S. Postal Service v. Aikens

Dear Thurgood:

Please join me in your dissent in this case.

Sincerely,



Justice Marshall

cc: The Conference

STYLISTIC CHANGES THROUGHOUT

Pg 5, 7-11

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER *v.* LOUIS H. AIKENS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Louis Aikens filed suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e *et seq.*, claiming that petitioner, the United States Postal Service, discriminated against him on account of his race. Aikens, who is black, claimed that the Postal Service had discriminatorily refused to promote him to higher positions in the Washington, D.C. Post Office where he had been employed since 1937. After a bench trial, the District Court entered judgment in favor of the Postal Service, but this judgment was reversed by the Court of Appeals. 642 F. 2d 514 (CA DC 1980). We vacated the judgment of the Court of Appeals and remanded for reconsideration in the light of *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981). 453 U. S. 902 (1981). On remand, the Court of Appeals reaffirmed its earlier holding that the District Court had erred in requiring Aikens to offer direct proof of discriminatory intent. 665 F. 2d 1057, 1058 (CA DC 1981) (*Per Curiam*). We granted certiorari to consider the assessment of proof of racial discrimination when an employer has selected among applicants for a higher managerial position¹. — U. S. — (1982).

¹We have consistently distinguished disparate treatment cases from cases involving facially neutral employment standards that have disparate impact on minority applicants. See, e. g., *Texas Department of Commu-*

The Court of Appeals, in its second opinion, held not only that the District Court erred in requiring Aikens to offer direct proof of discriminatory intent², but also that it erred in requiring Aikens to show, as part of his *prima facie* case, that he was “as qualified or more qualified” than the people who were promoted. The Postal Service insists that an employee who has shown only that he was black, that he had applied for a promotion for which he possessed the minimum qualifications, and that the Postal Service selected a non-minority applicant has not established a “*prima facie*” case of employment discrimination under Title VII.

Since the case has been fully tried on the merits in the District Court, one might at first blush wonder why the parties are still arguing about the nature of a *prima facie* case. Indeed, to the untutored this case, tried to the District Court in January, 1979, might seem to be one that could have been disposed of in a relatively short span of time (according to judicial lights) with the District Court making the necessary essential findings of fact and conclusions of law, and the Court of Appeals reviewing those findings and conclusions under the appropriate standards³. But we take the case as it comes to us.

We think that some statements in the briefs of the parties and of the *amici*, urging us either to “adhere” to, modify, or reconsider, the line of cases beginning with *McDonnell Doug-*

nity Affairs v. Burdine, 450 U. S. 248, 252, n. 5 (1981); *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802, n. 14 (1973).

² As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves. Thus, we agree with the Court of Appeals that the District Court should not have required Aikens to submit direct evidence of discriminatory intent. See *International Brotherhood of Teamsters v. United States*, 431 U. S. 324, 358, n. 44 (1977) (“[T]he *McDonnell Douglas* formula does not require direct proof of discrimination.”)

³ See *Pullman Standard v. Swint*, — U. S. —, — (1982).

las v. Green, 411 U. S. 792 (1972), reveal a misunderstanding of that line of cases. Because this misunderstanding may have been shared in part by the District Court and by the Court of Appeals in the present case, we take the liberty of setting forth the facts as well as the law in the principal cases in the *McDonnell-Douglas* line.

In *McDonnell-Douglas* itself, the defendant employer ran a newspaper advertisement seeking qualified mechanics. The plaintiff, a qualified mechanic who had been laid off by the defendant, applied for reemployment. The defendant declined to rehire him, even though it continued to hire other applicants who responded to the advertisement after the plaintiff. The plaintiff's Title VII suit was dismissed by the District Court, but the Court of Appeals for the Eighth Circuit reversed. That court held that the reason given by the defendant for refusing to rehire plaintiff—plaintiff's participation in a "stall in" and "lock-in" at defendant's place of business—was a "subjective" criterion that carried little weight in rebutting charges of discrimination. The Court of Appeals set forth its version of a *prima facie* case of discrimination under Title VII.

Our opinion described the now familiar elements of a *prima facie* case:

"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." *Id.*, at 802.

We immediately added, however, that "[t]he facts necessarily will vary in Title VII cases, and the specifications above of

the *prima facie* proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.*, at 802, n. 13.

We returned to the same question in *Furnco Construction Corp. v. Waters*, 438 U. S. 567 (1978). The employer's business was the rehabilitation of steel mill blast furnaces with "fire brick." The employer did not maintain a permanent force of bricklayers; instead, it hired a superintendent for each project, and then delegated to him the task of securing a competent work force. The superintendent who declined to hire the plaintiff did not accept applications at the job site, but hired only persons he knew to be experienced and competent in this work or who had been recommended to him as similarly skilled. The employer claimed this policy was established to ensure that only experienced and highly qualified fire bricklayers were employed, because untimely work could result in substantial losses both to the steel mill operator and to the contractor-employer. *Id.*, at 569-572.

We agreed with the Court of Appeals that the black plaintiffs had made out a *prima facie* case. We disagreed, however, with its conclusion that the reasons for the employer's hiring practices were illegitimate. In discussing the showings required of the parties to Title VII suits, we pointed out:

"The central focus of the inquiry in a case such as this is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.' *Int'l. Brotherhood of Teamsters v. United States*, *supra*, [431 U. S.,] at 335, n. 15. The method suggested in *McDonnell-Douglas* for pursuing this inquiry, however, 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." 438 U. S., at 577.

Finally, in *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981), plaintiff, a woman, claimed that the employer's failure to promote her and its later decision to terminate her had both resulted from gender-based discrimination. The District Court found after a bench trial that neither decision was discriminatory. *Id.*, at 251. The Court of Appeals for the Fifth Circuit upheld the decision of the District Court as to the promotion, but reversed its finding on the termination.

We reviewed only the part of the case that had been reversed by the Court of Appeals,⁴ and stated more clearly the consequences of the plaintiff's success in making the showing required by *McDonnell Douglas*. The *prima facie* case in a Title VII action is not merely the minimum showing that will justify a verdict for the plaintiff, it "creates a presumption that the employer unlawfully discriminated against the employee." *Id.*, at 254, n. 7. If the employer does not rebut this presumption by "clearly set[ting] forth, through the introduction of admissible evidence" a legitimate nondiscriminatory reason for his action, *id.*, at 255, the district court "must enter judgment for the plaintiff." *Id.*, at 254 (emphasis supplied).

The justification for this seemingly drastic rule can be found in *Furnco*:

"A *prima facie* case under *McDonnell-Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. . . . And we are willing to presume this largely because we know that from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business

⁴Thus Burdine's failure to be promoted to a managerial position was not before us.

setting. Thus, when all legitimate reasons for rejecting an applicant had been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, whom we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race." 438 U. S., at 577.

More succinctly phrased, a *prima facie* case "eliminates the most common non-discriminatory reasons for the plaintiff's rejection." *Burdine, supra*, at 254. For this reason, we have held that an un rebutted *prima facie* case is sufficiently compelling to require a judgment for the plaintiff as a matter of law.

In the present case, both the District Court and the Court of Appeals apparently thought that Aikens' claim against the Postal Service fits into the pattern of the *McDonnell-Douglas* line of cases. We disagree. The first and third elements of *McDonnell-Douglas* are undoubtedly present; Aikens belongs to a racial minority, and he applied for the promotions in question but was denied them. The fourth element, however, is entirely absent; the position did not remain open, as it did in *McDonnell-Douglas*, but was filled by the applicant chosen in preference to Aikens. Indeed, where an employer seeks to fill a single managerial position, the position will by definition not be open after one of the applicants has been chosen.

The second *McDonnell-Douglas* element—the showing that the plaintiff was "qualified" for the job—is more problematic. There is no doubt that Aikens had an impressive resume. He has a Masters Degree and has completed three years of residence towards a Ph.D. He has been rated as "an outstanding supervisor whose management abilities are far above average." App. 8. There was no derogatory or negative information in his Personnel Folder. He had more supervisory seniority and training and development courses than all but one of the white persons who were promoted

above him. It is clear that his qualifications were sufficient, in the eyes of the Postal Service, to merit serious consideration.

At this point, however, agreement between the parties, and between the courts that have considered this factual issue, breaks down. It is argued that Aikens must show he is "as qualified" as the person actually chosen, "better qualified" than the person actually chosen, "relatively qualified," or merely "qualified" for the jobs he sought. We believe that this contest of comparatives ultimately proves self-stultifying.

The fair reading of the *McDonnell-Douglas* advertisement for qualified mechanics is that there was a known, reasonably objective basis for determining who was a qualified mechanic, and that applicants would be hired on a first come, first served basis until the employer had obtained the number of mechanics it needed. But where one managerial position is open, there may be no totally objective measure of who is "qualified," and the employer certainly does not undertake to promote more than one applicant. Employers consider a wide range of factors, such as each applicant's understanding of the organization's goals, ability to work effectively with particular superiors and subordinates, maturity, originality, initiative, and decision making ability. It will rarely, if ever, be possible to quantify all the relevant criteria and tally them up on a score card.

In these circumstances, the question is not whether we will "follow" the *McDonnell-Douglas* line of cases, but whether the principles established in those cases were ever meant to apply to a situation so far removed from their factual context.⁵ If those principles do not provide the district courts

⁵The dissent asserts that a *prima facie* case arose in *McDonnell-Douglas* when the black plaintiff "submitted proof that he was rejected for an available position for which he was qualified." *Post*, at 4. The dissent thus ignores the third element of the *McDonnell-Douglas* formulation and

with a "sensible, orderly way to evaluate the evidence in light of common experience," *Furnco, supra*, at 577, they are inapplicable under the terms of those decisions. *Burdine, supra*, at 253, n. 6; *Furnco, supra*, at 575-576; *International Brotherhood of Teamsters v. United States*, 431 U. S. 324, 358 (1977); *McDonnell Douglas, supra*, at 802, n. 13.

McDonnell-Douglas and *Furnco* both dealt with entry level jobs, one in a large manufacturing industry and the other in the construction industry. In those cases, if the plaintiff could meet the four elements of the *McDonnell-Douglas prima facie* case—that he belonged to a racial minority, that he applied and was qualified for a job for which the employer was seeking applicants, that he was rejected, and that after his rejection the employer continued to seek similarly qualified applicants—the plaintiff has in effect negated the principal broadly applicable reasons that would show that the employer's refusal to hire him was not based on a discriminatory animus.

But that simply is not true in the present case. There were several applicants for each position, and only one could be chosen. The "qualifications" for the position as laid down by the Postal Service, while not appearing as clearly from the record as might be, were by no means as easy to assess as the qualifications for a "mechanic" advertised for in *McDonnell-Douglas*. We simply do not think that Aikens' showing that he is black, that he was sufficiently qualified to be seriously considered, and that he was not chosen, "*eliminates* the most common non-discriminatory reasons" for his rejection. *Burdine, supra*, at 254 (emphasis supplied).

We do not believe we can revise *McDonnell Douglas* to fit these facts. To do so, we would be obliged to hold that Aikens, merely by showing that he is black, he was qualified for a single vacancy, and the Postal Service promoted an-

trivializes the differences in the kinds of qualifications necessary for the positions in that case and this.

other of several non-minority applicants, was presumptively the victim of discrimination. This we are unwilling to do; such a showing in these circumstances does not justify the presumption that the employer's acts "if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco, supra*, at 577.

Although the Aikens showing made below does not justify a presumption of discrimination, it is sufficient to support an inference of discrimination. That is, if the District Court were to conclude that the Postal Service did treat Aikens less favorably than others because of his race, we surely could not say, on the basis of the record before us, that such a finding would be clearly erroneous. Aikens showed that white persons were consistently promoted and detailed over him and all other black persons between 1966 and 1974. Aikens had substantially more education than the white employees who were advanced ahead of him; of the 12, only 2 had any education beyond high school and none had a college degree. Aikens introduced testimony at trial that the person responsible for the promotion decisions at issue had made numerous derogatory comments about blacks in general and Aikens in particular.

We believe that the District Court, which is able to perceive the attitude and demeanor of witnesses, and to evaluate their credibility and the weight that should be placed on their testimony, is in a far better position than this Court to decide whether the Postal Service discriminated against Aikens. The District Court should decide this case in the same manner that it decides questions of fact in the myriad other kinds of litigation before it.

We therefore hold that in a case such as this, where no standardized *prima facie* case can be made out, the district court should evaluate all the admissible evidence and then decide the factual question of discrimination. Thus, plaintiffs may seek to obtain the benefit of the *Burdine* presumption by

making out a *McDonnell Douglas prima facie* case, and may also seek to prove their case in the ordinary way⁶. A plaintiff, through use of the liberal discovery provided in Fed. R. Civ. P. 26-37, can depose a defendant's employees and obtain relevant documents relating to employment decisions. Of course, a plaintiff who fails to make out a *McDonnell Douglas prima facie* case will not survive a motion for judgment at the close of his case under Fed. R. Civ. P. 41(b) unless he has presented evidence from which the district court can infer that he was discriminated against. See *Teamsters, supra*, at 358. This case presents one example of that sort of evidence.

JUSTICE MARSHALL's dissent contends that this opinion "exempts a broad class of cases from the *McDonnell-Douglas* framework on the basis of an entirely untenable distinction between supervisory and nonsupervisory positions." *Post*, p. 14. We do no such thing. We hold the *McDonnell-Douglas* presumption inapplicable because by its terms it requires that plaintiff prove four elements in order to have the benefit of it, and in this case respondent Aikens proved only two of those four elements. The dissent also states that even if the *McDonnell-Douglas* presumption does not apply, Aikens "certainly introduced sufficient additional evidence to warrant such an inference." *Post*, at 9. We fully agree that the evidence introduced by Aikens more than adequately supports an inference of discrimination, on the basis of which the finder of fact would be entirely justified in concluding that Aikens had been the victim of discrimination; we summarize that evidence earlier in the opinion. The dissent insists on

⁶ A rough analogy may be found in the law relating to *res ipsa loquitur* in negligence actions. In some circumstances a showing of circumstances sufficient to raise *res ipsa* creates a rebuttable presumption like the *Burdine* presumption. See Prosser, Torts 229-230 (1971). A tort plaintiff can also seek to show negligence directly without abandoning the benefit of *res ipsa*. *Id.*, at 231-232.

equating the "inference" of discrimination with the rebuttable "presumption" brought into play by *McDonnell-Douglas*, *post*, at 9. The distinction between the two was pointed out in footnote 7 of our opinion in *Burdine*. For the reasons stated above, we do not think a presumption is warranted in this case.

All courts have recognized that the questions facing triers of fact in discrimination cases are both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. In any Title VII case, regardless whether the *prima facie* case device is available to the plaintiff, the ultimate question is "whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" *Furnco*, *supra*, at 577 (quoting *Teamsters*, *supra*, at 335, n. 15). There will seldom be "eyewitness" testimony as to the employer's mental processes, but this does not mean that courts should treat the question of discrimination differently from other questions of fact. The law often obliges finders of fact to inquire into a person's state of mind. As Lord Justice Bowen said in treating this problem in an action for misrepresentation nearly a century ago:

"The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much as fact as anything else." *Eddington v. Fitzmaurice*, 29 Ch. Div. 459, 483 (1885).

The judgment of the Court of Appeals is vacated and the case is remanded with directions to remand to the District Court for further proceedings consistent with this opinion.

It is so ordered.

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First Draft--U.S. Postal Service v. Aikens--No. 81-1044

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I concur in the judgment of the Court. I cannot

agree, however, that resolution of the question presented
here requires that we abandon the framework for resolving
Title VII cases established in McDonnell Douglas Corp. v.

Green, 411 U.S. 792 (1973), and since followed
in Furnco & Burdine

I

Respondent, who is black, applied for several
high level positions in the Washington D.C. Post Office.
Despite his considerable qualifications, the Postal
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applicants. Respondent brought this action under Title

VII of the Civil Rights Act, 42 U.S.C. §2000e et seq.,
 alleging that the Postal Service had discriminated against
 him on account of his race. After a full trial, the
 District Court for the District of Columbia found that the
 respondent had failed to prove a prima facie case under
McDonnell Douglas since he had not shown that he was "as
 qualified or more qualified" than the other candidates.

See App. to Pet. for Cert. 59a. The Court of Appeals

reversed, ^{holding that} ~~because the District Court had set too high a~~

~~standard.~~ Under its view of McDonnell Douglas, a

plaintiff automatically establishes a prima facie case
 whenever he proves that he belongs to a racial minority,
 that he applied for an available position for which he
 possessed the "qualifications or background experiences
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nonminority applicant was selected, ~~instead~~.¹ See 665 F.2d 1057, 1060 (CA DC 1981) (per curiam).

The Court ^{today} --correctly I believe--rejects this

view. See ante, at 8. To establish a prima facie case a

Title VII plaintiff must introduce evidence that

eliminates the most common nondiscriminatory reasons for

his rejection. See Texas Department of Community Affairs

v. Burdine, 450 U.S. 248, 254 (1981). The most common

reasons for an employment decision, however, will vary

depending on the ^{facts and circumstances, including the} industry and the ~~level of employment~~ ^{the}

^{position to be filled.} involved. Accordingly, a court must consider the type of

¹The Court of Appeals held initially that a Title VII plaintiff must show only that he possessed the minimum qualifications to perform a job. See 642 F.2d 514, 519 (CA DC 1980). We vacated the judgment and remanded for reconsideration in light of Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). 453 U.S. 902 (1981). On remand the court adhered to its earlier holding.

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the employment decision being made before it determines whether a plaintiff has satisfied his initial burden.

As the Court recognizes, when an employer selects one of several ^{qualified} applicants for a ^{single} managerial

position, he customarily takes into account a wide range of subjective ~~considerations~~ ^{considerations}. ~~These may include~~ ^{These may include} ability, leadership, and ability to work well with other

employees. See ante, at 7. Additionally, ~~Even~~ ^{Even} those applicants who meet the employer's minimum objective

qualifications ~~generally~~ ^{often} will possess varying levels of ^{managerial} ability. In selecting a person to fill an executive

position, ~~an~~ ^a employer typically will choose the applicant ^{believed to be the best} who ~~is most~~ ^{is} qualified--i.e., the applicant who presents

the optimal combination of subjective qualifications the employer values ^{as well as} and outstanding objective qualifications.

With respect to this type of employment decision, a disappointed minority applicant who can establish only that he met the employer's minimum objective qualifications simply will not have eliminated the most common nondiscriminatory reasons for his rejection. See Teamsters, supra, at 358 n. 44.

Additionally, when only one position is ^{to be filled} open and the employer chooses from a pool of ^{objectively} qualified applicants, he necessarily ^{must} prefer ^{one} applicant over another. A choice has to be made and the employer's isolated decision to select a qualified nonminority applicant rather than a qualified minority applicant does ^{, without more,} not imply that the choice was discriminatory. Cf. Teamsters v. United States, 431 U.S. 324, 358 n. 44 (1977). ^{B/} In this respect, the decision here differs significantly from the decision

in McDonnell Douglas. In that case ^{where a non-management job was open} the employer rejected a qualified minority applicant ^{and but} left the position unfilled and continued to seek qualified applicants. See 411 U.S., at 802. Because the employer's decision in McDonnell Douglas was facially inconsistent with its own economic self interest, the plaintiff in that case "was rejected under circumstances which [gave] rise to an inference of unlawful discrimination." Burdine, supra, at 253. *Σ*

Thus to the extent the Court holds that the Court of Appeals set too low a standard for this type of employment decision, I agree with its reasoning. The Court, however, does not ~~go on to~~ specify the proof that would be sufficient to create a prima facie case in this context. It determines instead that ^{analysis} the prima facie case,

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from established principles
The reasons for this ^{*departure*} ~~conclusion~~ are difficult to fathom. The Court draws a distinction between evidence that establishes a "McDonnell Douglas presumption" and evidence that establishes an "inference of discrimination." Under its view, a McDonnell Douglas presumption arises only when proof of the "standardized prima facie case" eliminates the most common nondiscriminatory reasons for an employer's decision. If it does not, a plaintiff is not entitled to a McDonnell Douglas presumption. Ibid. In these situations, the Court would require a plaintiff instead to introduce facts that create an "inference" of discrimination and "prove [his] case in the ordinary way." Ibid. In my view, the

distinction the Court draws between a [?]standardized prima facie case and facts that create an inference of discrimination is neither required nor justified by our past cases.

II

In Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), we reaffirmed unanimously the basic allocation of burdens and order of proof initially set forth in McDonnell Douglas:

"First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' [McDonnell Douglas, 411 U.S.], at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were

not its true reasons, but were a pretext for discrimination." 450 U.S., at 252-253.

This framework is designed to bring the trier of fact "expeditiously and fairly" to the ultimate question to be proved--whether the challenged employment decision was in fact discriminatory. The prima facie case, the initial step in this process, requires a Title VII plaintiff to raise an inference of discrimination by removing the most common nondiscriminatory reasons for his rejection.² See id., at 253-254.

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²JUSTICE MARSHALL's dissenting opinion reasons that it is the employer's inability to articulate any legitimate reason for preferring a nonminority applicant that makes it "reasonable to infer that [the] decision was based ... on impermissible considerations." Post, at 8. This places the burden on the wrong party. Under Burdine, the plaintiff has the burden of proving facts that establish an inference of discrimination. Only after the inference is established does the burden shift to the employer to rebut the inference by articulating a legitimate, nondiscriminatory reason. See 450 U.S., at 254 (1981).

Burdine,

In many cases, a plaintiff may satisfy his initial burden by proving the four factors noted in McDonnell Douglas. See 411 U.S., at 802. But we have never held that proof of these factors automatically establishes a prima facie case. The facts in each case will vary and the prima facie proof specified in McDonnell Douglas will not be "necessarily applicable in every respect to differing factual situations." See id., at 802 n. 13. As we stated in Teamsters v. United States,

"the "importance [of the McDonnell Douglas articulation of the prima facie case] lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." 431 U.S., at 358.

Thus, a court must question whether, in light of the particular employment decision involved, the plaintiff's

proof raises an inference of discrimination. When a plaintiff has met this initial burden, he "in effect creates a presumption that the employer unlawfully discriminated against [him]." Id., at 254. As we explained in Burdine, this presumption is primarily an evidentiary device for allocating intermediary burdens of proof. It shifts the burden of production to the employer to articulate a legitimate, nondiscriminatory reasons for his decision. See id., at 255, n. 8.

Contrary to the Court's view, our cases make clear that prima facie case was never intended to be a rigid, standardized test. See Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). They establish that the requirements of the prima facie case will vary in accordance with the facts of each case. Nor does the

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Court's distinction between evidence that gives rise to an inference of discrimination and that which gives rise to a prima facie case find support in our precedent. The two concepts instead are interrelated. Evidence that gives rise to an inference of discrimination is sufficient to establish a prima facie case and shift the burden of production to the employer. See Burdine, supra, at 254; Furnco, supra, at 577; Teamsters, supra, at 358. 2

III

In my view, the proper method of analysis--and the one most consistent with our past opinions--is to adapt the prima facie case ^{approach} to the particular employment decision being made. As discussed above there are two

in this case do not *implicate* all
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typical McDonnell Douglas factors. In ~~a case~~ such as
^{as here,}
 this, [^]where only a single executive position is to be
 filled, the elements of a prima facie case--in addition to
 the applicable ones of McDonnell Douglas--include a
 showing that the plaintiff is at least as well qualified
 as the person who was given the promotion. Absent such a
 showing, a Title VII plaintiff will not have eliminated
 the most common nondiscriminatory reasons for his
 rejection.

Further, where only a single managerial position
 is to be filled from a pool of applicants, even a showing
 of relative qualifications ^{will not in every case} ~~may not~~ be sufficient to create
 an inference of discrimination. A plaintiff may be
 required to come forward with additional evidence that

indicates that the employer's decision was based on impermissible considerations. A plaintiff may rely on statistical or anecdotal evidence, or he may introduce evidence of employment practices that contradict normal expectations. Thus, an employer's decision to select a nonminority applicant, who previously had been supervised by the minority applicant, would constitute probative evidence of an employer's discriminatory motive. See Burdine, supra, at 254 n. 6.

As both the Court's opinion and JUSTICE MARSHALL's dissenting opinion make clear, respondent produced abundant evidence that he was at least as qualified if not more qualified than the other applicants. He also proved that the Postal Service repeatedly passed over him and chose white employees who had held positions

inferior to his own. In addition, he introduced anecdotal and statistical evidence of racial discrimination. In my view, there was abundant evidence to create a strong inference of discriminatory motive. Accordingly, I agree that the judgment of the Court of Appeals should be vacated and remanded for further consideration.

Justice -

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VII of the Civil Rights Act, 42 U.S.C. §2000e et seq., alleging that the Postal Service had discriminated against him on account of his race. After a full trial, the District Court for the District of Columbia found that respondent had failed to prove a prima facie case under McDonnell Douglas since he had not shown that he was "as qualified or more qualified" than the other candidates. See App. to Pet. for Cert. 59a. The Court of Appeals reversed because the District Court had set too high a standard. Under its view of McDonnell Douglas, a plaintiff automatically establishes a prima facie case whenever he proves that he belongs to a racial minority, that he applied for an available position for which he possessed the "qualifications or background experiences the employer has indicated are important," and that a

nonminority applicant was selected instead.¹ See 665 F.2d 1057, 1060 (CA DC 1981) (per curiam).

The Court--correctly I believe--rejects this view. See ante, at 8. To establish a prima facie case a Title VII plaintiff must introduce evidence that eliminates the most common nondiscriminatory reasons for his rejection. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). The most common reasons for an employment decision, however, will vary depending on the industry and the level of employment involved. Accordingly, a court must consider the type of

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As the Court recognizes, when an employer selects one of several qualified applicants for a high level managerial position, he customarily ^{also} takes into account a wide range of subjective considerations, such as decision making ability, leadership, and ability to work well with other employees. See ante, at 7. Typically, a second variable enters into the employment decision: the applicants who meet the employer's minimum objective qualifications generally will possess varying levels of ability. In selecting a person to fill a high level managerial position, it is customary for an employer to choose the applicant who presents the optimal combination of subjective qualifications the employer values and

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Additionally, when only one position is open and the employer chooses from a pool of qualified applicants, he necessarily prefers one applicant over another. A choice has to be made and the employer's isolated decision to select a qualified nonminority applicant rather than a qualified minority applicant does not imply that the choice was discriminatory. Cf. Ibid. In this respect, the decision here differs significantly from the decision in McDonnell Douglas. In that case the employer rejected

a qualified minority applicant but left the ^{non-managerial} position
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 nondiscriminatory reasons for an employer's decision. If
 it does not, a plaintiff is not entitled to a presumption
 of discrimination. Ibid. In these situations, the Court
 would require a plaintiff instead to introduce facts that
 create an "inference" of discrimination and "prove [his]
 case in the ordinary way." Ibid. In my view, the

*9
 would
 not.*

*Rever -
 can you
 illustrate
 this?
 compare
 with p 3*

distinction the Court draws between a standardized prima facie case and facts that create an inference of discrimination is neither required nor justified by our past cases.

II

In Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), we reaffirmed unanimously the basic allocation of burdens and order of proof initially set forth in McDonnell Douglas:

"First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' [McDonnell Douglas, 411 U.S.], at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were

not its true reasons, but were a pretext for discrimination." 450 U.S., at 252-253.

This framework is designed to bring the trier of fact "expeditiously and fairly" to the ultimate question to be proved--whether the challenged employment decision was in fact discriminatory. The prima facie case, the initial step in this process, requires a Title VII plaintiff to raise an inference of discrimination by removing the most common nondiscriminatory reasons for his rejection.² See id., at 253-254.

²JUSTICE MARSHALL's dissenting opinion reasons that it is the employer's inability to articulate any legitimate reason for preferring a nonminority applicant that makes it "reasonable to infer that [the] decision was based ... on impermissible considerations." Post, at 8. This places the burden on the wrong party. Under Burdine, the plaintiff has the burden of proving facts that establish an inference of discrimination. Only after the inference is established does the burden shift to the employer to rebut the inference by articulating a legitimate, nondiscriminatory reason. See 450 U.S., at 254 (1981).

each of our prior decisions, view, for the first time, would put the burden on the defendant.

97 This appears that the dissent, like the Court, rejects established precedents.

In many cases, a plaintiff may satisfy his initial burden by proving ^{only} the four factors noted in McDonnell Douglas. See 411 U.S., at 802. But we have never held that proof of these factors automatically establishes a prima facie case. The facts in each case will vary and the prima facie proof specified in McDonnell Douglas will not be "necessarily applicable in every respect to differing factual situations." See id., at 802 n. 13. As we stated in Teamsters v. United States,

"the "importance [of the McDonnell Douglas articulation of the prima facie case] lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." 431 U.S., at 358.

Thus, a court must question whether, in light of the particular employment decision involved, the plaintiff's

proof raises an inference of discrimination. When a plaintiff has met this initial burden, he "in effect creates a presumption that the employer unlawfully discriminated against [him]." Id., at 254. As we explained in Burdine, this presumption is primarily an evidentiary device for allocating intermediary burdens of proof. It shifts the burden of production to the employer to articulate a legitimate, nondiscriminatory reasons for his decision. See id., at 255, n. 8.

approach
 Contrary to the Court's view, our cases make clear that ^{the} ~~an~~ prima facie case ^{is} was never intended to be a rigid, standardized test. See Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). ~~They establish that the requirements of the prima facie case will vary in accordance with the facts of each case.~~ Nor does the

Repetition

Court's distinction between evidence that gives rise to an inference of discrimination and that which gives rise to a prima facie case find support in our precedent. ⁵ *Rather,* ¹ The two concepts ~~instead~~ ⁶ are interrelated. Evidence that gives rise to an inference of discrimination is sufficient to establish a prima facie case and shift the burden of production to the employer. See Burdine, supra, at 254; Furnco, supra, at 577; Teamsters, supra, at 358.

III

In my view, the proper method of analysis--and the one ~~most~~ ⁶ consistent with our past opinions--is to adapt the prima facie case ^{reasoning} ¹ to the particular employment decision being made. As discussed above there are two

Rule A
to the end

considerations here that require modification of the typical McDonnell Douglas factors. In a case such as this, where only a single executive position is to be filled, the elements of a prima facie case--in addition to the applicable ones of McDonnell Douglas--include a showing that the plaintiff is at least as well qualified as the person who was given the promotion. Absent such a showing, a Title VII plaintiff will not have eliminated the most common nondiscriminatory reasons for his rejection.

Further, where only a single managerial position is to be filled from a pool of applicants, even a showing of relative qualifications may not be sufficient to create an inference of discrimination. A plaintiff may be required to come forward with additional evidence that

indicates that the employer's decision was based on impermissible considerations. A plaintiff may rely on statistical or anecdotal evidence, or he may introduce evidence of employment practices that contradict normal expectations. Thus, an employer's decision to select a nonminority applicant, who previously had been supervised by the minority applicant, would constitute probative evidence of an employer's discriminatory motive. See Burdine, supra, at 254 n. 6.

As both the Court's opinion and JUSTICE MARSHALL's dissenting opinion make clear, respondent produced abundant evidence that he was at least as qualified if not more qualified than the other applicants. He also proved that the Postal Service repeatedly passed over him and chose white employees who had held positions

inferior to his own. In addition, he introduced anecdotal and statistical evidence of racial discrimination. In my view, there was abundant evidence to create a strong inference of discriminatory motive. Accordingly, I agree that the judgment of the Court of Appeals should be vacated and remanded for further consideration.

lfp/ss 02/03/83

RIVESA SALLY-POW

MEMORANDUM

TO: Rives DATE: Feb. 3, 1983
FROM: Lewis F. Powell, Jr.

Aikens

I have now read with some care your draft of Jan. 31. It is evident that you have devoted a great deal of thought to the case, and it may be that there is no clearer way to write out our position.

I must say, however, that I do not think the force of the opinion will be clear to the casual type reading often done by courts and lawyers.

Our basic difficulty with the Court's opinion is that it appears to scrap - as you state in the opening paragraph - the framework of analysis established by prior cases. As indicated in my memorandum to Justice Rehnquist of December 29, it seems to me that his rejection focuses on the term "presumption" as used particularly in Burdine. If I understand it correctly, he thinks a prima facie case under the McDonnell/Burdine formula results in shifting the burden of going forward and nothing more. Perhaps I should not have used the term "presumption", although as

we have agreed the term serves merely the evidentiary purpose of shifting this burden.

Rather than agreeing to this, WHR apparently prefers to hold that the McDonnell/Burdine prima facie case reasoning does not apply at all to situations where a single managerial position is to be filled.

Part II of your draft says pretty much all of this. My difficulty with the draft is Part I. After summarizing the facts, and setting forth very well what should be considered where a managerial position is open, you address the Court's distinction "between evidence that establishes a McDonnell/Douglas presumption and evidence that establishes an "inference of discrimination". (draft p. 7) Then you say:

"Under the this, a McDonnell-Douglas presumption arises only when proof of the 'standardized, prima facie case' eliminates the most common non-discriminatory reasons for an employer's decision. If it does not, a plaintiff is not entitled to a presumption of discrimination. In these situations, the Court would require a plaintiff instead to introduce facts that create an 'inference' of discrimination and 'prove his case in the ordinary way'".

This simply is not clear to me, perhaps because I have not reread Rehnquist's opinion and do not know what he means by a "standardized prima facie case". In any

event, I would like for you to educate me on this part of the draft.

I particularly would like for you to consider a different arrangement. Perhaps it could be as follows: After an introduction (that I may dictate), move your present Part II to the front of our opinion as a Part I - before stating any facts. You might preface what you have written with a sentence to the effect that it is well to summarize the cases that have established a consistent analytical approach to Title VII employment and promotion cases.

Then Part II could apply the analysis to this case, recognizing that only two of the specific McDonnell factors apply. We could state what you and I both have said (see my rider) as to what properly may be considered by an employer when filling a single executive position.

A brief Part III could address WHR's rejection of the Court's prior analysis. As you say, why he does this is difficult to "fathom". I simply do not understand it.

The last part could be quite brief along the lines of a rider I have dictated.

* * *

I do not want to make a major production out of this. You have an important Court opinion to write. You might put Aikens aside until you get a draft of the Court opinion; though we must circulate this Aikens opinion no later than Tuesday February 15 so that Rehnquist will have a chance to reply before the Friday Conference.

A fall back position, Rives, is simply to state that I write separately because I do not agree with my understanding of the reasoning of the Court's opinion. Then say that I nevertheless do not read its opinion as rejecting the consistent approach to these cases carefully developed in our precedents. I would summarize the prior precedents as you have done and apply the basic analysis to the particular facts of this case.

L.F.P., Jr.

SS

L78

MEMORANDUM

DATE: Feb. 3, 1983

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A fall back position, Rives, is simply to state that I write separately because I do not agree with my understanding of the reasoning of the Court's opinion. Then say that I nevertheless do not read its opinion as rejecting the consistent approach to these cases carefully developed in our precedents. I would summarize the prior precedents as you have done and apply the basic analysis to the particular facts of this case.

L.F.P., Jr.

SS

JUSTICE O'CONNOR, concurring in the judgment.

I join the opinion of JUSTICE POWELL, adding only a comment on my understanding of the proof necessary to establish a prima facie case of racial discrimination in hiring or promotion under Title VII. As I understand the reach of McDonnell Douglas v. Green, 411 U.S. 792 (1973), it provides a rough, flexible guide for all Title VII cases of the amount and type of proof that an individual plaintiff must show to establish a prima facie case of disparate treatment. As a general reformulation of the McDonnell Douglas factors, applicable to all plaintiffs alleging discrimination in hiring or promotion, one could say that the plaintiff in a Title VII action would establish a prima facie case upon proof (i) "that he belongs to a racial minority," 411 U.S., at 802; (ii) that he applied for a job and possessed objective qualifications fairly comparable to other applicants that merited the employer's serious consideration; (iii) that, despite his qualifications, he was rejected (iv) under circumstances that, absent other explanation, eliminate the most common legitimate reasons for his rejection. See Teamsters v. United States, 431 U.S. 324, 358, n. 44 (1977). This fourth factor is flexible, and the showing it requires depends on the circumstances of the particular case. In McDonnell Douglas itself, a showing that the job remained open was sufficient, in combination with the other factors, to establish a prima facie case. As JUSTICE POWELL suggests, ante, at 7, a showing that the employer promoted a subordinate instead of the plaintiff may satisfy this final element. Statistical or anecdotal evidence is also relevant.

It appears clear from the record here that respondent made more than an ample showing to establish a prima facie case. I agree with JUSTICE POWELL, however, that resolution of this factual question is more appropriately left to the courts below. I therefore concur that the judgment of the Court of Appeals should be vacated and the case remanded for further consideration.

lfp/ss 02/03/83

Rider A, p. 11 (Aikens)

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AIKENS11 SALLY-POW

The foregoing line of cases establishes a framework of reasoning that has been applied in each of our prior decisions. It should be applied in the present case. As the Court notes, two of the specific factors identified in McDonnell-Douglas are not present where a single executive position is to be filled. Yet, the burden remains on the plaintiff to produce evidence that gives rise to an inference of discrimination. If so, he has created a prima facie case shifting the burden of production to the employer. On the facts of record here, it is clear that respondent produced abundant evidence to make out a prima facie case. He proved that the Postal Service had repeatedly passed over him and chosen white employees who had held positions subordinate to his own. In addition, he introduced anecdotal and statistical evidence of racial

discrimination. In my view, his evidence created more than an inference of discriminatory motive. Accordingly, I agree with the judgment of the Court.

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Jm
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lfp/ss 02/03/83

Rider A, p. 11 (Aikens)

AIKENS11 SALLY-POW

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lfp/ss 02/03/83m

Rider A, p. 4 (Aikens)

AIKENS4 SALLY-POW

As the Court recognizes, when an employer selects one of several qualified applicants for a high level managerial position, the situation is quite different from the employment decision that is made in cases such as McDonnell-Douglas and Burdine. Whether minimum objective qualifications is merely the threshold inquiry. Normally, an employer wishes to fill managerial positions with the best qualified applicant. And making a fair and intelligent judgment may require a weighing of qualities not always apparent from information of record. For example, consideration normally would be given to an applicant's leadership qualities and ability to work well with others. Depending upon the level and authority of

the position, the capacity of the applicant to make sound decisions could be critical.

Additionally, when there are several fully qualified applicants who can be viewed as satisfying all of the foregoing factors, the employer necessarily must prefer one applicant over others. A choice has to be made, and thus an employer's decision to select a qualified non-minority applicant does not imply that the choice was discriminatory. See Teamsters, supra, at 358 n. 44. In this respect, the decision here differs significantly from the decision in McDonnell-Douglas.² In that case, where a non-managerial job was open, the employer rejected a qualified minority applicant but left the position unfilled and continued to seek qualified applicants. See 411 U.S., at 802. Because the employer's

decision was facially inconsistent with its own economic self interest, the plaintiff in that case "was rejected under circumstances which [gave] rise to an inference of unlawful discrimination." Burdine, supra, at 253. In view of the foregoing considerations, I agree that the Court of Appeals applied a standard that is wholly inapplicable to this type of employment decision. My difficulty with the Court's opinion is that it appears to reject, as inapplicable to managerial decisions, the prima facie case analysis and the entire McDonnell-Douglas framework.

The reasons for this apparent rejection of our precedents are difficult to fathom. The Court draws a distinction between evidence that establishes a "McDonnell-Douglas presumption" and evidence that

establishes an "inference of discrimination", a distinction not heretofore drawn. Under the Court's view, a McDonnell-Douglas presumption arises only when proof of the "standardized prima facie case" eliminates the most common non-discriminatory reasons for an employer's decision. If it does not, a plaintiff is not entitled to a presumption of discrimination.

River

lfp/ss 02/03/83

Rider A, p. 4 (Aikens)

AIKENS4 SALLY-POW

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The reasons for this apparent rejection of our precedents are difficult to fathom. The Court draws a distinction between evidence that establishes a "McDonnell-Douglas presumption" and evidence that

establishes an "inference of discrimination", a distinction not heretofore drawn. Under the Court's view, a McDonnell-Douglas presumption arises only when proof of the "standardized prima facie case" eliminates the most common non-discriminatory reasons for an employer's decision. If it does not, a plaintiff is not entitled to a presumption of discrimination.

FEB 10 1983

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: _____

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER *v.* LOUIS H. AIKENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[February —, 1983]

JUSTICE POWELL, concurring in the judgment.

I concur only in the judgment of the Court, as its reasoning appears to depart from the consistent approach to Title VII cases that our precedents have developed. The Court apparently perceives a distinction between evidence that establishes a *prima facie* case under *McDonnell Douglas v. Green*, 411 U. S. 792 (1973), and evidence that establishes an inference of discrimination. See *ante*, 9-11. If a plaintiff is able to make out a *prima facie* case, he is entitled to a "presumption of discrimination" that shifts the burden of production in accordance with the analytical framework established in *McDonnell Douglas*. See *id.*, at 9-10. If, however, a plaintiff can prove only an "inference of discrimination," the Court apparently would find the *McDonnell Douglas* framework inapplicable. See *id.*, at 10. In my view, the distinction the Court perceives finds no support in our precedents—precedents that I do not understand the Court to reject. Instead, our cases make clear that evidence that gives rise to an inference of discrimination is sufficient to establish a *prima facie* case. They do not indicate, as the Court suggests, that the *McDonnell Douglas* framework is inapplicable to the type of employment decision presented here.

I

In *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981), we reaffirmed unanimously the basic allocation of burdens and order of proof initially set forth in *McDonnell Douglas*:

“First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant ‘to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.’ [*McDonnell Douglas*, 411 U. S.], at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.” 450 U. S., at 252–253.

This framework is designed to bring the trier of fact “expeditiously and fairly” to the ultimate question to be proved—whether the challenged employment decision was in fact discriminatory. See *id.*, at 253.

The prima facie case, the initial step in this process, requires a Title VII plaintiff to raise an inference of discrimination by removing the most common nondiscriminatory reasons for his rejection. See *id.*, at 253–254. In many cases, a plaintiff may satisfy this initial burden by proving only the four factors noted in *McDonnell Douglas*. See 411 U. S., at 802. But we have never held that proof of these factors automatically establishes a prima facie case. The facts in each case will vary and the prima facie proof specified in *McDonnell Douglas* will not be “necessarily applicable in every respect to differing factual situations.” See *id.*, at 802, n. 13; *Furnco Construction Co. v. Waters*, 438 U. S. 567, 577 (1978). As we stated in *Teamsters v. United States*, 431 U. S. 324 (1977):

“the ‘importance [of the *McDonnell Douglas* articulation of the prima facie case] lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.” *Id.*, at 358.

Thus, a court must question whether, in light of the particular employment decision involved, the plaintiff’s proof raises an inference of discrimination. When a plaintiff has met this initial burden, he “in effect creates a presumption that the employer unlawfully discriminated against [him].” *Id.*, at 254. As we explained in *Burdine*, this presumption is primarily an evidentiary device for allocating intermediate burdens of proof. It shifts the burden of production to the employer to articulate a legitimate, nondiscriminatory reason for his decision.* See *id.*, at 255, n. 8.

As our cases make clear, we have never created a distinction between evidence that establishes an inference of dis-

*The Court seeks to justify its distinction between an inference of discrimination and a presumption of discrimination by relying on footnote 7 in *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981). See *ante*, at 11. In my view, the Court reads too much into this footnote. As we noted in *Burdine*, the term “prima facie case” has been used in two ways. See 450 U. S., at 254, n. 7. It may refer either to the level of proof necessary to withstand a motion for a directed verdict or to an evidentiary device that shifts the burden of production to the defendant. Footnote 7 only stands for the proposition—a proposition that should have been evident from the analytical framework established in *McDonnell Douglas*—that proof of a prima facie case does more than allow a plaintiff to withstand a motion for a directed verdict. It shifts the burden of production. As we subsequently explained, “the term ‘presumption’ properly used refers only to a device for allocating the production burden.” See *Burdine*, *supra*, at 255, n. 8. (quoting F. James and G. Hazard, *Civil Procedure* § 7.9 (2d ed. 1977)).

crimination and evidence that gives rise to a presumption of discrimination. Rather the two concepts are interrelated. Evidence that gives rise to an inference of discrimination is sufficient to establish a prima facie case and shift the burden of production to the employer. See *Burdine, supra*, at 254; *Furnco Construction Corp. v. Waters*, 438 U. S. 567, 577 (1978); *Teamsters, supra*, at 358. This analytical framework has been applied consistently both by this Court and the lower courts. Departing from it would create uncertainty and invite litigation.

II

As the Court notes, ~~two of the specific factors identified in *McDonnell Douglas* are absent where a single executive position is to be filled from a pool of qualified applicants.~~ See *ante*, at 6-8. When an employer selects one of several qualified applicants for a high level managerial position, the situation is quite different from the employment decision that is made in cases such as *McDonnell Douglas* and *Burdine*. Whether an applicant possesses minimum objective qualifications is merely the threshold inquiry. Normally, an employer wishes to fill managerial positions with the most qualified applicant. And making a fair and intelligent judgment may require a weighing of qualities not always apparent from information of record. For example, consideration normally would be given to an applicant's leadership qualities and ability to work well with others. Depending upon the level and authority of the position, the capacity of the applicant to make sound decisions could be critical.

Additionally, when there are several qualified applicants who can be viewed as satisfying all of the foregoing factors, the employer necessarily must prefer one applicant over others. A choice has to be made, and thus an employer's decision to select a qualified non-minority applicant does not necessarily imply that the choice was discriminatory. See *Teamsters, supra*, at 358, n. 44. In this respect, the decision

here differs significantly from the decision in *McDonnell-Douglas*. In that case, where a non-managerial job was open, the employer rejected a qualified minority applicant but left the position unfilled and continued to seek other applicants. See 411 U. S., at 802. Because the employer's decision was facially inconsistent with its own economic self interest, the plaintiff in that case "was rejected under circumstances which [gave] rise to an inference of unlawful discrimination." *Burdine, supra*, at 253.

Thus, in the context of a high level managerial employment decision, a minority plaintiff who seeks to raise an inference of discrimination must prove more than that he was qualified and that a nonminority applicant was selected for the position.[†] No purpose would be served by trying to specify in advance the evidence that will be sufficient to satisfy this initial burden. Each case must be judged on its own facts within the established analytical framework. See *Burdine, supra*, at 252-253. It is necessary also to keep in mind that the burden imposed by the prima facie case requirement need not be onerous. *Id.*, at 253.

On the facts of record in this case, it is clear that respondent produced abundant evidence to make out a prima facie case. In addition to impressive qualifications, he proved

[†] JUSTICE MARSHALL's dissenting opinion reasons that "[w]hen an employer is unable to articulate any legitimate reason for hiring a white applicant over a qualified Negro applicant, it is reasonable to infer that [the] decision was based . . . on impermissible considerations." *Post*, at 8. This view, for the first time, would shift the burden of production to the defendant even though the plaintiff has not met his initial burden. Our prior decisions have stressed that the plaintiff must establish an inference of discrimination initially. Only after this inference is established does the burden shift to the employer to rebut the inference by articulating a legitimate, nondiscriminatory reason for its decision. See *Burdine, supra*, at 254; *Furnco Construction Corp. v. Waters*, 438 U. S. 567, 577 (1978); *Teamsters v. United States*, 431 U. S. 324, 358, and n. 44 (1977); *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802 (1973).

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that the Postal Service had passed over him repeatedly and chosen white applicants who had held positions subordinate to his own. In addition, he introduced anecdotal and statistical evidence of racial discrimination. In my view, respondent's evidence created more than an inference of discriminatory motive. Accordingly, I agree with the judgment of the Court.

II

In this case, the District Court for the District of Columbia found that respondent had not established a prima facie case since he had failed to prove the second of the four McDonnell Douglas factors.¹

¹In McDonnell Douglas, we stated that a plaintiff may establish a prima facie case 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." 411 U.S., at 802.

We noted, however, that this model would vary according to the facts and circumstances of each case. See id., at 802, n. 13.

He had not shown that he was "as qualified or more qualified" than the individuals who were promoted. See App. to Pet. for Cert. 59a. The Court of Appeals reversed because the District Court had set too high a standard. See 665 F.2d 1057, 1060 (1982) (per curiam). Although it recognized that "Title VII cases involving professional and managerial positions raise uniquely difficult issues not found in cases involving lower-level jobs," it held that a plaintiff could prove the second McDonnell Douglas factor by showing that he "possesses whatever qualifications or background experiences the employer has indicated are important." Ibid. Since the court viewed the other three McDonnell Douglas factors as having been established,² it remanded for further consideration of

Footnote(s) 2 will appear on following pages.

respondent's qualifications in light of its articulation of the applicable standard.

In my view, the proof required by the Court of Appeals is insufficient to raise an inference of discrimination where a single executive position is to be filled from a pool of qualified applicants. When an employer selects an applicant for a managerial or professional position, the situation is quite different from the employment decision made in cases such as McDonnell Douglas and Burdine. Whether an applicant possesses minimum objective qualifications is merely the

²The Court of Appeals initially had found that respondent had proved each of the four McDonnell Douglas factors. See Aikens v. United States Postal Service, 642 F.2d 514, 517 (CA DC 1980), vacated and remanded, 453 U.S. 902 (1981). On remand, the court apparently adhered to its earlier determination that the other three factors had been proved, as it remanded to the District Court only for reconsideration of the second factor.

518

threshold inquiry since the applicants who meet the minimum requirements normally will present an employer with a wide range of qualifications and credentials. An employer of course will wish to fill the position with the most qualified applicant. Yet making a fair and intelligent judgment may require a weighing of qualities not always apparent from information of record. For example, consideration normally would be given to an applicant's leadership qualities and ability to work well with others. Depending upon the level and authority of the position, the capacity of the applicant to make sound decisions could be critical.

Additionally, when there are several qualified applicants who can be viewed as satisfying all of the foregoing factors, the employer necessarily must prefer

one applicant over others. A choice has to be made, and thus an employer's decision to select a qualified non-minority person from a pool of applicants does not necessarily imply that the choice was discriminatory. See Teamsters, supra, at 358 n. 44. In this respect, this case differs significantly McDonnell Douglas, where the employer rejected a qualified minority applicant but left the position unfilled and continued to seek other applicants. See 411 U.S., at 802. Because the employer's decision was facially inconsistent with its own economic self interest, the plaintiff in that case "was rejected under circumstances which [gave] rise to an inference of unlawful discrimination." Burdine, supra, at 253. No similar inference can be drawn in this case where the job was not left open.

The employment decision at issue here illustrates what our cases consistently have recognized: the proof necessary to establish a prima facie case will vary from the model set forth in McDonnell Douglas depending on the particular facts and circumstances of each case. See Burdine, supra, at 253, n. 6; McDonnell Douglas, supra, at 802, n. 13. This does not mean, however, as the Court seems to believe, that the McDonnell Douglas factors ^{will be} ~~are~~ no longer relevant in determining whether a plaintiff has raised an inference of discrimination. They continue to provide a rough guide to the type of evidence that a plaintiff must introduce.

Thus, if a plaintiff's "absolute or relative lack of qualifications" prevents him from being seriously considered for a position, ^{put Teamsters cite -} there would be little reason to

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?

infer that the employer rejected him for discriminatory reasons. See Teamsters, supra, at 358, n. 44. As noted above, in the context of a managerial or professional

position, a plaintiff must possess at least [relative] objective qualifications to be considered seriously, and

-- fairly comparable to those of other applicants

Proof of these qualifications normally will be a predicate

to establishing a prima facie case. It is true, *however,* that ~~an~~ employer *for such, in filling such a position,* may have legitimate subjective reasons for

preferring one applicant over another, [but a plaintiff's

showing of relative objective qualifications goes far

towards raising an inference of discrimination.] Moreover,

we have recognized that a plaintiff normally must adduce

additional evidence that demonstrates that he "was

rejected under circumstances which give rise to an

inference of unlawful discrimination." See Burdine,

For example,
supra, at 253. When the position does not remain open, as
 it did in McDonnell Douglas, a plaintiff may introduce
 other evidence that indicates that the employer's decision
 departs from the course that ^{a rational businessman, acting as a non-discriminator} normally would be expected of ^{to follow}
 a rational, nondiscriminatory businessman.

The McDonnell Douglas factors provide a guide to
 determining whether a plaintiff has proved a prima facie
 case; they were never intended to establish an inflexible
 rule. Each case must be assessed in light of its own
 particular facts to determine if a plaintiff has
 introduced evidence that raises an inference of
 discrimination. In this case, respondent produced
 abundant evidence to show that he was at least as ^{objectively}
 qualified as the individuals ^{was given the position?} who were hired. He also
 proved that the Postal Service had passed over him

appear to be

*It is clear that an
inference of discrimination
arises from this evidence,*

repeatedly and chosen white applicants who had held

positions subordinate to his own--an apparent departure

from the normal course of business. In addition,

respondent introduced anecdotal and statistical evidence

of racial discrimination. ~~Although there appears to be~~

~~more than enough evidence to establish a prima facie case,~~^{ing}

But

¹ resolution of this factual question is more appropriately

left to the courts below. Accordingly, I agree that the

Court of Appeals' judgment should be vacated and the case

remanded for further consideration.

FEB 17 1983

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: FEB 17 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER *v.* LOUIS H. AIKENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[February —, 1983]

JUSTICE POWELL, concurring in the judgment.

I concur only in the judgment of the Court, as its reasoning departs from the consistent approach to Title VII cases that our precedents have developed. The Court apparently perceives a distinction between evidence that establishes a prima facie case under *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973), and evidence that establishes an inference of discrimination. See *ante*, 9-11. If a plaintiff is able to make out a prima facie case, he is entitled to a "presumption of discrimination" that shifts the burden of production in accordance with the analytical framework established in *McDonnell Douglas*. See *id.*, at 9-10. If, however, a plaintiff can prove only an "inference of discrimination," the Court apparently would find the *McDonnell Douglas* framework inapplicable. See *id.*, at 10. In my view, the Court's distinction finds no support in our precedents. Instead, our cases make clear that evidence that gives rise to an inference of discrimination is sufficient to establish a prima facie case. They do not indicate, as the Court suggests, that the *McDonnell Douglas* framework is inapplicable to the type of employment decision presented here.

I

In *Texas Department of Community Affairs v. Burdine*,

450 U. S. 248 (1981), we reaffirmed unanimously the basic allocation of burdens and order of proof initially set forth in *McDonnell Douglas*:

“First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant ‘to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.’ [*McDonnell Douglas*, 411 U. S.], at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.” 450 U. S., at 252–253.

This framework is designed to bring the trier of fact “expeditiously and fairly” to the ultimate question to be proved—whether the challenged employment decision was in fact discriminatory. See *id.*, at 253.

The prima facie case, the initial step in this process, requires a Title VII plaintiff to raise an inference of discrimination by removing the most common nondiscriminatory reasons for his rejection. See *id.*, at 253–254. In many cases, a plaintiff may satisfy this initial burden by proving only the four factors noted in *McDonnell Douglas*. See 411 U. S., at 802. But we have never held that proof of these factors automatically establishes a prima facie case. The facts in each case will vary, and the prima facie proof specified in *McDonnell Douglas* is not “necessarily applicable in every respect to differing factual situations.” *Id.*, at 802, n. 13; see *Furnco Construction Corp. v. Waters*, 438 U. S. 567, 577 (1978). As we stated in *Teamsters v. United States*, 431 U. S. 324 (1977):

“The importance [of the *McDonnell Douglas* articulation

of the prima facie case] lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." *Id.*, at 358.

Thus, a court must question whether, in light of the particular employment decision involved, the plaintiff's proof raises an inference of discrimination.¹ When a plaintiff has met this initial burden, he "in effect creates a presumption that the employer unlawfully discriminated against [him]." *Burdine*, 450 U. S., at 254. This presumption is primarily an evidentiary device for allocating intermediate burdens of proof. It shifts the burden of production to the employer to articulate a legitimate, nondiscriminatory reason for its decision.² See *id.*, at 255 and n. 8.

¹JUSTICE MARSHALL's dissenting opinion reasons that "[w]hen an employer is unable to articulate any legitimate reason for hiring a white applicant over a qualified Negro applicant, it is reasonable to infer that [the] decision was based . . . on impermissible considerations." *Post*, at 8. This view, for the first time, would shift the burden of production to the defendant even though the plaintiff has not met his initial burden. Our prior decisions have stressed that the plaintiff initially must establish an inference of discrimination. Only then does the burden shift to the employer to rebut the inference by articulating a legitimate, nondiscriminatory reason for its decision. See *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248, 254 (1981); *Furnco Construction Corp. v. Waters*, 438 U. S. 567, 577 (1978); *Teamsters v. United States*, 431 U. S. 324, 358, and n. 44 (1977); *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802 (1973).

²The Court seeks to justify its distinction between an inference of discrimination and a presumption of discrimination by relying on footnote 7 in *Burdine*, *supra*. See *ante*, at 11. In my view, the Court reads too much into this footnote. As we noted in *Burdine*, the term "prima facie case" has been used in two ways. See 450 U. S., at 254, n. 7. It may refer either to the level of proof necessary to withstand a motion for a directed

As our cases make clear, we have never created a distinction between evidence that establishes an inference of discrimination and evidence that gives rise to a presumption of discrimination. Rather the two concepts are interrelated. Evidence that gives rise to an inference of discrimination is sufficient to establish a *prima facie* case and shift the burden of production to the employer. See *id.*, at 254; *Furnco, supra*, at 577; *Teamsters, supra*, at 358. This analytical framework has been applied consistently both by this Court and the lower courts. Departing from it would create uncertainty and invite litigation.

II

In this case, the District Court found that respondent had not established a *prima facie* case since he had failed to prove the second of the four *McDonnell Douglas* factors.³ He had not shown that he was “as qualified or more qualified” than the individuals who were promoted. See *Aikens v. Bolger*, Civ. Action No. 77-0303 (DDC Feb. 26, 1979). The Court of Appeals reversed because the District Court had set too high

verdict or to an evidentiary device that shifts the burden of production to the defendant. Footnote 7 stands only for the proposition—a proposition evident from the analytical framework established in *McDonnell Douglas*—that proof of a *prima facie* case does more than allow a plaintiff to withstand a motion for a directed verdict. It shifts the burden of production. As we subsequently explained, “[t]he word “presumption” properly used refers only to a device for allocating the production burden.” See *Burdine, supra*, at 255, n. 8. (quoting F. James and G. Hazard, Civil Procedure § 7.9, p. 255 (2d ed. 1977) (footnote omitted)).

³ In *McDonnell Douglas*, we stated that a plaintiff may establish a *prima facie* case 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.” 411 U. S., at 802.

We noted, however, that this model would vary according to the facts and circumstances of each case. See *id.*, at 802, n. 13.

a standard. See 665 F. 2d 1057, 1060 (CA DC 1982) (*per curiam*). Although it recognized that "Title VII cases involving professional and managerial positions raise uniquely difficult issues not found in cases involving lower-level jobs," it held that a plaintiff could prove the second *McDonnell Douglas* factor by showing that he "possesses whatever qualifications or background experiences the employer has indicated are important." *Ibid.* Since the court viewed the other three *McDonnell Douglas* factors as having been established,⁴ it remanded for further consideration of respondent's qualifications in light of its articulation of the applicable standard.

In my view, the proof required by the Court of Appeals is insufficient to raise an inference of discrimination where a single executive position is to be filled from a pool of qualified applicants. When an employer selects an applicant for a managerial or professional position, the situation is quite different from the employment decision made in cases such as *McDonnell Douglas* and *Burdine*. Whether an applicant possesses minimum objective qualifications is merely the threshold inquiry since the applicants who meet the minimum requirements normally will present an employer with a wide range of qualifications and credentials. A responsible employer of course will wish to fill the position with the best qualified applicant. Yet making a fair and intelligent judgment may require a weighing of qualities not always apparent from information of record. For example, consideration normally would be given to an applicant's leadership qualities

⁴The Court of Appeals initially had found that respondent had proved each of the four *McDonnell Douglas* factors. See *Aikens v. United States Postal Service*, 642 F. 2d 514, 517-518 (CA DC 1980), vacated and remanded, 453 U. S. 902 (1981). On remand from this Court, the Court of Appeals apparently adhered to its earlier determination that the other three factors had been proved, as it remanded to the District Court only for reconsideration of the second factor.

and ability to work well with others. Depending upon the level and authority of the position, the capacity of the applicant to make sound decisions could be critical.

Additionally, when there are several qualified applicants who can be viewed as satisfying all of the foregoing factors, the employer necessarily must prefer one applicant over others. A choice has to be made, and thus an employer's decision to select a qualified non-minority person from a pool of applicants does not necessarily imply that the choice was discriminatory. See *Teamsters, supra*, at 358 n. 44. In this respect, this case differs significantly from *McDonnell Douglas*, where the employer rejected a qualified minority applicant but left the position unfilled and continued to seek other applicants. See 411 U. S., at 802. Because the employer's decision was facially inconsistent with its own economic self interest, the plaintiff in that case "was rejected under circumstances which [gave] rise to an inference of unlawful discrimination." *Burdine, supra*, at 253. No similar inference can be drawn in this case where the job was not left open.

The employment decision at issue here illustrates what our cases consistently have recognized: the proof necessary to establish a prima facie case will vary from the model set forth in *McDonnell Douglas* depending on the particular facts and circumstances of each case. See *Burdine, supra*, at 253, n. 6; *McDonnell Douglas, supra*, at 802, n. 13. This does not mean, however, as the Court seems to believe, that the *McDonnell Douglas* factors are no longer relevant in determining whether a plaintiff has raised an inference of discrimination. They continue to provide a rough guide to the type of evidence that a plaintiff must introduce.

Thus, if a plaintiff's "absolute or relative lack of qualifications" prevents him from being seriously considered for a position, see *Teamsters, supra*, at 358, n. 44, there would be little reason to infer that the employer rejected him for discriminatory reasons. As noted above, to be seriously consid-

ered for a managerial or professional position, a plaintiff must at least possess objective qualifications that are fairly comparable to those of the other applicants. Proof of these qualifications normally will be a predicate to establishing a prima facie case. We have emphasized, however, that establishing such a case requires a plaintiff to demonstrate that he "was rejected under circumstances which give rise to an inference of unlawful discrimination." See *Burdine*, *supra*, at 253. This often will require a plaintiff to introduce additional evidence.⁵ If, for example, the position remains unfilled, as in *McDonnell Douglas*, this could be viewed as a departure from conduct ordinarily expected of an employer, giving rise to such an inference.

III

The *McDonnell Douglas* factors provide a guide to determining whether a plaintiff has proved a prima facie case; they were never intended to establish an inflexible rule. Each case must be assessed in light of its own particular facts to determine if a plaintiff has introduced evidence that raises an inference of discrimination. In this case, respondent produced abundant evidence to show objectively that he was at least as qualified as the individuals who were given the positions. He also proved that the Postal Service had passed over him repeatedly and chosen white applicants who had held positions subordinate to his own—an apparent departure from the normal course of business. In addition, respondent introduced anecdotal and statistical evidence of racial discrimination. It appears to be clear that an inference

⁵ As indicated above, an employer—in filling a managerial or professional position—often will have legitimate, subjective business reasons for preferring one applicant over another. See *infra*, at ——. Where these reasons are known only to the employer, as frequently will be the case, they must be brought out by the employer after the plaintiff has established a prima facie case.

8 U. S. POSTAL SERVICE BD. OF GOVS. *v.* AIKENS

of discrimination arises from this evidence, establishing a prima facie case. But resolution of this factual question is more appropriately left to the courts below. Accordingly, I agree that the Court of Appeals' judgment should be vacated and the case remanded for further consideration.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: FEB 22 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER, *v.* LOUIS H. AIKENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[February —, 1983]

JUSTICE O'CONNOR, concurring in the judgment.

I join the opinion of JUSTICE POWELL, adding only a comment on my understanding of the proof necessary to establish a prima facie case of racial discrimination in hiring or promotion under Title VII. As I understand the reach of *McDonnell Douglas v. Green*, 411 U. S. 792 (1973), it provides a rough, flexible guide for all Title VII cases of the amount and type of proof that an individual plaintiff must show to establish a prima facie case of disparate treatment. As a general reformulation of the *McDonnell Douglas* factors, applicable to all plaintiffs alleging discrimination in hiring or promotion, one could say that the plaintiff in a Title VII action would establish a prima facie case upon proof (i) "that he belongs to a racial minority," 411 U. S., at 802; (ii) that he applied for a job and possessed objective qualifications fairly comparable to other applicants that merited the employer's serious consideration; (iii) that, despite his qualifications, he was rejected (iv) under circumstances that, absent other explanation, eliminate the most common legitimate reasons for his rejection. See *Teamsters v. United States*, 431 U. S. 324, 358, n. 44 (1977). This fourth factor is flexible, and the showing it requires depends on the circumstances of the particular case. In *McDonnell Douglas* itself, a showing that the job remained open was sufficient, in combination with the

Justice O'Connor did not waste
any time

RR

other factors, to establish a prima facie case. As JUSTICE POWELL suggests, *ante*, at 7, a showing that the employer promoted a subordinate instead of the plaintiff may satisfy this final element. Statistical or anecdotal evidence is also relevant. See also *Texas Department of Community Affairs v. Burdine*, 450 U.S. 246, 253 (1981).

It appears clear from the record here that respondent made more than an ample showing to establish a prima facie case. I agree with JUSTICE POWELL, however, that resolution of this factual question is more appropriately left to the courts below. I therefore concur that the judgment of the Court of Appeals should be vacated and the case remanded for further consideration.



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 23, 1983

No. 81-1044 U. S. Postal Service Bd. of Gov.
v. Aikens

Dear Lewis,

I plan to join your separate opinion in this case. Do you have any objection to my supplemental explanation as set forth in the attached draft? I do not want to take liberties with what I understand to be your view.

Sincerely,

Sandra

Justice Powell

*I agree & have
advised Sandra*

Enclosure

February 24, 1983

81-1044 U.S. Postal Service v. Aikens

Dear John:

I am glad that you are talking to Bill Rehnquist with some hope of making changes in his opinion that would attract a Court. This would be constructive.

My efforts in this respect, both verbally and by the enclosed memo of December 29, were not fruitful. But these occurred before it was clear that Bill's views would not be acceptable to four other Justices.

My memo, of course, is not as detailed or carefully thought out as the opinion I have circulated. It does identify the concerns that I brought to Bill's attention some time ago - verbally as well as in the memo.

I should add that Sandra showed me her opinion before she circulated it. She views it as consistent with mine, and thinks it would be helpful to trial courts to have a brief summary of the appropriate analysis.

Sincerely,

Justice Stevens

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 25, 1983

✓
See my
reply
of 2/28

Re: 81-1044 - United States Postal Service
v. Aikens

Dear Lewis:

This morning I spent a good deal of time reviewing the Burdine opinion and the various circulations in this case. I gather that all of us in the majority agree that when the four factors specifically outlined in the McDonnell Douglas opinion are present, these consequences result:

- (1) Plaintiff's evidence raises an inference of discrimination;
- (2) That evidence establishes a prima facie case; and
- (3) If that evidence is un rebutted, judgment must be entered for plaintiff.

We also all agree that this case does not fit precisely into the McDonnell Douglas four-factor formula because the job did not remain open after plaintiff's application was rejected. We apparently also all agree that there is enough evidence in the record to support a judgment for the plaintiff if the District Court makes the proper findings, and we also agree that as appellate judges we cannot resolve the factual questions ourselves. In other words, none of us is prepared to say that judgment should be entered in plaintiff's favor as a matter of law. It seems to me that our area of agreement is broad enough to enable us to fashion a consensus on an opinion.

Where we part company, as I understand the writing, is on the question whether in Title VII litigation there is any difference between an

"inference of discrimination" and a "presumption" that requires that judgment be entered in favor of the plaintiff if the presumption is unrebutted. You emphasize the function of the presumption as a procedural, burden-shifting device. Bill, on the other hand, focuses on the substantive character of the presumption if the plaintiff's evidence is not rebutted. I am persuaded that there is not any necessary conflict between your two positions, although you may use the word "inference" differently. ?

If a case fits precisely into the McDonnell Douglas four-factor formula, I think Bill agrees with you that the burden shifts to the employer. I think, however, that you agree with him that if the McDonnell Douglas "presumption" (or "inference") is unrebutted, judgment must be entered for the plaintiff.

If a case does not satisfy all four McDonnell Douglas factors, Bill says--as I understand him--that the question whether plaintiff has made out a prima facie case depends on the strength of the inferences to be drawn from the plaintiff's evidence, and that the job of drawing those inferences is one that should initially be performed by the trial judge. You seem to say--and please correct me if I am wrong--that whenever the plaintiff's evidence raises an "inference of discrimination", he has made out a prima facie case which entitles him to judgment if that inference is not rebutted. In other words, any "inference of discrimination" no matter how slight has the same legal consequences as the McDonnell Douglas presumption. ?

Let me suggest a hypothetical case that may identify the linguistic problem that seems to be present. Assume that a Title VII plaintiff has sued the estate of a deceased employer and therefore the defense counsel was simply unable to adduce any evidence to rebut the plaintiff's case. The plaintiff's case consists of proof: (1) that she is a woman; (2) that she is a lawyer well qualified to work as a law clerk; (3) that a judge each year hires three applicants; (4) that in the year in question two male and two female lawyers applied and the employer hired two males and one female and rejected the plaintiff. ?

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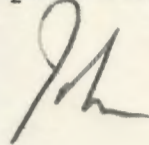
Subjective
factors

Facts of this kind might establish a case that could be described in at least three different ways: (1) they do not raise any inference of discrimination because they are equally consistent with guilt or innocence; (2) they raise an inference of discrimination against female applicants but the inference is so weak that judgment should be entered in favor of the defendant even though the inference is unrebutted; or (3) the inference of discrimination is so strong that judgment must be entered in favor of the plaintiff if no rebuttal evidence is offered.

It seems to me that Bill uses the term "inference of discrimination" in a way that leaves room for weak inferences that do not require the entry of judgment in favor of the plaintiff, whereas you seem to use the term as one that compels the entry of judgment in favor of the plaintiff whenever the inference is unrebutted.

If I am correct in identifying the point that separates the two of you, I feel sure we can work out language that will resolve the difference. (Perhaps, for example, Bill might be willing to substitute a phrase such as "evidence of discrimination" for "inference"--at least when he is talking about weak inferences.) If I do not fairly understand your position, I hope you will further enlighten me.

Respectfully,

A handwritten signature in dark ink, appearing to be 'JP' or similar initials, written in a cursive style.

Justice Powell

drk 02/28/83

To: Mr. Justice Powell

From: Rives

Re: No. 81-1044, United States Postal Service v. Aikens

In Justice Rehnquist's second draft, he stated that the evidence in this case was insufficient to establish a prima facie case, but indicated that the same evidence might be sufficient to establish an inference of discrimination. Although the second draft was far from clear as to when a prima facie case would be established, it was arguable that the opinion limited McDonnell Douglas to its facts. Thus, when the position was not an assembly line job or when the position did not remain open, a prima facie case would not have been established and the McDonnell Douglas framework would be inapplicable.

His third draft is somewhat of an improvement, but it still represents a substantial departure from McDonnell Douglas. This new draft differs from the second in that it suggests that a prima facie case might have been made out on the facts in this case. See ante, at 9. The difficulty with the third draft is that it retains the [?]privilege/inference distinction. Thus, reading the opinion in the most favorable light, it establishes a two-track system. In some cases, the same evidence will be sufficient to establish both an inference of discrimination and a presumption of

discrimination. But in others, the evidence will be sufficient to establish only an inference of discrimination.

This scheme has two problems. First, it is unclear how one distinguishes between the amount of evidence necessary for a presumption of discrimination and that necessary for an inference of discrimination, except that more proof is needed to establish the former than the latter. Because this two-tier system is unexplained, it will create considerable uncertainty. Second, because it is unclear what difference exists between the two systems, it is probable that DC's will never attempt to apply the McDonnell Douglas framework to Title VII cases. It will be easier for them to find simply that the plaintiff met the lower standard of proof--that he established an inference of discrimination--and not reach any conclusion as to the applicability of the McDonnell Douglas framework. In practice, it is likely that the McDonnell Douglas framework will remain available but simply never used. This would deprive the lower courts of the guidance that the McDonnell Douglas framework provides.

I do not see that the present draft is sufficiently close to warrant joining. I have attached a copy of a draft of our opinion revised in light of Justice Rehnquist's new draft. I did not see the need to make changes other than minor changes in the wording. The only possibility that occurred to me would be to add a footnote pointing out the difficulty in distinguishing between inferences and presumptions of discrimination. A call could be placed after the word "inapplicable" on the first page, the seventh line from the bottom of the first paragraph (call marked in pencil).

I have attached a draft of a proposed footnote. I am not sure whether this footnote is necessary or appropriate as it may look too much as if you are heaping insult on injury since the changes that spur the footnote were made ostensibly to accomodate your views.

I can explain these drafts - RIK -
In fact, the file on my queue
should conform to all the Justice's
changes -

File

lfp/ss 02/28/83

EXPLAIN RIVES-POW

81-1044 U.S. Postal Service v. Aikens

Dear John:

As busy as we all are with our own cases (in addition to the general work of the Court), I particularly appreciate your undertaking the role of "mediator" between Bill and me. Yet, in candor, I do not think we can get together on the basis of the outline in your letter.

I see no reason why the Court should depart at this late date from the basic framework of McDonnell Douglas/Burdine. I understand and respect Bill's differing views, but I do not agree with them. I am distressed also that three Justices apparently would severely undercut existing precedents, as would be the result of Thurgood's opinion. Once the Court starts

chipping away at the rationale of precedents, each of us is invited to join in the process.

So much for generalities, and I turn now to specifics.

As I read Bill's opinion, it holds that a Title VII plaintiff may prove his case in two ways. He may seek to establish a prima facie case by proving the four factors noted in McDonnell Douglas. Proof of these factors entitles him to a "presumption of discrimination" and shifts the burden of production to the employer. Where, however, "no standardized prima facie case can be made out," a plaintiff may seek to establish an "inference of discrimination." p. 9. In such cases, a court would depart from the allocation of burdens and order of proof established in McDonnell Douglas.

The distinction Bill draws between presumptions and inferences is, at least to me, unclear. The latest draft of his opinion states that in this case "there may well be additional evidence in the record" that would establish a presumption, see p. 9, but it ^{does not indicate} ~~never specifies~~ how one determines when a presumption has been established and when it has not. This distinction could well confuse lower courts as they try to decide which method of proof is applicable to the case before them.

I agree with your statement that a plaintiff should show more than a "weak inference of discrimination" to establish a prima facie case. But, it is not clear to me that Bill's and my opinion differ significantly on this point. Neither of us distinguishes between weak and strong inferences. Each refers only to establishing an

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substituted
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by Jimmie

"inference of discrimination," and each entrusts this determination to the trier of fact. It may be true, as you observe, that Bill's opinion would leave more room for judges to dismiss a plaintiff's case. But it provides no framework for determining whether the employer has acted for discriminatory reasons. In this respect, it leaves the trier of fact free to find a prima facie case when there has been proof of only a weak inference of discrimination. I suppose it also would leave a court free to reject proof as strong as that made out by Aikens.

My opinion, ^{does} ~~I believe~~, gives triers of fact some latitude in judging the strength of the inference of discrimination to be drawn from the evidence. At the same time, it notes that the McDonnell Douglas factors continue to provide a rough guide for making this determination.

As the McDonnell Douglas framework provides the trial court with both flexibility and guidance in assessing the strength of a plaintiff's evidence, I see no reason for us to depart from it by distinguishing between inferences and presumptions of discrimination.

I certainly am not unmindful of the desirability of having a Court. Yet, I am unwilling to join an opinion that seems to me to cast doubt as to what the Court has said and intended in our prior decisions. McDonnell Douglas and its progeny leave the trier of fact with considerable latitude. Changing the framework of analysis will not further this interest materially.

I have no objection, of course, to your showing this letter to Bill. He and I have had quite an exchange on this case already.

Sincerely,

Justice Stevens

lfp/ss 02/03/83

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Rider A, p. 11 (Aikens)

AIKENS11 SALLY-POW

III

The foregoing line of cases establishes a framework of reasoning that has been applied in each of our prior decisions. It should be applied in the present case. As the Court notes, two of the specific factors identified in McDonnell-Douglas are not present where a single executive position is to be filled. Yet, the burden remains on the plaintiff to produce evidence that gives rise to an inference of discrimination. If so, he has created a prima facie case that shifts the burden of production to the employer. On the facts of record here, it is clear that respondent produced abundant evidence to make out a prima facie case. In addition to impressive qualifications, he proved that the Postal Service had repeatedly passed over him and chosen white employees who had held positions subordinate to his own. In addition, he introduced anecdotal and statistical evidence of racial discrimination. In my view, his evidence created more than an inference of discriminatory motive. Accordingly, I agree with the judgment of the Court.

February 28, 1983

81-1044 U.S. Postal Service v. Aikens

Dear John:

As busy as we all are with our own cases (in addition to the general work of the Court), I particularly appreciate your undertaking the role of "mediator" between Bill and me. Yet, in candor, I do not think we can get together on the basis of the outline in your letter.

I see no reason why the Court should depart at this late date from the basic framework of McDonnell Douglas/Burdine. I understand and respect Bill's differing views, but I do not agree with them. I am distressed also that three Justices apparently would severely undercut existing precedents, as would be the result of Thurgood's opinion. Once the Court starts chipping away at the rationale of precedents, each of us is invited to join in the process.

So much for generalities, and I turn now to specifics.

As I read Bill's opinion, it holds that a Title VII plaintiff may prove his case in two ways. He may seek to establish a prima facie case by proving the four factors noted in McDonnell Douglas. Proof of these factors entitles him to a "presumption of discrimination" and shifts the burden of production to the employer. Where, however, "no standardized prima facie case can be made out," a plaintiff may seek to establish an "inference of discrimination." p. 9-10. In such cases, a court would depart from the allocation of burdens and order of proof established in McDonnell Douglas.

The distinction Bill draws between presumptions and inferences is, at least to me, unclear. The latest draft of his opinion states that in this case "there may well be additional evidence in the record" that would establish a presumption, see p. 9, but does not indicate how one determines when a presumption has been established and when it has not. This distinction could well confuse lower

2.
courts as they try to decide which method of proof is applicable to the case before them.

I agree that a plaintiff should show more than a "weak inference of discrimination" to establish a prima facie case. But, it is not clear to me that Bill's and my opinions differ significantly on this point. Neither of us distinguishes between weak and strong inferences. Each refers only to establishing an "inference of discrimination," and each entrusts this determination to the trier of fact. It may be true, as you observe, that Bill's opinion would leave more room for judges to dismiss a plaintiff's case. But it provides no framework for determining whether the employer has acted for discriminatory reasons. In this respect, it leaves the trier of fact free to find a prima facie case when there has been proof of only a weak inference of discrimination. I suppose it also would leave a court free to reject proof as strong as that made out by Aikens.

My opinion does give triers of fact some latitude in judging the strength of the inference of discrimination to be drawn from the evidence. At the same time, it notes that the McDonnell Douglas factors continue to provide a rough guide for making this determination. As the McDonnell Douglas framework provides the trial court with both flexibility and guidance in assessing the strength of a plaintiff's evidence, I see no reason for us to depart from it by distinguishing between inferences and presumptions of discrimination.

I certainly am not unmindful of the desirability of having a Court. Yet, I am unwilling to join an opinion that seems to me to cast doubt as to what the Court has said and intended in our prior decisions.

I have no objection, of course, to your showing this letter to Bill. He and I have had quite an exchange on this case already.

Sincerely,

Justice Stevens

lfp/ss

March 2, 1983

[1\$1044I]

No. 81-1044

United States Postal Service v. Louis H Aikens

[March ___, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Louis Aikens filed suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., claiming that petitioner, the United States Postal Service, discriminated against him on account of his race. Aikens, who is black, claimed that the Postal Service had discriminatorily refused to promote him to higher positions in the Washington, D.C. Post Office where he had been employed since 1937. After a bench trial, the District Court entered judgment in favor of the Postal Service, but this judgment was reversed by the Court of Appeals. 642 F. 2d 514 (CA DC 1980). We vacated the judgment of the Court of Appeals and remanded for reconsideration in light of Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). 453 U.S. 902 (1981). On remand, the Court of Appeals

reaffirmed its earlier holding that the District Court had erred in requiring Aikens to offer direct proof of discriminatory intent. 665 F. 2d 1057, 1058 (CADC 1981) (per curiam). We granted certiorari to consider the assessment of proof of racial discrimination when an employer has selected among applicants for a higher managerial position.¹

The Court of Appeals, in its second opinion, held not only that the District Court erred in requiring Aikens to offer direct proof of discriminatory intent,² but also that it erred in requiring Aikens to show, as part of his prima facie case, that he was "as qualified or more qualified" than the people who were promoted. The Postal Service insists that an employee who has shown only that he was black, that he had applied for a promotion for which he possessed the minimum qualifications, and that the Postal Service selected a non-minority applicant has not established a "prima facie" case of employment discrimination

¹We have consistently distinguished disparate treatment cases from cases involving facially neutral employment standards that have disparate impact on minority applicants. See, e.g., Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252, n. 5 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, n. 14 (1973).

²As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves. Thus, we agree with the Court of Appeals that the District Court should not have required Aikens to submit direct evidence of discriminatory intent. See Teamsterse v. United States, 431 U.S. 324, 358, n. 44 (1977) ("[T]he McDonnell Douglas formula does not require direct proof of discrimination.")

under Title VII.

Since the case has been fully tried on the merits in the District Court, one might at first blush wonder why the parties are still arguing about the nature of a prima facie case. Indeed, to the untutored this case, tried to the District Court in January, 1979, might seem to be one that could have been disposed of in a relatively short span of time (according to judicial lights) with the District Court making the necessary essential findings of fact and conclusions of law, and the Court of Appeals reviewing those findings and conclusions under the appropriate standards.³ But we take the case as it comes to us.

We think that some statements in the briefs of the parties and of the amici, urging us either to "adhere" to, modify, or reconsider, the line of cases beginning with McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972), reveal an imprecise understanding of that line of cases. Because this approach may have been shared in part by the District Court and by the Court of Appeals in the present case, we take the liberty of setting forth the facts as well as the law in the principal cases in the McDonnell Douglas line.

In McDonnell Douglas itself, the defendant employer ran a

³See Pullman Standard v. Swint, ____ U.S. ____, ____ (1982).

newspaper advertisement seeking qualified mechanics. The plaintiff, a qualified mechanic who had been laid off by the defendant, applied for reemployment. The defendant declined to rehire him, even though it continued to hire other applicants who responded to the advertisement after the plaintiff. The plaintiff's Title VII suit was dismissed by the District Court, but the Court of Appeals for the Eighth Circuit reversed. That court held that the reason given by the defendant for refusing to rehire plaintiff--plaintiff's participation in a "stall in" and "lock-in" at defendant's place of business--was a "subjective" criterion that carried little weight in rebutting charges of discrimination. The Court of Appeals set forth its version of a prima facie case of discrimination under Title VII.

Our opinion described the now familiar elements of a prima facie case:

"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." Id., at 802.

We immediately added, however, that "[t]he facts necessarily will vary in Title VII cases, and the specifications above of the prima facie proof required from respondent is not necessarily

applicable in every respect to differing factual situations." Id., at 802, n. 13.

We returned to the same question in Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The employer's business was the rehabilitation of steel mill blast furnaces with "fire brick." The employer did not maintain a permanent force of bricklayers; instead, it hired a superintendent for each project, and then delegated to him the task of securing a competent work force. The superintendent who declined to hire the plaintiff did not accept applications at the job site, but hired only persons he knew to be experienced and competent in this work or who had been recommended to him as similarly skilled. The employer claimed this policy was established to ensure that only experienced and highly qualified fire bricklayers were employed, because untimely work could result in substantial losses both to the steel mill operator and to the contractor-employer. Id., at 569-572.

We agreed with the Court of Appeals that the black plaintiffs had made out a prima facie case. We disagreed, however, with its conclusion that the reasons for the employer's hiring practices were illegitimate. In discussing the showing required of the parties to Title VII suits, we pointed out:

"The central focus of the inquiry in a case such as this is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'

Int'l Brotherhood of Teamsteres v. United States, supra, [431 U.S.,] at 335, n. 15. The method suggested in McDonnell Douglas for pursuing this inquiry, however, 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." 438 U.S., at 577.

Finally, in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), plaintiff, a woman, claimed that the employer's failure to promote her and its later decision to terminate her had both resulted from gender-based discrimination. The District Court found after a bench trial that neither decision was discriminatory. Id., at 251. The Court of Appeals for the Fifth Circuit upheld the decision of the District Court as to the promotion, but reversed its finding on the termination.

We reviewed only the part of the case that had been reversed by the Court of Appeals,⁴ and stated more clearly the consequences of the plaintiff's success in making the showing required by McDonnell Douglas.

"Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (emphasis supplied).

⁴Thus Burdine's failure to be promoted to a managerial position was not before us.

The justification for ~~a rule~~ requiring that judgment be entered for the plaintiff in these circumstances can be found in Furnco.

"A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.... And we are willing to presume this largely because we know that from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant had been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, whom we generally assume acts only with some reason, based his decision on an impermissible consideration such as race." 438 U.S., at 577.

More succinctly phrased, a prima facie case "eliminates the most common non-discriminatory reasons for the plaintiff's rejection." Burdine, supra, at 254. For this reason, we have held that an un rebutted prima facie case is sufficiently compelling to require a judgment for the plaintiff as a matter of law.

In the present case, both the District Court and the Court of Appeals apparently thought that Aikens' claim against the Postal Service fits into the pattern of the McDonnell Douglas line of cases. We disagree. The first and third elements of McDonnell Douglas are undoubtedly present; Aikens belongs to a racial minority, and he applied for the promotions in question but was denied them. The fourth element, however, is entirely absent; the position did not remain open, as it did in McDonnell Douglas, but was filled by the applicant chosen in preference to

Aikens. Indeed, where an employer seeks to fill a single managerial position, the position will by definition not be open after one of the applicants has been chosen.

The second McDonnell Douglas element--the showing that the plaintiff was "qualified" for the job--is more problematic. There is no doubt that Aikens had an impressive resume. He has a Masters Degree and has completed three years of residence towards a Ph.D. He has been rated as "an outstanding supervisor whose management abilities are far above average." App. 8. There was no derogatory or negative information in his Personnel Folder. He had more supervisory seniority and training and development courses than all but one of the white persons who were promoted above him. It is clear that his qualifications were sufficient, in the eyes of the Postal Service, to merit serious consideration.

At this point, however, agreement between the parties, and between the courts that have considered this factual issue, breaks down. It is argued that Aikens must show he is "as qualified" as the person actually chosen, "better qualified" than the person actually chosen, "relatively qualified," or merely "qualified" for the jobs he sought. ~~We believe that this contest of comparatives ultimately proves self-stultifying.~~

The fair reading of the McDonnell Douglas advertisement for qualified mechanics is that there was a known, reasonably

objective basis for determining who was a qualified mechanic, and that applicants would be hired on a first come, first served basis until the employer had obtained the number of mechanics it needed. But where one managerial position is open, there may be no totally objective measure of who is "qualified," and the employer certainly does not undertake to promote more than one applicant. Employers consider a wide range of factors, such as each applicant's understanding of the organization's goals, ability to work effectively with particular supervisors and subordinates, maturity, originality, initiative, and decision making ability. It will rarely, if ever, be possible to quantify all the relevant criteria and tally them on a scorecard.⁵

In these circumstances, the question is not whether we will "follow" the McDonnell-Douglas line of cases, but how much guidance those cases provide for the trier of fact in a dissimilar factual situation such as this one. McDonnell Douglas and Furnco both dealt with entry level jobs, one in a large manufacturing industry and the other in the construction industry. In those cases we made it clear that if the plaintiff

⁵But the procedural significance of the prima facie case gives us some guidance concerning the showing that a plaintiff must make to establish that he was "qualified," in order to shift the burden of production to the employer. An employer filling a managerial or professional position may have legitimate, subjective business reasons, known only to the employer, for preferring one applicant over another. Where this is the case, these reasons should form part of the employer's burden of production in response to the plaintiff's prima facie case, rather than part of the plaintiff's prima facie case itself.

can meet the four elements of the McDonnell Douglas prima facie case--that he belonged to a racial minority, that he applied and was qualified for a job for which the employer was seeking applicants, that he was rejected, and that after his rejection the employer continued to seek similarly qualified applicants--the plaintiff has in effect negated the most common explanations that would rebut his allegations of discriminatory animus.

But that simply is not true in the present case. The "qualifications" for the position as laid down by the Postal Service, while not appearing as clearly from the record as might be, were by no means as easy to assess as the qualifications for a "mechanic" advertised for in McDonnell Douglas. In addition, there were several applicants for each position, and only one could be chosen. Hence, as we have noted, the position did not remain open after Aikens was rejected. Under these circumstances, we do not think that, simply by showing that he is black, that he was sufficiently qualified to be seriously considered, and that the Postal Service did not give him the job but promoted one of several non-minority applicants, Aikens, eliminated "the most common nondiscriminatory reasons" for his rejection. Burdine, supra, at 254. Stated differently, we cannot conclude without more that these acts by the employer, "if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Furnco, supra, at 577. Therefore we do not deem these facts alone to be sufficient to

→ established a prima facie case.

~~justify a presumption that the employer discriminated against the plaintiff.~~

Even though a ~~plaintiff like~~ Aikens ^{did not (establish)} may be unable to prove a standardized prima facie case ~~by proving the existence of the~~ four factors described in McDonnell Douglas, we have repeatedly emphasized that ~~there are other ways for a plaintiff to prevail~~ ^{this does not BAR him from establishing} ~~disparate treatment that he was discriminated against because of his race~~ in a Title VII case. See pp. 3-4, supra (quoting from McDonnell Douglas and Furnco); see also Burdine, supra, at 253, n. 6; Teamsters v. United States, 431 U.S. 324, 358 (1977).⁶ In an appropriate case, the four McDonnell Douglas factors serve to focus the court's attention on a limited number of probative facts, but these are not the only items of evidence that may tend to show that the employer discriminated against the plaintiff. Other types of circumstantial or direct evidence may be available. A plaintiff might introduce anecdotal or statistical evidence of discriminatory attitudes and practices by the employer. Or he might show that the employer engaged in irregular business practices such as promoting subordinates over him. More infrequently, a plaintiff may be able to present direct evidence of the employer's discriminatory intent in his

⁶A rough analogy may be found in the law relating to res ipsa loquitur in negligence actions. In some situations a showing of circumstances sufficient to raise res ipsa creates a rebuttable presumption like the standardized McDonnell Douglas-Burdine prima facie case. See W. Prosser, Handbook of the Law of Torts 229-230 (1971). A tort plaintiff may also seek to show negligence directly without abandoning the benefit of res ipsa. Id., at 231-232.

own case. Although such evidence as this does not coincide with the standardized four-factor prima facie case described in the McDonnell Douglas case, we emphasize that, if supported by credible proof, it may establish a nonstandardized prima facie case.⁷ In other words, if a plaintiff presents a ~~sufficiently strong case~~ ^{from which we may presume} evidence that shows that it was more likely than not that the employer discriminated against him ~~under the normal rules of civil procedure he will be entitled to a legally~~ a nonstandardized prima facie case.

⁷Of course, two of the McDonnell Douglas factors are absolute prerequisites to recovery in any Title VII hiring or promotion case--that the plaintiff is a member of a protected category of persons, and that he or she was not chosen for the job in question. Another McDonnell Douglas factor, that the plaintiff was qualified for the job, raises more complexities when the selection process involves subjective qualifications, see p. ___, supra, but it is evident that a rejected applicant who is clearly unfit for the job cannot prevail in a Title VII suit. Thus a plaintiff cannot establish a presumption of discrimination and shift the burden of production to the employer without proving that he or she possessed objective qualifications fairly comparable to other applicants that merited the employer's serious consideration. Thus, in attempting to make out a nonstandardized prima facie case, the plaintiff is required to adduce proof that closely resembles three of the McDonnell Douglas factors.

In a significant sense, therefore, it is a matter of semantics whether the nonstandardized prima facie case is, on the one hand, described in terms of four factors, the fourth of which is so flexible that it can accommodate any type of probative evidence; or, on the other hand, characterized as a flexible concept that varies with the evidence presented. What is important to bear in mind is that a prima facie case is made out if, but only if, the plaintiff's evidence standing un rebutted ~~would make it more likely than not that the defendant acted in a discriminatory manner.~~ As this definition makes clear, a prima facie case can be made out even if plaintiff has not negated all conceivable legitimate nondiscriminatory reasons for the employer's action. But if the plaintiff has not eliminated the most common such reasons, then the trier of fact would be unable to infer that it is more likely than not that the plaintiff was the victim of discrimination.

would allow a trier of fact to presume that it is

- 13 -

The burden of production will shift to the employer.
~~mandatory rebuttable presumption.~~ In the absence of rebuttal by
the defendant, *the trier of fact must enter* ~~such a presumption requires~~ judgment for the
plaintiff as a matter of law because he has met his burden of
showing discrimination by a preponderance of the evidence. Thus,
as with the standardized prima facie case, the effect of the
presumption is to shift the burden of production to the employer
to avert the entry of judgment against him. See Burdine, supra,
at 255, n. 8.

We recognize that in a case in which the evidence does not
fit neatly into the standardized McDonnell Douglas prima facie
case, the tasks facing both the plaintiff and the trier of fact
are more difficult. For in a standardized case like McDonnell
Douglas or Furnco, four relatively straightforward inquiries will
determine whether a prima facie case has been established; this
is simply not true in cases like the present one. But the
plaintiff, through use of the liberal discovery provided in Fed.
R. Civ. P. 26-37, can depose a defendant's employees and obtain
relevant documents relating to employment decisions. The court
is called upon to exercise a greater degree of judgment when it
decides, in a nonstandardized case presenting a variety of types
of evidence, whether *the plaintiff has established a prima*
~~it is more likely than not that the~~
facie case.
~~plaintiff was discriminated against.~~ But it should not be
forgotten that a Title VII lawsuit is a civil action, not unlike
other civil actions, and that triers of fact are customarily
given the difficult task of weighing and balancing the evidence
to determine ~~who should prevail.~~

*if a plaintiff has met
his burden.*

The trier of fact may be called upon to evaluate the strength of the plaintiff's case at two points in the trial. First, at the close of the plaintiff's case, the defendant may make a Rule 41(b) motion to dismiss. If the plaintiff has established a standardized prima facie case by establishing precisely the four factors set forth in McDonnell Douglas, then the Rule 41(b) motion must be denied. Similarly, if the plaintiff has established a nonstandardized prima facie case--by presenting evidence ~~strong enough to show~~ ^{from which,} in the absence of rebuttal, ^{allows a trier of fact to presume} that plaintiff was more likely than not the victim of unlawful discrimination--the Rule 41(b) motion must be denied. Indeed, if judgment for the defendant were granted, that decision would be reversible error, because the plaintiff has established a right to a rebuttable presumption in his or her favor. ~~If the plaintiff's evidence falls short of a prima facie case, standardized or nonstandardized, then the court has room for the exercise of discretion. The court may choose to let the trial go forward with the presentation of the defendant's evidence, for Rule 41(b) clearly states that the court "may decline to render any judgment until the close of all the evidence." Or it may decide the case on the merits and render judgment against the plaintiff, if it determines as a matter of law that the evidence produced by the plaintiff, even if unrebutted, is insufficient to show discrimination by a preponderance of the evidence.~~

Second, after both plaintiff and defendant have presented their evidence, the court must decide whether the plaintiff has

proven discrimination by a preponderance of the evidence. At ~~this stage~~, the three-step analytical framework set forth in McDonnell Douglas and Burdine ^{guides a trier of fact in} ~~provides a mental road map for~~ evaluating all of the evidence in light of common experience and common sense. It tells ^{him} ~~the trier of fact~~ first to look at the plaintiff's case and assess its strength, then to examine the defendant's justifications, ^{finally to} ~~and decide whether they are genuine or~~ ^{the plaintiff has proved} ~~pretextual.~~⁸ ~~If they are pretextual, the plaintiff prevails,~~ ~~because in essence the plaintiff's evidence tending to show~~ ~~discrimination has not been effectively rebutted.~~ See Burdine, supra, at 255-256. To the extent that this is the teaching of McDonnell Douglas and Burdine, it is of course applicable to every Title VII case, whether or not the plaintiff's proof fits

⁸In Burdine, supra, we reaffirmed the basic allocation of burdens and order of proof initially set forth in McDonnell Douglas:

"First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' [McDonnell Douglas, 411 U.S.], at 802. Third, should the defendant carry this burden, the plaintiff must then have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." 450 U.S., at 252-253.

This framework is designed to bring the trier of fact "expeditiously and fairly" to the ultimate question to be proved--whether the challenged employment decision was in fact discriminatory. See *id.*, at 253.

within the four-factor standardized prima facie case.

Applying these considerations to the case at hand, we conclude, first, that the Court of Appeals erred in holding that a presumption of discrimination is justified any time a white applicant is promoted to a job for which a qualified black man applied. 642 F. 2d, at 517; 665 F. 2d, at 1058-1059. It did not, however, analyze the record in light of the considerations we have just set forth. We are therefore not fully apprised of all of the evidence relevant to the question whether Aikens was the victim of discrimination. Nor is it the task of a reviewing court to sift the evidence in the first instance. The District Court, which is able to perceive the attitude and demeanor of witnesses, and to evaluate their credibility and the weight that should be placed on their testimony, is in a far better position than either this Court or the Court of Appeals to decide in the first instance whether the Postal Service discriminated against Aikens.

~~Nothing we have said precludes the possibility that the District Court, on remand, would be able to find sufficient evidence in the record to establish a nonstandardized prima facie case. The record might show that, had there been no rebuttal, Aikens would have been entitled to judgment as a matter of law, and that a decision to the contrary would have been reversible error. But that is not necessary to permit Aikens to prevail. Even if Aikens' case falls short of a prima facie case giving~~

rise to the legally mandatory presumption just described, it seems clear that it justifies at least a permissible inference of discrimination. This would be enough to withstand a Rule 41(b) motion and to support, though not to command, a judgment in Aikens' favor. # On the facts presented to us in the two opinions of the Court of Appeals, if the District Court were to conclude that the Postal Service treated Aikens less favorably than others because of his race, under the Rule 52(a) standard of appellate review that judgment would surely be upheld.

Aikens showed that white persons, who had been his subordinates, were consistently promoted and detailed over him between 1966 and 1974. He had substantially more education than the white employees who were advanced ahead of him; of the 12, only two had any education beyond high school and none had a college degree. Aikens introduced testimony at trial that the person responsible for the promotion decisions at issue had made numerous derogatory comments about blacks in general and Aikens in particular. He also introduced statistical evidence tending to show racial discrimination. In short, Aikens produced a plethora of nonstandardized evidence that does not neatly fit into the four-factor McDonnell Douglas test. In cases such as this, trial courts have a different--and more difficult--task to perform in evaluating the plaintiff's evidence. But the normal rules of procedure and proof in civil actions provide sufficient guidance for the successful performance of that task.

All courts have recognized that the questions facing triers of fact in discrimination cases are both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. In any Title VII case, whether or not a standardized prima facie case is available to the plaintiff, the ultimate question is "whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" Furnco, supra, at 577 (quoting Teamsters, supra, at 335, n. 15). There will seldom be "eyewitness" testimony as to the employer's mental processes, but ~~this does not mean that courts should treat the question of discrimination differently from other questions~~ of fact. ^{the} The law often obliges finders of fact to inquire into a person's state of mind. As Lord Justice Bowen said in treating this problem in an action for misrepresentation nearly a century ago:

"The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else." Eddington v. Fitzmaurice, 29 Ch. Div. 459, 483 (1885).

The judgment of the Court of Appeals is vacated and the case is remanded with directions to remand to the District Court for further proceedings consistent with this opinion.

It is so ordered.

CHANGES PAGES 1-4
AND stylistic CHANGES THROUGHOUT

MAR 2 1983

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: _____

Justice,

I have not yet circulated this
2d Draft in Aikens. In view of
Justice Stevens' statement that he was
undertaking a draft, I was uncertain
as to whether it would be appropriate
for us to circulate and wanted to
get your clearance first

RR

ED STATES

ARD OF GOV-
AIKENS

UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1983]

JUSTICE POWELL, with whom JUSTICE O'CONNOR joins,
concurring in the judgment.

I concur only in the judgment of the Court. The reasoning of the plurality opinion appears to depart from the consistent approach to Title VII cases that our precedents have developed. As I read the opinion, it perceives a distinction between evidence that establishes a prima facie case under *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973), and evidence that establishes an inference of discrimination. See *ante*, at 9-11. If a plaintiff is able to make out a prima facie case, he is entitled to a "presumption of discrimination" that shifts the burden of production in accordance with the analytical framework established in *McDonnell Douglas*. See *ante*, at 10. If, however, a plaintiff proves only an "inference of discrimination," the plurality apparently would find the *McDonnell Douglas* framework inapplicable.¹ See *id.*, at 10. In my view, this distinction finds no support in our precedents. Instead, our cases make clear that evidence

¹The plurality opinion indicates that the evidence in this case may have been sufficient to establish both an inference and a presumption of discrimination. See *ante*, at 9. But the opinion does not explain how or why it distinguishes between these two levels of proof. In creating this distinction, the plurality departs from our precedents and—in my view—interjects a confusing and unexplained distinction into Title VII law.

CHANGES PAGES 1-4
AND stylistic changes THROUGHOUT

MAR 2 1983

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER *v.* LOUIS H. AIKENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1983]

JUSTICE POWELL, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

I concur only in the judgment of the Court. The reasoning of the plurality opinion appears to depart from the consistent approach to Title VII cases that our precedents have developed. As I read the opinion, it perceives a distinction between evidence that establishes a *prima facie* case under *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973), and evidence that establishes an inference of discrimination. See *ante*, at 9-11. If a plaintiff is able to make out a *prima facie* case, he is entitled to a "presumption of discrimination" that shifts the burden of production in accordance with the analytical framework established in *McDonnell Douglas*. See *ante*, at 10. If, however, a plaintiff proves only an "inference of discrimination," the plurality apparently would find the *McDonnell Douglas* framework inapplicable.¹ See *id.*, at 10. In my view, this distinction finds no support in our precedents. Instead, our cases make clear that evidence

¹The plurality opinion indicates that the evidence in this case may have been sufficient to establish both an inference and a presumption of discrimination. See *ante*, at 9. But the opinion does not explain how or why it distinguishes between these two levels of proof. In creating this distinction, the plurality departs from our precedents and—in my view—interjects a confusing and unexplained distinction into Title VII law.

that gives rise to an inference of discrimination is sufficient to establish a prima facie case. They do not indicate, as the plurality suggests, that the *McDonnell Douglas* framework may be inapplicable to the type of employment decision presented here.

I

In *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981), we reaffirmed unanimously the basic allocation of burdens and order of proof initially set forth in *McDonnell Douglas*:

“First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant ‘to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.’ [*McDonnell Douglas*, 411 U. S.], at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.” 450 U. S., at 252–253.

This framework is designed to bring the trier of fact “expeditiously and fairly” to the ultimate question to be proved—whether the challenged employment decision was in fact discriminatory. See *id.*, at 253.

The prima facie case, the initial step in this process, requires a Title VII plaintiff to raise an inference of discrimination by removing the most common nondiscriminatory reasons for his rejection. See *id.*, at 253–254. In many cases, a plaintiff may satisfy this initial burden by proving only the four factors noted in *McDonnell Douglas*. See 411 U. S., at 802. But we have never held that proof of these factors automatically establishes a prima facie case. The facts in each case will vary, and the prima facie proof specified in

McDonnell Douglas is not “necessarily applicable in every respect to differing factual situations.” *Id.*, at 802, n. 13; see *Furnco Construction Corp. v. Waters*, 438 U. S. 567, 577 (1978). As we stated in *Teamsters v. United States*, 431 U. S. 324 (1977):

“The importance [of the *McDonnell Douglas* articulation of the prima facie case] lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.” *Id.*, at 358.

Thus, a court must question whether, in light of the particular employment decision involved, the plaintiff’s proof raises an inference of discrimination.² When a plaintiff has met this initial burden, he “in effect creates a presumption that the employer unlawfully discriminated against [him].” *Burdine*, 450 U. S., at 254. This presumption is primarily an evidentiary device for allocating intermediate burdens of proof. It shifts the burden of production to the employer to articulate a legitimate, nondiscriminatory reason for its decision.³ See *id.*, at 255 and n. 8.

²JUSTICE MARSHALL’s dissenting opinion reasons that “[w]hen an employer is unable to articulate any legitimate reason for hiring a white applicant over a qualified Negro applicant, it is reasonable to infer that [the] decision was based . . . on impermissible considerations.” *Post*, at 8. This view, for the first time, would shift the burden of production to the defendant even though the plaintiff has not met his initial burden. Our prior decisions have stressed that the plaintiff initially must establish an inference of discrimination. Only then does the burden shift to the employer to rebut the inference by articulating a legitimate, nondiscriminatory reason for its decision. See *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248, 254 (1981); *Furnco Construction Corp. v. Waters*, 438 U. S. 567, 577 (1978); *Teamsters v. United States*, 431 U. S. 324, 358, and n. 44 (1977); *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802 (1973).

³The plurality seeks to justify its distinction between an inference of dis- 1

As our cases make clear, we have never created a distinction between evidence that establishes an inference of discrimination and evidence that gives rise to a presumption of discrimination. Rather the two concepts are interrelated. Evidence that gives rise to an inference of discrimination is sufficient to establish a *prima facie* case and shift the burden of production to the employer. See *id.*, at 254; *Furnco, supra*, at 577; *Teamsters, supra*, at 358. This analytical framework has been applied consistently both by this Court and the lower courts. Departing from it could create uncertainty and invite litigation.

II

In this case, the District Court found that respondent had not established a *prima facie* case since he had failed to prove the second of the four *McDonnell Douglas* factors.⁴ He had

crimination and a presumption of discrimination by relying on footnote 7 in *Burdine, supra*. See *ante*, at 11. In my view, the plurality reads too much into this footnote. As we noted in *Burdine*, the term “*prima facie* case” has been used in two ways. See 450 U. S., at 254, n. 7. It may refer either to the level of proof necessary to withstand a motion for a directed verdict or to an evidentiary device that shifts the burden of production to the defendant. Footnote 7 stands only for the proposition—a proposition evident from the analytical framework established in *McDonnell Douglas*—that proof of a *prima facie* case does more than allow a plaintiff to withstand a motion for a directed verdict. It shifts the burden of production. As we subsequently explained, “[t]he word “presumption” properly used refers only to a device for allocating the production burden.” See *Burdine, supra*, at 255, n. 8. (quoting F. James and G. Hazard, *Civil Procedure* § 7.9, p. 255 (2d ed. 1977) (footnote omitted)).

⁴ In *McDonnell Douglas*, we stated that a plaintiff may establish a *prima facie* case 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.” 411 U. S., at 802.

We noted, however, that this model would vary according to the facts and

not shown that he was "as qualified or more qualified" than the individuals who were promoted. See *Aikens v. Bolger*, Civ. Action No. 77-0303 (DDC Feb. 26, 1979). The Court of Appeals reversed because the District Court had set too high a standard. See 665 F. 2d 1057, 1060 (CADC 1982) (*per curiam*). Although it recognized that "Title VII cases involving professional and managerial positions raise uniquely difficult issues not found in cases involving lower-level jobs," it held that a plaintiff could prove the second *McDonnell Douglas* factor by showing that he "possesses whatever qualifications or background experiences the employer has indicated are important." *Ibid.* Since the court viewed the other three *McDonnell Douglas* factors as having been established,⁵ it remanded for further consideration of respondent's qualifications in light of its articulation of the applicable standard.

In my view, the proof required by the Court of Appeals is insufficient to raise an inference of discrimination where a single executive position is to be filled from a pool of qualified applicants. When an employer selects an applicant for a managerial or professional position, the situation is quite different from the employment decision made in cases such as *McDonnell Douglas* and *Burdine*. Whether an applicant possesses minimum objective qualifications is merely the threshold inquiry since the applicants who meet the minimum requirements normally will present an employer with a wide range of qualifications and credentials. A responsible employer of course will wish to fill the position with the best

circumstances of each case. See *id.*, at 802, n. 13.

⁵The Court of Appeals initially had found that respondent had proved each of the four *McDonnell Douglas* factors. See *Aikens v. United States Postal Service*, 642 F. 2d 514, 517-518 (CADC 1980), vacated and remanded, 453 U. S. 902 (1981). On remand from this Court, the Court of Appeals apparently adhered to its earlier determination that the other three factors had been proved, as it remanded to the District Court only for reconsideration of the second factor.

qualified applicant. Yet making a fair and intelligent judgment may require a weighing of qualities not always apparent from information of record. For example, consideration normally would be given to an applicant's leadership qualities and ability to work well with others. Depending upon the level and authority of the position, the capacity of the applicant to make sound decisions could be critical.

Additionally, when there are several qualified applicants who can be viewed as satisfying all of the foregoing factors, the employer necessarily must prefer one applicant over others. A choice has to be made, and thus an employer's decision to select a qualified non-minority person from a pool of applicants does not necessarily imply that the choice was discriminatory. See *Teamsters, supra*, at 358 n. 44. In this respect, this case differs significantly from *McDonnell Douglas*, where the employer rejected a qualified minority applicant but left the position unfilled and continued to seek other applicants. See 411 U. S., at 802. Because the employer's decision was facially inconsistent with its own economic self interest, the plaintiff in that case "was rejected under circumstances which [gave] rise to an inference of unlawful discrimination." *Burdine, supra*, at 253. No similar inference can be drawn in this case where the job was not left open.

The employment decision at issue here illustrates what our cases consistently have recognized: the proof necessary to establish a prima facie case will vary from the model set forth in *McDonnell Douglas* depending on the particular facts and circumstances of each case. See *Burdine, supra*, at 253, n. 6; *McDonnell Douglas, supra*, at 802, n. 13. This does not mean, however, as the Court seems to believe, that the *McDonnell Douglas* factors are no longer relevant in determining whether a plaintiff has raised an inference of discrimination. They continue to provide a rough guide to the type of evidence that a plaintiff must introduce.

Thus, if a plaintiff's "absolute or relative lack of qualifications" prevents him from being seriously considered for a po-

sition, see *Teamsters, supra*, at 358, n. 44, there would be little reason to infer that the employer rejected him for discriminatory reasons. As noted above, to be seriously considered for a managerial or professional position, a plaintiff at least must possess objective qualifications that are fairly comparable to those of the other applicants. Proof of these qualifications normally will be a predicate to establishing a prima facie case. We have emphasized, however, that establishing such a case requires a plaintiff to demonstrate that he "was rejected under circumstances which give rise to an inference of unlawful discrimination." See *Burdine, supra*, at 253. This often will require a plaintiff to introduce additional evidence.⁶ If, for example, the position remains unfilled, as in *McDonnell Douglas*, this could be viewed as a departure from conduct ordinarily expected of an employer, giving rise to such an inference.

III

The *McDonnell Douglas* factors provide a guide to determining whether a plaintiff has proved a prima facie case; they were never intended to establish an inflexible rule. Each case must be assessed in light of its own particular facts to determine if a plaintiff has introduced evidence that raises an inference of discrimination. In this case, respondent produced abundant evidence to show objectively that he was at least as qualified as the individuals who were given the positions. He also proved that the Postal Service had passed over him repeatedly and chosen white applicants who had held positions subordinate to his own—an apparent depar-

⁶ As indicated above, an employer—in filling a managerial or professional position—often will have legitimate, subjective business reasons for preferring one applicant over another. See *supra*, at 5-6. Where these reasons are known only to the employer, as frequently will be the case, they must be brought out by the employer after the plaintiff has established a prima facie case.

ture from the normal course of business. In addition, respondent introduced anecdotal and statistical evidence of racial discrimination. It appears to be clear that an inference of discrimination arises from this evidence, establishing a prima facie case. But resolution of this factual question is more appropriately left to the courts below. Accordingly, I agree that the Court of Appeals' judgment should be vacated and the case remanded for further consideration.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 2, 1983

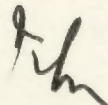
Re: 81-1044 - U.S. Postal Svs. v. Aikens

Dear Lewis, Bill, & Sandra:

The more I have studied what has been written in this case the more firmly I have become convinced that an opinion to which we could all subscribe should be draftable. I have therefore thought it worthwhile to try to redraft the portions of Bill's opinion that Lewis finds most difficult to accept but yet to retain the central analysis with which I agree. I am enclosing the results of that attempt to see if you think there is any possibility that it might at least provide the basis for a draft that we could all accept. (Lewis and Sandra will both recognize a good deal of plagiarism in the paragraphs that are new).

The reasons why we should make every effort to obtain a Court opinion in this case are too obvious to restate. I would only add that if I have been unfaithful either to Bill's analysis or to Lewis' concerns, the error is purely unintentional.

Respectfully,



Justice Powell
Justice Rehnquist
Justice O'Connor

Enclosure

drk 03/02/83

To: Mr. Justice Powell

From: Rives

Re: No. 81-1044, United States Postal Service v. Aikens

Justice Stevens' draft in Aikens is an improvement over Justice Rehnquist's draft. Yet, it is not without its problems. Under his draft, a plaintiff has three alternatives. ^① He may prove a "standardized prima facie" case. This case would be applicable in employment situations similar to those in McDonnell Douglas and would be established on proof of the four factors specified in McDonnell Douglas. ^② Second, he may prove a "nonstandardized prima facie case." This case is applicable when the employment situation or the factual situation departs from that in McDonnell Douglas. A plaintiff may establish a nonstandardized case by adducing evidence along the lines of yours and Justice O'Connor's concurring opinions in Aikens. See pp. 11-13 & n. 7. Justice Stevens states that a plaintiff must "presen[t] a sufficiently strong case--evidence that shows that it was more likely than not that the employer discriminated against him." p. 12. If a plaintiff establishes either a standardized or a nonstandardized prima facie case, he is entitled to a legally mandatory rebuttable presumption. ^③ Third, if a plaintiff fails to prove either a standardized or a nonstandardized case:

"then the court has room for the exercise of discretion. The court may choose to let the trial go forward with the presentation of the defendant's evidence, for Rule 41(b) clearly states that the court "may decline to render any judgment until the close of all the evidence." Or it may decide the case on the merits and render judgment against the plaintiff, if it determines as a matter of law that the evidence produced by the plaintiff, even if un rebutted, is insufficient to show discrimination by a preponderance of the evidence." p. 14.

Justice Stevens would retain the three-step analytical framework set forth in McDonnell Douglas as a "mental road map" for evaluating all of the evidence in a case. Its function is to "tel[l] the trier of fact first to look at the plaintiff's case and assess its strength, then to examine the defendant's justifications and decide whether they are genuine or pretextual." p. 15

My difficulty with Justice Stevens' draft is that it retains, without saying it, the inference/presumption distinction that was present in Justice Rehnquist's drafts. Justice Stevens' draft recognizes that there will be strong inferences of discrimination that will be sufficient to establish a nonstandardized prima facie case. It also recognizes that the plaintiff's evidence, as a matter of law, may not be sufficient to show discrimination by a preponderance of the evidence. This leaves a middle category where the trial court, in its discretion, may allow the case to go ahead. This middle category seems to be what Justice Rehnquist had termed an "inference of discrimination" and what Justice Stevens had termed in his letter to you a "weak inference of discrimination."

There are several problems with introducing this "middle category" into Title VII analysis. Since proof of the middle category does not shift the burden of production, it renders any

procedural effect of the McDonnell Douglas framework relatively meaningless. The allocation of burdens and order of proof in McDonnell Douglas no longer provide a procedural mechanism for focusing the substantive inquiry as to whether the challenged employment decision was in fact discriminatory. As restated in Justice Stevens' draft, the McDonnell Douglas framework provides only a "mental roadmap." Indeed, if a plaintiff has introduced only enough evidence to satisfy this middle category, it does not make any sense to speak of shifting the burden of production to the employer.

Curiously enough, the opinion appears almost to create a two stage analysis in which the burden of persuasion is shifted to the employer. Justice Stevens characterizes the trial court's task as assessing the strength of the plaintiff's case and assessing the credibility of the employer's case. His opinion then states, "[i]f the [employer's justifications] are pretextual, the plaintiff prevails, because in essence the plaintiff's evidence tending to show discrimination has not been effectively rebutted." p. 15. This formulation implies that the employer bears the burden of proving that its reasons were not pretextual. Thus, even when the plaintiff has not introduced enough evidence to establish a nonstandardized prima facie case, the employer may find itself saddled with a greater burden than if the plaintiff had adduced evidence giving rise to a stronger inference of discrimination.

The problem with the opinion does not lie just in matters of phrasing. Instead, it seems that the introduction of a middle category, in which the plaintiff does not make out a prima facie

case but still survives a 41(b) motion, renders the whole McDonnell Douglas scheme superfluous. As discussed in my earlier memo, to the extent that will be easier for DC's to rely on this lesser standard of proof, there is a substantial possibility that the McDonnell Douglas framework will not be used. Further, the opinion does not explain why this middle category is necessary or how it advances the analysis. While the opinion is done with a deft touch, I am not sure that it is consistent with the analysis that was established in McDonnell Douglas and Burdine.

drk 03/03/83

To: Mr. Justice Powell

From: Rives

Re: No. 81-1044, United States Postal Service v. Aikens

I have attached a marked up copy of Justice Stevens' draft in Aikens. There are two problems that I sought to remedy, both of which are related. The opinion, as written by Justice Stevens, holds that even if a plaintiff does not establish a "standardized prima facie case," he may seek to establish a "nonstandardized prima facie case." My primary difficulty with Justice Stevens' articulation of the nonstandardized prima facie case is that it sets too high a threshold for the nonstandardized prima facie case.

Justice Stevens would find that a plaintiff has established a prima facie case only when he "shows that it was more likely than not that the employer discriminated against him." p. 12. This means, I believe, that a plaintiff may establish a prima facie case under Justice Stevens' view only when he has proved discrimination by a preponderance of the evidence--i.e., shown that it was more likely than not that the employer discriminated against him. As I understand the analysis in Burdine, this sets too high a standard for proof of the prima facie case. Under Burdine, a prima facie case will be proved when a plaintiff has established an inference of discrimination. Evidence that establishes an inference

of discrimination allows a trier of fact to presume that the plaintiff has proved the presumed fact--discriminatory motive--by a preponderance of the evidence, unless the employer rebuts this presumption by meeting his burden of production. Thus, if the employer fails to articulate a legitimate business reason for his actions, the plaintiff is entitled to prevail. If the employer does meet his burden the presumption drops from the case. As you explain in footnote 10 of Burdine, this does not destroy the probative value of the evidence adduced at the prima facie stage. It simply means that we no longer will presume that it is more likely than not that the employer acted for discriminatory reasons. The plaintiff then has an opportunity to prove that the employer's reasons were pretextual.

Justice Stevens' higher standard is derived from Furnco. see p. 10 (quoting Furnco, 438 U.S., at 577). But I do not believe that Furnco mandates this level of proof as a prerequisite to establishing a prima facie case. The full quotation from which Justice Stevens' standard is drawn provides:

"A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."

As I read Furnco, proof of a prima facie case allows a trier to fact to presume that it was more likely than not--i.e., to presume that the plaintiff has proved by a preponderance of the evidence--that the employer's action was based on impermissible factors. Thus, Furnco states the effect of proving a prima facie case, not the evidence necessary to establish one. I do not believe that Furnco or Burdine requires that a plaintiff prove discrimination by

a preponderance of the evidence in order to establish a prima facie case.

Because Justice Stevens may have read too much into Furnco, he ends up setting a very high standard for a plaintiff to establish a nonstandardized prima facie case. This results in two problems. First, few plaintiffs will ever make out a prima facie case, standardized or nonstandardized. The standardized prima facie case will be applicable only when a plaintiff falls within the fact situation of McDonnell Douglas and the nonstandardized prima facie case will be applicable only when a plaintiff can establish discrimination by a preponderance of the evidence.

This leads to a second problem. Because both these standards are relatively unavailable, there is a need for a lower level of proof. This level of proof exists whenever a plaintiff can survive a motion for a directed verdict but cannot establish discrimination by a preponderance of the evidence. Although Justice Stevens leaves this middle category nameless throughout much of the opinion, he finally terms it a "permissible inference" on page 17. The result of Justice Stevens' opinion, as Justice Rehnquist's before him, is to establish a presumption/inference distinction that is unwarranted by the prior opinions. The creation of the permissible inference distinction results, I believe, from his misreading of Furnco and his setting the standard for a prima facie case too high.

All this is a long explanation of the changes I made. First, I tinkered with the statement of the "more likely than not" test to bring it into accord with what I believe is the letter and

spirit of Furnco. Second, once the level of proof for the nonstandardized prima facie case was lowered, there was no need to retain the category of "permissible inferences." Since the category of permissible inferences emerges clearly only at the last of the opinion in a couple of references, I excised those paragraphs.

I am not completely satisfied with the opinion as marked. I believe the "more likely than not" language in Furnco confuses the issue by stating the effect of the presumption, rather than what is necessary to establish it. I think your explanation is clearer, fairer to both plaintiffs and defendants, and more consistent with precedent. Perhaps I am too close to the opinion to take a balanced view, but I think Justice Stevens' opinion would limit substantially the application of the McDonnell Douglas framework.

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

Talked to W.H.R. He will try writing a shorter, lower draft, avoiding issues we have debated

March 3, 1983

Re: No. 81-1044 U.S. Postal Service v. Aikens

Dear John:

First let me say that I am most appreciative of your willingness to act as a "mediator" between Lewis and me in this case. I think Lewis and I had concluded after earlier exchanges that we were like "east is east, and west is west, and never the twain shall meet."

Respecting the revisions in my circulating draft which are contained in the substitute which you enclose with your letter of March 2nd, I can give you a general response. The changes appearing on pages 3, 6, 7, 9, 10, and most of 11 are satisfactory to me, and I think in many instances represent improvements on my most recent circulating draft. Subject to the approval of the Chief and Byron, I would accept them.

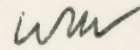
With respect to some of the changes on page 11, and the changes on pages 12, 13, 14, 15, and parts of 16 and 17, I don't doubt that they represent as good an attempt as can be made to "harmonize" the approach I have taken and the approach Lewis has taken. But I fear that the result of accepting them would be to produce internal inconsistencies in the opinion as a whole that would prove more confusing to lower courts than if my present circulation came down as a plurality opinion. Regrettable as that would be, it would get it off of all our minds for a while, and give us a chance to take another look at the question when it comes back, as it inevitably will if this case is decided in that manner.

At this late date, it occurs to me that it might have been possible to write the opinion more narrowly than is required to respond to the issues framed by the parties, and simply point out the undesirability of dealing with arguments about inferences and presumptions when the

- 2 -

District Court had conducted a full bench trial and made findings of fact and conclusions of law. I fear, however, that I may lack the necessary energy and dedication to go back to the drawing boards at this stage of the case.

Sincerely,



Justice Stevens

cc: Justice Powell
Justice O'Connor

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 9, 1983

Re: No. 81-1044 U.S. Postal Service v. Aikens

Dear Lewis:

I enclose a copy of the "new" Aikens opinion. You will find it at least slimmer, if not better, than before. I have tried to pretermitt any discussion about whether the McDonnell Douglas presumption should have been applied in this case, and simply dwelled on the fact that an appeals court reviewing a judgment of the trial court after a full trial should not get tangled up in questions about presumptions.

If you think you could join this, I am hopeful that the Chief, Byron, and John, and perhaps Sandra, might also join. If you don't think it is "joinable," I think it better to have the case come down in its present form, and I will not bother to circulate my revision to the Conference.

Sincerely,

Bill

Justice Powell

#

*See my
letter
to W.H.R.
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circulated*

The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

LJR

See memo
letter to
WHR
of 3/9.

From: **Justice Rehnquist**

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER *v.* LOUIS H. AIKENS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Louis Aikens filed suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e *et seq.*, claiming that petitioner, the United States Postal Service, discriminated against him on account of his race. Aikens, who is black, claimed that the Postal Service had discriminatorily refused to promote him to higher positions in the Washington, D. C. Post Office where he had been employed since 1937. After a bench trial, the District Court entered judgment in favor of the Postal Service, but the Court of Appeals reversed. 642 F. 2d 514 (CA DC 1980). We vacated the Court of Appeals' judgment and remanded for reconsideration in light of *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981). 453 U. S. 902 (1981).

On remand, the Court of Appeals reaffirmed its earlier holding that the District Court had erred in requiring Aikens to offer direct proof of discriminatory intent. It also held that the District Court erred in requiring Aikens to show, as part of his *prima facie* case, that he was "as qualified or more qualified" than the people who were promoted. 665 F. 2d 1057, 1058, 1059 (CA DC 1981) (*Per Curiam*). We granted certiorari.¹ — U. S. — (1982).

¹We have consistently distinguished disparate treatment cases from cases involving facially neutral employment standards that have disparate

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The Postal Service argues that an employee who has shown only that he was black, that he applied for a promotion for which he possessed the minimum qualifications, and that the employer selected a non-minority applicant has not established a "*prima facie*" case of employment discrimination under Title VII. Aikens argues that he submitted sufficient evidence that the Postal Service discriminated against him to warrant a finding of a *prima facie* case.² Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a *prima facie* case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination *vel non*.³

By establishing a *prima facie* case, the plaintiff in a Title

impact on minority applicants. See, e. g., *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248, 252 n. 5 (1981); *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802 n. 14 (1973).

²Aikens showed that white persons were consistently promoted and detailed over him and all other black persons between 1966 and 1974. Aikens has been rated as "an outstanding supervisor whose management abilities are far above average." App. 8. There was no derogatory or negative information in his Personnel Folder. He had more supervisory seniority and training and development courses than all but one of the white persons who were promoted above him. He has a Masters Degree and has completed three years of residence towards a Ph.D. Aikens had substantially more education than the white employees who were advanced ahead of him; of the 12, only two had any education beyond high school and none had a college degree. He introduced testimony that the person responsible for the promotion decisions at issue had made numerous derogatory comments about blacks in general and Aikens in particular. If the District Court were to find, on the basis of this evidence, that the Postal Service did discriminate against Aikens, we do not believe that this would be reversible error.

³As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves. Thus, we agree with the Court of Appeals that the District Court should not have required Aikens to submit direct evidence of discriminatory intent. See *International Brotherhood of Teamsters v. United States*, 431 U. S. 324, 358 n. 44

VII action creates a rebuttable "presumption that the employer unlawfully discriminated against" him. *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248, 254 (1981). See *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973). To rebut this presumption, "the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. *Burdine*, *supra*, at 255. In other words, the defendant must "produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Id.*, at 254.

But when the defendant fails to persuade the district court to dismiss the action for lack of a *prima facie* case,⁴ and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the *McDonnell-Burdine* presumption "drops from the case," *id.*, at 255, n. 10, and "the factual inquiry proceeds to a new level of specificity." *Id.*, at 255. After Aikens presented his evidence to the District Court in this case, the Postal Service's witnesses testified that he was not promoted because he had turned down several lateral transfers that would have broadened his Postal Service experience. See Tr. 311-313, 318-320, 325; Pet. App. 53a. The District Court was then in a position to decide the ultimate factual issue in the case.

The "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff." *Burdine*, *supra*, at 253. In other words, is "the employer

(1977) ("[T]he *McDonnell Douglas* formula does not require direct proof of discrimination.")

⁴It appears that at one point in the trial the District Court decided that Aikens had made out a *prima facie* case. When Aikens concluded his case in chief, the Postal Service moved to dismiss on the ground that there was no *prima facie* case. Tr. 256. The District Court denied this motion. Tr. 259. See Pet. App. 47a.

... treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" *Furnco Construction Corp. v. Waters*, 438 U. S. 567, 577 (1978), quoting *Int'l Brotherhood of Teamsters v. United States*, 431 U. S. 324, 355, n. 15 (1977). The *prima facie* case method established in *McDonnell Douglas* 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." *Furnco, supra*, at 577. Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff." *Burdine, supra*, at 253.

On the state of the record at the close of the evidence, the District Court in this case should have proceeded to this specific question directly, just as district courts decide disputed questions of fact in other civil litigation.⁵ As we stated in *Burdine*:

"The plaintiff retains the burden of persuasion. [H]e may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U. S., at 256.

In short, the district court must decide which party's explanation of the employer's motivation it believes.

All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult.

⁵Of course, the plaintiff must have an adequate "opportunity to demonstrate that the proffered reason was not the true reason for the employment decision," but rather a pretext. *Burdine, supra*, at 256. There is no suggestion in this case that Aikens did not have such an opportunity.

The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be "eyewitness" testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern "the allocation of burdens and order of presentation of proof," *id.*, at 252, in deciding this ultimate question. The law often obliges finders of fact to inquire into a person's state of mind. As Lord Justice Bowen said in treating this problem in an action for misrepresentation nearly a century ago:

"The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else." *Eddington v. Fitzmaurice*, 29 Ch. Div. 459, 483 (1885).

The District Court erroneously thought that respondent was required to submit direct evidence of discriminatory intent, see n. 3, *supra*, and erroneously focused on the question of *prima facie* case rather than directly on the question of discrimination. Thus we cannot be certain that its findings of fact in favor of the Postal Service were not influenced by its mistaken view of the law. We accordingly vacate the judgment of the Court of Appeals, and remand the case to the District Court so that it may decide on the basis of the evidence before it whether the Postal Service discriminated against Aikens.

It is so ordered.

March 9, 1983

81-1044 U.S. Postal Service v. Aikens

Dear Bill:

I called your Chambers this afternoon, just after you had departed, to say that I will be happy to join your "new" Aikens opinion.

It may not make the casebooks, and yet I think it adequately disposes of this case. I note that you have included bits and pieces from several of our opinions, and this may help bring about a consensus.

I appreciate your undertaking a Solomonian revision, and I think you have done it very well.

Sincerely,

Justice Rehnquist

lfp/ss

Alternate Draft

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: MAR 13 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER *v.* LOUIS H. AIKENS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Louis Aikens filed suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e *et seq.*, claiming that petitioner, the United States Postal Service, discriminated against him on account of his race. Aikens, who is black, claimed that the Postal Service had discriminatorily refused to promote him to higher positions in the Washington, D. C. Post Office where he had been employed since 1937. After a bench trial, the District Court entered judgment in favor of the Postal Service, but the Court of Appeals reversed. 642 F. 2d 514 (CA DC 1980). We vacated the Court of Appeals' judgment and remanded for reconsideration in light of *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981). 453 U. S. 902 (1981).

On remand, the Court of Appeals reaffirmed its earlier holding that the District Court had erred in requiring Aikens to offer direct proof of discriminatory intent. It also held that the District Court erred in requiring Aikens to show, as part of his *prima facie* case, that he was "as qualified or more qualified" than the people who were promoted. 665 F. 2d 1057, 1058, 1059 (CA DC 1981) (*Per Curiam*). We granted certiorari.¹ — U. S. — (1982).

¹We have consistently distinguished disparate treatment cases from cases involving facially neutral employment standards that have disparate

*9 re
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9:11
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letter of
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The Postal Service argues that an employee who has shown only that he was black, that he applied for a promotion for which he possessed the minimum qualifications, and that the employer selected a non-minority applicant has not established a "*prima facie*" case of employment discrimination under Title VII. Aikens argues that he submitted sufficient evidence that the Postal Service discriminated against him to warrant a finding of a *prima facie* case.² Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a *prima facie* case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination *vel non*.³

By establishing a *prima facie* case, the plaintiff in a Title

impact on minority applicants. See, e. g., *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248, 252 n. 5 (1981); *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802 n. 14 (1973).

²Aikens showed that white persons were consistently promoted and detailed over him and all other black persons between 1966 and 1974. Aikens has been rated as "an outstanding supervisor whose management abilities are far above average." App. 8. There was no derogatory or negative information in his Personnel Folder. He had more supervisory seniority and training and development courses than all but one of the white persons who were promoted above him. He has a Masters Degree and has completed three years of residence towards a Ph.D. Aikens had substantially more education than the white employees who were advanced ahead of him; of the 12, only two had any education beyond high school and none had a college degree. He introduced testimony that the person responsible for the promotion decisions at issue had made numerous derogatory comments about blacks in general and Aikens in particular. If the District Court were to find, on the basis of this evidence, that the Postal Service did discriminate against Aikens, we do not believe that this would be reversible error.

³As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves. Thus, we agree with the Court of Appeals that the District Court should not have required Aikens to submit direct evidence of discriminatory intent. See *International Brotherhood of Teamsters v. United States*, 431 U. S. 324, 358 n. 44

VII action creates a rebuttable “presumption that the employer unlawfully discriminated against” him. *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248, 254 (1981). See *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973). To rebut this presumption, “the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff’s rejection. *Burdine*, *supra*, at 255. In other words, the defendant must “produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.” *Id.*, at 254.

But when the defendant fails to persuade the district court to dismiss the action for lack of a *prima facie* case,⁴ and responds to the plaintiff’s proof by offering evidence of the reason for the plaintiff’s rejection, the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the *McDonnell-Burdine* presumption “drops from the case,” *id.*, at 255, n. 10, and “the factual inquiry proceeds to a new level of specificity.” *Id.*, at 255. After Aikens presented his evidence to the District Court in this case, the Postal Service’s witnesses testified that he was not promoted because he had turned down several lateral transfers that would have broadened his Postal Service experience. See Tr. 311–313, 318–320, 325; Pet. App. 53a. The District Court was then in a position to decide the ultimate factual issue in the case.

The “factual inquiry” in a Title VII case is “whether the defendant intentionally discriminated against the plaintiff.” *Burdine*, *supra*, at 253. In other words, is “the employer

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It is so ordered.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

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14

March 14, 1983

Re: U.S. Postal Service v. Aikens

Dear Chief, Byron, and John:

When we discussed what cases were "ready" at a recent Friday Conference, I mentioned that I was going to try to rewrite the circulating draft in this case to get a Court. As matters stood then, the Court seemed to be irrevocably divided three ways: the three of you had joined my circulating draft, Lewis had written separately and was joined by Sandra, and Thurgood had written separately and was joined by Bill and Harry. Since the question is one of statutory construction, it seems unfortunate to let it come down that way, and hence the enclosed and substantially revised draft.

The revised draft pretermits any attempt to answer the question of whether the McDonnell Douglas-Burdine "prima facie case" was applicable to the situation here, where respondent was passed over for promotion to a single vacancy. It instead attempts only the more modest task of discussing the usefulness of such "prima facie case" analysis after the case has been fully tried and is on appeal. I think what we say is still worth saying, and I think it better to say this (if it is possible to get a Court for it) than to splinter on the more far-reaching issue.

I have shown the revised draft to Lewis, and he says he can join it. I did this because if there were no possibility of picking up additional votes, I did not want to go through the trouble of recirculating. If I can get a "Court" from among the three of you, Lewis, and Sandra, I would prefer to go with the "revised" draft. If I cannot get a Court for either version, I think it probably best to stick with the previous circulation which the three of you have joined.

Sincerely,

WHR

The Chief Justice
Justice White
Justice Stevens

cc: Justice Powell
Justice O'Connor

No change
I recommend
a join
RK

March 14, 1983

88-1044 United States Postal Service v. Aikens

Dear Bill:

Please join me in your circulation of March 13.

Sincerely,

Justice Rehnquist

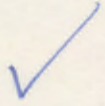
lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 14, 1983

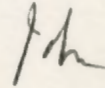


Re: 81-1044 - U.S. Postal Service
v. Aikens

Dear Bill:

Please join me in the revised draft. I think it would be most helpful to get a Court opinion if at all possible.

Respectfully,



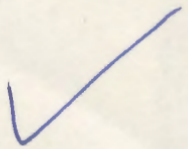
Justice Rehnquist

cc: The Chief Justice
Justice White
Justice Powell
Justice O'Connor

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 14, 1983



Re: 81-1044 - U.S. Postal Service Board of Governors v. Aikens

Dear Bill:

I join your revised opinion.

Regards,

A handwritten signature in black ink, appearing to be "Lewis B.", is written below the word "Regards,".

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

✓

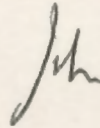
March 16, 1983

Re: 81-1044 - U.S. Postal Service Board
of Governors v. Aikens

Dear Bill:

Please join me in your latest circulation.

Respectfully,



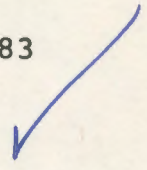
Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 16, 1983

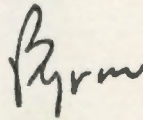


Re: 81-1044 - United States Postal
Service Board of Governors v. Aikens

Dear Bill,

I am content to join the 1st draft of
your second edition.

Sincerely yours,



Justice Rehnquist

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 28, 1983

Re: No. 81-1044, United States
Postal Service Board of Governors
v. Louis H. Aikens

Dear Bill,

I agree.

Sincerely,

Bio

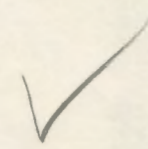
Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 28, 1983



Re: No. 81-1044-United States Postal Service Board
of Governors v. Louis H. Aikens

Dear Bill:

Please record me at the end of your opinion as
"joining in the judgment".

Sincerely,



T.M.

Justice Rehnquist

cc: The Conference

Stylistic Changes

p. 5

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

MAR 29 1983

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER *v.* LOUIS H. AIKENS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

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¹We have consistently distinguished disparate treatment cases from cases involving facially neutral employment standards that have disparate

Nothing new
RR

The Postal Service argues that an employee who has shown only that he was black, that he applied for a promotion for which he possessed the minimum qualifications, and that the employer selected a non-minority applicant has not established a "*prima facie*" case of employment discrimination under Title VII. Aikens argues that he submitted sufficient evidence that the Postal Service discriminated against him to warrant a finding of a *prima facie* case.² Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a *prima facie* case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination *vel non*.³

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VII action creates a rebuttable "presumption that the employer unlawfully discriminated against" him. *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248, 254 (1981). See *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973). To rebut this presumption, "the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. *Burdine*, *supra*, at 255. In other words, the defendant must "produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Id.*, at 254.

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The District Court erroneously thought that respondent was required to submit direct evidence of discriminatory intent, see n. 3, *supra*, and erroneously focused on the question of *prima facie* case rather than directly on the question of discrimination. Thus we cannot be certain that its findings of fact in favor of the Postal Service were not influenced by its mistaken view of the law. We accordingly vacate the judgment of the Court of Appeals, and remand the case to the District Court so that it may decide on the basis of the evidence before it whether the Postal Service discriminated against Aikens.

It is so ordered.

JUSTICE MARSHALL concurs in the judgment.

Supreme Court of the United States
Washington, D. C. 20543

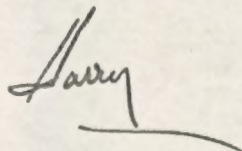
CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 29, 1983

Re: No. 81-1044 - U. S. Postal Service v. Aikens

Dear Bill:

Please join me in your circulation of today.

A handwritten signature in dark ink, appearing to read "Harry", with a long horizontal line extending to the right.

Justice Rehnquist

cc: The Conference

[illegible]