LIMITING THE RIGHT TO A BIAS-FREE WORKPLACE: A SURVEY OF THE EMPLOYMENT DISCRIMINATION DECISIONS OF THE 1988-89 TERM

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In its 1988-89 Term, the Supreme Court decided an extraordinary number of cases involving employment discrimination. That Term marked a shift in the Court's attention from affirmative action questions[1] to other issues related to employment discrimination suits, such as procedural guidelines, attorney's fees and the availability of actions under the Civil Rights Attorney's Fees Awards Act of 1976.[2] These recent decisions have set up a series of hurdles for people seeking to challenge discrimination by their employers. For example, it is now more difficult for a plaintiff to bring a valid cause of action,[3] to win a case on the merits,[4] or to settle a case out of court.[5]

In *Lorance v. AT&T Technologies, Inc.*,[6] the Court placed certain potential employment discrimination claimants at a severe disadvantage by ruling that, where a seniority system is involved, the statute of limitations may begin running before the plaintiff is aware of any injury.[7] Under the federal anti-discrimination statutes a plaintiff must either bring suit in court within the time required by the applicable state statute of limitations[8] or file a charge

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1. 42 U.S.C. § 1981 (1988) [hereinafter section 1981].

2. In contrast to prior Terms, the Court decided only one affirmative action case in the 1988 Term, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989).

3. *See* Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989) (municipality may not be held liable for its employees' violation of section 1981 under the theory of respondeat superior); Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (section 1981 does not protect against discrimination arising after formation of employment contract); Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989) (statute of limitations for challenging discriminatory seniority systems begins to run when system initially adopted, rather than when individual plaintiff first affected). In addition, decisions limiting attorney's fees have affected a plaintiff's ability to bring suit by making it more difficult to obtain a lawyer. *See generally* Sternlight, *The Supreme Court's Denial of Reasonable Attorney's Fees to Prevailing Civil Rights Plaintiffs*, 17 N.Y.U. REV. L. & SOC. CHANGE 535 (1989-90).

4. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989); Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989).

5. Martin v. Wilks, 109 S. Ct. 2180 (1989) (white fire fighters, who failed to intervene in earlier employment discrimination proceedings in which consent decrees were entered, could challenge employment decisions taken pursuant to those decrees).

6. 109 S. Ct. 2261 (1989).

7. *Id.* at 2268.

8. Since section 1981, unlike Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988), does not contain its own statute of limitations, a court must "borrow" the most analogous state statute of limitations, *i.e.*, the time limitations governing actions for recov-

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with an appropriate agency within the required time.[9] It is generally presumed that such time requirements serve notions of fairness, since a plaintiff should not "sleep" on her rights, and a defendant should be given adequate notice of a pending lawsuit. These are laudable goals, but *Lorance* raised a valid question: how can a plaintiff sleep on rights not known to be violated?

The Court in *Lorance* acknowledged the logic of this question but nonetheless held that the statute of limitations for challenging discriminatory seniority systems begins to run when the system is adopted, rather than when it first affects the plaintiff.[10] In *Lorance*, a class of women plaintiffs, who were laid off by the defendant, brought suit claiming that their discharges were wrongful because they resulted from a discriminatory seniority policy adopted by the employer five years earlier.[11] Although the plaintiffs brought suit almost immediately after they were laid off, the Court held that they should have filed their Equal Employment Opportunity Commission [hereinafter EEOC] charges within 300 days of the defendant's adoption of the seniority provision.[12] Justice Scalia, writing for the majority, acknowledged the logic behind the argument that a seniority system is a continuing violation[13] since it adversely affects an employee every day until it is changed through a new contract.[14] Nevertheless, the Court refused to grant the plaintiffs relief, in part because of the special protection for seniority systems contained in section 703(h) of Title VII.[15] As that section was interpreted by the Supreme

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ery of wages or actions for tort or contract. *See* Goodman v. Lukens Steel Co., 482 U.S. 656 (1987).

9. Under Title VII, before filing in federal court a plaintiff must follow certain administrative procedures, including filing a charge with the Equal Employment Opportunity Commission [hereinafter EEOC] within 180 days after the alleged unlawful practice occurred, or within 300 days if the plaintiff has instituted proceedings with a state or local fair employment agency. 42 U.S.C. § 2000e-5(e) (1988).

10. 109 S. Ct. at 2267. By contrast, white males may mount a challenge to a consent decree many years after it is entered into, even where they were aware of and participated in the earlier litigation. *See* Martin v. Wilks, 109 S. Ct. 2180 (1989).

11. The plaintiffs alleged that their employer and their union had altered certain seniority rules to favor men in a particular job classification.

12. 109 S. Ct. at 2264 n.2. Seniority provisions commonly have their most significant effect during a layoff. In time of economic plenty, reductions in force are rare. The usual plaintiff would, understandably, ignore such provisions until their effect is felt.

13. Under the "continuing violation" doctrine, where a plaintiff is able to show that the violation complained of is "continuing", *i.e.*, not a discrete act such as a discharge or a one-time promotion, each manifestation of the violation is a new act of discrimination. *See, e.g.*, Bazemore v. Friday, 478 U.S. 385, 395-96 (1986) (each payment made pursuant to a discriminatory salary scale is a separate act of discrimination).

14. 109 S. Ct. at 2265. In the majority's view, two earlier decisions foreclosed any argument that the situation faced by the *Lorance* plaintiffs was a continuing violation. *Id.* at 2266 (citing Delaware State College v. Ricks, 449 U.S. 250 (1980) (holding that notification of denial of tenure triggers statute of limitations rather than actual termination of employment one year later) and United Air Lines v. Evans, 431 U.S. 553 (1977) (holding that original discriminatory discharge, not failure to credit for prior service after rehire, is the triggering act)).

15. Section 703(h), 42 U.S.C. 2000e-2(h) (1988), provides, in part, as follows:

> Notwithstanding any other provisions of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or

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Court in 1977, a facially neutral seniority system with a disparate effect on protected groups may nevertheless be legal unless the system is shown to have been developed or maintained with an intent to discriminate.[16]

The decision in *Lorance* leads to some anomalous results and raises more questions than it answers. First, as Justice Marshall noted in his dissenting opinion, the majority requires "employees [to] now anticipate, and initiate suit to prevent, future adverse applications of a seniority system, no matter how speculative or unlikely these applications may be."[17] Second, the decision may place the EEOC in the curious position of having to accept charges after every union bargaining session where seniority or similar rights are negotiated. However, a subsequent action on the alleged illegal bargaining agreement may be dismissed for lack of a case or controversy. Third, it is unclear whether and how the decision will affect pending cases involving seniority systems established before Title VII, when a plaintiff could not have challenged the system. Moreover, it is not clear whether the decision will be limited to seniority systems or possibly affect all similar practices such as pension plans. Finally, the decision casts doubt on the vitality of the "continuing violation" doctrine that has been well-recognized in Title VII cases for decades.[18]

In addition to tightening the statute of limitations requirement, the Court also made it more difficult to bring a discrimination claim by narrowing the legal basis for such a suit. In *Patterson v. McLean Credit Union*,[19] the Court whittled down the scope of an 1866 civil rights law passed by Congress during the Reconstruction[20] in order to protect the newly freed slaves. This law, section 1981, had become an increasingly powerful tool in combatting discrimination in employment and other areas as well.[21] Brenda Patterson, a black woman, sued her employer after her discharge, alleging that her employer had

different terms, conditions, or privileges of employment pursuant to a bona fide seniority ... system, ... provided that such differences are not the result of an intention to discriminate because of race ... or national origin.

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

17. 109 S. Ct. at 2273.

18. *Cf.* Brooks, McGinn & Cary, *Second Generation Problems Facing Employers in Employment Discrimination Cases: Continuing Violations, Pendent State Claims, and Double Attorneys' Fees*, 49 LAW & CONTEMP. PROBS. 25 (Autumn 1986); Crivens, *The Continuing Violation Theory and Systemic Discrimination: In Search of a Judicial Standard for Timely Filing*, 41 VAND. L. REV. 1171 (1988).

19. 109 S. Ct. 2363 (1989).

20. The clause at issue in *Patterson* reads, in part, as follows: "All persons within the jurisdiction of the United States shall have the same right in every State ... to make and enforce contracts ... as is enjoyed by white citizens." *Id.* at 2372 (quoting 42 U.S.C. § 1981 (1988)).

21. Legislative history makes clear that the statute was intended to provide a federal remedy for all private discrimination. *See, e.g.*, McDonald v. Santa Fe Transp. Co., 427 U.S. 273, 296 (1976) ("Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the ... immediate plight of the newly freed Negro slaves."); CONG. GLOBE, 39th Cong., 1st Sess. 43 (1866)(remarks of Senator Trumball, describing the protection afforded by the bill as "sweeping and efficient"). Indeed, prior to *Patterson*, the Court itself had adopted such an interpretation of section 1981. *See* Goodman v. Lukens Steel Co., 482 U.S. 656 (1987); Runyon v. McCrary, 427 U.S. 160 (1976); Johnson v. Railway Express Co., 421 U.S. 454 (1975).

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subjected her to particularly egregious forms of racial harassment.[22] She also alleged that her employer failed to promote her and, finally, discharged her[23] because of her race. Prior to *Patterson*, the courts of appeals had construed the protection of section 1981 as coterminous with that of Title VII of the Civil Rights Act of 1964, *i.e.*, prohibiting all racial discrimination in hiring, firing, promotion, terms and conditions of employment.[24] The Court in *Patterson* held that section 1981 prohibited racial discrimination in hiring and *possibly* promotion, because such actions involved the formation of a contract. However, the Court gave a "needlessly cramped interpretation"[25] of the language of the 1866 statute, holding that it does not cover "post-formation" problems in terms and conditions of employment, including racial harassment on the job.[26] Thus, while an employer may not refuse to hire an applicant based on discriminatory motives, she is free to subject that employee to discriminatory treatment after hire.

The Court reasoned that the right to "make" a contract relates only to issues of hiring and perhaps promotion — the latter being covered only if it

22. Patterson testified that she was told by the person who hired her that she would be working with women who were not accustomed to working with blacks and who might create problems for her. It was not her co-workers, however, but her supervisor who harassed her by persistently giving her extra work, assigning her menial tasks which whites were not required to do, making racially derogatory remarks and subjecting her to public humiliation. 109 S. Ct. at 2392.

23. Because the plaintiff had not appealed a jury determination that her discharge was not discriminatory, the Court had no occasion to decide whether the discharge would be covered by section 1981. Several months later, the Court declined an invitation to rule on the question of whether discharge was covered. Lytle v. Household Mfg., Inc., 110 S. Ct. 1331 (1990). There, plaintiff claimed his discharge was in violation of both Title VII and section 1981, and he had requested a jury trial. After erroneously dismissing the section 1981 claims, the district court decided against the plaintiff under Title VII. Lytle v. Household Mfg., Inc., No. CA-84-453-A-C (W.D.N.C. 1986). The Fourth Circuit, in an unpublished opinion, affirmed, reasoning that the Title VII findings collectively estopped plaintiff from "relitigating" his claims before a jury. Lytle v. Household Mfg., Inc., 831 F.2d 1057 (Table) (4th Cir. 1987) (text in WestLaw) (Widener, J., dissenting). The Supreme Court decided only the procedural question of the collateral estoppel effect of the Title VII findings on a subsequent new trial before a jury, leaving the application of *Patterson* to discharge for the district court on remand.

24. *See, e.g.*, Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987) (prohibiting discrimination in training and providing pay raises); Lopez v. S.B. Thomas, Inc., 831 F.2d 1184 (2d Cir. 1987) (prohibiting discriminatory discharge); Conner v. Fort Gordon Bus Co., 761 F.2d 1495 (11th Cir. 1985) (prohibiting discriminatory discharge); Fong v. American Airlines, Inc., 626 F.2d 759 (9th Cir. 1980) (prohibiting discriminatory discharge).

25. 109 S. Ct. at 2379 (Brennan, J., dissenting).

26. *Id.* at 2373. Before deciding the case, the Court sent shock waves throughout the civil rights community, as well as a broad community of lawyers and concerned groups, when it set the case for reargument and requested the parties to brief and argue an issue that neither party had raised. The Court, sua sponte, announced that it would decide whether Runyon v. McCrary, 427 U.S. 160 (1976), should be overturned. In *Runyon*, the Court grappled with the issue of whether section 1981 applied to private conduct, as well as to state action, finally holding that it did. *Id.* at 172-73. The Court in *Patterson* concluded, paradoxically, that "no special justification has been shown for overruling *Runyon*." 109 S. Ct. at 2370. The Court declined to follow Justice Brennan's dissent and include in its rationale for not overruling *Runyon* either that it was "correct as an initial matter" or that Congress had not overturned the decision, in effect ratifying it. *Id.* at 2371 n.1.

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amounts to an opportunity to enter into a new contract with the employer.[27] These fine distinctions again raise more questions than they answer and led to the dismissal of a number of complaints shortly after the decision.[28] The artificiality of the majority's constructs is bound to lead to inconsistent treatment of cases involving individuals who are treated in a discriminatory manner, since there is no principled distinction between the culpability of an employer who in a given time frame refuses to hire a black applicant based on a policy of having few or no black employees and one who discharges black employees based on that same policy.[29]

It is ironic that the Court has chosen to severely limit section 1981[30] just as it has become more important to plaintiffs because of its advantages over Title VII. For example, in contrast to Title VII, section 1981 affords plaintiffs the right to a jury trial,[31] a longer statute of limitations,[32] the opportunity to sue smaller employers,[33] and the possibility of obtaining compensatory and punitive damages, as well as equitable relief, such as back pay and reinstatement.[34] By contrast, a plaintiff suing under Title VII has no express right to a jury trial and must comply with administrative prerequisites to suit, including a 180- or 300-day filing time period.[35] Employers must employ at least fifteen people to be covered by Title VII, and a successful complainant is limited to the monetary remedy of back pay for up to two years before the filing of the charge.[36] Since compensatory and punitive damages are not available under

27. 109 S. Ct. at 2377.

28. *See* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, THE IMPACT OF *Patterson v. McLean Credit Union* (1989). This study showed that close to 100 complaints were dismissed in the first five months after *Patterson*. *Analysis by NAACP Defense Fund on Impact of Supreme Court's Decision in* Patterson v. McLean Credit Union, Daily Labor Rep. (BNA) No. 223, D-1, Nov. 21, 1989.

29. *See, e.g.*, Padilla v. United Air Lines, 716 F. Supp. 485 (D. Colo. 1989) (reasoning that plaintiff's claim was actionable because, in addition to being discharged, he was prevented from obtaining future employment with the airline).

30. The Supreme Court carried its construction of section 1981 one step further in Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989), holding that a municipality may not be held liable for its employees' violations of section 1981 under the theory of respondeat superior. Rather, a plaintiff must show that the alleged violation was caused by a custom or policy of the municipal employer. *Id.* at 2722.

31. At one time, civil rights plaintiffs viewed the right to a jury trial in a civil case as a dubious advantage. In Curtis v. Loether, 415 U.S. 189 (1974), Jack Greenberg, former Director-Counsel of the NAACP Legal Defense and Educational Fund, argued against the right to a jury trial in a housing case, because of the likelihood that all-white juries would be hostile to black plaintiffs. As juries have become more integrated in terms of gender and race, plaintiffs' lawyers often prefer juries, since they presumably can look at the problems faced by working women and blacks with more understanding than federal judges. *See* Schnapper, *Judges Against Juries — Appellate Review of Federal Civil Jury Verdicts*, 1989 WISC. L. REV. 237, 281-86.

32. *See supra* note 8.

33. While Title VII is applicable only to employers of fifteen or more persons, 42 U.S.C. § 2000e(b)(1988), section 1981 contains no express limitation regarding the size of employer.

34. 42 U.S.C. § 2000e-5(e)(1988).

35. *See supra* note 8 and accompanying text.

36. 42 U.S.C. § 2000e-5(g)(1988); *cf.* Johnson v. Railway Express Inc., 421 U.S. 454, 460

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Title VII, the immediate result of the decision in *Patterson* is that no meaningful remedy now exists for post-employment racial harassment. Because monetary relief under Title VII is limited to back pay, a plaintiff complaining of racial or sexual harassment under that statute who has not suffered an actual loss in wages may obtain only injunctive relief. The lack of such a remedy may well loosen restraints on racial hostility in the workplace.

In addition to hindering a plaintiff's ability to bring an employment discrimination suit, the Court has made it more difficult for a claimant to win such a suit on the merits. In two recent decisions, the Court reallocated burdens of proof in a way that favors employers. *Wards Cove Packing Co. v. Atonio*[37] presented the Court with the same issue it had decided eighteen years earlier in *Griggs v. Duke Power Co.*:[38] whether a defendant-employer has the burden of demonstrating that an employment practice having a disparate exclusionary effect is essential to its business, *i.e.*, whether the employer must prove that the challenged practice accurately measures a person's ability to perform the job in question.[39] The Court in *Griggs* had answered that question in the affirmative.[40]

In *Wards Cove*, a case involving an Alaskan salmon cannery with a racially stratified work force, the Court held that, in order to establish a prima facie case under a disparate impact theory, a plaintiff must do considerably more than show statistically the disparate effect of the employer's actions.[41] The plaintiff must also attribute the disparity to a particular employment practice.[42] Read literally, this requirement would present a nearly impossible task, because it is often a combination of many of the employer's practices that produces disparity, even where each practice in isolation does not.[43] The Court also held that even where the plaintiff is able to make the necessary causal connection, the burden of proof remains on the plaintiff — the party with least access to the evidence — to prove that the discriminatory practice does *not* serve the employer's legitimate goals.[44] As Justice Stevens points out,

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(1975) (holding that a back pay award under section 1981 is not restricted to the two-year period).

37. 109 S. Ct. 2115 (1989).

38. 401 U.S. 424 (1971).

39. The practice under challenge in *Griggs* was Duke Power's requirement that applicants for promotion possess a high school education, a practice that disqualified blacks at a much greater rate than it did whites. *Id.* at 430.

40. *Id.* at 430-31.

41. 109 S. Ct. at 2124.

42. *Id.* at 2125.

43. The cannery engaged in a number of practices that maintained a "plantation" atmosphere, such as housing a racially stratified work force in racially segregated living quarters. *Id.* at 2127 n.4. The company also did not post job openings and relied on nepotism and word-of-mouth for hiring. *Id.* at 2133.

44. Justice White assumes that "liberal civil discovery rules" will permit easy access to the records needed to demonstrate the causal connection. *Id.* at 2125. However, as Justice White recognizes, the Uniform Guidelines on Employee Selection Procedures allow exemption for seasonal employment. *Id.* n.10 (citing 29 CFR § 1602.14(b) (1988)). Moreover, a plaintiff cannot be assured of favorable discovery rulings or that an employer will have maintained all rele-

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such an allocation of the burden "[t]urn[s] a blind eye to the meaning and purpose of Title VII." Justice Stevens continues, "the majority's opinion perfunctorily rejects a longstanding rule of law and underestimates the probative value of evidence of a racially stratified work force."[45]

Under *Griggs*, a unanimous decision written by then Chief Justice Berger, a prima facie showing of impact by the plaintiff shifted the burden to the employer to show the policy was "essential to effective job performance."[46] The Court in *Wards Cove* rejected the *Griggs* touchstone of "business necessity" in favor of a "reasoned review of the employer's justification for his use of the challenged practice."[47] While a "mere insubstantial justification . . . will not suffice, . . . there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business."[48] The majority felt that the weighty burden of "business necessity" is inappropriate, because it would be impossible to meet and would result in "a host of evils," such as quotas,[49] a step most likely to help minorities and women and least desired by white males. The majority neglected, however, to provide any support for this proposition.

The effect of the Supreme Court's retreat from its position in *Griggs* should not be underestimated. The *Griggs* decision caused a number of employers, particularly public employers, to either discontinue use of or reform tests previously relied on for hiring and promotion which very often had a disparate impact on minorities and women.[50] For example, in a case involving the New York City Fire Department, women plaintiffs successfully challenged the Fire Department's practice of using a discriminatory test as a basis for its hiring decisions.[51] As a result, the Department was required to adopt a new, non-discriminatory test.[52] Similar results had been achieved in courts across the country. In fact, employers who wished to avoid potential litigation often sought expert assistance to construct fairer hiring and promotion tests. After *Wards Cove*, it is doubtful employers will feel similarly motivated to develop

vant records. *See, e.g.*, EEOC v. Dresser Indus., Inc., 668 F.2d 1199, 1204 (11th Cir. 1982) (rejecting EEOC claim that employer should have retained more than just the individual employee's records, given the possibility of a Commission bringing class action suit).

45. 109 S. Ct. at 2127 (Stevens, J., dissenting) (footnote omitted).

46. 401 U.S. at 431.

47. 109 S. Ct. at 2126.

48. *Id.*

49. *Id.* at 2123. Contrary to the implication of the majority opinion, employers have been successful in meeting the business necessity defense. *See, e.g.*, Black Law Enforcement Officers Ass'n v. City of Akron, 824 F.2d 475, 480-81 (6th Cir. 1987) (defendants showed test to be job-related through validity study and testimony of experts); Davis v. City of Dallas, 777 F.2d 205, 211 n.6 (5th Cir. 1985) (upholding educational requirements for police officers and discussing other similar cases); Zahorik v. Cornell Univ., 729 F.2d 85, 96 (2d Cir. 1984) (upholding tenure selection criteria).

50. Conversation with Dr. Richard Barrett, noted psychometrician, December 1940.

51. Berkman v. City of New York, 536 F. Supp. 177 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 584 (2d Cir. 1983).

52. The new test was upheld as valid. Berkman v. City of New York, 626 F. Supp. 591 (E.D.N.Y. 1985), *aff'd in relevant part*, 812 F.2d 52 (2d Cir. 1987).

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fair employment selection practices, given that fewer plaintiffs are likely to prevail in discrimination suits.

The Court recently addressed two other issues regarding burdens of proof in *Price Waterhouse v. Hopkins*,[53] a "mixed-motive" case. In mixed-motive cases, the plaintiff must first prove that an illegal factor, such as race or sex, motivated an employment decision. The burden then shifts to the employer to show that it would have made the same decision in the absence of the illegal motive.[54] The first issue presented in *Price Waterhouse* was whether proof that the employer would have made the same decision regardless of the illegal motive should allow the employer to evade liability altogether, or should serve only to limit the relief awarded to the plaintiff.[55] The second issue was whether the employer should bear the heavier burden of "clear and convincing evidence" or the lighter burden of "preponderance of the evidence."[56] The Court resolved both of these issues in favor of the employer.[57]

The plaintiff in *Price Waterhouse*, Ann Hopkins, demonstrated that the defendant-partners engaged in blatant sexual stereotyping during their discussions regarding her promotion to partner.[58] Although the partners conceded that Ms. Hopkins had an excellent record and had played a key role in at least one twenty-five million dollar project, they did not promote her. The district court found that the partnership's decision was affected by its discriminatory views about the role of women. However, while ruling for the plaintiff, the district court characterized Ms. Hopkins as abrasive[59] and stated that such a personality trait could be a legitimate reason for not promoting an employee to the partnership rank.[60]

In the one case considered favorable to plaintiffs, the Court made it substantially easier for employers to escape liability even where a plaintiff has established intentional discrimination. It did so by holding that a discriminatory action by the employer may be acceptable if the employer can demonstrate that it would have made the same decision in the absence of any impermissible motives.[61] The plaintiff in *Price Waterhouse* argued, and many lower courts had previously held,[62] that such evidence is irrelevant to the mer-

53. 109 S. Ct. 1775 (1989).

54. *See* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

55. 109 S. Ct. at 1784.

56. *Id.* at 1783-84.

57. *Id.* at 1792-93.

58. Several partners had criticized her use of profanity and described her as "macho." Another advised Hopkins to take a course at charm school. Finally, one partner told Hopkins that she could improve her chances of making partner by wearing make-up and dressing more femininely. 109 S. Ct. at 1782.

59. Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1120 (D.D.C. 1985). Arguably, this characterization of her personality is a form of sexual stereotyping as well. What is considered aggressive, go-getter behavior on the part of a man might be viewed as abrasive in a woman.

60. *Id.* at 1114.

61. 109 S. Ct. at 1786.

62. *E.g.*, Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985) (en banc); Fadhl v. City of San Francisco, 741 F.2d 1163 (9th Cir. 1984); *see also*, Edwards v. Jewish Hosp. of St. Louis, 855

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its of the plaintiff's case, and should be considered only after there has been a finding of a violation. A court could then use the evidence to determine an appropriate remedy. For example, if a plaintiff succeeds in establishing that her dismissal is a result of discrimination, and the employer then proves that it would have reached the same decision in the absence of such discrimination, a court might conclude that the employer should not be required to reinstate the plaintiff. The Court offers two different articulations of how the plaintiff may satisfy her burden. For the plurality the question turns on whether "at the moment of the decision . . . one of [the employer's] reasons" for the action taken was the gender of the applicant.[63] However, according to Justice O'Connor's concurrence, "in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision."[64] Under either articulation the Court has, in effect, created a 'discrimination exception.' In so doing, the Court has ignored the obvious and reasonable proposition that Title VII requires employment decisions to be made free from *any* discriminatory motive, and that once it has been shown that such a motive has infected an employer's decision, liability should follow.

These decisions individually and collectively demonstrate a willingness on the part of an increasingly conservative Court to interpret the civil rights statutes ever more narrowly. *Price Waterhouse* sends employers the message that discrimination on their part may be permitted, providing they can create an adequate pretext for their actions. *Patterson* seems to suggest that employers, though forbidden from basing hiring decisions on race, may discriminate with impunity against blacks who have already been hired. Finally, the decisions in *Martin v. Wilks*[65] and *Lorance*, ironically announced on the same day, demonstrate that for this Court the expectations of white males merit more consideration than those of women workers who have been victims of discrimination.

The Court's Reagan-Rehnquist majority again exhibited its hostility to affirmative action in *City of Richmond v. J.A. Croson Co.*,[66] in which it struck down Richmond's plan requiring prime contractors who are awarded city construction contracts to subcontract at least thirty percent of the dollar amount of each contract to "Minority Business Enterprises."[67] The Court criticized Richmond's set-aside program because it "seems to rest on the un-

F.2d 1345 (8th Cir. 1988), *rev'd*, 109 S. Ct. 1775 (1989) (applying the same rule in a section 1981 case).

63. 109 S. Ct. at 1790.

64. *Id.* at 1804 (O'Connor, J., concurring).

65. 109 S. Ct. 2180 (1989); *see supra* note 5.

66. 109 S. Ct. 706 (1989).

67. *Id.* at 707. The Court also expressed its suspicion of black empowerment being used as a tool for discriminating against whites. After noting that Richmond's population was 50% black and that five of the nine members of the city council were black, the Court expressed its "concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts." *Id.* at 722.

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supported assumption that white . . . contractors simply will not hire minority firms."[68] In *Wards Cove Packing Co. v. Atonio*,[69] however, the majority justified its decision with its own unsupported assumption that employers, finding it too difficult to defend subjective employment practices under the *Griggs* standard, would resort to quotas in order to avoid litigation.[70] Evidently, the unfounded fear of "quotas" is more disturbing to the Court than the widespread, well-documented use of discriminatory contracting practices.

For many years racial and ethnic minorities and, more recently, women, have looked to the Supreme Court to protect their rights, as members of "discrete and insular" groups, from the tyranny of the majority. The Supreme Court, whose members are appointed for life and therefore theoretically immune to political pressures, was thought to be the last bastion of hope for assuring justice under the civil rights laws. The Reagan-Rehnquist Court has disavowed any intention of retreating "one inch . . . from Congress' policy to forbid discrimination in the private, as well as the public, sphere."[71] Yet, the Court appears to have abandoned historically oppressed groups through the decisions of a majority that, in the words of Justice Blackmun, no longer "believes that . . . discrimination . . . is a problem in our society, or even remembers that it ever was."[72] Absent swift, decisive action by Congress,[73] the 1990s may well be the decade when the Supreme Court deems white males the discrete group in need of its protection.

68. *Id.* at 725.
69. 109 S. Ct. 2115 (1989).
70. *Id.* at 2122.
71. Patterson v. McClean Credit Union, 109 S. Ct. 2363, 2379 (1989).
72. *Wards Cove*, 109 S. Ct. at 2136 (Blackmun, J., dissenting).
73. Earlier this year, Senator Kennedy and a large number of other sponsors introduced legislation aimed at counteracting a number of recent Supreme Court decisions. Civil Rights Act of 1990, S.2104, 101st Cong., 2d. Sess., 136 CONG. REC. S991-01 (daily ed. Feb. 7, 1990); S. REP. No. 991, 101st Cong., 2d Sess. (1990).

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