No. 19-83

In The

Supreme Court of the United States

VERONICA W. OGUNSULA,
Petitioner

vs.

STAFFING NOW, INC.,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

Petition For Writ Of Certiorari

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QUESTIONS PRESENTED

1. How does the framework and prima facie prongs of the Supreme Court's precedent setting employment case, McDonnell Douglas vs. Green, apply in a Title VII and ADEA case where applicants or employees of temporary employment agencies or staffing firm employers do not apply for a "specific job or position", but seek work assignments or types of positions at any of the employers' third party clients? Does the employee's prima facie case fail if they cannot prove that they applied for a single position but rather they sought work assignments at the temporary employment agency? What did the Supreme Court intend?

2. Does the wording of Federal Rules of Civil Procedure (FRCP) 26, 33 and 34 regarding Discovery timeframes and the response period unjustly provide an advantage to practicing lawyers and members of the bar while disadvantaging pro se litigants?

3. Should a Motion For Judicial Recusal accompany a hearing or a request for additional information on the merits when a pro se litigant submits such a Motion?

LIST OF PARTIES

The Petitioner in this case is Veronica W. Ogunsula, a citizen of the United States and a resident of Maryland.

The Respondent is Staffing Now, Inc., (SNI), an employment agency/staffing firm that provides temporary and permanent placement services of employees. Per their website, they specialize in "clerical and administrative staffing solutions in all industries on a full-time and temporary basis".

SNI was acquired in 2017 by GEE Group, Inc. (JOB), a publically traded company.

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The U.S. Court of Appeals for the District of Columbia Circuit decision denying Ms. Ogunsula's, Petitioner, appeal of the Respondent's Motion for Summary Judgment and two Motions To Compel Discovery are reprinted in the Appendix (App.) at Page 43. The Appeals Court denying a Motion for Rehearing and a Motion for Judicial Recusal are reprinted at Page 58. A Motion for Rehearing En Banc was denied and is reprinted at Page 60. The U.S. District Court for the District of Columbia's Order granting Summary Judgment to the Respondent and denying the Petitioner Motion 56D is reprinted at Page 46.

JURISDICTION

The U.S. District Court for the District of Columbia issued its opinion on September 21, 2017. A Motion to Compel Discovery was denied by the District Court on May 11, 2017.

The District of Columbia Circuit denied an appeal on August 10, 2018. A Petition for Rehearing and Rehearing En Banc was denied on December 3, 2018. A Motion for Judicial Recusal was also denied on December 3, 2018.

The Supreme Court of the United States has jurisdiction under 18 U.S.C. § 1254 (1) to review this Petition. On February 26, 2019, Chief Justice John G. Roberts granted an application for an extension until April 18, 2019. On April 22, 2019, Chief Justice Roberts granted a second application for an extension until May 2, 2019.

INTRODUCTION

When McDonnell Douglas vs Green, the precedent for Title VII cases, was decided by the Supreme Court in 1973, the workforce was significantly different than it is today. Then, roughly, 88 million or 61% of the total 146 million individuals who were living in America, age 16 and over, comprised the civilian workforce.[1] Women were 39% of the workforce and men were 61%.[2] Nine million or 10% of the workforce was African Americans and 3.7 million or 4% were Hispanics.[3] It's safe to say that the largest percentage of the workforce was white and male, and more than 40% of all men were married.

In 1973, the overall unemployment rate was 5.2%. The unemployment rate for whites was 4.3% while the unemployment rate for African Americans was 9.4%, a rate that was more than double that of whites and nearly twice the overall unemployment rate. The Hispanic unemployment rate was 7.9%. It should be noted here that while the unemployment rate today in March 2019 is 3.9%, the lowest it's ever been, the 6.7% rate for unemployed African Americans is still almost double that of the white rate of 3.5%. Unfortunately, this

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[1]Labor Force Statistics from the Current Population Survey, Civilian noninstitutional population, March 1973, U.S. Department of Labor, bls.gov.
[2]Ibid.
[3]Ibid.

trend has pretty much remained constant for the last 50 years.

Many scholars attribute the disparity to a combination of factors including hiring discrimination. In fact, a study published in the Proceedings of the National Academy of Sciences in 2017 concluded that hiring discrimination against African Americans has remained consistent and not substantially declined in 25 years.[4] The study compared resumes of equally qualified applicants only varying the names of the individuals to reflect cultural/ethnic sounding names. Hispanics whose unemployment rate at 4.9% is better than African Americans also faced more hiring discrimination than their white counterparts.

Over the years since the passage of the Civil Rights Act of 1964, technology and globalization have impacted both the type of labor that is needed by employers and skills needed by employees. These factors have also increased productivity for America businesses. Social customs and economic conditions have changed the composition and demographics of the workforce. Women now represent 47% of the 162.8 million individuals in the workforce. Single and married women make up 15% and 23% of the workforce, respectively. White men are now 29% of the workforce. Minorities are a larger percentage of

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[4]Lincoln Quillan, Devah Pager, Arnfinn H. Midtbøen, and Ole Hexel, "Hiring Discrimination Against Black Americans Hasn't Declined in 25 Years, Harvard Business Review, 10/11/17, http://hbr.org/2017/10/hiring-discrimination-against-black-americans-hasnt-decline-in-25-years

the working population than in 1973. African Americans are 12% of the workforce while Hispanics are 18% and Asians are 6% of the total workforce.[5] Women are working because they are heads of households and they have career aspirations just like their male counterparts.

Additional laws have been required to protect equal employment opportunities, fair pay, and the right to a discrimination free work environment. Hence the enactment of the following laws:

- Age Discrimination and Employment Act (1967)
- The Pregnancy Discrimination Act (1978)
- Americans With Disabilities Act (1990)
- The Civil Rights Act of 1991
- Lilly Ledbetter Fair Pay Act (2009)

Temporary or contingent staffing firms, which was essentially started in the late 1940's by William "Russ" Kelly, the founder of *Kelly Girls*, only employed less than 200,000 individuals in the early 1970s. These workers of mostly white women were an infinitesimal slice of the workforce. Then temporary workers performed clerical jobs and were viewed as cheap labor. The characteristics of this temporary workforce made it susceptible to a number of abuses ranging from fee-splitting between the agency and the employer when temporary applicants were required to pay a fee to apply for work at an agency, to "flipping" of

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[5]Current Population Survey, Labor Force Statistics, March 2019, bls.gov

permanent employees from the employer to the temporary agency.

Today, approximately 3.1 million[6] of the 162.8 million[7] individuals employed in the U.S. are temporary workers. About ten percent of the entire workforce may be employed as a "temporary" at some point during the year.[8] Noting the explosive growth in the contingent workforce in 1997, which had double between 1990 and 1997, the Equal Employment Opportunity Commission (EEOC) issued guidelines "to provide clear and comprehensive guidance on the coverage of equal employment opportunity laws with respect to these workers."[9]

A disproportionate number of women and minorities who comprised this segment of the workforce were more at risk for discrimination and abuse. The EEOC made it clear that "contingent workers were covered under the anti-discrimination statutes because they typically qualify as

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[6]Employment, Hours, and Earnings from the Current Employment Statistics survey (National), Temporary help services, NAICS Code: 56132, February, 2019, http://bls.gov

[7]Labor Force Statistics from the Current Population Survey, Civilian noninstitutional population, March 2019, U.S. Department of Labor, bls.gov.

[8]Staffing Industry Statistics, American Staffing Association, https://americanstaffing.net/staffing-research-data/fact-sheets-analysis-staffing-industry-trends/staffing-industry-statistics/

[9]EEOC Issues Guidance On Application of EE Laws to Contingent Workers, News Release, 12/8/1997, West Law 766184

"employees" of the staffing firm, the client to whom they are assigned, or both."[10] The government agency went further stating that temporary employment agencies and their clients were prohibited from discriminating against workers on the basis of race, color, religion, sex, national origin, age, or disability, and that a staffing/temporary agency employer must take immediate and appropriate corrective action if it is made aware that its client has discriminated against one of the temporary employees it placed with the client.

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[10]Ibid.

STATEMENT OF THE CASE

A. Factual Background

In the summer of 2014, Ms. Veronica Ogunsula, the Petitioner, was one of the 9.6 million Americans, age 16 and over, who was actively seeking employment. Most recently she had worked as a Program Manager for a local county government and as an executive director of a non-profit she founded to develop and promote community health programs for women in the Washington, D.C. metropolitan area. Having been severely affected by the recession, she shuttered the non-profit health promotion programs in 2013 for budgetary reasons.

She then decided to seek full time employment. She had over 20 years of experience in marketing to the federal government and had worked for AT&T as a sales and marketing professional and program manager. She *also* had excellent administrative skills and had tested very high (80's to high 90's) on the Microsoft office automation software tests. This led her to also seek temporary work assignments, focusing on administrative jobs, in order to immediately begin earning an income and pay her mortgage, and other household and living expenses. The Petitioner has a Bachelor of Business Administration degree from Howard University in Washington, DC and a Master's degree in Business Administration from the University of Pittsburgh in Pittsburgh, PA.

Ms. Ogunsula first contacted the Respondent, Staffing Now, Inc., in the July/August timeframe of 2014. She approached Staffing Now, Inc. because they specialized in "clerical and administrative staffing solutions in all industries on a full-time and temporary basis"[11]. As stated earlier, she specifically wanted to work temporary assignments so that she could continue to look for full-time employment.

She spoke by phone with Chris Van Landingham, a manager at Staffing Now, Inc. They exchanged first names. She told him that she was inquiring about temporary administrative assignments with their agency. During their conversation, she told him of her past experience working with temporary staffing agencies in college and her outstanding administrative and social media skills. She also communicated that she had extensive experience with the Microsoft Office suite of products (i.e., Word, Excel, Outlook, PowerPoint, and Project, etc.). Mr. Van Landingham, a white male, seemed impressed and enthusiastic about her skills and asked that she send him a resume via email. She followed up and sent a resume to the Respondent. The initial email was rejected because the email address the Petitioner used for Mr. Van Landingham was incorrect. She corrected the address and resent the email. This time it was not rejected.

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[11]http://staffingnow.com

The Petitioner called the Respondent once or twice per week over the next three to four weeks, but she did not receive a response. The receptionist offered to refer her to another recruiter, Niya Leek and also provided her with Ms. Leek's email address so that she could send her resume to her. The Petitioner followed up and sent a resume to Ms. Leek and left a voice mail message for her. She then followed up with two calls to Ms. Leek, but the Petitioner never received a response from Ms. Leek.

During the first or second week of September 2014, Petitioner called Staffing Now again to follow up on her resume and staffing opportunities with the company. This time she was referred to Ms. Ekundayo. She spoke with Ms. Ekundayo by phone and sent her a resume in the pdf format by email. Ms. Ekundayo asked her to come in the office on September 15, 2014 for an interview. She also asked her to complete several Microsoft Office automation tests. The Petitioner completed the tests and was told that she passed all tests. During her interview with Ms. Ekundayo, they discussed the Petitioner's experience with temporary agencies in college, the agencies she had worked for and administrative positions she was hired to work. Ms. Ekundayo asked the Petitioner the name of some of the agencies she had worked for and she responded that they probably were not around anymore because she had not worked for these type of firms since the mid-1980's when she was in college. It was at this point that the Respondent made a comment about the Petitioner's age. She stated that the Petitioner looked younger than that.

Ms. Ekundayo next asked the Petitioner the type of positions she was interested in. The Petitioner stated that she was interested in administrative assignments. At the close of the interview, Ms. Ekundayo said she would start sending the Petitioner out for assignments. Ms. Ekundayo then requested the Petitioner to provide her with a hard copy of her resume as well as several references. When asked for the name of a supervisor, the Petitioner told Ms. Ekundayo that she had not been in a supervisor/employee relationship for several years but would provide her with the name of a former supervisor from AT&T. Ms. Ekundayo asked the Petitioner to re-submit her resume in the MS Word format as opposed to the .pdf format she had sent in the previous email to Ms. Ekundayo. The Respondent ended the interview by stating that they would be calling her for assignments and she asked the Petitioner to fill out several employment forms including the I-9 form and payroll documents before she left. The Petitioner was also asked whether she would like her check deposited directly to her bank account or on a payroll card. The Petitioner responded by asking if she had to make the decision that day and she was told no.

The Petitioner followed up on her interview with Ms. Ekundayo with an email that provided her an MS Word version of her resume as had been requested. She also left a message with the updated phone number for one of her references. The Petitioner was under the impression that she was completing the on-boarding process and that

she would start receiving calls for assignments. After a few days, she called Ms. Ekundayo and left her a message to ensure that she had received the information that she emailed. In fact, the Petitioner made several calls to follow up after the interview and to communicate that she was available for assignments. After not receiving a response from the Ms. Ekundayo, the Petitioner called Ms. Ekundayo again and was told that she was not available. A few weeks later, the Petitioner called and left a messages for Mr. Van Landingham but never received a call back or any calls regarding assignments.

After not receiving any response from the Respondent after a few months of calling them, Petitioner visited the EEOC office in Washington, D.C. in December 2014, several days before the Christmas holiday. She was asked by EEOC staff if the reason for her visit was to fill out a complaint. The Petitioner was troubled by the comments the Respondent had made regarding her age and their lack of response early on after she had initially submitted her resume to them and her identity and age had been revealed to the Respondent. Not fully aware of what she should do, The Petitioner stated that she first wanted to speak with someone about her experience with the Respondent. Before she filled out the complaint, she spoke with an investigator about her experiences with Staffing Now, Inc. She recounted her interaction with the Respondent's employees as described above, the calls, emails, interview and follow-up calls to the temporary staffing agency. She was then asked

again whether she wanted to fill out a complaint, the Petitioner stated yes. The Petitioner completed the complaint and returned it to the staff person at the front desk.

During the Christmas holiday in 2014 and after the New Year in January 2015, the Petitioner placed several calls and left messages for the EEOC investigator she had originally spoke with about her interaction with Staffing Now, Inc. She wanted to inquire about how the investigation was going. After not receiving a call back from the investigator, the Petitioner visited the EEOC Field Office in Washington, DC on January 23, 2015 to inquire about the investigation. At that time she was told that an EEOC Charge Document had been issued and mailed to her address. She had not received the document in the mail; she was given a copy of the Charge and Right To Sue documents at that time by the EEOC staff person.

The Respondent stated in their Motion To Dismiss that they received from the EEOC a copy of the Petitioner/Plaintiff's EEOC-issued "Dismissal and Notice of Rights" document within a few days after the EEOC's issue date of December 15, 2014. (Appendix---DCD Court Docket No. 8-1, page 7, para2) Ms. Ogunsula did not receive this document.

Around February 2015, Petitioner started attending the free "Advice and Referral" legal clinic sponsored by the D.C. Bar on the second Saturday of the month at Bread For The City in Washington, D.C.

to receive assistance and representation to file an employment complaint in federal court. She was not working and could not afford to pay for an attorney. Throughout the initial phases of the lawsuit, she attended a few other free legal clinics in Washington, D.C., but she received the most assistance from the D.C. Bar Pro Bono clinic at Bread For The City. Also, the Petitioner heavily relied on Law Library resources at area Law Schools including American University, Catholic University and Howard University; she also utilized the Library of Congress' Law Library.
In April 2015, the Petitioner filed a civil complaint in the U.S. District Court for the District of Columbia for employment discrimination claims against Staffing Now, Inc. under Title VII of the 1964 Civil Rights Act and Age Discrimination in Employment Act of 1967. The Complaint alleged discrimination based on race, national origin, and age by the Respondent, Staffing Now, Inc.

B. The Proceedings Below

The civil complaint was served on the Respondent by the Court on June 30, 2015. On July 30, 2015, the Respondent/Defendant submitted a Motion To Dismiss. The Court issued a Fox Neal order on August 2, 2015 advising the Petitioner/Plaintiff to respond by August 19, 2015. The Petitioner submitted her response to the Court on August 18, 2015. On August 20, 2015, the Petitioner/Plaintiff submitted an amended complaint to the Court to correct typographical errors and other small errors in the original complaint. The Court denied with

prejudice the Respondent/Defendant's Motion To Dismiss and deemed the Petitioner/Plaintiff's Amended Complaint as filed on October 7, 2015.

On November 17, 2015 a scheduling conference was held before District Court Judge Tanya Chutkhan where the parties consented and were referred by the Court to mediation before Magistrate Judge Alan Kay. Following the initial Hearing, the Respondent/Defendant sent their initial Interrogatories to the Petitioner/Plaintiff on November 20, 2015.

The parties' first Mediation/Settlement Conference was held on December 14, 2015. The Magistrate Judge offered the Petitioner Pro Bono Counsel to assist with negotiations during the mediation period only and the Petitioner accepted. Counsel was assigned and entered an appearance on March 26, 2016.

On January 7, 2016, the Petitioner filed a Production of Documents/Subpoena request to two parties, The Library of Congress and DC Public Library, Georgetown Branch in Washington, D.C. The subpoenas were related to USB storage drives that had been stolen from the Petitioner while she was doing research in their facilities. The Petitioner/Plaintiff conferred with the Defendant prior to filing the subpoenas with the Court and they stated that they would not oppose the request. The District Court denied the subpoenas' request and issued an Order stating that, "Except to the extent both parties agree, discovery in this action is

hereby STAYED pending mediation." Petitioner believed that the information requested in the subpoenas would provide evidence of thefts of case documents and other privileged communication, and expose unlawful retaliation.

On July 14, 2016 the last settlement conference was held before the Magistrate Judge. A settlement was not agreed to and mediation ended unsuccessfully on July 31, 2016. The parties conferred on July 27, 2016 and the Petitioner filed a joint Status Report on behalf of the parties.

On October 11, 2016 the Petitioner/Plaintiff sent a response to the Defense's Interrogatories to Defense's Counsel via email. Six documents were attached to the email, however the Interrogatories response document, although prepared, was not attached. Plaintiff was unaware of this oversight. On October 14, 2016 at 11:45 pm on 10/14/16, Plaintiff attempted to send her Plaintiff's Interrogatories/Questions to their Counsel via email. Her cell phone malfunctioned, "powered off" and would not "power on". Although the phone's battery was at about 20 or 25 percent, the phone would not work. Because the cell phone was her only means of sending email and the Defendant Counsel's contact information was in the phone, she was unable to email Defendant's Counsel. The Petitioner called 411 on a landline and obtained the phone number for the Defendant Counsel's office, Constangy, Brooks, Smith & Prophete, in Fairfax, Virginia. She left a voice mail message in the firm's general mailbox regarding the issue.

At 5:46 am on October 15, 2016, the Petitioner successfully sent her Plaintiff's Interrogatories to the Defendant via email with an explanation of what had happened. Although Ms. Ogunsula has since been counseled by pro bono lawyers that her Interrogatories were deemed late because she had not submitted them to the Defendant 30 days prior to October 14, 2016 date, she was not aware of this custom.

The Respondent said that they were probably going to object to the Plaintiff's interrogatories because they considered them late. Ms. Ogunsula told the Respondent's attorney that she had called his office on the night of the deadline of Discovery and left a message that her phone had malfunctioned and that she did not have access to her contacts or email addresses. The Respondent's counsel said that they would answer the questions and that they had 30 days to respond.

On December 5, 2016, the Petitioner/Plaintiff returned to DC area to sit for a Deposition for the Defendant. At the Deposition, the Defendant did not deliver the response to Petitioner's Interrogatories, but again promised to send them to the Petitioner soon. At this point the response was more than 50 days late.

On December 13th, the Petitioner received an unsigned, unauthenticated response to her Plaintiff's Interrogatories via email from the Respondent's Counsel. On December 16th, she

received the transcript from the 12/5/16 Deposition to review and make corrections.

On December 28, 2016, the Petitioner received notice via Electronic Case Filing (ECF) of the Defendant's Motion for Summary Judgment and the same day she was notified by Order of the Court advising her to respond by January 18, 2017 to the Defendant's motion or risk entry of judgment.

The Petitioner filed a "MOTION TO EXTEND THE TIME TO RESPOND TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND TO COMPEL DISCOVERY" on January 17, 2017. The Motion was denied without prejudice on January 19, 2017.

In order to comply with the Court's instructions regarding Discovery Disputes, she completed a detailed rebuttal report to the Defendant's Interrogatory Responses. She then contacted the Defense Counsel and the Judge's Chambers in Order to schedule a conference/Hearing on the matter. The Respondent/Defendant communicated via email on January 25, 2017 that they were opposed to a Discovery conference and opposed Plaintiff's requested extension. Ms. Ogunsula then emailed the Judge's chambers on February 10, 2017 with her Discovery Disputes. She was instructed to file something on the docket because the Defendant opposed the Conference and did not participate in the Report. On February 21, 2017 she filed what she construed as a Motion To Compel Discovery. The Court issued an Order for the Defendant to

respond. (See District Court Docket #52-54). On May 11, 2017, the Court denied the Petitioner/Plaintiff Motion For Discovery and ordered Ms. Ogunsula to file a reply to the Defendant's Motion for Summary Judgment by June 16, 2017.

On June 23, 2017, Ms. Ogunsula filed what she construed as a "Motion 56D". (See District Court Docket #56 and 57) On July 10th, the Defendant filed a Reply. The District Court ruled in favor of the Defendant's Summary Judgment Motion on September 21, 2017.

On October 20, 2017, the Petitioner/Plaintiff filed a timely appeal with the U.S. Court of Appeals for the District of Columbia. On August 10, 2018, a Special Panel of the U.S. Court of Appeals for the District of Columbia affirmed the decision of the District Court. The Petitioner filed a Petition for Rehearing and Rehearing En Banc on September 18, 2018. A Motion For Recusal was filed by the Petitioner on September 24, 2018. On December 3, 2018, the Appeals Court denied the Rehearing and Rehearing En Banc and the Special Panel denied the Motion For Recusal.

REASONS FOR GRANTING THE WRIT

I. McDonnell Douglas prongs and framework should be reconsidered

The EEOC issued guidance in 1997 that established that employees of employment agencies and staffing firms are considered employees and covered by Title VII of Civil Rights Act of 1964 (42 U.S.C. 2000e-5) including the amendments known as the Civil Rights Act of 1991 (commonly referred to in whole part as Title VII) and the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"). As it relates to Title VII, the EEOC provided definitions of the terms "employee" and "employer"; factors that indicate whether an employee is covered under Title VII; and circumstances that lead to the determination of whether an employment agency/staffing firm is considered a joint employer with their client. That guidance stated the nature of the relationship is determined by factors including:

- Who controls when, where and how the worker performs its job;
- Who has the right to assign additional work or projects; and
- Who sets the employee's hours, etc.

Although the Supreme Court has not had an occasion to address the standards that govern who is an "employee" under Title VII and the ADEA, etc., the EEOC said the rationale in [Nationwide

Mutual vs Darden] should apply.[12] (Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 324 (1992). (See also NLRB v. United Ins. Co. of America, 390 U.S. 254, 258, 1968); Magnuson v. Peak Technical Services, Inc., 808 F. Supp. 500, 508 (E.D. Va. 1992) 40 F.3d 1244 (4th Cir. 1994)) The Commission stated that, "both staffing firms and their clients share EEO responsibilities toward these (temporary or contingent) workers"[13]

To the best of the Petitioner's ability and research, she has not found a case where the Supreme Court addressed Title VII as it relates to temporary employees or contingent workers, and hiring discrimination. Most cases address the issue in the context of a single employer situation. As it is Congress' intent to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens, the Petitioner believes that this case presents an opportunity for the Supreme Court to address this.

Notwithstanding current EEO laws, Congress' intent, and the EEOC's enforcement, African Americans still suffer from an unemployment rate that is disproportionate to their overall population when compared with their white counterparts. And

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[12]Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms", EEOC NOTICE No. 915.002, Footnote No. 10, 12/03/97

[13]Ibid, page 3.

their unemployment rate is still higher when compared to an equally qualified group of white individuals.

With the technological shift that has taken place since 1973 that affects how individuals apply for and accept positions and work assignments/arrangements, and the fact that America continues to struggle with both overt and subtle forms of discrimination, especially as it relates to hiring African Americans and other minorities, this case presents a clear opportunity for the U.S. Supreme Court to re-address the McDonnell Douglas' prima facie proofs and framework as it relates to temporary and contingent workers and their employers.

The prima facie proofs should be updated to reflect the context of today's work force and an environment that is largely ruled by technology, the internet and social media. As discerning as the Supreme Court was in deciding the McDonnell Douglas vs Green case in 1973 that has provided an enduring precedent and comprehensive framework for over 45 years, it could not have anticipated the tremendous growth that has occurred in the temporary staffing industry and the characteristics, both positive and negative, of this industry. The Petitioner will argue that the McDonnell Douglas proofs and framework should be reconsidered in light of the nuances of temporary employment/staffing firms that afford cost saving benefits to the employers but also provide an opportunity for increased, sometimes brazen

discrimination for their employees and company clients.

A. Application For A Position/Work Assignment

There is no dispute that McDonnell Douglas' prima facie prongs in a hiring case are:

> (i) [Petitioner] belongs to a racial minority;
> (ii) She applied and was qualified for a job for which the employer was seeking applicants;
> (iii) Despite [her] qualifications, [s]he was rejected; and
> (iv) After [her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[13]

(McDonnell Douglas Corp. v. Green, 411 U.S. 792, U.S. Supreme Court, 1973)

Likewise, the ADEA framework, which is based on the McDonnell case framework is:

(1) Petitioner is a member of the protected class (*i.e.*, over 40 years of age);
(2) She was qualified for the position for which she applied;
(3) She was not hired; and
(4) She was disadvantaged in favor of a younger person." (District Court's 9/21/17 Memorandum Opinion, citing Cuddy v. Carmen, 694 F.2d 853, 856-57 (D.C. Cir. 1982)).

These proofs, as currently stated, reflect how individuals applied for employment in 1973. However, a lot has changed since then. Back then most people presented themselves as well as their resume at the employer's company location to fill out an application(s) for available positions. Positions were physically posted on a board or in a window, and/or advertised in the classified section of a local newspaper. Job ads directed the interested applicants to contact the employer by phone or in person. Today, virtually no applications are made in person and almost all are completed online. Job postings appear on company websites and job boards such as Career Builder, Indeed, Dice, LinkedIn, Glassdoor, Idealist, and Google, etc.[14] Some temporary agencies and staffing firms send out emails, also known as email blasts, with current opportunities and some employers even post their positions on social media.

With respect to temporary employment agencies, applicants may not and most commonly do not **apply** for *"a [single] job"*. (See McDonnell Douglas prima facie proofs, emphasis added) They apply for *types* of positions and they apply to work at any of the temporary agency's clients that are accessible to them given their transportation means and other constraints, such as family responsibilities.

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[14]Weiss, Sabrina Rojas, "The Best Job Search Sites To Use In Your Obsessive Hunt For A New Gig", Refinery29, 4/19/19, http://www.refinery29.com/en-us/jobs-search-websites

The Supreme Court added a footnote, Footnote 13, at the end of their framework proofs in the McDonnell Douglas case. It states:

> **[13] The 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 to differing factual situations.**

Petitioner argues that what the Supreme Court intended to do with Footnote 13 was to provide a framework that could be adjusted for the different factual situations of Title VII cases just like the Petitioner's case. A strict reading of the existing prima facie proofs above could leave a loophole for employment agencies to engage in discriminatory practices between the period of application to the agency and when and how they are *selected* for a position(s). And this does happen. The plaintiffs in Pruitt et al. vs. Personnel Staffing Group in Chicago, IL alleged racial discrimination and disparate treatment in the employment agency's hiring and selection of employees for work assignments. The employers stated a preference for and hired Hispanic applicants over equally qualified African American applicants. (See Derell Pruitt, et al. Plaintiffs, v. Personnel Staffing Group, LLC d/b/a MVP, et al., Defendants. Case No. 16 C 5079, Docket #85 Memorandum of Opinion, November 30, 2016.) The employer was accused of discriminatory practices in how they referred employees to their clients. In this case both the

employer and their clients were sued for hiring discrimination.

The Petitioner applied for and was interviewed by the Respondent, Staffing Now, for administrative positions in September 2015. Staffing Now is an employment agency "employer" that places temporary and permanent employees with client companies. They are responsible for paying their employees and they are liable for Title VII and ADEA violations. (See 42 U.S. Code § 2000e – Definitions and also Magnuson v. Peak Technical Services, Inc., 808 F. Supp. 500, 508, E.D. Va. 1992)

At the end of the interview, the Petitioner completed payroll and I9 documentation. She was then told that she would be sent out for work assignments. She sought and was qualified for administrative positions at Staffing Now. She was not told by the Respondents that they did not have any work or job assignments available. In fact, she was given the impression that as soon as she delivered her resume in the MS Word format and the additional references that were requested by the Respondent, she would have completed the on-boarding process and begin work assignments. The Respondent had positions available and they presently continue to offer administrative positions. (See StaffingNow.com)

The Petitioner will argue that she did meet her prima facie case. However, she does also contend that the Respondent did not comply with her interrogatory requests and this was a violation of

the FRCPs. This was also severely prejudicial to her as a Plaintiff as will be discussed more below.

B. Practices Related to Recruiting/Hiring Employees Have Changed

"A staffing firm is obligated, as an employer, to make job assignments in a nondiscriminatory manner. It also is obligated as an employment agency to make job referrals in a nondiscriminatory manner."[15] Unlike company human resources departments and a lot of full-time permanent staffing or recruiting firms, temporary employment agencies or staffing firms do not advertise *all* of their positions **nor do they require their employees to apply for every position that they accept.** Their employees *rely* on the temporary agencies to call and make offers of work. All the more reason why liberal discovery in a case like this is essential.

Typically when temp agencies call an individual about a specific short term temporary position, they are making an offer of work. The temporary employee either confirms her availability and willingness to accept the offer or declines the offer. So, these practices do not easily fit into prima facie proofs #2, 3, and 4.

In this case, Petitioner did not apply for one specific position or several positions. She applied to work certain types of positions at the temporary agency's

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[15]EEOC NOTICE No. 915.002 (n 12), Discriminatory Assignment Practices.

client locations. To require that the Petitioner should have applied to a specific, single or multiple positions is not consistent with the practices of the temporary staffing industry. And as to the question whether Staffing Now had administrative-type vacancies, the Petitioner is led to believe that they did have vacancies because the interviewer said that they would start sending her out for assignments.

The Respondent was asked to provide the Petitioner/Plaintiff with their positions, hires, and other relevant data during the relevant period in Plaintiff's Interrogatory #21. The Respondent objected and did not provide this basic discovery information. This flies in the face of broad and liberal discovery. The EEOC would have had authority to request this information. Any information relevant — in a discovery sense — to an EEOC investigation is likewise relevant to the private attorney-general [i.e., Petitioner], either in [her] individual role or in [her] capacity as the claimed representative of a class. (H. Kessler and Co. v. EEOC, 5 Cir., 1973, 472 F.2d 1147 [1972] (En Banc) quoting Burns v. Thiokol Chemical Corporation, 483 F. 2d 300, 5th Circuit, 1973).

Although their practices regarding advertising positions and selection differ somewhat from other human resources organizations, they are nonetheless prohibited from discrimination in hiring and discriminatory practices. The [EEOC] guidance makes clear that a staffing firm must hire

and make job assignments in a non-discriminatory manner.[16]

Given Respondent's comment about the Petitioner's age during the interview, which was characterized as "harmless" by the Respondent, that together with the Respondent's action after the interview are more than likely indicative of disparate treatment of older and minority applicants.

Research studies presented statistical evidence that one's chances of getting a callback or interviewed is significantly less if you are an African American and Hispanic.[17] In the study, applicants with "race-typed" names or names that are commonly thought to be popular in or indicative of African American or Hispanic ethnicity put the applicant at a disadvantage for getting a callback or being invited to an in-person interview.

In [another] research study conducted by the National Bureau Of Economic Research in October 2015 and revised in November 2017, the data specifically found that the "callback" rate for administrative jobs was in fact 29% lower for

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[16]Ibid, Executive Summary.

[17]The [Quillan et al.] meta analysis of callback rates from all existing field experiments showed evidence of discrimination against both blacks and Latino applicants. Since 1990 white applicants received, on overage, 36% more call backs than black applicants and 24% more call backs than Latino applicants with identical resumes. The analysis [was] of 21 field experiments contrasting white and black Americans based on 42,703 applications for 20,990 positions. See Lincoln Quillan (N 4).

applicants in the 49-51 year old group as compared to the rate for applicants who were 29-31. Further, they also concluded in their research study that there was a direct correlation between the applicant's age and their callback rate.[18] The Petitioner experienced this very phenomenon with the Respondent. (See pages 6-8)

The Respondent stated in their limited response to the Petitioner/Plaintiff's interrogatories regarding whether the Petitioner was ever considered for any positions with Staffing Now, Inc. that the "Defendant did not have any positions for which Ms. Ogansula qualified."[19] When asked to provide detailed information about individuals who were selected for positions during the 9 month period the Petitioner applied and interviewed with the Respondent, the Respondent refused and submitted a boilerplate objection: "Defendant object to this Interrogatory because it is vague, overly broad, unduly burdensome, and seeks information that is not relevant to Plaintiff's claims."[20] The FRCP No. 33 (b) (4) states that "grounds for objecting to an interrogatory must be stated with specificity."

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[18]Neumark, David, Ian Burn and Patrick Button, "IS IT HARDER FOR OLDER WORKERS TO FIND JOBS? NEW AND IMPROVED, EVIDENCE FROM A FIELD EXPERIMENT", NATIONAL BUREAU OF ECONOMIC RESEARCH, October 2015, Revised November 2017

[19]PLAINTIFF'S REBUTTAL TO DEFENDANT'S DISCOVERY RESPONSE, (Motion To Compel) Ogunsula vs Staffing Now, Inc., Case No. 1:15-cv-00625-TSC, U.S. District Court for the District of Columbia, Docket # 52, page 4.

[20]Ibid.

Respondent's reply to the Petitioner interrogatory request was in direct conflict with the FRCPs.

Moreover, the Respondent's response in this case harkens back to the rampant discrimination that took place in the housing industry where minority applicants would try to buy homes in certain neighborhoods or rent apartments at a complex, and they were told that there were no vacancies. However, when their white counterparts attempted to buy a home in the same neighborhood or rent at the same building, they were welcomed. (See Trafficante vs Metropolitan Life Insurance Co. 409 U.S. 205, 1972)

In Trafficante, this Court said that "complainants act not only on their behalf but also "as private attorneys general in vindicating a policy that Congress considered to be of the highest priority." If the U.S. Attorney General or EEOC has a right to the "discovery" information in question, so does this Petitioner/Plaintiff. The Respondent intentionally withheld their response to Interrogatory #21 regarding persons who were selected for positions (including the position and employees' protected class) to thwart the Petitioner ability to make a prima facie case. And if there were positions available for which the Petitioner was qualified, this presents a material fact issue in this case.

Also, a comment during the interview followed up by actions of the Respondent that contradicted their statements regarding sending the Petitioner out on assignments, most assuredly can provide a pretext

of discrimination. (Texas Department of Community Affairs vs. Burdine, 450 U.S. S.Ct 248, 1981)

II. A UNITED STATES COURT OF APPEALS has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

The submission of the interrogatories on 10/15 was explained in the statement of the case. However, the Respondent/Defendant did state that they would provide a response. If they had objected and stated that they were not going to respond to the interrogatories, the Petitioner would have contacted the District Court Judge's Chambers to arrange for a discovery conference or filed a Motion To Compel which she eventually did.

The Respondent submitted responses that were less than forthcoming and contained a large amount of boilerplate language. The Interrogatory Responses were unauthenticated and the Petitioner was forced to file a Motion To Compel after the Discovery period had ended.

This Court has said that discovery is to be broadly and liberally construed. (Hickman v. Taylor, 1947, 29 U.S. 495, 507) Generally, the rule regarding discovery is that parties are entitled to "discover information even when such evidence will be

inadmissible at trial, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1). (Planells v. Howard University et al., WL 30372, U.S. District Court, District of Columbia,1983)

In Title VII cases, the EEOC, on behalf of plaintiffs, or plaintiffs in a private action are permitted a very broad scope of discovery. (paraphrasing Rich v. Martin Marietta Corp., 522 F.2d 333, 343, 10th Cir. 1975). "The expansive scope of discovery in these cases is dictated by the fact that direct evidence of discrimination is rarely obtainable and consequently, plaintiffs often must rely on circumstantial and statistical evidence of an employer's discrimination." (Planells v. Howard University et al., WL 30372, U.S. District Court, District of Columbia,1983) (See also Hazelwood School District v. U.S., 433 U.S. 299, 308, 1977)

It is well settled that the District Court has discretion in setting and managing Discovery. (Hussain v. Nicholson, 435 F.3d 359, 363, D.C. Cir. 2006, quoting Edmond v. U.S. Postal Serv. Gen. Counsel, 949 F.2d 415, 425, D.C. Cir. 1991) However, "the District Court's discovery rulings, like their other procedural determinations, are not entirely sacrosanct. If they fail to adhere to the liberal spirit of the Rules, [the Court] must reverse. (See Wallin v. Fuller and Nationwide Mutual Insurance Co., 5th Cir. 1973, 476 F.2d 1204 [1973]). And this is especially true in Title VII cases where courts have refused to allow procedural

technicalities to impede the full vindication of guaranteed rights. (Sanchez v. Standard Brands, Inc., 5th Cir. 1970, 431 F.2d 455, 461, quoting Burns v. Thiokol Chemical Corporation, 483 F. 2d 300 - Court of Appeals, 5th Circuit, 1973) This should be especially true when pro se litigants are prosecuting Title VII cases. Liberal discovery is an essential hallmark of the American justice system. Anything less is unfair.

In a case that was one of the catalysts for the 1991 Civil Rights Acts, the Supreme Court stated that "...liberal discovery rules give plaintiffs broad access to employers' records, ...employers falling within the scope of the Uniform Guidelines on Employee Selection Procedures must maintain records disclosing the impact of tests and selection procedures on employment opportunities of persons by identifiable race, sex, or ethnic group. (Wards Cove Packing v. Atonio, S.Ct. 490 U.S. 642, 1989) Key elements of this case has been superseded by the aforementioned Civil Rights Act, but what has not been superseded is its stance on liberal discovery.

> Staffing firms and their clients are subject to the same record preservation requirements as other employers that are covered by the anti-discrimination statutes. They therefore must preserve all personnel records that they have made relating to job assignments or any other aspect of a staffing firm worker's employment for a period of one year from the date of the making of the record or the

> personnel action involved, whichever occurs later. Personnel records relevant to a discrimination charge or an action brought by the EEOC or the U.S. Attorney General must be preserved until final disposition of the charge or action. 29 C.F.R. §§ 1602.14, 1627.3(b).[21]

In denying the Petitioner's Motion To Compel Discovery, the lower court abused its discretion and the effects represented a manifest injustice to the Petitioner. A motion to [a court's] discretion is a motion not to its inclination but to its judgment; and its judgment is to be guided by sound legal principles. (Kirtsaeng vs John Wiley E. Sons, Inc., 136 S.Ct 1979, 2016, quoting United States vs. Burr, 25 F.Cas. 30, 35)

III. Request Change/Update to Federal Rules of Civil Procedure Rule 26, 33 and 34

The FRCPs 26, 33, and 34 as well as all Rules related to Discovery should be updated to reflect the unstated customs of the Bar of Attorneys. Customs that are well known to litigating attorneys and bar members are not known to pro se litigants and therefore put them at a disadvantage when navigating the federal and local rules of the court. Pro Se litigants are most likely to represent themselves in employment litigation. The number of "pro se litigants" has risen substantially in the

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[21]"EEOC No. 915.002 (n 12) Footnote 30.

last decade, due in part to the economic downturn...[22]

For example, a custom exists among attorneys to deliver interrogatories or other discover-related requests 30 days before the discovery deadline. However, this custom is not written anywhere in FRCPs 26, 33, or 34.

The FRCPs, and specifically Rule 26 or 33, do not plainly state that discovery requests must be submitted 30 days prior to the deadline for fact discovery. It would be helpful for non-lawyers if this custom was included in the Rules.

For pro se litigants and any non-lawyer having to navigate the FRCPs, they can be daunting to both understand and comply with in circumstances where there is no prior experience in litigation. Adding the local rules of the court to the mix only compounds the confusion and maze a pro se litigant faces when trying to prosecute a case. One usually is not aware that they have not complied with the rules until they are admonished by the Court or an opposing party's counsel.

Clearly stating the 30 day custom in plain language would be helpful. Additionally, including this information in notices commonly provided to pro se

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[22]Lucas, Lauren Sudeall and Darcy Meals, "Every Year, Millions Try to Navigate US Courts Without A Lawyer", The Conversation, 9//21/17, http://theconversation.com/every-year-millions-try-to-navigate-us-courts-without-a-lawyer-84159

litigants by the federal courts and during the Scheduling Conference would also be helpful.

IV. Judicial Recusal

The foundation of justice is good faith.
--Cicero

28 U.S. Code §455 (a) states: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might be reasonably be questioned."

The facts related to this issue is as follows. The Petitioner was driving a rented sports utility vehicle on August 30, 2017 on 95 North in Harford County, Maryland and was pulled over by a Maryland State Trooper in an unmarked car. She was not speeding. The traffic stop was initiated by the Maryland law enforcement officer without *probable cause or reasonable suspicion.* Ms. Ogunsula was en route to a traffic court hearing in Highstown, New Jersey. After being detained for approximately 20 minutes, the trooper informed her that she was being arrested on an outstanding warrant. He provided no details regarding the warrant except a few accusatory comments related to a stolen car. Ms. Ogunsula had no knowledge of what the officer was referencing or the outstanding warrant. She was held in Harford County Detention Center for three days before being released on bail. The warrant had been issued in Arlington, Virginia and was based on false

information. In fact the allegations had no factual basis. The Arlington, Virginia warrant was recalled and the charges and case in Harford County, Maryland was dropped in October 2017.

The Petitioner contacted and retained an attorney in Baltimore, Maryland in the fall of 2017 to pursue civil remedies against all parties including the State of Maryland that initiated actions that led to her false arrest and detention in Maryland.

On July 9, 2018, Ms. Ogunsula was notified by Per Curiam Order via ECF from the U.S. Appeals Court for the District of Columbia that a three Judge panel consisting of Kavanaugh, Wilkins, and Katsas would dispose of the present case without argument. That day, it was announced that Judge Kavanaugh was on the short list to be nominated to the U.S. Supreme Court. Petitioner wrote a short blog about Judge Kavanaugh and the other three nominees. She later updated it to confirm the Kavanaugh nomination after the President announced on the evening of July 9. (It was later learned on the date of the 8/10/18 Appeals' decision that Associate Justice Kavanaugh did not participate in the decision and that the decision was rendered by the aforementioned two-judge "Special Panel".)

It was a few weeks later that she "googled" the other two judges in the matter and found out that Judge Wilkins had been involved in a civil action against the State of Maryland related to a traffic stop by a Maryland State Trooper. Not sure of what

to do, she thought it best to notify the Court in case there was a potential conflict of interest. She drafted the brief Motion just to notify the Court that she intended to be a plaintiff in a civil suit related to a traffic stop and "false claims leading to [her] arrest and detainment. She also stated that the State of Maryland would be a party to the civil suit. She did not research the law regarding judicial recusals, but she did attempt to contact her attorney in the traffic stop matter. She had been unable to reach her for several days. The day that she was finally able to speak with her attorney, it was the day of the decision.

Ms. Ogunsula attempted to notify the Appeals Court on or after August 7th. This was before its August 10, 2018 decision. She brought a paper copy of the Motion to the Appeals Court but was not allowed to file it because she had electronic filing privileges with the Court. Shortly after the Appeals Court's decision was announced, she decided to file a Petition For Rehearing and Rehearing En Banc which she did file. Still having not formally informed the Court of the potential conflict, she filed the original Motion with a modified date. She was anticipating that the Court would request additional information on this matter in order to make a decision, however it did not and the Motion was denied with the Petitions for Rehearing.

Standard of Review

The Supreme Court is being asked to provide a "first instance" review of the denial of the U.S.

Appeals Court for the District of Columbia Circuit's Motion on the basis of Section 455 (a) listed above. Firstly, the facts of Ms. Ogunsula's encounter and incident with Maryland State law enforcement personnel are very similar to Judge Wilkins. She was not aware of Judge Wilkins' incident at the time of her arrest or for almost a year thereafter. However, she believes that his involvement in her Appeals case raises an appearance of bias whether or not any bias actually exists in reality.

If the two judge panel that included Judge Wilkins had ruled in favor of the Petitioner/Appellant, the Respondent/Appellee could have submitted a Motion For Recusal on the basis of apparent bias. If the Judge had ruled against the Petitioner, as the panel did, inference can be made about the viability or validity of the Petitioner's civil complaint/case against the State of Maryland. There is an appearance of a lack of impartiality or that the judge was more rigid in his view of the case to compensate for an appearance that the public could perceive a bias. Additionally because another judge was not added to the panel to replace Justice Kavanaugh, it only further increases the appearance of a lack of impartiality in the judicial process regarding the panel's decision.

Scienter is not an element of a violation of §455 (a). The judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy but it does not eliminate the risk that "his impartiality might reasonably be questioned" by other persons. (Liljeberg vs. Health Services

Acquisition Corp., 486 U.S. 847, 1988) Prior knowledge of the disqualifying information or actual facts is not required under §455 (a) in order for the judge to disqualify himself before or after a decision. The Petitioner formally advised the Court of the potential conflict of interests via a filed Motion about 45 days after the Court's initial Appeals' decision and well before the decision on her Petition for Rehearing. The Petitioner would have provided more detail to the Court in a Hearing or Memorandum if she had been asked.

The Supreme Court further went on to say, "that in determining whether a judgment should be vacated for a violation of §455 (a), it is appropriate to consider the risk of injustice to the parties in this particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." (Liljeberg, at 864) "Neither actual partiality, nor knowledge of the disqualifying circumstances on the part of the judge during the affected proceeding, are prerequisites to the disqualification under this section. The recusal applies equally before, during, and after a judicial proceeding whenever disqualifying circumstances become known to the judge." (US vs Kelly, 888 F2.d 732, U.S. Court of Appeals, 11th Circuit, 1989)

Petitioner requests the Supreme Court to vacate the U.S. Appeals Court's denial of the Motion For Recusal and remand for further proceedings.

CONCLUSION

For the foregoing reasons, the Petitioner is requesting the U.S. Supreme Court grant this Petition For Writ of Certiorari.

Dated: June 24, 2019

Respectfully submitted,

Veronica W. Ogunsula

Veronica W. Ogunsula, Pro Se