In the

Supreme Court of the United States

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS,	)	
Petitioner,	)	
v.	)	No. 79-1764
JOYCE ANN BURDINE,	)	
Respondent.	)	

Washington, D.C.
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ORIGINAL

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v. : No. 79-1764

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Respondent.

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Tuesday, December 9, 1980

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:11 o'clock a.m.

APPEARANCES:

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HUBERT L. GILL, ESQ., 508 First Federal Plaza, Austin, Texas 78701; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Texas Department of Community Affairs v. Joyce Ann Burdine.

Mr. Wilson, you may proceed whenever you are ready.

ORAL ARGUMENT OF GREGORY WILSON, ESQ.,

ON BEHALF OF PETITIONER

MR. WILSON: Thank you, Your Honor. Mr. Chief Justice and may it please the Court:

This is a Title VII sex discrimination case in which two issues are presented to the Court for resolution. First, what burden is placed on the defendant in a Title VII case after the plaintiff establishes a prima facie case? Is it a burden to merely establish or to articulate legitimate non-discriminatory reasons, or is it a burden to come forward and prove reliance upon those reasons by a preponderance of the evidence.

The second question for resolution is --

QUESTION: Well wasn't the first question at least, all but resolved in the Sweeney case?

MR. WILSON: That is our contention, Your Honor. We believe that the Fifth Circuit completely misconstrued the Sweeney case and -- in the Sweeney case, the issue on appeal was whether the defendant had to prove that there was an absence of discriminatory motive. I personally don't believe

that there's any difference between that burden of proof and proving by a preponderance of the evidence reliance upon non-discriminatory reasons.

QUESTION: The Fifth Circuit here equated the articulation of a non-discriminatory reason with proof by a preponderance which I would have thought the Sweeney case was contrary to.

MR. WILSON: Yes sir, it was exactly contrary to it. And we -- the Texas Department of Community Affairs won this case in the District Court and it was partially reversed by the Fifth Circuit on this issue. They determined that because we had merely articulated the reason and not proved it by a preponderance of the evidence that we had failed to rebut the plaintiff's prima facie case.

QUESTION: Mr. Wilson, since you've been interrupted, who were the judges of the Fifth Circuit that decided this case? Was it argued orally?

MR. WILSON: Yes sir, Your Honor, not by myself.

QUESTION: Their names don't appear in the papers, at least I can't find them.

MR. WILSON: Well the author of the opinion was Judge Gee.

QUESTION: Judge Gee?

MR. WILSON: Yes sir.

QUESTION: Judges Jones and Clark were on it.

MR. WILSON: Yes sir.

QUESTION: Jones and Clark? I couldn't find it.

QUESTION: It's in the brief.

MR. WILSON: The second question for review is the standard upon which a District Court finding in a Title VII case of either a discriminatory motive in the employment decision or the lack of a discriminatory motive, what standard is that to be reviewed under. Is the Appellate Court to undertake an independent review of the evidence or is it to accept the District Court's finding unless it's found to be clearly erroneous.

Ms. Burdine was hired by the Texas Department of Community Affairs in January of 1972 as an accounting clerk and was quickly promoted to a coordinating role in the division, in the public service careers division, with some supervisory responsibilities. She worked under a fellow by the name of Mr. Mark Nealy, who was the project director of the public service careers division. Nealy quit in October of 1972 and was not replaced. And during the ensuing year from January of '72 when Ms. Burdine was hired until the following April of '73, when she was fired, there developed a certain amount of dissension among Ms. Burdine and two other employees in the division, Mr. Roberto Carraveo and Marian Kirkland. The public service careers division was wholly funded by the United States Department of Labor and in February of 1973, the

Department notified the executive director of the Texas Department of Community Affairs, Mr. B. R. Fuller, that funding for the program would cease due to inefficiencies in its administration. And they specifically noted that there was a failure of fiscal controls in the division, that there had been improper documentation of expenditures, overstaffing and questionable eligibility of some of the enrollees in the program.

Mr. Fuller drafted a response to the agency, to the Department of Labor, and convinced them to continue funding the program provided that certain steps were taken to clear up the problems. In particular, he was required to hire a new permanent project director and to reorganize and reduce the staff.

In April of 1973, Mr. Fuller hired a new project director, he terminated Ms. Burdine along with the two other employees who had been involved in the dissension in the division and retained Mr. Alan Walz who had previously been supervised by Ms. Burdine but was now promoted to the coordinating role which she had previously held. Now the state concedes that Ms. Burdine established a prima facie case merely by showing that she was fired from her position and that she was replaced by a male. This is not a very demanding level of proof, but under the McDonnel Douglas test, most of the steps, the four steps in establishing a prima facie case are pretty well satisfied when a person is already being employed by an agency and is then fired. However, --

QUESTION: And somebody else of a different gender, in this case, or a race in some other case, is hired to fill the vacancy. That's part of the test.

MR. WILSON: That's right, in this case, right, and a male was hired in this case to fill the vacancy when she was fired.

QUESTION: Yes, that's part of the prima facie case.

MR. WILSON: Right. However, as this Court has held in the Furnco case, a prima facie case is not equivalent to a factual finding that discrimination took place in the employment decision. What the prima facie case does is merely eliminate the two most common reasons for an employment decision, the two most common legitimate reasons which are that the applicant was not qualified for the job or that there was not a vacancy in the position at the time that he applied.

QUESTION: Under your view, Mr. Wilson, supposing the plaintiff's evidence went in just as you've described it, and the defendant offered no evidence at all but had filed an answer in which they had articulated the legitimate reason for discharge, said that the person was incompetent but didn't offer any evidence. How would the District Court decide the case?

MR. WILSON: We're not faced with that in this case. Because we did articulate evidence into the record through testimony. I --

QUESTION: I'm curious to know what the word articulate means?

MR. WILSON: I understand the question. We -- I think that in your concurrence in the Sweeney case, that the fact that an employee of the agency testifies as to the reasons, I believe that that's articulation.

Now, I think that you could go a step further; I'm not sure the Court would be willing to go this far, and say that the mere -- merely by establishing a prima facie case what the plaintiff does is create a fact question which in certain negligence cases would allow the case to go to the jury and the jury would be --

QUESTION: Even though there's a general denial in the answer?

MR. WILSON: That's right.

QUESTION: A general denial, plus a statement in the answer that the real reason is the legitimate reason. A reason articulated in the answer but unsupported by proof. And I'm asking in that state of the record, how does a judge decide the case?

MR. WILSON: Well it would seem to me that at that point there would be at least a strong -- I think that what you've done is create a fact question and the --

QUESTION: You could decide it either way.

MR. WILSON: -- preponderance of the evidence would

be probably in favor of the plaintiff if there was no evidence adduced by the defendant.

QUESTION: And supposing the defendant got on the stand and said my reason is X legitimate reason and that's all he said, no corroborating evidence, and then the judge put in a finding and said I do not believe the defendant. Would the plaintiff then prevail?

MR. WILSON: Yes sir.

QUESTION: You're not putting any evidence of pretext in, other than the prima facie evidence of --

MR. WILSON: Yes sir, the way I interpret the case, is what it creates when the defendant gets up there and articulates a reason that the plaintiff's evidence in rebuttal of that articulated reason does not have to specifically address that articulated reason.

QUESTION: What is articulate? I'm as bad as my brother Stevens. If somebody testifies?

MR. WILSON: Yes sir.

QUESTION: Well why not say that?

MR. WILSON: We're just --

QUESTION: Because I don't know what articulate means, honestly.

MR. WILSON: We're quoting the McDonnel Douglas case, Your Honor. I would feel that the testimony by Mr. Fuller in this case certainly satisfies the --

QUESTION: Well the testimony, the testimony is an articulation?

MR. WILSON: Yes sir.

QUESTION: Well doesn't it simply shift the burden of proof back, in this four-stage procedure outlined in McDonnel, so that then the plaintiff has to say no the reason you articulated is no good or wasn't the real reason?

MR. WILSON: I think they have -- the plaintiff has to go on and say that, and as you all are well aware, the -- in the trial court that's not the way the case is going to develop. It's a rule of analysis more than it is a rule of procedure.

QUESTION: What do you think was the rule that Judge Gee developed for the Fifth Circuit and its panel?

MR. WILSON: Your Honor, it seems that what the Fifth Circuit has done is shifted the burden in this entire case --

QUESTION: That isn't what I asked. I asked what the rule is that the Fifth Circuit developed?

MR. WILSON: That the defendant has to prove that he relied upon a legitimate reason by a preponderance of the evidence.

QUESTION: Did it go that far, or did it merely say that the defendant has to show the existence of an acceptable reason? And if so, what's wrong with that?

MR. WILSON: By, he has to show the existence of a

legitimate reason by a preponderance of the evidence. I don't know how you can limit or how you would weigh the preponderance of the evidence when someone says that dissension was a legitimate reason for what happened, for the employment decision. I think that everyone would concede that dissension is a legitimate reason and proving the dissension is a legitimate reason by a preponderance of the evidence does not really make any sense. So the only issue --

QUESTION: Well who else would know whether it is -- whether a reason exists? If I am the employer?

MR. WILSON: The employee would also know, if, in the case of dissension for example. What I'm trying to say is that you can't prove -- the only way you can prove that dissension is a legitimate reason is to prove that the employee was involved in dissension.

QUESTION: Isn't there a certain inconsistency in the Fifth Circuit opinion at page A-11 of the petition where the Court says in the full paragraph on that page, "defendant may refute plaintiff's prima facie case by articulating a legitimate non-discriminatory reason for the rejection", Ibid. "This Court requires defendant to prove non-discriminatory reasons by a preponderance of the evidence." If articulate means anything other than prove by a preponderance of the evidence, hasn't the Fifth Circuit kind of melded together the two?

MR. WILSON: They said one and then they said the other, yes, Your Honor.

Because of the difficulty that a plaintiff encounters in attempting to prove discrimination in the employment context, what this Court did in McDonnel Douglas was to say that if you can eliminate these two most common legitimate reasons then the defendant will have to come forward and tell you why he fired you, for instance, in this case. And I think that normally you would expect that that would happen in the discovery stage of the trial. The plaintiff would discover the reason that the defendant fired him, or that he did not hire him. And then would be able to bring out evidence at trial that those reasons were not the real reasons for the employment decision. In this case, the Texas Department of Community Affairs articulated two reasons for the decision with regard to Ms. Burdine, through the testimony of Mr. Fuller. And those were Ms. Burdine's partial responsibility for the problems in the public service careers division pointed out by the Department of Labor and her partial responsibility for dissension in the division.

Since, under the Fifth Circuit's burden of proof, if a plaintiff comes forward with his prima facie case and then the defendant is unable to prove by a preponderance of the evidence that he actually relied upon legitimate non-discriminatory reasons then the plaintiff automatically wins the case,

because there has been a failure to rebut the prima facie case. This completely eliminates the last step in the McDonnel Douglas test which is the step in which the plaintiff is allowed to come back and show that the articulated reasons by the defendant are pretextual.

QUESTION: As you say, if it's been proved by the defendant that they are not pretextual that's the end of it, isn't it?

MR. WILSON: Yes sir. There's nothing left for the plaintiff to --

QUESTION: There's no room for the plaintiff's -- or for the last step in McDonnel Douglas.

MR. WILSON: I'm sorry?

QUESTION: I said, I just wanted to be sure I had your point.

MR. WILSON: If the defendant, if he proves that he relied by a preponderance of the evidence then there's nothing left for the plaintiff to show; if he fails to prove it, there's still nothing left for the plaintiff to show because he's failed to rebut the prima facie case.

QUESTION: Mr. Wilson, do you contend on this record that the defendant did prove by a preponderance of the evidence that there was a valid reason for the discharge?

MR. WILSON: I hadn't addressed that, but I think that he satisfied -- I think that the way I would address that

under the District Court's finding that there had been no discrimination --

QUESTION: Isn't that equivalent to a finding that I believe in Mr. Fuller?

MR. WILSON: Sir?

QUESTION: Isn't that equivalent to a finding of fact that I believe that Mr. Fuller testified truthfully?

MR. WILSON: Yes sir.

QUESTION: Then why isn't that a preponderance of the evidence?

MR. WILSON: I guess it would be.

QUESTION: Isn't what the Fifth Circuit did, is establish a rule of law that oral testimony must be corroborated?

MR. WILSON: That's essentially what they did, yes, Your Honor.

The -- that brings me to the next step in my argument, which is that the finding of the Fifth Circuit that there was not discrimination -- I mean, excuse me, of the District Court that there was not discrimination in this employment decision, was not clearly erroneous because it was supported by that testimony by Mr. Fuller. And the Fifth Circuit improperly intruded upon the fact finding authority of the District Court when it undertook an independent review of the evidence in which it credited some of the evidence of

the plaintiff and discredited some of the evidence of the defendant. And this is kind of a fact question, the motivation for an employment decision which the District Courts are required to decide on a daily basis in the -- for instance in the Mount Healthy cases, First Amendment cases, in which the plaintiff is alleging that he's been fired for making a First Amendment speech. And the District Court's finding in this instance that sex discrimination was not the motivating factor for the decision to fire Ms. Burdine, should have been accorded the deference that a fact finding is due by the Appellate Court and it should have been affirmed by the Fifth Circuit and for that reason, as well as the failure of the Fifth Circuit to apply the proper burden of proof, I believe that the Fifth Circuit's decision in this case should be reversed and the judgment of the District Court reinstated.

MR. CHIEF JUSTICE BURGER: Mr. Gill.

ORAL ARGUMENT OF HUBERT L. GILL, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GILL: Mr. Chief Justice, and may it please the Court:

Initially I would speak on the -- just briefly to the fact issue raised by the counsel for the Petitioner. He said that there was proof in the record that the plaintiff Joyce Ann Burdine was involved in dissension within the agency and that there was proof that she was at least partially

responsible for some deficiencies in the program. I believe a close review of the record will indicate that the only evidence of that in the record whatsoever was Mr. Fuller's statements to that effect, that other than that, the evidence indicated as the Court of Appeals found, not only was that not true, that she was not involved in any dissension, that the dissension had occurred and it started before she was ever employed at the agency, that the executive director himself was at least partially responsible for it, and that she did not have authority to deal with it anyway, and she had written memorandums to her supervisors bringing forth this problem of -- within her division, concerning the deficiencies. The executive director was completely unable to point to any specific area where she was deficient in her job, and he said that there was no way to tell whether she was responsible as opposed to any other person within that division, or even himself.

Therefore, the evidence indicated that not only did the plaintiff establish her prima facie case, but the evidence of defendant substantiated the plaintiff's prima facie case. Initially, I would distinguish this case from Sweeney and McDonnel and Furnco, on one important ground. And this was brought out by the Fifth Circuit, Judge Gee, in this opinion, and earlier in Turner v. Texas Instruments. In McDonnel and in Furnco and in Sweeney, you have a situation where the reason

given by the employer, the -- in articulating a legitimate, non-discriminatory reason, is undisputed. Such as for example, the plaintiff had a bad absence record. That is basically undisputed in those cases. The burden at that point then shifts to the plaintiff who is not arguing that he or she did not have a bad attendance record but that that was not actually the reason, that was not actually the reason for what the employer did and that there was another reason. That was pretextual in nature. Now what the Fifth Circuit is saying in this case is that the reason given by the employer, that is, that the plaintiff was involved in some dissension in the program and that she was responsible for some deficiencies within the agency, that is disputed initially. And all the Court is requiring, all the Fifth Circuit is requiring, is for the employer to have to prove that the reasons they state is actually the reason for what they did.

QUESTION: Well Mr. Gill, don't you think there's a certain inconsistency between the two sentences in the Fifth Circuit's opinion that I read your opposing counsel, where it says defendant may refute plaintiff's prima facie case by articulating a legitimate, non-discriminatory reason for the rejection and then, this court requires the defendant to prove non-discriminatory reasons by a preponderance of the evidence?

MR. GILL: Your Honor, I am certain if I were writing the opinion I would not have used the term preponderance of the

evidence. However, I think it is applicable in this case, and I would argue that regardless of that, that the Plaintiff proved her case by a preponderance of the evidence but I don't think that the Court followed the wrong standard for the reason that I mentioned, that initially, we do not ever get to the question of pretext in this case. I think the Court properly, and I think the evidence is clear, recognized the correct legal standard.

There were three issues involved, and I think the case has to be put in perspective. The first issue was the plaintiff argued that she should have been promoted. The Court of Appeals, on that issue, affirmed the decision of the lower court and in doing so, said that the plaintiff had established a prima facie case, that the defendant/employer had articulated a legitimate non-discriminatory reason for its conduct; the burden then shifted back to the plaintiff who was unable to show that this was pretextual in nature. Therefore, I think it's clear that the Court did recognize the proper legal standard.

Concerning the issue involved in this case, with the Court's permission, the Court said we don't have to reach the standard of the question of pretext, because the employer has never proven that the reasons given were the actual reasons. And I think this Court, I don't think this is inconsistent with Sweeney, and with Furnco --

QUESTION: Maybe if you had been writing the opinion you wouldn't have -- I mean, to switch your language a bit -- you wouldn't have used the word articulated?

MR. GILL: Well, I think the word articulated --

QUESTION: But you're already bound by the use of the word here.

MR. GILL: The word articulate, I think, in this context as set forth in McDonnel Douglas, has been a problem for lower courts, the Court of Appeals and the District Court, as to exactly what is the meaning of articulate.

QUESTION: Well, what do you think it means?

MR. GILL: I think that it means, and it should mean, and be adopted by this Court to be the same language as set forth in a First Circuit case following Sweeney, Loeb v. Textron, Incorporated, in which that was a case after Sweeney, after Furnco, in which the First Circuit speaks to the question of what is actually articulating, and states that it must be sufficient, the evidence must be sufficient on its face to rebut or dispel the inference of discrimination that rises from proof of a prima facie case.

QUESTION: But now isn't that contrary, Mr. Gill, to the very language in Sweeney, on page 24, where we -- the Court said "while words such as articulate, show and prove may have more or less similar meanings depending upon the context in which they are used, we think there is a significant distinction

between merely articulating some legitimate non-discriminatory reason and proving absence of discriminatory motive"?

MR. GILL: There certainly is a problem. I would point out to the Court that in this particular case, there was no requirement that the defendant/employer prove the absence of a discriminatory motive. Judge Gee spoke exactly to that question and distinguished that particular situation from this one. He was simply saying that he has to prove the actual reason that exists. And Your Honor, in writing Sweeney, in Footnote 2, stated that the petitioners clearly did produce evidence to support their legitimate non-discriminatory explanation for refusing to promote the respondent during the years in question. I would argue that this Court even recognized the need to produce evidence other than simply a bald assertion, completely unsupported by any other evidence in the record, to establish and to show that the actual reason was what the employer said it was.

QUESTION: But you would agree that it means something less than proving the absence of a discriminatory motive?

MR. GILL: Yes, I would say that and I think the Court has clearly held that it's not the burden of the employer to prove that.

QUESTION: Do you think that something else, as Mr. Justice Rehnquist has described it, might be the existence of a reason, not necessarily that that was the reason that prevailed,

but at least the existence of a legitimate reason?

MR. GILL: I think it should be the existence of a legitimate reason and that it should be articulated with enough specificity to actually identify that as being the reason.

QUESTION: Well in any event, I suppose you would agree that the language chosen by the Court of Appeals for the Fifth Circuit, at least in this case, is not quite accurate?

MR. GILL: It is not --

QUESTION: And that articulate means something more than just say, it means to adduce evidence?

MR. GILL: Yes, --

QUESTION: To meet the prima facie case of the plaintiff?

MR. GILL: Right. I would say --

QUESTION: You would say that wouldn't you?

MR. GILL: Yes, I would. I would say --

QUESTION: Because it doesn't mean much more than that.

MR. GILL: No. But I would argue that in this case--

QUESTION: It means persuasive. Persuasive.

MR. GILL: It has to be at least credible evidence and it has to convince -- enough to --

QUESTION: But convince whom?

MR. GILL: Well, of course, convince the trier of facts.

QUESTION: And didn't Mr. Fuller's evidence convince the trier of facts?

MR. GILL: Well I would argue that in this case it is impossible to tell, based on the District Court's ruling, because --

QUESTION: Suppose that he had written a little different opinion; I suppose neither of these opinions is a model of perfection, as no opinions are, supposing he'd said I believe Mr. Fuller, that he thought this lady was responsible for dissension. Maybe he's wrong, maybe somebody else was really responsible for it, but when he made his discharge decision that was what he thought and he convinced me he was telling me the truth. Does she still have a claim?

MR. GILL: In that event, Your Honor, I would concede that unless she was able to come back and show that that was pretextual in nature, --

QUESTION: That he was lying, in other words?

MR. GILL: Right, or that there was --

QUESTION: Then if you admit that there was --

MR. GILL: -- some other reason, --

QUESTION: Then the distinction between these other cases does not turn on the existence of a valid reason, because there we're assuming that she really wasn't responsible for the

dissension but he just thought she was.

MR. GILL: Well that's correct, if you assume that, from the record that the District Court did believe him --

QUESTION: Right.

MR. GILL: -- rather than her.

QUESTION: If you just read his opinion you certainly would come to the conclusion he believed Mr. Fuller.

MR. GILL: But I would argue that the opinion is so vague in the sense of applying the McDonnel Douglas test, and that's just what Judge Gee held in the Fifth Circuit.

QUESTION: No, because Judge Gee didn't send it back for another trial or another opinion, he entered -- he directed that judgment be entered in her favor.

MR. GILL: Right. And of course that goes to the second question of whether an independent review of the facts can be made under the East v. Romine doctrine. However, I think that, and I will speak to that rule -- but I think he was within his authority to consider the question of discrimination as being one of ultimate fact, that he was able and that appeals courts are able to decide by making an independent review of all the record and the evidence -- of the evidence in the record. And I think the evidence in this case was so overwhelming in the record, to show that the plaintiff had proved by a preponderance of the evidence, and even substantiated -- with the defendant's own proof , substantiated her case,

that he was able to make a reversal on that point as a matter of law. He did, the Fifth Circuit did remand this case --

QUESTION: On the equal pay issue.

MR. GILL: -- on the equal pay issue. Therefore, I think on that issue, it felt like it was not sufficient evidence in the record concerning the actual standard of what does articulate a legitimate standard mean. As we talked about before. As I stated, I believe it means that the standard has to be stated, or the reason has to be stated with at least enough specificity for the plaintiff to be able to identify that as the reason and to speak to it. And I think what the Fifth Circuit was saying and what Judge Gee was saying, is that the employer should not be able to throw out rabbit trails, numerous reasons, even though they might be legitimate or entirely unsupported or untrue by the evidence in the record, and then place the burden back on the plaintiff to disprove the reasons that are legitimate or that they're not true.

QUESTION: Suppose only two people know the facts, the complaining party, the employee; and the employer who testifies. The employer states a set of reasons and the court accepts them. Why isn't that the end of the case?

MR. GILL: Well, of course, assuming that the correct standard was followed by the District Court, which would not -- we would argue is not the case here, but assuming that the correct standard were followed, that that is all the evidence

in the record and the Court made it clear in its subsidiary findings, which it did not in this case, made it clear that it believed the testimony of the employer and did not believe the testimony of the employee.

QUESTION: Let's make it concrete. Let's make it concrete. It's just one on one, the testimony of the supervisor is that three out of four letters that the person prepared had to be rewritten to correct the errors, but that the erroneous drafts have been thrown away so there's no documentary evidence, and the judge says he believes the testimony of that person and doesn't believe the contrary testimony that no errors were made.

MR. GILL: In that event, and assuming that the Court followed, enunciates and follows the correct standard under McDonnel Douglas --

QUESTION: What do you mean by that?

MR. GILL: Well, in other words, --

QUESTION: I'm not sure I follow you.

MR. GILL: -- first requires the plaintiff to establish a prima facie case -- and then correctly applies the rebuttal standard required of the defendant, and simply at that point that is all the evidence in the record and he believes the testimony of the defendant, of course, then he would be correct in making his decision for the employer. I would argue that that is not the situation here. That there is the

documentary evidence substantiates as pointed out, by the Fifth Circuit, substantiates the plaintiff's view of the case. And I think there's other evidence that would indicate that the District Court did not properly recognize the correct standard. It mentioned terms such as this was a rational decision on the part of the employer, that decision was wrought in good faith, did not speak at all to the McDonnell Douglas standard nor to the requirements of the employer or the plaintiff in that type of a situation. And I think it was so clear that that goes again, to the second part of it, that the Court was obligated, the Fifth Circuit Court to make an independent review of the facts. I would argue that that -- making an independent review of the facts, is a legitimate rule that has been adopted by the Fifth Circuit, it's an old standing rule in numerous types of cases, cases where the ultimate finding of law is also an ultimate finding of fact, and that the Fifth Circuit adopted this rule in Title VII cases --

QUESTION: You're not contending that the Rules of Civil Procedure are not applicable to Title VII cases, are you?

MR. GILL: No, I'm not.

QUESTION: And that would include Rule 52(a).

MR. GILL: That's correct. But I think the evidence in this case makes it obvious that if you, for example, on the question of upgrading, or promotion, in which the Court of Appeals affirmed the District Court, the judge wrote that after

making an independent review of the record he was convinced that the finding of the District Court was not clearly erroneous. Therefore, I think he in fact used the clearly erroneous test, he simply avoided the necessity of sending this case back to the District Court, of saying we need more findings of fact, and bringing it back -- this case was filed in 1973 and it's been on the books this far -- this long at this point, if it had to be sent back to the District Court, sent back to the Fifth Circuit, I think the rule is one of efficacy in order to keep down the burden of the District Court and it's particularly necessary where there are insufficient findings of subsidiary facts as there were in this case and particularly important in Title VII cases, where discrimination is a hard thing to prove, where the facts are always relevant, particularly in a disparate treatment case, the particular facts are extremely relevant and therefore, it's certainly a rule and even the state, in its brief, admitted the efficacy of that rule. And I would argue that the Court should not disturb that rule.

Speaking briefly again on the nature of the type of evidence needed to articulate a legitimate, non-discriminatory reason, by the employer, I do not believe that this Court has of yet, clearly defined, nor has any Court, clearly defined exactly what is meant by articulation of a reason and what type of evidence is necessary. In this case, I would argue that the

evidence given by the employer was completely hypothetical in nature. There was subjective standards used, statements such as "I feel like he was better qualified", "I made my decision based on the recommendations of subordinates", first off being hearsay, secondly, the subordinates themselves may have discriminated, there was no comparative-type of data of any kind introduced, as was pointed out --

QUESTION: But then aren't you still saying that he has to prove non-discrimination rather than simply articulate a reason?

MR. GILL: Well, if you're speaking of articulate in that sense, Justice Rehnquist, in the sense of just stating it, in other words, just making an oral statement -- if that is articulate, then I would argue that that is not enough.

QUESTION: Then what do you do with Sweeney?

MR. GILL: Well I would argue that that is not in direct conflict with Sweeney. That in Sweeney, when -- in writing the opinion you stated that --

QUESTION: It was a per curiam opinion, I think.

MR. GILL: Right. But there was a statement by the Court in Footnote 2, saying that the petitioners in Sweeney did produce evidence to support their legitimate non-discriminatory explanation. In other words, the Court was stating that some evidence other than simply an explanation, an oral statement, is necessary. And certainly Sweeney did contain

that other type of evidence such as another female had recommended Sweeney for the job -- I mean, made an unfavorable recommendation to her, another female had taken her place -- there was other evidence highly qualified males had not been promoted as well as Ms. Sweeney. And there was other evidence that the Court pointed out and that was in that record that is not in the record in this case.

So I would argue that Sweeney is not in conflict and that the Court has not clearly recognized or stated the standard that must be followed. And I would urge the Court to adopt the standard announced in Loeb v. Textron, or at least articulated by the Court there. And I think it is the same thing that the Fifth Circuit, Judge Gee, was trying to get to in his opinion.

QUESTION: But he said proof by a preponderance of the evidence.

MR. GILL: Again, Your Honor, as I stated, I don't agree particularly with the language involved there, but I would point out that --

QUESTION: We have to assume that that language reflected his state of mind and his analytical processes, don't we?

MR. GILL: Well, I think that we need to look at exactly what he applied that to. And I think that what he was saying and what the Court in Loeb was saying is that the

plaintiff, in any kind of a case, has the opportunity and should have the opportunity to disprove the reason given by the employer; that if the employer says the reason -- for example, the reason that I fired her was because she had a poor attendance record, that the plaintiff should have the opportunity as in this case to introduce evidence and show -- she doesn't have -- I don't have a poor attendance record, I was in attendance every day. And that, in that case, we're not switching the burden of proof to the defendant, we're just saying the defendant, employer, has not even rebutted the prima facie case set forth by the plaintiff.

QUESTION: So you say that this case involves only steps 1 and 2 in McDonnel, and that steps 3 and 4 were never brought into play?

MR. GILL: That is correct. Because, I think it's clear that the Court stated, and I think it spoke specifically to that point, that they are simply -- that it said that defendant may refute plaintiff's prima facie case by articulating a legitimate and non-discriminatory reason. It goes on to state that in this case, on this particular issue, that the plaintiff -- all the evidence in the record completely disproves the reason given by the employer for his conduct. Therefore, you don't even have to go to the third step. I think the Court certainly recognized the third step because on the first issue of non-promotion it reached the third step. It said

plaintiff had presented a prima facie case, defendant/employer had articulated a legitimate non-discriminatory reason, but plaintiff was unable to prove that this was pretext, pretextual in nature. And therefore, that the preponderance of the evidence, the employer on the issue of promotion, prevailed. However, concerning the issue of termination, simply saying that plaintiff's prima facie case was so strong and the defendant/employer's case was so weak and unsupported by the evidence that the prima facie case was not rebutted and therefore plaintiff prevailed on a -- by a preponderance of the evidence. And I think this speaks to what Justice Stevens was talking about earlier. What happens if the plaintiff, for example, produces a prima facie case and evidence of negligence in an automobile accident case. Produces ten eye-witnesses and engineers testimony, let's say that the defendant ran a red light, and the defendant simply gets up and says I don't think it happened that way, it happened some other way. And the Court at that point, I think is able to say, that the defendant has not -- the plaintiff has presented the prima facie case, the defendant has not dispelled or rebutted that, and therefore, the finding would be proper for the plaintiff.

QUESTION: Well what if the trial court in the hypothesis you just gave, on -- contrary to its conclusion as you stated, said the plaintiff has produced ten witnesses, the defendant had simply testified himself, but I believe the

defendant and not the ten witnesses of the plaintiff and therefore I enter judgment for the defendant. Now would there be anything wrong with that, unless the Appellate Court were to say the finding were clearly erroneous?

MR. GILL: No, there wouldn't. And I certainly wouldn't argue that the judge or the jury or whatever may be involved, has the right to believe who they want to believe. However, I think that is not applicable in this particular situation. Because number one, I think it is unclear -- or it is clear that the District Court did not apply the proper standards from the beginning. It never even started, as to whether the plaintiff had presented a prima facie case. It used questions of good faith and rational conduct as the test. And I think that the evidence in this case is so overwhelming as found by the Fifth Circuit to indicate that the finding was clearly erroneous. As a matter of law. Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Wilson?

ORAL REBUTTAL ARGUMENT OF GREGORY WILSON, ESQ.,
ON BEHALF OF THE PETITIONER

MR. WILSON: I just would like to point out to the Court that the District Court did specifically find that Ms. Burdine was involved in the dissension in the division on page A3 of the Appendix of the Petition for Certiorari. At the

bottom of the page, the sentence begins "The three individuals who were terminated, plaintiff, Carraveo and Kirkland did not work well with each other and had some disagreements and in light of the Department of Labor's concern about a lack of communication within the staff and other considerations, it was certainly a rational decision for the defendant to terminate those parties."

The -- once the defendant has articulated reasons, what he has essentially done is he's created a fact question as I think the Court has begun to realize, that the -- and the District Court is at that time empowered to rule in either direction. If the defendant fails to articulate a reason, then the prima facie case would require the District Court to rule in favor of the Plaintiff. Once the defendant has gotten on the stand and testified that he had another reason, there's a fact question and it should not be reversed by the Appellate Court unless it was found to be clearly erroneous. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon at 11:59 o'clock a.m. the above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1764

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS

v.

JOYCE ANN BURDINE

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: William J. Wilson

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