OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ST. MARY'S HONOR CENTER, ET AL., Petitioners v.

MELVIN HICKS

CASE NO: 92-602

PLACE: Washington, D.C.

DATE: Tuesday, April 20, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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ST. MARY'S HONOR CENTER, ET AL., :

Petitioners :

v. : No. 92-602

MELVIN HICKS :

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Washington, D.C.

Tuesday, April 20, 1993

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

APPEARANCES:

GARY L. GARDNER, ESQ., Assistant Attorney General of Missouri, Jefferson City, Missouri; on behalf of the Petitioners.

CHARLES R. OLDHAM, ESQ., St. Louis, Missouri; on behalf of the Respondent.

EDWARD C. DuMONT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States and Equal Employment Opportunity Commission, as amici curiae, supporting Respondent.

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P R O C E E D I N G S

(11:11 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 92-602, St. Mary's Honor Center v. Melvin Hicks.

Mr. Gardner.

ORAL ARGUMENT OF GARY L. GARDNER

ON BEHALF OF THE PETITIONERS

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

The issue in this employment discrimination case alleging racial discrimination in demotion and discharge is whether a district court is compelled as a matter of law, because of a finding of pretext, to enter a judgment for the employee even though he found as a matter of fact that there was no intentional discrimination and believed as a matter of fact there was no intentional discrimination.

The answer to that question is no because, as this Court said in Aikens, once legitimate, nondiscriminatory reasons have been articulated for the employment decision, no presumption operates and the trier of fact must make a factual determination about whether there was intentional discrimination or not.

Aikens rejected a rigid, mechanistic, and

ritualistic method of factfinding, a method that I think would straitjacket factfinders and actually obstruct the truth-seeking process. If rejected a method like the method appearing on page 18 of the employee's brief on the merits, a method -- a diagram type method which typifies a rigid approach to factfinding, which should not be taken in employment discrimination cases. This --

QUESTION: Can I ask you one thing? If the employer in a case like this, after a prima facie case has been made, just remains quiet or he doesn't offer any allegedly neutral ground, is the plaintiff entitled to judgment then?

MR. GARDNER: In the usual case he is, Your Honor, because in the usual case, there's no evidence at all of any nondiscriminatory reason for the discharge.

QUESTION: Well, and if the employer offers on its face a neutral reason and the plaintiff fails to prove that it's a farce, the case is over.

MR. GARDNER: Well, if the employer --

QUESTION: That would mean the employer then is entitled to judgment.

MR. GARDNER: If the plaintiff fails to prove pretext --

QUESTION: Yes.

MR. GARDNER: -- yes, of course, the case is

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over.

QUESTION: But if the plaintiff proves pretext --

MR. GARDNER: The case is not over.

QUESTION: Well, you think he's -- it's not over. He's in worse position than he would have been if the employer had stayed quiet.

MR. GARDNER: Not necessarily, Your Honor. I can imagine some situations where the employer is silent in response to the prima facie case, but the case is not over because there are some situations where the evidence of the prima facie case may also contain in it evidence of a nondiscriminatory reason, as the evidence in this case in the evidence of pretext contained in it a nondiscriminatory reason.

QUESTION: Well, supposing the employer, after the prima facie case is made, testifies that my reason for firing the person was not discriminatory. It was thus and so. Well, that certainly is evidence of a nondiscriminatory reason, but the finder of fact isn't required to believe the employer when it comes to the ultimate decision, is he?

MR. GARDNER: No, he's not, and he's not required to believe the employee. On the other hand, even if there is a finding of pretext that the offered reason

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was not the actual reason, the finder of fact has got to decide which one it really believes is the actual motive of the employer.

QUESTION: Does your opponent agree, do you think, that the district court in this case found as a fact that the reason for the discharge was not discrimination on the basis of race?

MR. GARDNER: I believe my opponent does not agree with that finding of the district court.

QUESTION: But does he agree that the district court made that finding?

MR. GARDNER: Yes, he does. That was a finding of fact that the district court made after he weighed all the evidence, after he made credibility determinations, and he found that there was no intentional discrimination because there was evidence before him which undermined any inference of intentional discrimination and which revealed a motive for the employment decision other than the employee's motive or the employer's proffered motive.

QUESTION: But he -- did he -- did the district trial court find pretext that the offered reason was pretextual?

MR. GARDNER: Yes, he did. He found that the -- his words were that the proffered reason was not the actual reason. He did not accept, however, the employee's

explanation that the actual reason was a racially motivated reason.

QUESTION: So, then an employer is really well advised to come up with a pretextual reason as your opponents says in his brief.

MR. GARDNER: Not so, Your Honor.

QUESTION: Well, if you stand silent, you lose. Right? Automatically because of the prima facie case, you must lose.

MR. GARDNER: In the usual prima facie case.

QUESTION: Right.

MR. GARDNER: But an employer's --

QUESTION: So, better to come up with -- once you come up with some pretext, you don't necessarily lose. Then the factfinder can decide, well, even though this was a pretext, and even though there was a prima facie case, nonetheless, I just don't basically believe that there was racial discrimination going on here.

MR. GARDNER: An employer should never come up with a pretextual reason. It's never in his interest to do so because --

QUESTION: Why not? He has got nothing to lose on your theory.

MR. GARDNER: Yes, he does.

QUESTION: What?

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MR. GARDNER: An inference of improper motive discrimination can be drawn from the finding of pretext. That's the common sense rule -- part of the rule of McDonnell Douglas.

QUESTION: But at least you'd have a finding. At least you'd have a factfinder who could make a finding; whereas, if he doesn't come up with a pretext, the game is over. There's no finding possible you tell us. Right? The prima facie case governs.

MR. GARDNER: Well, that's in the situation of the usual prima facie case which eliminates all or most common reasons for an action. This is not really the usual case. The plaintiff's evidence in this case from the very first witness, whether it was in the pretext stage or in the prima facie stage of the case, presented evidence of a motive other than discrimination and other than the employer's proffered reason --

QUESTION: Let me --

MR. GARDNER: -- a third explanation for the employment decision.

QUESTION: May I interrupt you for a moment, Mr. Gardner?

You've emphasized the usual prima facie case and distinguishing it apparently from this case because I think what you're saying is that in the prima -- the

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plaintiff's own evidence, there was another nonracial reason for the discharge.

MR. GARDNER: I'm saying that, yes.

QUESTION: So, does that not mean that your client was entitled to a -- have the case dismissed at the end of the plaintiff's case?

QUESTION: He should have never been able to make a prima facie case.

MR. GARDNER: No, Your Honor, because there was a finding of pretext.

It's difficult --

QUESTION: No. But no, no, no, no, no. I'm suggesting that you didn't even reach the need to determine whether there was pretext if you're correct. If the plaintiff's own evidence provided the basis for finding an alternative ground for discharge, you should have prevailed on a motion to dismiss at the close of the plaintiff's case.

MR. GARDNER: I agree with you if we were able to -- if we are able to distinguish in these trials when the prima facie case stage ends, when the rebuttal of that begins, and when that ends.

QUESTION: Well, it ends when the plaintiff's evidence is in. That's easy.

MR. GARDNER: Well, when the plaintiff's

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evidence is in, it usually contains the evidence of pretext also. We did not try this case in sections, prima facie case, rebuttal, pretext stage, and rebuttal to that. It came in all at once. Plaintiff's evidence had everything in it.

QUESTION: Did you make a motion to dismiss at the close of the plaintiff's case?

MR. GARDNER: I did. The district court --

QUESTION: And it was denied, but then eventually you won because it should not have been denied is what you're saying.

MR. GARDNER: If we can distinguish in the steps of the case.

QUESTION: Well, Mr. Gardner, even though -- when you proceed here -- when a plaintiff proceeds and makes out a prima facie case, the plaintiff does that by showing the plaintiff was fired, that he was qualified as an employee, and that someone of another race was hired instead. Right?

MR. GARDNER: Right.

QUESTION: I mean, that's what we have here. That's a typical case.

MR. GARDNER: That's the usual prima facie case.

QUESTION: Now, at the so-called end of the plaintiff's case, even if this other evidence may emerge

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that, well, there was some animosity here, even though it isn't a mandatory presumption at that stage, there still are inferences to be drawn, are there not, from the plaintiff's evidence that he was fired, that he was qualified, that someone of another race was hired instead?

MR. GARDNER: That's correct.

QUESTION: So, I mean, how would he ever be entitled to summary judgment even though some of other evidence had emerged? I mean, it still is a fact question to be determined by the trier of fact.

MR. GARDNER: I agree with you.

QUESTION: And there's some evidentiary value to that evidence whether or not it's applied in a mandatory sense.

MR. GARDNER: I agree with you. Once there is the prima facie case, once there is evidence of pretext, the employee may still prevail if the district court believed and credited that evidence. In this particular case --

QUESTION: So, you weren't entitled to summary judgment or to a motion to dismiss at the conclusion of the plaintiff's evidence because these other things were in the case.

MR. GARDNER: I think so because we tried it all at once. We tried the prima facie case and we tried the

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pretext part of the case all at once.

QUESTION: You just take witnesses to tell kind of a chronological story I suppose, and it isn't necessarily parsed out as to this shows the McDonnell Douglas burden and then we get to another. You're going to take the witnesses and find out everything they have to say on the subject.

MR. GARDNER: Exactly, Your Honor. The first witness didn't testify to the prima facie case and sit down, and then the employer come and testify, and then the employee came again and testify. The first witness, Mr. Hicks, testified about everything right to the --

QUESTION: Mr. Gardner, what is the effect of the prima facie case? I mean, maybe we could avoid the dilemma that the other side says exists if the effect of the prima facie case is not to entitle the employee to judgment if there's no response from the employer, no other reason given, but rather just to entitle the employee to get to the factfinder. In other words, it survives your motion to dismiss, but the fact -- which means the factfinder may find in favor of the employee, but perhaps the prima facie case does not mean that the factfinder must find in favor of the employee.

MR. GARDNER: That's interesting, Your Honor. I don't believe that has been the position of the Court,

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however.

QUESTION: Well, I understand that, but we wouldn't be faced with this dilemma, would we?

MR. GARDNER: That's true. I'm not asking you to change that.

QUESTION: No. You wouldn't mind having that rule I don't suppose.

(Laughter.)

MR. GARDNER: Well, I'm not here today asking you to promulgate that rule because it's not necessary to resolve this particular case.

QUESTION: Well, I take it the concomitant of the rule is that the presumption would not drop out of the case altogether. The employee, under at least one formulation, might be entitled to always go to the finder of fact once he had a prima facie case.

MR. GARDNER: That sounds very reasonable.

QUESTION: And we could also say I suppose, if we're just making up rules, that the burden continues to rest on the employer.

MR. GARDNER: To come forward with an articulation of a legitimate, nondiscriminatory reason, but --

QUESTION: Or the ultimate burden of proof once a prima facie case has been shown.

MR. GARDNER: Again, I would say the same thing as I said to Justice Scalia. That has not been the position of this Court. It has always been that the burden of proof does not shift in the indirect evidence situation, but stays always with the employee.

QUESTION: It seems to me there's an undercurrent in this case that the employer is not bound by what it says. It's really a rather unremarkable principle to say that a party is bound by his own proof, isn't it? Aren't we departing from that somewhat in this case?

MR. GARDNER: Well, that is an unremarkable principle. It's not a matter of the employer switching grounds in this case. The legitimate, nondiscriminatory reasons we proffered we believe in and we still believe in today. The factfinder didn't find those to be the actual reasons and, for that reason, decided that there was no showing of actual discrimination, which is the plaintiff's burden. And I think it's proper for the employer to rely upon a failure of proof by the plaintiff, which is what the district court held.

QUESTION: How can you call it a failure of proof if what you're really saying is that there was a third reason, not the racial reason, not the defendant's reason, but this antagonism? Is that a failure of proof,

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or is that a finding of an affirmative explanation?

MR. GARDNER: Well, it's a failure of proof of racial motivation.

QUESTION: How can there be a failure of proof if you have a prima facie case of racial motivation?

MR. GARDNER: Well, because that has been rebutted by the nondiscriminatory reason.

QUESTION: Well, but no, it wasn't --

MR. GARDNER: It does not --

QUESTION: -- rebutted by the nondiscriminatory reason. It's rebutted by something that the defendant did not rely on. Isn't that right?

MR. GARDNER: Well, the pretext -- the finding of pretext was rebutted by the personal animosity, but once the legitimate, nondiscriminatory reason has been proffered, there's no more presumption which operates. It becomes solely then weighing evidence and credibility determinations and then going to the fact of whether there has been proof of intentional discrimination.

QUESTION: Well, if you wanted to fit this more tightly into the McDonnell Douglas framework, if that were thought necessary, I suppose you could say that the judge's finding that the discharge resulted from personal animus was a finding of a nonpretextual reason for the discharge. That was the factual reason in the view of the

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judge.

MR. GARDNER: It would be a nonpretextual reason in the sense that if one equates pretext with intentional discrimination, it would be a nonpretextual reason. The district court did not look at it that way. The district court equated pretext with just not the actual reason and looked at all of the explanations which it had before it from the two parties and from the third reason to determine what the actual reason was.

QUESTION: Well, Mr. Gardner, now the court of appeals didn't really review the district court finding of personal animosity as a reason. It instead went off on the application of making it a mandatory presumption.

MR. GARDNER: That's right. It did not review subsidiary findings of fact. It really did not review the ultimate finding of fact.

QUESTION: So, we don't know if there's enough evidence in this record presumably to support that district court finding of personal animosity or not I guess.

MR. GARDNER: I think you do know that for two reasons. One, the testimony from Mr. Hicks himself and his witness about the personal animosity. In a nutshell, it was that his supervisor admitted to him that he was trying to make him fight.

The other evidence which shows that that personal animosity is credible is the explanation, rather than the racial inference -- is the evidence which undermined the racial inference.

QUESTION: Well, but the court of appeals hasn't evaluated that, and I guess there's no reason why we have to. We can deal with the question of whether there should be a mandatory presumption.

MR. GARDNER: That's true. You could just say it need not be a mandatory presumption, but the evidence --

QUESTION: Just so that I understand your position, though, may I ask were those two items of evidence that you mentioned, the Hicks testimony and I think the employee's own testimony -- were they adduced as part of the plaintiff's case before the plaintiff rested?

MR. GARDNER: That's correct, Your Honor. It was adduced through the plaintiff himself. He was the first witness. It was the plaintiff's, Mr. Hicks', testimony and the testimony of a coemployee.

QUESTION: So, your position is that before the plaintiff's case rested, there was testimony that the firing was due to personal animosity for reasons other than racial antagonism.

MR. GARDNER: That's true.

QUESTION: But we don't really know that. We know personal animosity, but he could have not liked this man because he was black. All we know is that there was personal animosity. We don't know what the basis for the personal animosity --

QUESTION: After the plaintiff rested, the defendant came forward with some evidence, and that is the evidence which undermines the inference that the personal animosity was racially motivated. That evidence is -- there was a full scale changeover in the supervisory personnel in the institution. There were six supervisors, but the institution was so poorly run that four of the six supervisors were gone. Mr. Hicks was not one of the four.

But even though there is this changeover in the institution as a whole, the number of blacks employed at the beginning of a calendar year was the same as at the end of the calendar year. The number of blacks hired and fired was the same at the beginning -- the number of blacks hired and fired was approximately equal. The number of people, those six people, in a supervisory position would have been equally split between black and white after the changeover if one of the person -- black person had accepted an offer for it.

QUESTION: The person who showed the personal animosity was not the one in charge of all of these --

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MR. GARDNER: No, but --

QUESTION: -- of all of these decisions. Right?

MR. GARDNER: No. The person who showed the personal animosity is the one who initiated every employment action that was taken against Mr. Hicks. There was four of them in a month and a half.

QUESTION: Against Hicks. So, the fact that higher up people kept the same racial balance that used to be there does not show whether this particular supervisor disliked Mr. Hicks because he was black or not.

MR. GARDNER: Also, this particular supervisor did not initiate any discipline against Mr. Hicks' subordinates who actually committed the violation who were also black. He apparently picked Mr. Hicks out and excluded other black employees who actually committed the violations, and Mr. Hicks was disciplined essentially for permitting them to commit them.

QUESTION: Mr. Gardner, you have said that you're not asking the Court in this case to adopt the view that the prima facie case should be regarded merely as a case sufficient to get to the factfinder. That might be nice, but that's not what you're asking us to do here.

MR. GARDNER: That's right. I'm not asking you to do that.

QUESTION: Is the alternative then necessarily

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that what you're asking us to do is to hold that the reasons given by the employer, once the burden of going forward shifts, need not be ultimately the exclusive reasons that he relies upon to defend the case? In other words, you're -- it seems to me you're necessarily saying that there should not be a requirement for the employer to raise all possible defenses that he intends to rely on at that time. Is that a fair statement of your position?

MR. GARDNER: Approximately fair.

QUESTION: That's usually as close as I get.

(Laughter.)

MR. GARDNER: It's always in the employer's interest to not present a pretextual reason. It's always in the employer's interest to present all the reasons because an adverse inference can be drawn if he does not.

But at the end of the day when all is said and done, the finder of fact has to determine from the evidence before it what was the motive, and if there's evidence of a third explanation for the motive there, which he thinks is credible and has evidence in the record that links it to credibility and undermines the racial inference, the finder of fact ought to be permitted to base his decision on that as long as there's sufficient evidence.

QUESTION: Then I think you are saying that the

employer is not confined to the reasons he gives even though all of those reasons may, in fact, turn out to be pretextual, the reasons he raises in his defense when the burden shifts to him. You're saying he is not confined to those.

MR. GARDNER: I would say the trier of fact is not confined to those reasons so long as there's --

QUESTION: Well, why do you split them up? I mean, you're not simply saying that the employer ought to have the possibility of a wild card in the form of a factfinder who says, well, I think in this instance I'll go beyond the reasons given. You're saying that's a legitimate thing to do, and if it's a legitimate thing to do, then I can't think of any reason why the employer shouldn't be able to argue it. He says, look, I gave you two reasons, purely pretextual, but I've got some more evidence, and if you're going to find against me on these two stated reasons as pretextual, let me throw in the rest of the evidence and you may find that I've got a third good reason that I haven't mentioned yet. You're saying that that's legitimate.

MR. GARDNER: It's legitimate -- he doesn't sandbag the court and say if you're going to find this, this is the real reason. It's legitimate if that third reason comes out in the plaintiff's case, as it did in

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this case. The plaintiff knows it's there.

QUESTION: Yes, but if that's the case, then why don't we go right back to the point that I guess Justice Scalia made and say the real error in this case is that there was never a prima facie case made?

MR. GARDNER: It can be looked at that way.

QUESTION: Let's not monkey with the standards for raising defenses if, in fact, the very first stage, even that is the predicate for shifting to the -- or raising the burden of going forward is not satisfied.

MR. GARDNER: It can be looked at that way, Your Honor, because the evidence of the third motive came out in the very first witness.

QUESTION: And if we look at it that way, what have we got here in this case? Just a matter of error correction I guess. The district court's error was in failing to see the plaintiff's failure in the first instance.

MR. GARDNER: If it's looked at in that way, that would be the district court's error.

QUESTION: Well, Mr. Gardner, I tried to question you here. Now, the evidence the plaintiff put in included he was qualified, he worked for the employer, he was fired, and someone of a different race was hired in his place. And that is ordinarily enough for a prima

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facie case.

Now, you say that there was also evidence at the time the plaintiff himself testified that maybe there was some kind of animosity going on here. That doesn't wipe out the inferences to be drawn from what would amount to a prima facie case. I don't understand why it wouldn't still go to the factfinder at the end of the day to decide whether the factfinder thought the inferences to be drawn from what would make out a prima facie case here weren't sufficient.

MR. GARDNER: Your Honor, I think --

QUESTION: The factfinder didn't have to go off on a personal animosity. Maybe he could. That's the issue here, but he didn't have to. It wasn't enough to entitle you to any kind of motion to dismiss at the conclusion of the plaintiff's case.

MR. GARDNER: I think the difficulty is trying to pin down exactly at what stage the third explanation came in. If we pin it down that it came in at the prima facie case stage, Justice Souter's explanation --

QUESTION: But whenever it comes in, the trier of fact doesn't have to believe that. To make your case, you just want us to say the trier could believe it. He didn't have to.

MR. GARDNER: That's true.

QUESTION: The prima facie case is not dissipated because there is evidence that if believed might require a ruling in favor of the employer, is it?

MR. GARDNER: No, it's not. It's still there to draw the inference. The district court dissipated the presumption, so to speak, and went to the factual question.

QUESTION: Well, in Aikens, we said that after all the evidence is in, the presumptions are much less important. It's just a question of was there -- did the employer discriminate or did the employer not discriminate, and just look at all the evidence and make a factual determination.

MR. GARDNER: I think that's the way the district court looked at it rather than seeing it as a failure of the prima facie case.

QUESTION: You -- what do you object in the court -- to in the court of appeals judgment? Namely, that the district court was -- it was improper for him, for the district court judge, to rule for the plaintiff just because there was a finding of pretext.

MR. GARDNER: I think that's it in a nutshell. That -- the presumption has disappeared. It undermines the requirement that there be a factual finding of intentional discrimination, and there's a third

explanation in this record. Not all proffered explanations have been --

QUESTION: How is it if there's a third explanation that was so obvious to the judge that the defendant never mentioned it? It's kind of counter-intuitive.

MR. GARDNER: Plaintiff never mentioned it either. It was his testimony and apparently was unaware like defendant that --

QUESTION: The defendant's real reason for firing him was there was animus there, but the defendant didn't tell the judge that.

MR. GARDNER: Nor the plaintiff.

QUESTION: And what's your -- what's --

QUESTION: Of course. The plaintiff thought it was racial.

QUESTION: I'm sorry. I was going to say and what's the justification. Coming back to kind of the other alternative analysis, what's the justification for allowing the defendant to profit by this if he never raises it as a defense? It's sitting right there in front of him. He never mentions it. Why -- as a matter of just sensible procedure, why allow him to take advantage of that?

MR. GARDNER: Because the falsity of the

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justification does not necessarily mean that there has been discrimination. It can be false --

QUESTION: Well, that may very well be. I'm just raising simply a procedural point. Let's get our issues defined, and the way to define our issues is to require the defendant, when it's -- when the burden shifts to the defendant, to give all the reasons that he may rely on. And if he chooses to omit one, particularly one which you claim here was disclosed by the plaintiff's case, why in effect should he be allowed to do that? Why not simply adopt a rule that says we want to know what the defenses are going to be, defining the issues before us at least at the point at which the burden shifts to the defendant. If he does not give that reason, too bad. He can't rely on it.

MR. GARDNER: The problem I see with that is it might straitjacket factfinders. There may be some evidence in there, like this case, where neither party was aware.

QUESTION: Look, the factfinder is not an independent party here. If a defendant -- a factfinder is straitjacketed when somebody doesn't raise a defense, let's not cry for the factfinder. Why as a matter of just sensible procedure do we not require that the defenses be raised and that the person who raises them be limited to

them?

MR. GARDNER: I don't know really.

QUESTION: Then you lose.

QUESTION: Well, maybe it's because --

MR. GARDNER: Not --

QUESTION: -- the employer is not likely to come up with some of these answers because they are not rational answers. I mean, you come up with the answer, well, this employee was not working well, and that's why I dismissed him. That's what the employer will come up with. He won't come up with the explanation which you assert was the real case here. Well, for some reason or other, my supervisor just didn't like this guy. I mean, it's maybe unrealistic to expect the employer to come in with such an irrational explanation.

MR. GARDNER: Like I said, Mr. Powell initiated all of the employment actions and the supervisors' and Mr. Powell mistake was was not perceiving it at that time, that it was personally motivated then.

QUESTION: The thing that concerns me, Mr. Gardner, is what does the plaintiff do on rebuttal. He looks at the two defenses or three defenses. Well, I've blown those out of the water. I better search the record for any possible other reason that might occur to the judge, and I better cover the waterfront with all sorts of

testimony. Won't you get a lot of collateral issues developed in the rebuttal stage of the case if you have to cover every conceivable reason for discharge even if not relied on by the defendant?

MR. GARDNER: I don't think we have to cover every conceivable reason, only those that had sufficient evidence.

QUESTION: Suggested remotely by the evidence. He was late one day a couple years ago. He didn't say good morning to somebody. I mean, all sorts of things could be --

MR. GARDNER: Not suggested remotely, Your Honor. Supported by sufficient evidence.

QUESTION: Thank you, Mr. Gardner.

MR. GARDNER: Thank you.

QUESTION: Mr. Oldham.

ORAL ARGUMENT OF CHARLES R. OLDHAM

ON BEHALF OF THE RESPONDENT

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

Mr. Gardner and I are in substantial disagreement about the facts and substantial disagreement about what the court below held, the district court held.

In regard to the issue of personal animosity --

QUESTION: But, of course, we're reviewing the court of appeals judgment.

MR. OLDHAM: I understand, Your Honor, but he --

QUESTION: And you're defending that judgment.

MR. OLDHAM: I'm defending that judgment.

QUESTION: Yes, all right.

MR. OLDHAM: And I just wanted to point out just one fact that what the district court held that plaintiff had failed to prove that personal animus was not the true reason. That's what the district court held.

What happened in this situation, we proved the prima facie case. The employer came forward with his two reasons, the severity of the -- the number of disciplinary actions in a short period of time and severity of a provoked confrontation between Mr. Powell and Mr. Hicks. Then the court went on to find that these reasons were pretextual, and then ignored I think the mandates of Green and Burdine.

QUESTION: Do you think pretext means it's a lie?

MR. OLDHAM: It's false. I think that he gave false reasons. That's a lie, yes.

QUESTION: Well, do you think it would be -- is it -- or does pretext really just mean that there was another reason?

MR. OLDHAM: As I understand pretext, the way we use pretext it's false. It is not the true reason, that they advanced a reason which was not accurate, which was not true, which substantially amounts to it was a lie in this particular case. It was not the reason he was discharged.

And the problem that Mr. Gardner has, and he admits, that if we prove a prima facie case and if the defendant or employer remains silent, we're entitled to judgment as a matter of law.

He next -- go to the next step. If we offer a false reason --

QUESTION: Do you think a trial judge in a case like this could reserve his judgment on -- reserve his ruling on a motion to dismiss at the close of the plaintiff's case?

MR. OLDHAM: They often do that, Judge. They often defer the ruling on the motion to dismiss. They hear the entire case, and then they make the decision on the -- whether or not there should have been a directed verdict in the first place.

QUESTION: And do you think that -- don't judges sometimes rule on the motion although they think we really are going to -- we really don't think it's much of a prima facie case, and we may ultimately decide the case because

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the plaintiff's case was deficient?

MR. OLDHAM: The answer to that is yes, Your Honor, because usually in a jury trial case --

QUESTION: So, making just a ruling that there's a prima facie case doesn't necessarily end the factfinder's task.

MR. OLDHAM: No, it does not necessarily end the factfinder's task when the person comes forward with an articulated, nondiscriminatory reason. If he doesn't -- if he stands mute, makes no statement at all, I think it's clear that under Burdine he's -- the plaintiff is entitled to a judgment. That's the ruling in Burdine.

QUESTION: Well, isn't there something to what Mr. Gardner was saying about the way a trial proceeds, that you don't say now we're going to call three witnesses to make out our prima facie case? You put on a witness. You find out as much as you can from him on both sides. Then you go on to the next witness, and sometimes you can't be sure at what point the prima facie case has been made out. You know at the end of all the witnesses the plaintiff has called it has.

MR. OLDHAM: That's right, Your Honor. When you try a case, you don't try it in this three-stage step like this. We try it from the beginning to the end in a chronological state. We present our evidence and we -- at

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the time you're trying the case, you will probably present some evidence of pretext because the employer has already articulated in some manner or another, as was done in this case, his stated reasons for the action taken, for the employment decision.

QUESTION: And you can call the employer as a witness if you want to, can't you?

MR. OLDHAM: I can call the employer as a witness. In this case we actually had documents which spelled out the specific reasons for the actions taken, and they were part of the exhibits in the case. And so that this was part of the pretrial discovery.

The -- essentially what the State is asking this Court to do is to modify greatly the holdings in Green and Burdine. You know, some 20 years ago Green was argued in front of this Court and there was a unanimous decision. And the Court looked at the Civil Rights Act and said we want to stop discrimination, overt and subtle. And then they devised a method of proving discrimination, and it's by indirect evidence.

QUESTION: What about Aikens? Do you think that had anything to do with a case like this?

MR. OLDHAM: Did that modify Green and Burdine in this specific area?

QUESTION: Well, it certainly said that after

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the evidence is in, the presumption drops out of the case and you go on. I assumed that meant something.

MR. OLDHAM: That's true, Your Honor. The holding is that once the employer comes forward with a legitimate, nondiscriminatory reason, that that rebuts the presumption of the --

QUESTION: The presumption drops out.

MR. OLDHAM: That rebuts the presumption, and that presumption drops from the case. However, the evidence remains. The evidence remains on the inferences that can be legally drawn from that evidence remains in the case.

Our position is that you start out, as we've pointed out in our brief, with a Green/McDonnell Douglas format, where you start out with all sorts of possible reasons for the actions taken. The plaintiff claims it was discrimination. You prove the prima facie case which eliminates some of the reasons, and then the employer is required to come forward and articulate the nondiscriminatory reasons. Now, after he has articulated, that narrows the focus down to the question of whether or not these reasons are true or not true. Once you prove pretext, all you have left on one side is discrimination and the false reasons given by the employer.

And my position is and the position that we have

taken is that this entitles us to judgment as a matter of law, and that's what the court of appeals held in --

QUESTION: Your rule is, I take it, that if -- once a prima facie case is made, then the court must rely on the employer's explanation if there is to be a ruling for the employer.

MR. OLDHAM: He must rely upon the articulated legitimate and nondiscriminatory reasons. The purpose of the whole thing is to focus and narrow the inquiry from all possible reasons down to the ones that the employer says he relied upon. Once you prove they're false --

QUESTION: Does this sort of rule exist in any other area of the law?

MR. OLDHAM: I think that this is fairly unique, Your Honor, because of the prodigy of Green, Burdine, Furnco, and all the cases that have followed, which are a product of the Civil Rights Act of 1964 where the Congress declared it was one of the highest priorities that we had was to eliminate discrimination, both overt and subtle. And in Furnco, this Court recognized that it's kind of hard to get into the minds of individuals, that you have to devise a method of reaching the results of proving discrimination. And the Court has devised this process of proving discrimination, and this is what we followed when we tried this Hicks case. We used --

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QUESTION: So, this is really shifting the ultimate burden of proof it seems to me.

MR. OLDHAM: No, Your Honor. I don't think it shifts.

QUESTION: Despite the fact that Green says that that's not what happens, it seems to me that that's what's happening here. If there's evidence in the record from which a trier of fact in an ordinary case could find for the employer, the courts prevent it from doing so.

MR. OLDHAM: Your Honor, if the State or the employer doesn't project or articulate the legitimate, nondiscriminatory reasons, it is our position that the trier of fact shouldn't search the record and come up with his own articulated reasons, that the articulation is the responsibility of the employer.

QUESTION: What if the plaintiff, in the course of his testimony, had offered evidence of a fact which would have justified a conclusion that there was a nondiscriminatory reason for his firing?

MR. OLDHAM: If the plaintiff makes an admission that the reason for the discharge was nondiscriminatory --

QUESTION: But he doesn't -- I'm not saying he makes an admission as if these were pleadings. We're talking about testimony, not defenses and complaints and so on.

Supposing the plaintiff gets up and testifies that I was fired because I was black and I know the employer didn't like blacks and he wanted to get rid of me. But also in the course of his testimony, he gives evidence of facts which would justify a finder of fact in saying, well, look, I see that the reason was not because he was black, but because thus and so.

MR. OLDHAM: Your Honor, I think the answer to that is that the Burdine test requires the employer to articulate the reasons. And we have to have a full and fair opportunity to meet those reasons. And so, I would say that if evidence is brought forth, it might go to the issue of pretext, but it doesn't necessarily defeat the plaintiff's case.

QUESTION: Well, but I joined the Burdine opinion. I never thought of it as just imposing a totally different regime on this particular type of trial as are opposed -- imposed on all other regimes of trying cases. I mean, you can have evidence that comes out in the plaintiff's case from the plaintiff's own mouth that will be favorable to the defendant, and that's ordinarily something the trier of fact can take into consideration.

MR. OLDHAM: That's true, Your Honor, and you can have evidence come from the defendant that's favorable for the plaintiff.

QUESTION: But in your view, under the Chief Justice's submission, he could not -- the trier of fact could not take into account adverse inferences from the employee's own testimony so long as the employee makes out a prima facie case.

MR. OLDHAM: Your Honor, I still go back to the requirements in Burdine --

QUESTION: That's correct, isn't it?

MR. OLDHAM: Yes, Your Honor. I don't see how a --

QUESTION: It seems to me very strange.

MR. OLDHAM: -- the plaintiff is going to have a full and fair opportunity to meet the allegations of the employer, the nondiscriminatory reasons announced by the employer, unless he has a full and fair opportunity to meet those. And in this situation, I don't agree that that happened, but I understand the hypothetical.

QUESTION: Well, why should this be different than a negligence case? You know, the plaintiff gets up and testified, you know, I slipped and fell, and there was -- it was icy and there was -- the employer failed to shovel the walks. Well, again, the plaintiff in that sort of a case can testify in a way that would entitle a jury to find there was no negligence, and we don't say that because it came out of the plaintiff's mouth, it's somehow

-- the defendant didn't have a fair opportunity to rebut it or the plaintiff didn't have a fair opportunity to rebut it.

MR. OLDHAM: Your Honor, this is different from a negligence case. This is a race case which has brought about by specific legislation of Congress which was designed to defeat and change certain patterns of --

QUESTION: Yes, but do you think Congress intended that the factfinding process in these cases should be different than the factfinding process in all other sort of civil litigation was?

MR. OLDHAM: All I know is, Judge, is that in Green and versus Burdine -- Green and Burdine, the Court did set up a method of indirect proof and a specific process which this Court has recognized for long periods of time, and I think that it is unique. It's a little different from a negligence case.

QUESTION: Well, it's unique in the -- perhaps, although I'm not so sure it's that different than res ipso loquitur or something like that in negligence cases, that if the plaintiff shows certain elements, he's entitled to have the finder of fact make a determination in his favor. But I think you're adding onto it a lot when you say that testimony that comes in during the trial can't be used for purposes that it would be used for in every other sort of

a civil proceeding.

MR. OLDHAM: Well --

QUESTION: Well, what if in the course of cross-examining the defendant's witnesses, in order to prove pretext, the -- it turns out that there was personal animosity? Do you think just because the defendant -- the plaintiff proves pretext by that evidence, that it's entitled to judgment and that the court is disentitled to say, well, it may be pretext, but there really is a neutral reason, a race-neutral reason, for the discharge? Is a court forbidden to do that?

MR. OLDHAM: I think that the court is bound by the issues that are projected by the parties. That's not unusual at all to say that --

QUESTION: So, your answer is yes, the court --

MR. OLDHAM: Yes, Your Honor.

QUESTION: Yes, all right.

MR. OLDHAM: The answer is yes.

QUESTION: May I ask in this case, did the defense counsel argue to the judge that the real reason was personal animosity?

MR. OLDHAM: Judge, he did not. The first time that personal animosity was mentioned, it was January 1984 until January of 1991 when the decision came down. Prior

to that time, there had been no mention of personal animosity except the statement of Mr. Powell that there's nothing personal. When he was asked if there were any difficulties between him and the plaintiff, Mr. Powell said there's nothing personal. That's the only evidence there is that's in the case. That case says that Mr. Powell said there was nothing personal.

QUESTION: Did you try the case for the plaintiff?

MR. OLDHAM: Yes, I did, Your Honor.

QUESTION: Did you try to put in any evidence that there was no personal animosity? Did you try to rebut this potential real reason for the --

MR. OLDHAM: No, I didn't, Your Honor, because I felt that the -- under the McDonnell Douglas/Burdine test that the employer was required to articulate the nondiscriminatory reasons to give me a fair opportunity to meet those. I wasn't in a position to meet every possible facet that might arise in a case whether or not he was absent --

QUESTION: Do you think it would have been permissible as a matter of procedure for the defendant's counsel at the end of the cross-examination to say now our witnesses have said reasons are A and B, but the cross-examination has brought out the fact that it's a -- animus

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was the real reason and we're going to rely on that in closing argument? Would that have been permissible?

MR. OLDHAM: I don't believe so, Your Honor.

QUESTION: You have to say that I think to support your theory of the case.

MR. OLDHAM: I've had cases, Judge, where we've tried it and we fully tried a issue other than the issue that was originally focused, and there was a motion made to amend the pleadings after the trial. That's very rarely done. It's only when there has been a full trial on those issues, and here we did not have a full trial on that issue.

QUESTION: Well, the Federal rules have a provision that if an issue not in the pleadings is tried by consent of the parties, they're -- the pleadings are deemed amended, don't they?

MR. OLDHAM: That's true, Your Honor. That's true. That did not happen in this particular case.

QUESTION: Well, I -- if we reverse the court of appeals on its theory, it sounds to me like it -- you would all -- you would still win because there wouldn't be enough evidence to support the finding of animus.

MR. OLDHAM: Well, I will point out to the Court that we did raise issues of a fact that one of the complaints had to do with retaliation, and that wasn't

ruled upon. That -- another complaint had to do with the fact that we alleged there were errors in certain findings of fact --

QUESTION: Well, did you argue in the court of appeals that the district court was wrong in -- that -- in ruling on the basis on animus because there wasn't enough evidence of it?

MR. OLDHAM: That's correct, and actually the court of appeals looked at that and said it was wrong for the district court to assume, without any evidence to support it, that there was animus involved. We raised that point, but the court did not rule on that issue.

It ruled on the question of whether or not the judgment is compelled. And we believe that that was a right ruling under Burdine and a right ruling under Green, and that this Court should sustain that decision.

QUESTION: But if we disagree with you, the court of appeals on remand would address that and you might still prevail.

MR. OLDHAM: That's possible, Your Honor. But I think it's important that we set a procedure which trial attorneys, everybody else, employers can rely upon in terms of determining how you go about proving discrimination. Do we have to add an additional step that many of the courts have not recognized in terms of pretext

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plus or can we rely upon pretext as a means of obtaining a proof of discrimination and --

QUESTION: Well, you still would have the inferences to be drawn from that evidence. That doesn't ever leave the case, does it?

MR. OLDHAM: That's true, Your Honor.

QUESTION: So, of course, can you rely on the inferences to be drawn from that evidence.

MR. OLDHAM: That is correct.

Thank you very much.

QUESTION: Thank you, Mr. Oldham.

(Whereupon, at 12:00 p.m., oral argument in the above-entitled matter was recessed, to reconvene at 12:59 p.m., this same day.)

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AFTERNOON SESSION

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: Mr. DuMont, we'll hear from you.

ORAL ARGUMENT OF EDWARD C. DuMONT

ON BEHALF OF THE UNITED STATES AND

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

AS AMICI CURIAE, SUPPORTING THE RESPONDENT

MR. DuMONT: Thank you, Mr. Chief Justice, and may it please the Court:

What Burdine and Aikens explicitly state, that at the final stage of the McDonnell Douglas analysis, the plaintiff can carry his ultimate burden of proving discrimination in one of two ways, either directly or -- and I quote from both opinions -- indirectly by showing that the employer's proffered explanation is unworthy of credence.

QUESTION: Well, to say that he can -- the plaintiff can carry the burden to me means nothing more than the finder of fact would be justified in ruling in his favor.

MR. DuMONT: With respect, Your Honor, we would disagree that that is what Burdine said, and we think that is not what Burdine ought to say because Burdine and Aikens, the whole like of cases, set up a sensible and

orderly system for getting at the ultimate issue in these cases, which is discrimination.

Now, it's clear that in some cases, the plaintiff will have direct evidence and therefore can use the first option of persuading the trier of fact directly that there was discrimination. But Burdine sets up the second and indirect method of proving discrimination, the proof of -- that the employer's reasons are unworthy of credence precisely because in many discrimination cases there will not be direct evidence. And we would suggest that on the --

QUESTION: Excuse me. But you're proposing going beyond that. I mean, what you're saying is not only that he may prove it that way, but that it must constitute proof, that the trier of fact must accept that as adequate. You don't have to go that far to solve the problem you were just talking about, but you do contend that it goes all the way and it says the trier of fact must make that finding.

MR. DuMONT: We believe that when the defendant has articulated particular reasons for his actions and the plaintiff has disproved to the satisfaction of the trier of fact those reasons --

QUESTION: Right.

MR. DuMONT: -- that it's mandatory for the

court or the factfinder to return --

QUESTION: You think Burdine holds that.

MR. DuMONT: We think Burdine holds that, Your Honor.

QUESTION: And what other case?

MR. DuMONT: And Aikens.

QUESTION: Aikens said, as I recall, when all the evidence is in, we -- these presumptions are not nearly as important. We simply try to decide was there discrimination here.

MR. DuMONT: That's correct, Mr. Chief Justice. Aikens says that once there was a full trial, as there was in this case, that we go straight to the issue of discrimination. The question is how is the plaintiff able to prove discrimination, and we would say that both Burdine and Aikens, which reiterated the language from Burdine, say that he can prove it in two ways, either directly --

QUESTION: There's no question about the way he can prove it, but what you're arguing is that certain elements brought forth by the plaintiff not only permit a finding by the finder of fact, but it requires them. I don't think Aikens said that.

MR. DuMONT: Right. That is what we are saying, Your Honor, and let me say why. We think that once the

defendant has come forward with specific reasons -- after all, this information is uniquely within the ken of the defendant. Once the defendant has come forward and articulated particular reasons, reasonably, specifically, and clearly, as Burdine says he must do, that the plaintiff's burden is set as a sort of matter of orderly judicial procedure. That is what the plaintiff then has to contend with, and both for the benefit of the plaintiff, giving him a full and fair opportunity to meet the defendant's case, and for the benefit of the court in assuring that the adversarial factfinding process proceeds in the way that will generate a true result.

You can't get a true result under the circumstances, for instance, of this case where the entire case was tried on the issue of whether the defendant's disciplinary reasons were or were not valid, and the court on its own came up with a reason which has no support at all in the record.

QUESTION: Well, you do have - I mean, these cases are tried under the same sort of Federal Rules of Civil Procedure that other cases are tried under, are they not?

MR. DuMONT: That's correct.

QUESTION: And you have a complaint and an answer. I suppose a defendant might in the form of his

answer waive certain -- but if the defendant simply denies generally that he discriminated and he has never been pinned down by any interrogatories or depositions, why should it be different than any other kind of case?

I mean, I get the impression from hearing your co-counsel and you as if at each point after a witness testified in one of these cases, the counsel must stand up and say, well, now this witness proved this, and that's just not the way cases are tried.

MR. DuMONT: No, not at all, Your Honor. We think that the functional test here is the test that Burdine sets out which is a reasonably clear and specific articulation by the defendant of particular reasons why it took its action to meet the prima facie case and then a full and fair opportunity for the plaintiff to contest those reasons.

Now, they can emerge at any time during the trial. They do have to be reasonably specifically articulated, but it might happen during the trial. It might happen on -- out of something that came out of the plaintiff's evidence, but we do think that the defendant would be required to step up to the plate and accept whatever reasons he's planning to rely on. That defines what the plaintiff will try to rebut, and that defines what the decision maker will have an opportunity to decide

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on.

QUESTION: What if the defendant files an answer to the Title VII complaint denying generally that it discriminated and that is never further amplified by deposition discovery? Now, at the time of trial, why should that suddenly be transformed into something that's quite different than is set out by the pleadings?

MR. DuMONT: Well, if in fact the defendant offers no specific articulation of why it took the action that it took, aside from a general denial of discrimination, then we would submit that under Burdine, the defendant would have to lose. It has not carried its burden of rebutting the prima facie case.

QUESTION: Well, that may be true, but what you're saying is more than that. You're saying that if the defendant -- if witnesses testify that these were the reasons that the plaintiff was fired, they were nondiscriminatory, that those and only those can be considered by the finder of fact even though there was a general denial in the answer.

MR. DuMONT: Yes. We believe that the point is to frame the issue really for the trial court or the factfinder.

QUESTION: That's the pleadings. That's the point of the pleadings.

MR. DuMONT: Well, it's also the point of trial. As you pointed out before, the pleadings are amended effectively to conform to the proof at trial by the end of the trial. When you get to the end of the trial, as Aikens says, you should take all the evidence taken together and make a decision on the question of discrimination.

Now, the question is what does the plaintiff have to prove, and we submit that it's unreasonable to make the plaintiff try to disprove, which is exactly what the petitioners contend -- try to disprove every possible nondiscriminatory reason for the action --

QUESTION: Well, doesn't -- isn't that contained ordinarily in the burden of proof? If you have to prove element A, you have to exclude other hypotheses.

MR. DuMONT: I think that the burden of the Court's opinion in Burdine is that as a way of getting these very complex cases where, after all, any reason or completely arbitrary reason would be legitimate so long as it is not one of the prohibited reasons -- in order to distill the potential mass of evidence down to a manageable framework for the court, it's perfectly reasonable to ask the defendant to come forward and say, well, what did happen here. You know. What did happen here? Allege your reasons and then allow the plaintiff a

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full and fair opportunity to meet those reasons.

What strikes us as fundamentally unfair to the plaintiff and unwise from the point of view of accurate factfinding, is to say that once the plaintiff has met the plaintiff's -- the defendant's articulated reasons, the factfinder may then range through the record and pick out some reason -- either pick out a reason which may be what happened here and say I think this is more likely when the plaintiff has not --

QUESTION: Well, Mr. DuMont, we don't know if that's how the court of appeals would -- whether the court of appeals would sustain that finding of the district court. I thought our inquiry here was just whether it's a mandatory presumption or a permissive one at the conclusion of the case. I thought that was all we had to decide.

MR. DuMONT: That is what you have to decide, Your Honor.

QUESTION: Then why can't it just be a permissive one? All that evidence and the inferences from it are still available to the plaintiff/employee at the end of the case.

MR. DuMONT: That's correct. I think what we need to look at is what is in the case at the end of the case. The plaintiff has proved a prima facie case. The

defendant has articulated certain reasons. The plaintiff has, by hypothesis, disproved those reasons to the satisfaction of the trier of fact. All that is left in the case is the evidence supporting the prima facie case, the evidence that the defendant has lied or is unwilling or unable to come forward with a credible reason for its actions, and essentially nothing else. Now, on those facts --

QUESTION: Well, we don't know whether it's nothing else. The district court thought there was something else, but the court of appeals didn't really face up to that.

MR. DuMONT: There could only be one of two other things, either evidence that came in in the plaintiff's case, which I submit is not true here -- and the court of appeals was quite clear about that. They said it was merely an assumption, this personal animosity thing -- or evidence that the defendant has somehow introduced or that seems to arise out of the evidence that the defendant has been specifically unwilling to embrace, as is the case here. And we would submit that's not a sensible rule of judicial procedure to allow a factfinder to go off on that ground when the defendant has refused to embrace it.

QUESTION: It seems to me that one problem we

have in these cases is that causes are not always clear. It may be that this person was late. It may be that he did have disciplinary problems. It may be that those were partial underlying causes, but it may be that the substantial cause for the firing was something that the court figures out in retrospect in a way that even the employer himself or itself could not ascertain with great accuracy. And it seems to me that to say that there's a pretext only when there's a lie is inconsistent with the way civil trials usually proceed.

MR. DuMONT: We don't believe that it's inconsistent in this case, Your Honor.

Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. DuMont.

The case is submitted.

(Whereupon, at 1:09 p.m., the case in the above-entitled matter was submitted.)

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St. Mary's Honor Center, et al., Petitioners v. Melvin Hicks

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Lynn M. May

(REPORTER)