No. 83-1623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PHYLLIS A. ANDERSON,

Petitioner,

—v.—

CITY OF BESSEMER CITY, etc.,

Respondent.

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

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, NOW LEGAL DEFENSE AND EDUCATION FUND, AND WOMEN'S LEGAL DEFENSE FUND, *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Interest of Amici Curiae[1/]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the right to equal treatment under the law. The ACLU has established the Women's Rights Project to help eliminate the pervasive problem of gender-based discrimination. It has participated in the litigation of many cases before this Court challenging sexually discriminatory practices, including in particular cases involving interpretation and enforcement of Title VII of the Civil Rights Act of 1964, as amended.

The NOW Legal Defense and Education Fund

1/ The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

("NOW LDEF") is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was established in 1970 by leaders of the National Organization for Women. A major goal of the NOW LDEF is eliminating barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of laws prohibiting employment discrimination.

The Women's Legal Defense Fund is a non-profit, tax exempt membership organization founded in 1971 to provide pro bono legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combating sex discrimination in employment through litigation of significant employment discrimination cases, operation of an employment discrimination counseling program, and agency advocacy before the EEOC and other federal agencies that are charged with enforcement of the equal opportunity laws.

Amici believe that the opinion of the Fourth Circuit below misapplies important precedents of this Court and that, unless corrected, its interpretation will subvert congressional intent and unduly hamper aggrieved individuals in many circumstances in their legitimate efforts to enforce Title VII. Moreover, the proposition accepted by the Circuit Court that a male employer may be absolved of charges of sex discrimination against working women simply because his wife works affronts both men and women and recognizes an unauthorized and illogical defense.

Statement of the Case

In 1975, the city of Bessemer City, North Carolina decided to hire a full-time recreation director to run its community recreation program. The program was to provide recreational activities for residents of both sexes and all ages. Joint Appendix ("J.A.") 70a. Prior to this time, the recreation program had been run almost entirely by the Optimist Club, a community service organization whose membership was limited to males. J.A. 142a-143a,149a. The new recreation director was to be selected by a hiring committee, appointed by the Mayor for that purpose. J.A. 68a.

The committee had five members, 4 men and 1 woman. Of the male members, two - Butler and Nichols - were active in the Optimist Club and in the recreation program it had conducted. J.A. 142a-143a, 149a, 156a, 159a-160a.

The committee had no educational or experience requirements for the job, although they did collectively decide that residence in Bessemer City would be essential. J.A. 169a. Different committee members had different expectations as to what the job would entail. See J.A. 108a, 117a, 142a, 149a, 150a. Some committee members referred to the job as that of "athletic director," J.A.160a, although the program also included music, art, and other similar activities. J.A. 108a, 117a, 131a. No written statement of job responsibilities was formulated until after the selection process was completed. J.A.56a, 107a, 157a.

Eight people applied for the position of recreation director, J.A.111a, of whom Phyllis Anderson was the only female. The finalists for the position were William ("Bert") Broadway, Donald Kincaid, and

Phyllis Anderson.

The male members of the committee would have selected Broadway for the position except for his refusal to relocate in Bessemer City. J.A. 140a, 154a, 157a, 164a. At the time of his application, Broadway was recreation director in Cramerton, North Carolina. Broadway had two years experience in recreation; he had no college degree but had taken five college courses in physical education. He had also participated in the Optimist recreation program. He was 24 years old, with a wife and one child. J.A.73a-74a.

Donald Kincaid had a college degree in health and physical education, J.A. 62a, in conjunction with which he had done one semester of student teaching. He had participated in the Optimist recreation program, J.A. 141a, and had worked in the finance department of a credit organization for approximately one year. J.A. 62a. He also was twenty-four years old, J.A. 134a, was married and had a child. J.A. 121a, 151a.

Phyllis Anderson graduated from high school in 1953. J.A. 58a. She married the following year and temporarily discontinued her education. J.A. 90a. While her husband was overseas in military service she worked supervising a hospital recreation program. J.A. 59a, 91a. Later, while her husband attended college, she worked as a nurse's aide and receptionist in a doctor's office. J.A. 86a, 59a. She subsequently returned to school and earned a degree from a two-year college while working part-time as a retail sales clerk. For ten years she was a substitute school teacher in all grades, until she obtained her Bachelor of Arts degree in elementary education. She then taught third grade full-time. J.A. 87a. She was also active in local civic organizations, the Exchangette Club and the Jaycette Club.

J.A. 58a, 59a. At the time of her application, she was thirty-nine years old, married, with two children. J.A.89a.

Both Butler and Nichols knew Broadway and Kincaid through the Optimist Club. J.A. 132a, 140a-141a, 149a, 156a. The two male finalists were recruited by Butler, who recruited other males as well. He knew some women he thought were qualified for the job, but did not contact them. J.A. 144a, 148a.

The male members of the committee thought Broadway's experience qualified him for the job, even though he had no college degree. J.A. 147a, 154a-155a, 159a, 163-164a. Kincaid's degree in physical education, even though he had limited experience, qualified him in the minds of a majority of the committee. J.A. 141a, 153a, 157a. Boone, who chaired the committee and was its only female member, thought Anderson was the most qualified candidate overall

because of her combined education and experience. J.A. 117a. However, male committee members refused to acknowledge the relevance of her education and experience. J.A. 150a-151a, 158a. None of the male committee members apparently credited Ms. Anderson's club activities or personal childraising experiences as having any relevance to the job even though she testified that she had shepherded two boys through numerous sporting activities. J.A. 189a-190a. In contrast, the fact that Kincaid played sports as a youth and was active in the Optimists clearly counted in his favor. J.A. 127a, 151a, 164a.

During the interviews, Anderson was asked whether her husband approved of her taking this job and whether she would be able to stay out late at night to supervise activities. J.A. 81a, 108a. No other candidate was questioned in this manner. J.A.

145a. Boone, apparently annoyed at these questions, commented facetiously to Kincaid: "and your new bride won't mind." J.A. 121a. No questions or comments relating to spouse's reactions or family responsibilities were asked of any of the other six male candidates. J.A.145a.

In explaining the decision to hire Kincaid, one committee member, Nichols, stated that he thought "it would be real hard" for a woman to do the job, and that he thought his "wife should be home at night." J.A. 158a, 161a. Another stated that he did not recruit two women he thought were qualified because, as teachers, they probably earned more than the recreation job would pay. But he was not similarly dissuaded from recruiting a male teacher, Russ Bergman, for the job. J.A. 148a-149a.

Summary of Argument

The record in this case reflects pervasive and undisguised sex discrimination. This was proved largely by direct evidence of discriminatory motive: i.e., open hostility by male committee members towards the prospect of a woman in the job in question, recruitment only of men, offensive sex-based questions posed solely to the woman applicant, and a history of overt sex discrimination. The Court of Appeals failed to recognize the critical significance of these and other unrebutted facts establishing discriminatory motive, and mistakenly applied the analysis in Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248 (1981). That analysis only applies when the plaintiff creates an inference of discrimination from circumstantial evidence, not when discriminatory motive is established

directly.

Once discriminatory intent in the employment process is shown directly, the burden shifts to the defendant to prove that the resulting employment decision was not tainted. This may not be accomplished through a simple articulation of a purportedly legitimate reason for the decision. At this stage defendant bears the burden to prove that the victim of proved discrimination was not qualified for the job or would not have been hired in any event. See International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). That burden could not have been met in this case, since there is no dispute that petitioner was qualified for the job she sought.

The Court of Appeals found that evidence that male committee members were married to women who had worked outside the home rebutted direct evidence of discrimination against a woman applicant for employment. This conclusion is inconsistent with the principles established in Castaneda v. Partida, 430 U.S. 482 (1977) and with basic Title VII law. It is also illogical and offensive to both sexes to assume that women work only if their husbands approve, or that men's motives can be ascertained simply by observing their wives.

ARGUMENT

Introduction

Twenty years after the enactment of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq. ("Title VII"), employment discrimination is still a pervasive and disruptive factor in the lives of many working women. It is measured by entrenched occupational segregation[2] and by an intractable wage gap in the earnings of women and men: women still earn about 60 cents for every dollar earned by men[3] and women with high school diplomas on the average earn less than men with an eighth grade education.[4] Systematic devaluation of jobs held predominantly by women,[5] exclusion of women from jobs traditionally reserved for men,[6] and stereotypical notions about women's abilities and roles[7] all contribute

[2] "[O]verall employment patterns of women in the United States have changed little since 1950. Of the 420-odd occupations listed by the 1950 census of occupations, women were employed primarily in 20. That fact was virtually unchanged by 1970. In 1978, only 9.9 percent of women employees held traditionally male jobs, 21.6 percent held jobs that are not sex-stereotyped, and 68.5 percent held traditionally female jobs. U.S. Department of Labor, Office of the Secretary, Women's Bureau, The Employment of Women: General Diagnosis of Developments and Issues, United States Report for OECD High Level Conference on the Employment of Women, April 1980, p.6.

[3] See generally, Committee on Occupational Classification and Analysis, Assembly of Behavioral and Social Sciences, National Research Council, National Academy of Sciences, Women, Work, and Wages: Equal Pay for Jobs of Equal Value (D. Treiman, and H. Hartman, eds. 1981).

[4] U.S Department of Labor, Office of the Secretary, Women's Bureau, The Earning Gap Between Women and Men 1979, Table 8, "Comparison of Median Income of Year-Round Full-Time Workers, by Educational Attainment and Sex, 1977 (Persons 25 years of age and over)."

[5] See County of Washington v. Gunther, 452 U.S. 161 (1981).

[6] See Dothard v. Rawlinson, 433 U.S. 321 (1977), Hishon v. King & Spaulding, ___ U.S. ___, 104 S.Ct. 2229 (1984).

[7] Phillips v. Martin-Marietta Corp., 400 U.S. 542

to the observed results.

The instant case presents a paradigm of the overt and subtle discrimination still experienced by vast numbers of working women. This record shows graphically what happens to women when they move away from more accepted forms of "women's work" and apply for jobs which women have traditionally not held. In Anderson's case, the effort was met with outright resistance to the notion of a woman in the job she sought.

I. Burdine Does Not Govern A Case, Such As The Present One, In Which There Is Direct Evidence Of Intentional Discrimination

The Court below failed to acknowledge the direct evidence of discriminatory motive in the trial record and, in rote-like fashion, applied an analysis inappropriate in such a case. The Fourth Circuit in this case[8/] tried to force these facts into the "disparate treatment" model characterized by such cases as Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248 (1981) and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). That model, however, at best provides only a starting point for an analysis in a case such as this where direct evidence of bias is apparent.

The Burdine analysis is applicable where plaintiffs, in order to establish a prima facie case, rely on circumstantial evidence supporting the inference of discrimination.

(1971). See generally, Taub, Nadine, "Keeping Women In Their Place: Stereotyping Per Se As A Form of Employment Discrimination," 21 Boston Coll. L.Rev. 345 (1980).

8/ Within the Circuit, there is contradictory case law as to the analysis of cases presenting direct evidence of intent to discriminate. See Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir.) cert. denied, 454 U.S. 860 (1981) and Evans v. Harnett County Bd. of Educ., 684 F.2d 304, 306-07 (4th Cir. 1982).

As explained in Furnco Construction Co. v. Waters, 438 U.S. 567,577 (1978), the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Thus, the Court said in Burdine that "the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." 450 U.S. at 254 n.8. Proof of discriminatory motive is the end-point contemplated by the Burdine analysis.

In the present case, the "consideration of impermissible factors" was not "elusive"; it was apparent.[9/] The record is clear that but for her sex, Anderson's interview and application would have been handled differently.

At the time Phyllis Anderson applied for the position of recreation director of Bessemer City in 1975, she was almost 40 years old. She had taught school in various grades and under varied circumstances for approximately twelve years. She had worked with young and old people, teaching them sports and other recreational activities. She had earned a college degree, raised children, and participated in community activities. She was and is unquestionably a

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9/ The assertion of a non-discriminatory reason supporting the decision not to hire Anderson does not eliminate the existence of discriminatory motive or resolve the matter. Evidence of intent may deprive the non-discriminatory explanation of credibility or reveal it to be pretextual. In either event, direct evidence of intentional discriminatory motive or other proof of discriminatory intent markedly alters the defendant's posture to that of a "proved wrongdoer." International Brotherhood of Teamsters v. United States, 431 U.S. 324,360 n.45 (1977). The burden then shifts to the defendant to prove that the ultimate decision was not tainted by discrimination. See Point II, infra.

woman with energy, initiative, a range of abilities, and breadth of experience, all of which was obtained within the confines of traditionally female activities.

In response to Anderson's application to be recreation director, a male committee member inquired into her husband's views, asked whether she could stay out late at night, and questioned the ability of a woman to do the job.[10/]

The recreation program Anderson sought to direct had previously been conducted by the male-only Optimist Club. Two committee

10/ The district court found that Anderson was the only candidate seriously questioned about whether her family responsibilities would interfere with job performance, and characterized a remark by Boone, the sole woman on the selection committee, to Kincaid about whether his wife would mind as "facetious." The record supports this interpretation, see J.A. 120a-121a.

In any event, such an inquiry is highly suspicious. There is no dispute that other male candidates were not asked similar questions, or that a male committee member made the inquiry of Anderson alone.

members, Butler and Nichols, "just about ran the Optimist program. J.A. 156a. Broadway and Kincaid, the male candidates who were preferred by the committee, had both been active in the Optimist recreation program. Thus, Broadway and Kincaid had gained experience with the prior recreation program through their affiliation with the Optimists, and committee members had the opportunity to meet, socialize and observe them in that context. Anderson, solely because she is a woman, was excluded from these opportunities.

The question to Anderson about her spouse's reaction, and the statement that "it would be real hard" for a woman to do the job, standing alone, provide direct evidence of discriminatory motive. They reveal an attitude that a woman's application had to be evaluated differently. The attitude is grounded in the supposition that any woman, by virtue of her sex, stands in a "special"

relationship to employment, particularly non-traditional employment. This view posits that a woman is dependent on her husband's approval and support and would not contravene his wishes;[11] that a woman has primary responsibility for childrearing and household maintenance, to which employment responsibilities are subordinated. In contrast, none of these considerations is present when a man applies for a job.[12]

These inquiries and comments are not minor, innocent remarks. They are instead highly significant direct evidence that a

[11] Men, no less than women, may be influenced by their spouse's opinions. This was apparently the message Boone's remark to Kincaid was intended to convey. However, the framing of the question to Anderson alone, by a male committee member, reveals his view that only women are constrained in this fashion.

[12] These notions contribute to the perception of women as marginal, unreliable workers. See, e.g., Phillips v. Martin-Marietta Corp., 400 U.S. 542.

different standard of review and a different set of assumptions accompanied the evaluatio of a female applicant for employment. This is precisely the evil Title VII forbids.

The truth or falsity of this kind of sex-based generalization is irrelevant. As this Court stated in Los Angeles Dep't. of Water and Power v. Manhart:

> Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply . . . [T]he statute requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.

435 U.S. 702, 708-09 (1978). In the present case there is no evidence that Anderson's husband's views or family responsibilities would interfere in any way with her job

performance, nevertheless some committee members presumed they would. Similarly, there was no evidence that Kincaid's or Broadway's family responsibilities or wife's opinions would not interfere with their job performance, but that possibility was never considered.

This Court has often condemned, in a variety of contexts, reliance on the "baggage of sexual stereotypes" which are used to classify, limit, protect or otherwise needlessly differentiate between men and women, to the historical disadvantage of women as a class. Orr v. Orr, 440 U.S. 268,283 (1979). Only recently this Court disapproved

> discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes [which] forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.

Roberts v. United States Jaycees, ___ U.S. ___, 104 S.Ct. 3244, 3253 (1984).

The remarks to and about Anderson, offensive as they may be, do not stand alone. They occurred in a context in which overt sex discrimination had been openly embraced. Recreation in Bessemer City had been controlled by a male-only club, whose members and participants were prominent both on the selection committee and among the preferred candidates. The "men's club" atmosphere pervaded the committee's activities, notwithstanding Ms. Boone's complaints,[13] and was evidenced in Butler's openly discriminatory recruitment practices, in

[13] Boone charged repeatedly that the committee was biased against Anderson because of her sex, a charge the male committee members did not even answer. J.A. 166a.

Nichols' references to the "athletic" director and to male-dominated competitive team sports, J.A. 116a, 142a, and in the male committee members' preference for candidates with training and experience similar to theirs. The men who had controlled recreation in Bessemer City looked for "one of the boys" to carry on their tradition.

Like the supervisory ranking system condemned in Albemarle Paper Co. v. Moody, 422 U.S. 405, 433 (1975), the subjective nature of this process, with no clearly defined job duties and functions, requirements, or credentials permitted committee members to act on their personal biases. Because they offer an easy opportunity to discriminate, many courts rightly regard subjective employment decisions with great suspicion. See Castaneda v. Partida, 430 U.S. 482, 497 (1977) (a "highly subjective . . . . system is subject

to abuse as applied," even if it is not unlawful per se).[14/] In the present case, the absence of a job description or defined qualifications permitted committee members to shift criteria, depending on the preferred candidate of the moment. Thus, when Broadway was favored, experience was deemed qualifying and education was not viewed as essential; however, when Broadway was disqualified and Kincaid was the only remaining male candidate, his education was cited as a reason for his superiority over a female with greater experience. In each instance, the reasons for the preference shifted to match whatever qualifications the male candidate possessed.

14/ See also, e.g., Boykin v. Georgia Pacific Corp., 706 F.2d 1384 (5th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 999 (1984), Coble v. Hot Springs School Dist. No. 6, 682 F.2d 721 (8th Cir. 1982), Burrus v. United Tel. Co. of Kansas, 683 F.2d 339 (10th Cir.), cert. denied, 459 U.S. 1071 (1982).

Thus, the trial record in this case contained overt expressions of preference for a male, suspicious and suggestive questions seriously posed only to the female applicant, admissions of stereotypical views on women's proper role, a history of sex-segregation in the job, shifting criteria, and a subjective decision-making process. This was more than sufficient to establish a case of intentional discrimination based largely on direct evidence, not inferences. Faced with less compelling facts, lower courts have so concluded,[15] and have recognized the inapplicability of the Burdine - type analysis. See, e.g., Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) (that approach

[15] See Bell v. Birmingham Linen Service, 715 F.2d 1552 (11th Cir. 1983), cert. denied, ___ U.S. ___, 52 U.S.L.W. 3844 (U.S. May 22, 1984), Lee v. Russell County Bd. of Educ., 684 F.2d 769,774 (11th Cir. 1982), Muntin v. State of Calif. Parks and Rec. Dep't., 671 F.2d 360 (9th Cir. 1982).

inapplicable when plaintiff relies on direct evidence of discrimination); Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982) (constitutional challenge) ("where the evidence consists, as it does here, of direct testimony that defendants acted with a discriminatory motivation, if the trier of fact believes the prima facie evidence the ultimate issue of discrimination is proved; no inference is required"); Evans v. Harnett County Bd. of Educ., 684 F.2d 304, 307 (4th Cir. 1982) (intentional discrimination warrants shifting burden of persuasion to defendant); Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir.), cert. denied, 454 U.S. 860 (1981) (reliance on direct evidence of intent makes it unnecessary to prove pretext; McDonnell-Douglas analysis does not apply); League of United Latin American Citizens v. Salinas Fire Dept., 654 F.2d 557, 559 (9th Cir. 1981) ("where, as here, the plaintiff

has proved intentional discrimination, Burdine no longer applies"); Ramirez v. Sloss, 615 F.2d 163, 169 n.10 (9th Cir. 1980) (McDonnell Douglas does not apply when plaintiff "has already shown intentional discrimination by direct evidence"). 16/

16/ Even when Burdine is applied to analyze cases involving direct evidence of discriminatory motive, the result must be the same. See, e.g., Muntin v. State of Calif. Parks and Rec. Dep't., 671 F.2d at 363: direct evidence of intentional discrimination "not only permits, but compels, an inference" that the the defendant discriminated. Thus, no "explanation could be sufficient, as a matter of law, to justify a judgment that unlawful discrimination did not occur." While amici submit that it would be more appropriate to acknowledge the inapplicability of Burdine to this situation, this analytical difference of opinion is of no import in the Muntin case, since the same result was obtained. The critical distinction between Muntin and the decision below is the Fourth Circuit's failure to recognize the crucial significance of direct evidence of intent, thus permitting it to accept, as the Ninth Circuit refused to do, an "explanation" insufficient as a matter of law. Because of the potential for this kind of error in application of the Burdine type analysis, used in almost all individual Title VII cases, amici believe that clarification of the limits of Burdine is urgently needed.

II. Unrefuted Direct Evidence of Discriminatory Motive Establishes Title VII Liability Which Cannot Be Avoided by Mere Articulation of A Purportedly Legitimate Reason for Challenged Conduct

As stated above, under Burdine a defendant may dispel the inference of discrimination based on circumstantial evidence simply by articulating a legitimate non-discriminatory reason for its conduct. The plaintiff, to prevail, must prove that the proferred reason is pretextual, or otherwise undermine its credibility. See also United States Postal Service Bd. of Governors v. Aikens, ___ U.S. ___, 103 S.Ct. 1478 (1983). Plaintiff's "ultimate burden," Burdine, 450 U.S. at 253, is to establish that "consideration of impermissible factors" underlaid the employer's decision. Furnco Constr. Co. v. Waters, 438 U.S. at 577. 17/

17/ In the Title VII context, the Court has condemned the use of race or sex as "a factor." International Brotherhood of Teamsters v. United States, 431 U.S. at 335 n.15 (1977) (emphasis added). See also Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S.

In this case, plaintiff proved through direct evidence that the defendant considered "impermissible factors" in hiring the recreation director. Under Burdine and Furnco she had thus satisfied her ultimate burden, and the kind of defense those cases contemplate was no longer availing. It was thus improper for the circuit to permit defendant's mere articulation of another

252,265-66 (1977) ("where there is proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified.") But see McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976) (plaintiff can prevail if shown that race was a "but for" factor). In Mt. Healthy School Dist. v. Doyle, 429 U.S. 274 (1977), a First Amendment case, this Court noted with apparent approval the lower court's requirement that the alleged constitutional infringement be a "substantial" factor in the employment decision. Some courts have used the "substantial factor" and "but for" language interchangeably. E.g. Bundy v. Jackson, 641 F.2d 934,942 (D.C. Cir. 1981). This issue need not be reached in this case, since by any standard Anderson's proof was adequate. See pp. 19-22, 25-28, supra.

reason for its decision to rebut plaintiff's showing of intentional discrimination.[18/]

In Bell v. Birmingham Linen Service, 715 F.2d 1552 (11th Cir. 1983), cert. denied, ___ U.S. ___, 52 U.S.L.W. 3844 (U.S. May 22, 1984), the plaintiff's request for a job transfer elicited a supervisor's remark that if he granted the request, "every woman in the plant would want" the same job. Id. at 1553. The Court noted the unavailability of the Burdine - type defense to cases presenting direct evidence of bias:

> If the evidence consists of direct testimony that the defendant acted with a discriminatory motive, and the trier of fact accepts this testimony, the ultimate issue of discrimination is proved. Defendant cannot refute this

18/ Moreover, the articulated reason, Kincaid's college degree in physical education, in any event related only to the hiring decision, but failed altogether to address the openly discriminatory treatment accorded Anderson in the application and interview process. See pp. 41-4, infra.

> evidence by mere articulation of other reasons; the legal standard changes dramatically. . . .

Id. at 1557. Thereafter, the burden shifts to defendant to prove "'that the same decision would have been reached even absent'" the discrimination. Id. (Citations omitted.) 19/

As the Eleventh Circuit noted in Bell, it would be "illogical" and "ironic," id. at 1556, if direct evidence of motive or conduct forbidden by Title VII could be negated by the mere articulation, but not proof, that the employment decision was undertaken for permissible reasons. It is just this kind of illogic and irony that the Fourth Circuit has embraced in this case. Notwithstanding that the analyses in McDonnell Douglas, Burdine, and Furnco were all intended to aid courts in ascertaining the existence of discriminatory motive where it is denied and hidden, and therefore not subject to direct proof, the opinion below ignores overt discrimination and gives it no legal significance. If this were the law, plaintiffs could virtually never prevail in individual Title VII cases: an employer who admits to unlawful motivation can almost always articulate some other reason, as well, for a decision. Unless the facts conveniently provide analogies for the plaintiff, in the way of similarly situated employees or applicants of different races or sexes who were treated differently, pretext may be impossible to prove and proof of unlawful motive would be unavailing.

19/ Accord: Evans v. Harnett County Bd. of Educ., 684 F.2d at 306-07, Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982) (constitutional challenge), League of United Latin American Citizens v. Salinas Fire Dep't., 654 F.2d 557, 559 (9th Cir. 1981). See also King v. Trans World Airlines, ___ F.2d ___, 35 FEP Cases 102, 104 (8th Cir. 1984) and Muntin v. State of Calif. Parks and Rec. Dep't., 671 F.2d at 363.

Prior decisions indicate this Court's unwillingness to dismiss so lightly proof of discriminatory motive or to exonerate so easily employers whose decisions appear, by this evidence, to be tainted.[20/] Decisions of this Court have repeatedly admonished that in Title VII "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. at 707 n.13. See also McDonnell Douglas Corp. v. Green,, 411 U.S. at 801: "Title VII tolerates no . . . discrimination, subtle or otherwise."

[20/] As this Court has recognized in another context:

> Invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude. Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not.

Personnel Administrator of Massachusetts v. Feeney 442 U.S. 256,277 (1979) (footnote omitted).

Class-wide disparate treatment cases provide guidance in implementing this congressional purpose in cases like the present one in which Burdine ceases to apply. In such cases, proof of discriminatory motive is commonly inferred from a combination of statistical data and individual experiences. "[P]roof of the pattern or practice supports an inference that any particular employment decision . . . was made in pursuit of that [discriminatory] policy." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 362 (1977). Proof of a pattern or practice of discrimination, under accepted Title VII doctrine, constitutes proof of discriminatory motive. See id. at 335 n.15. Proof of discriminatory motive, in turn, "change[s] the position of the employer to that of a proved wrongdoer." Id. at 360 n.45. All this may occur without any inquiry into the

qualifications of a particular individual for a particular position.[21] In bifurcated proceedings normally used in Title VII class suits, attention is focussed during the initial "liability" stage on the issue of intent or motive.[22] Once that is found, an individual plaintiff or class member enjoys "a rebuttable presumption in favor of individual relief," id., and the burden shifts to the "employer to demonstrate that the individual applicant was denied an

[21] The Teamsters opinion notes that the absence of individual injury flowing from discriminatory conduct is a question not relating to liability but to relief. 431 U.S. at 342-43 n.24.

[22] This Court has approved in other analogous contexts separating the question of liability from that of remedy in individual cases. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 280 n.14 (1978) (Powell, J., for the Court) (whether Bakke would have been admitted goes to the issue of relief, not liability). See also Carey v. Piphus, 435 U.S. 247, 266 (1978) (the right to due process is "absolute" and "does not depend on the merits of the substantive claim").

employment opportunity for lawful reasons." Id. at 362.[23]

There is no reason why a plaintiff in an individual disparate treatment case who has proved discriminatory motive should receive less protection from Title VII than plaintiffs and class members do in class-wide challenges. In individual cases, proof of motive may be more difficult to elicit, especially if the size of the employer's operation makes statistical proof unavailable or unpersuasive. However, once motive has been shown by whatever means available, a presumption should arise favoring individual relief in either an individual or class

[23] This burden could not be satisfied simply by asserting that the best qualified candidates had been hired. Teamsters, 431 U.S. at 342-43 n.24. Likewise, in constitutional cases this Court has found "simple protestations" that discrimination did not affect the result "insufficient." Castaneda v. Partida, 430 U.S. 482, 498 n.19 (1977). Accord, Alexander v. Louisiana, 405 U.S. 625, 633 (1972).

action. The burden then falls to the employer to prove that the plaintiff was not qualified, would not have been hired anyway, etc.[24/]

In the present case, the trial record reveals that Bessemer City did not and could not meet this burden. There is no dispute that Phyllis Anderson was qualified for the job she sought. Her education equaled and her experience far outstripped that of her male competitors. The job as ultimately defined after-the-fact was one for which her education and experience were highly relevant. The objective comparisons between

24/ See East Texas Motor Freight v. Rodriquez, 431 U.S. 395, 403 n.9 (1979) and Franks v. Bowman Transp. Co., 424 U.S. 747,773 n.32 (1976). Similarly, in constitutional challenges to employment decisions, once an unconstitutional factor has tainted a decision-making process, the burden shifts to the employer to prove that the same decision would have been reached even without the presence of that factor. Mt. Healthy School District v. Doyle, 429 U.S. 274.

Anderson and Kincaid or Broadway alone suggest that discrimination played a major or determinative role. The direct evidence of bias makes that conclusion inescapable. Because female sex-role stereotypes were so strongly embedded in the minds of committee members, impermissible factors could never be convincingly disentangled from the process that actually occurred.[25/]

Not only did Bessemer City fail to prove

25/ The burden is on defendant to prove that it would have made the same decision absent discrimination, not that it could have. Franks v. Bowman Transp. Co., 424 U.S. at 773 n.32.

Amici suggest that in cases presenting direct evidence of discrimination, the motives of discriminators can rarely be disentangled from the decision sufficiently to prove that the same decision would have been made anyway. This Court has recognized the difficulty of parsing out motives with such fine precision. See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. at 265-66. In discrimination cases, imposition of this heavy burden on proved wrongdoers is appropriate, since personal sex or race-based bias tends to taint the entire process it touches. Id. And see generally, S. Fiske and S. Taylor, Social Cognition, 139-54, 159-67, 171-73 (1984).

that its hiring decision was not influenced by proved bias, but it failed altogether to explain the different treatment accorded Anderson in the application and interview process. The Eighth Circuit has found such a failure fatal to a defendant's claims. In King v. Trans World Airlines, Inc., ___ F.2d ___, 35 FEP Cases 102 (8th Cir. 1984), the plaintiff applied for a job, was interviewed, and subsequently denied employment. In the course of her interview she was asked questions, not asked of male applicants, about her marital status, her children, childcare arrangements and childbearing plans. The employer did not deny that the questions were asked but contended that the denial of employment was based on legitimate non-discriminatory reasons. The Eighth Circuit held that these articulated reasons did not address the discrimination in the application and

interview process, as to which no explanation was offered. The failure to explain this overt difference in treatment subjected it to liability under Title VII[26/] and entitled plaintiff to declaratory and injunctive relief. A remand was required to determine whether she might also obtain backpay, and on remand the burden shifted to defendant to prove that unlawful discrimination had not accounted for its action.

All of these opinions indicate that proof of discriminatory motive radically alters the position of the Title VII defendant to that of a "proved wrongdoer." By separating out the issue of liability and relief, as this Court has traditionally done in Title VII class cases, it becomes possible

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26/ Similary, in Teamsters, the Court noted that a violation would be established if women are "not considered and hired on the same basis that [men] were considered and hired." 431 U.S. at 917. (emphasis added).

to adjust the burden on the defendant in accord with its changed status. Proof of bias creates liability and a presumption in favor of relief. It does not automatically compel a remedy in an individual instance, but the employer does and should bear the heavy burden to prove that the applicant or employee who was subjected to a discriminatory practice did not actually suffer as a result.

Shifting of the burden of proof to a defendant comports with the Court's recent admonition that it will "avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without a clear congressional mandate." County of Washington v. Gunther, 452 U.S. 161,178 (1981). Moreover, in this situation, "[n]o reason appears . . . why the victim rather than the perpetrator of the illegal act should bear the burden of proof on this

issue." Franks v. Bowman Transp. Co., 424 U.S. at 773 n.32.

III. Marriage to A Working Woman Does Not Rebut Direct Evidence of A Man's Discriminatory Motivation

The Court of Appeals found that any inference of bias by male members of the selection committee against a woman applican for recreation director was dispelled by the fact that "[a]ll four testified that their wives had worked and were accustomed to being away from home during evening hours." 717 F.2d at 155 n.5, Pet. App. 61a n.5. The notion that intentional discrimination evidenced by the sex-based inquiries and remarks and by disparate recruitment practices was rebutted by evidence that the wives of committee members worked, and that therefore those committee members were not biased against working women, defies logic, contravenes the holding of this Court in

Castaneda v. Partida, 430 U.S. 482 (1977), and offends basic Title VII concepts. Phillips v. Martin-Marietta Corp., 400 U.S. 542, Los Angeles Dep't. of Water & Power v. Manhart, 435 U.S. 702.

Dubbed by petitioner as the "working wife defense," such a notion would effectively insulate all men whose wives have ever worked from any charge of intentional sex discrimination in employment.[27] The notion is more than absurd; in its suggestion that women do only those things of which their husbands approve, or that men necessarily agree with their wives'

[27] The Bureau of Labor Statistics reports that in June, 1984, of married men in the civilian labor force 61.9% had wives who were also currently in the civilian labor force. This of course does not include those married men whose wives were previously but are not currently in the labor force. See U.S. Department of Labor, Bureau of Labor Statistics, Employment and Earnings, June, 1984, Table A-10, p.39.

activities, it offends both sexes. Women are no longer subject to the legal or social control of their male relatives, nor does the institution of marriage create a single indissoluble entity with a unitary mind. Both partners have an independent identity, and each is free to do things the other disapproves of or dislikes. Thus, women may work without their husband's consent, and men may discriminate without their wives' support.

More than half of all married women work.[28] Many do so out of economic necessity rather than ideology. The fact that a woman works therefore carries little or no ideological significance, and even if it did, any significance in that regard would be

[28] Statistical Abstract of the United States 1982-83, p. 382, table 638.

attributable solely to the woman herself. In short, it is totally irrelevant to the question of discriminatory motive that a man's wife works. To say otherwise is to adopt the same biased assumptions embraced by members of the selection committee in this case - that Phyllis Anderson could not undertake the recreation director job without her husband's approval.

This Court has recognized the illogic in the Court of Appeals' approach. Castaneda v. Partida rejected the proposition that individuals do not discriminate against other members of a class to which they also belong:

> Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.

430 U.S. at 499.

The present case is even more compelling. The assumption endorsed by the Fourth Circuit is not the simple linear one postulated in Castaneda. Here, motivations are being ascribed to one person because of the activities of a different person. We know nothing whatever about the reasons committee members' wives worked, or even their own subjective feelings about working. They may have themselves preferred the traditional female role of housewife and mother but have been compelled to work out of economic necessity. Or they may have felt gratified, stimulated and liberated by work outside of the home. The motivations of the wives are a complex matter alone, and may or may not have influenced their spouses. However, it is absurd to travel this road yet another step and attempt to deduce from the single fact of wives' employment that their husband's motivations were pure when they

rejected a different unrelated woman for a job of a type their wives had never held.

It is also clear that without more information one cannot infer motive simply from observing behavior. Among other things, a fact-finder would need to know the cost to an individual, e.g., economic and emotional, of a particular course of conduct. A man's attitude toward his own wife working may vary depending upon the amount of income she can bring to the family unit, the amount of extra housework or other responsibilities, if any, which might fall to him, etc. By contrast, the potential costs of discriminating against some other woman in the employment context might be too abstract, uncertain, or distant to affect behavior.

In sum, wives' activities are wholly irrelevant to their husbands' subjective motivation. The non-sequitur adopted by the Court of Appeals to insulate the acts of men who openly expressed bias towards a woman as recreation director must be rejected. It would make almost as much sense to conclude that men can never discriminate against women since all men have mothers.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the judgment of the Court of Appeals below should be reversed.

Respectfully submitted,

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Dated: New York, New York
August 15, 1984