The Limits of the Olympian Court: Common Law Judging versus Error Correction in the Supreme Court

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B. An Often Unpredictable and Incoherent Body of Law

Despite the well-established legal standards used by the courts, this area of the law is chaotic and often arbitrary, with some judges willing to grant summary judgment in cases that other judges would find worthy of a trial. Nonetheless, the Supreme Court has provided very little guidance to the lower courts on how to apply these standards. In fact, by the end of October Term 2004, the Court had addressed the application of McDonnell-Douglas to defendants' motions for summary judgment exactly once, when it decided Reeves v. Sanderson Plumbing Products, Inc. [FN112] in 2000—nearly thirty years after McDonnell-Douglas itself and thirty-six years after the passage of Title VII.

Many commentators, analyzing numerous cases, have decried the misuse of summary judgment in employment discrimination cases, both before and after Reeves. [FN113] These commentators argue that judges all too often resolve *302 issues of fact on summary judgment, including—or especially—issues related to intent, which is supposed to be particularly ill-suited to summary resolution.

To take one recurrent issue as an example, consider how courts handle the question of pretext. What kind of evidence is enough to overcome the defendant's legitimate nondiscriminatory explanation for whatever action it took and to allow a jury to infer discrimination? On this question, the cases are extremely inconsistent. In Weinstock v. Columbia University, [FN114] for example, a female chemistry professor at Barnard was denied tenure by Columbia University's provost despite recommendations in favor of tenure from all levels at Barnard, from the Columbia chemistry department, and from an ad hoc committee formed to review her candidacy. [FN115] Columbia claimed that the provost denied Weinstock tenure because her scholarship did not meet the standard uniformly applicable within Columbia University. [FN116] In response, the plaintiff produced evidence that, in fact, Barnard science professors are generally held to a lower standard than Columbia science professors because they have fewer resources available to them. [FN117] She produced evidence that the provost had expressed his belief that women in the sciences tend not to get promoted because they lack merit. [FN118] She produced evidence that the provost deviated from regular procedures of tenure review in her case, including soliciting negative comments about
from professors outside her field but failing to seek additional reviews of her work from people familiar with it. [FN119] And she produced some evidence that during the discussions of her candidacy, she was described as nice, nurturing, and a pushover. [FN120] While the opinions in the case do not demonstrate definitively that she was the victim of sex discrimination, they do establish that the plaintiff provided evidence from which a jury could conclude that Columbia's stated reason for the denial of tenure was false and that the provost's decision was motivated by sexism. *303 Nonetheless, the Second Circuit affirmed the district court's grant of summary judgment.

In contrast, some courts deny summary judgment where the plaintiff's evidence of pretext is both less compelling and less specifically indicative of a discriminatory motive than was Professor Weinstock's. In Blow v. City of San Antonio, [FN121] for example, the plaintiff was an African-American woman passed over for a promotion in favor of a newly-hired white man. The city's legitimate nondiscriminatory reason for its decision was that by the time Ms. Blow applied for the job, the position had been filled. [FN122] Her evidence of pretext was that her supervisors, who would have known that as a city employee (and possibly as a minority) she would have priority for the job, discouraged her from applying until it was too late and failed to follow proper procedure in the hiring process. [FN123] On this basis alone, the Fifth Circuit reversed summary judgment.

In other cases, surprisingly similar evidence and arguments lead to different results. In Feingold v. New York, [FN124] for example, the Second Circuit reversed summary judgment. It found sufficient evidence of pretext where the white Jewish plaintiff was ostensibly fired for actions for which African-American employees were not even disciplined. [FN125] In contrast, in Bryan v. McKinsey & Co., [FN126] the African-American plaintiff lost summary judgment despite the fact that he established that his white peers were given more supervision, feedback, and opportunities to resolve the same type of performance problems that he had. [FN127]

The unpredictability is sometimes within circuits, as well as between circuits. The Second Circuit, for example, is home to both Weinstock and Feingold. The Fifth Circuit decided Blow, but it also decided Bryan. The Seventh Circuit has denied summary judgment in cases like Curry v. Menard, [FN128] where the primary evidence of pretext was that other employees were not disciplined for the same infractions, and Firestine v. Parkview Health *304 Systems, [FN129] where the evidence was also differences in the employer's treatment of violators of a company policy, the fact that the employer changed its story, and the court's own belief that the proffered reason on summary judgment was not "objectively reasonable." [FN130] But it also has decided cases in which it is much less solicitous of plaintiffs' evidence and much less willing to draw inferences in the plaintiffs' favor. In Massey v. Blue Cross-Blue Shield of Illinois, [FN131] for example, the Seventh Circuit upheld judgment as a matter of law in favor of the defendant after a jury found that the African-American plaintiff had been fired due to race discrimination. Massey presented evidence that her white supervisor gave a white employee more assistance with her work than she gave Massey, that she criticized Massey's written work unreasonably and held it to a higher standard than her own work, and that she assigned the seating in the office the only possible way in which she could avoid sitting next to or in the same row as an African-American. [FN132] And in Malacara v. City of Madison, [FN133] the majority opinion denied summary judgment in the plaintiff's promotion claim without so much as a discussion of the plaintiff's extensive evidence of pretext, evidence that included test scores showing that the plaintiff was more qualified than the individual promoted,
evidence that the plaintiff's experience was more extensive and relevant than defendant claimed (and that the chosen employee's was less so), and specific evidence that other aspects of the defendant's claims were false. [FN134]

Such intracircuit inconsistency is notable. [FN135] Intracircuit inconsistency (or inconsistency at the district court level) is generally believed to be a matter of concern *305 for the courts of appeals, not for the Supreme Court. Yet despite a significant number of appellate decisions, employment discrimination law on summary judgment remains both stubbornly chaotic and amorphous. Left to their own devices, the courts of appeals are not doing a good job of creating or enforcing uniformity.

Moreover, courts' use of precedent in these cases also suggests that they are either unwilling or unable to do a comprehensive search of the case law. In fact, they frequently do not bother to search at all, relying exclusively on the judges' own intuitions about or analysis of the evidence. [FN136] There is often no attempt to discuss, distinguish, or analogize to fact patterns and holdings in other cases; often the only citations in discrimination cases are those setting out the broad and uncontroversial outlines of the law. This pattern strongly suggests that courts consider summary judgment motions "paper trials" in which coherence with the law as announced in other cases is of minor importance.

Adding to the chaos of this area of law, the result in these cases may depend at least in part on who the judges are. For example, one study reports that, on appellate courts, Republican-appointed judges have a greater tendency to vote against some discrimination plaintiffs than do Democratic judges. [FN137] Indeed, some plaintiffs' lawyers say that the most important event of a case is the assignment of the judge the day it is filed, or on appeal, the assignment of the panel. [FN138]

*306 Finally, there is statistical support for the view that some courts are eager--perhaps overly eager--to grant summary judgment. Between January 1, 1995, and June 30, 2003, there were 2300 summary judgment motions filed in employment cases in the Northern District of Illinois (about 26.4% of all employment cases). Seventy-two percent of them were granted. [FN139] And these grants of summary judgment are rarely reversed. One national study reported that when plaintiffs in employment cases appeal the dismissal of their claims on a pretrial motion, they succeed in obtaining reversal only 11.7% of the time. [FN140]

Even more telling, however, is the evidence of what happens to pro-plaintiff jury verdicts on appeal. There is a good chance that such verdicts will not stand, suggesting that appellate courts are willing to grant defendants judgment as a matter of law--which is evaluated by the same standard as summary judgment [FN141]--with surprising frequency. In a study of cases terminated between 1988 and 1997, Professors Clermont and Eisenberg found that in civil rights employment cases, defendants who appealed trial losses prevailed on appeal 44% of the time. [FN142] In other words, where a defendant appealed a verdict, there was an almost even chance that the appellate court would reverse the verdict. In contrast, an employment plaintiff who appealed from a pro-defendant verdict had only a 6% chance of prevailing. The overall reversal rate from all civil trials was 18%. [FN143] These statistics suggest a surprising lack of deference to juries when they rule for plaintiffs in employment cases and a willingness to grant judgment as a matter of law (the equivalent of summary judgment) even in cases where a jury has already found for the plaintiff. [FN144]
the Supreme Court's major foray into this area of law, in the 2000 case of Reeves v. Sanderson Plumbing Products, Inc., [FN151] was prompted by a circuit split about a modification some circuits had made to the McDonnell-Douglas framework on summary judgment, not by a request that the Court provide general guidance in this particular area of law. The question was whether a plaintiff's jury verdict in an age discrimination case could be upheld where the plaintiff had no particular evidence of discrimination beyond his prima facie case under McDonnell-Douglas and evidence that the employer's stated reason for the termination was pretextual. [FN152] Some circuits had adopted a "pretext-plus" requirement as a matter of law--plaintiffs who had no evidence that discrimination in particular was the motivating cause of the adverse employment action lost on summary judgment or saw their jury verdicts reversed as a matter of law. Other circuits had no such absolute requirement, allowing juries to infer from a finding of pretext that the employer had discriminated.

The Supreme Court overruled the pretext-plus requirement, although it declined to establish a rule that when pretext is established, the case must always go to the jury. The Court also repeated an earlier holding that the standard for judgment as a matter of law is identical to the standard for summary judgment, which was one of the other "Questions Presented." Finally, the Court reiterated that "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." [FN153] Reeves clarified that "although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." [FN154]

The Court could have easily stopped there. It had already answered all the "Questions Presented," and could have remanded for the lower court to apply the standards it had announced, as it did in Johnson v. California. [FN155] In Reeves, however, the Court--without explaining why--instead went on to "apply[] this standard [about the evidence to be reviewed] here," analyzed the evidence in detail, and concluded that the Fifth Circuit had been wrong to grant judgment as a matter of law. The Court criticized the Fifth Circuit for failing to consider evidence that the plaintiff provided as part of his prima facie case when deciding whether he had also provided adequate evidence of pretext. [FN156] It faulted the court of appeals for not taking account of age-related comments directed at the plaintiff by a manager, evidence of different treatment afforded a younger employee by the same manager, and evidence that the manager was the actual decisionmaker behind the firing. The Court reversed the Fifth Circuit without even remanding for further proceedings. [FN157]

When the court decided Reeves in 2000, the case was hailed by many commentators and practitioners as the dawning of a new day for plaintiffs in employment discrimination cases. [FN158] They have been largely disappointed, [311] however. Many lower courts continue to resolve inferences against plaintiffs and pick away at bits of evidence rather than viewing the record as a whole. [FN159] In the Northern District of Illinois, rates of grants of summary judgment still hover around 70%. [FN160] Commentators' dismay at courts' eagerness to grant summary judgment in these cases is now coupled with frustration at lower courts' less than passionate embrace of Reeves' insistence that juries, rather than judges, decide employment discrimination cases with competing inferences. [FN161]
The Court's lack of influence here requires a bit of unpacking, but it is consistent with the Court's general approach to its role and the lower courts' predictable responses. On the one hand, the Court claims that it announces rules of law and resolves circuit splits. In fact, that is what it said it was doing in Reeves—resolving a circuit split on the pretext-plus issue. Not surprisingly, therefore, lower courts have stopped requiring pretext-plus, at least explicitly.

On the other hand, the application of the summary judgment standards the Court announced (or, more accurately, reiterated) is easy for lower courts to distinguish or even ignore. The Court made no claims about why it applied the standards, and it said nothing about concerns with trends or inconsistencies in the lower courts, so it gave the lower courts no particular reason to think that the Court saw anything amiss in their prior approaches. It should be no surprise, therefore, that lower courts' responses have been inconsistent. [FN162] In fact, all the cases discussed at the beginning of Part VI.B were decided after Reeves. [FN163]

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[FN112]. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000). In February 2006, the Supreme Court issued a per curiam opinion in an employment discrimination case, Ash v. Tyson Foods, Inc., 2006 WL 386343 (Feb. 21, 2006). The plaintiffs, who alleged race discrimination in promotions, won a jury verdict. The Eleventh Circuit upheld a grant of judgment as a matter of law despite a jury verdict in favor of one plaintiff, and although it reversed the judgment as a matter of law as to the other plaintiff, it upheld an order for a new trial. The Supreme Court reversed. Ash is discussed in more detail, infra note 164.


[FN121]. Blow v. City of San Antonio, 236 F.3d 293 (5th Cir. 2000).


[FN125]. Id. at 153-55; see also Curry v. Menard, 270 F.3d 473, 479- 80 (7th Cir. 2001) (finding evidence of pretext where an African-American cashier, ostensibly fired for discrepancies in her cash drawer, showed that non-black cashiers were not fired for such discrepancies).


[FN129]. Firestine v. Parkview Health Sys., Inc., 388 F.3d 229 (7th Cir. 2004).

[FN131]. Massey v. Blue Cross-Blue Shield of Ill., 226 F.3d 922 (7th Cir. 2000).

[FN133]. Malacara v. City of Madison, 224 F.3d 727 (7th Cir. 2000).

[FN134]. Id. at 730-31 (affirming summary judgment after concluding that "[d]efendants established legitimate, nondiscriminatory reasons for not hiring" the plaintiff); id. at 730 (Williams, J., dissenting) (criticizing the majority opinion for "rely[ing] solely on defendants' version of the evidence and [giving] little or no credence to Malacara's version"); id. at 732-35 (detailing and analyzing evidence of pretext).

[FN135]. This is not to suggest that there are no identifiable differences in the ways different circuits apply the standards here. The Fifth Circuit, for example, has been notably more willing to send employment cases to the jury than some other circuits, at least since Reeves (perhaps in response to being reversed by the Supreme Court.) See, e.g., Patrick v. Ridge, 394 F.3d 311, 317-18 (5th Cir. 2004); Blow v. City of San Antonio, 236 F.3d 293, 297- 98 (5th Cir. 2000). But even in the Fifth Circuit, inconsistencies remain. See, e.g., Bryan v. McKinsey & Co., 375 F.3d 358, 360-62 (5th Cir.
And although in some cases, the Second Circuit essentially continued to require pretext-plus even after Reeves, (for example, James v. N.Y. Racing Ass'n, 233 F.3d 149, 154-57 (2d Cir. 2000)), there are other cases in which that court draws inferences in the plaintiffs' favor. See, e.g., Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 119-26 (2d Cir. 2004) (finding evidence sufficient to conclude that supervisors were motivated by discriminatory attitudes towards women and reversing summary judgment on that basis).

[FN136]. See, e.g., Feingold v. New York, 366 F.3d 138, 148-60 (2d Cir. 2004) (holding that sufficient evidence was presented to create a triable question on a disparate treatment claim); Bryan, 375 F.3d at 360-62 (holding that insufficient evidence was presented to show that employee's reasons for termination were false).

[FN137]. See generally Cass R. Sunstein et al., Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation, 90 VA. L. REV. 301, 319-21 (2003). Sunstein and his co-authors found this bias in sex discrimination, sexual harassment, and disability discrimination cases. For race discrimination cases, however, the difference between Republican and Democratic judges was not statistically significant. Id. at 324-25. Whether ideology or political identity is more generally predictive of case results is not uniformly proven. See Gregory C. Sisk & Michael Heise, Judges and Ideology: Public and Academic Debates About Statistical Measures, 99 NW. U. L. REV. 743, 778 (2005) (surveying recent studies and concluding that they verify the claim that "[i]deology is a factor in judging, at least sometimes for some categories of cases and at least to some degree"); Orley Ashenfelter et al., Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes, 24 J. LEGAL STUD. 257 (1995) (finding no effect).

[FN138]. The idea that litigants believe that different judges may lead to different results certainly did not originate with me. See, e.g., Barry Friedman, The Politics of Judicial Review, 84 TEX. L. REV. 257, 302 (2005). I practiced plaintiff-side civil rights law for several years, however, and often heard some version of the view that the assignment of the judge is the most important event of the case. I have every reason to believe that defense-side lawyers hold the same view, but I lack the personal experience to assert that they do.

[FN139]. N.D. ILL. STATISTICS, supra note 96.


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[FN144]. Clermont and Eisenberg's data do not say on what basis appeals were made, and undoubtedly some of the reversals were made on the basis of, for example, evidentiary rulings, faulty jury instructions, or questions of law that somehow arose in the case--although there is no particular reason to think that such issues would have such a lopsided effect. Moreover, Clermont and Eisenberg rely on the "civil rights employment" category, which encompasses more than just
employment discrimination cases. Id. at 967; see also Paul W. Mollica, Employment Discrimination Cases in the Seventh Circuit, 1 EMP. RTS. & EMP. POL'Y J. 63, 66-67 (1997) (concluding that in employment discrimination cases the Seventh Circuit sometimes applies a more deferential standard to post-verdict judgment as a matter of law cases than it does to summary judgment cases but relying only on published opinions).

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[FN152]. See id. at 140; see also Reeves v. Sanderson Plumbing Prods., Inc., 528 U.S. 985 (1999) (granting certiorari without limitation); Petition for Writ of Certiorari, Reeves, 1999 WL 33611445, *i (presenting three questions). The questions, as granted, were:
1. Under the Age Discrimination in Employment Act, is direct evidence of discriminatory intent required to avoid judgment as a matter of law for the employer?
2. In determining whether to grant judgment as a matter of law under Fed. R. Civ. P. 50, should a District Judge weigh all of the evidence or consider only the evidence favoring the non-movant?
3. Whether the standard for granting judgment as a matter of law under Fed. R. Civ. P. 56 is the same as the standard for granting judgment as a matter of law under Fed. R. Civ. P. 50? Id.

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[FN158]. See, e.g., Trevor K. Ross, Casenote, Reeves v. Sanderson Plumbing Products: Stemming the Tide of Motions for Summary Judgment and Motions for Judgment as a Matter of Law, 52 MERCER L. REV. 1549, 1566 (2001) ("Reeves will make it easier for a plaintiff to reach the jury because the courts will no longer be able to require 'plus' evidence."). Michael J. Zimmer, Leading By Example: An Holistic Approach to Individual Disparate Treatment Law, 11 KAN. J.L. & PUB. POL'Y 177, 188 (2001) (arguing that Reeves "should lead to most individual disparate treatment cases surviving a motion for summary judgment and going to the factfinder and many fewer judgments as a matter of law being granted overturning jury verdicts for plaintiffs").

[FN159]. Supra Part IV.B & nn.113-35. See Mereish v. Walker, 359 F.3d 330, 337-38 (4th Cir. 2004) (affirming summary judgment and explaining away decisionmakers' stated desire to protect "young, bright junior scientists" and concern about aging workforce, "tunnel vision," and "problem' of the 'average age going higher'"'); Love-Lane v. Martin, 355 F.3d 766, 788 (4th Cir. 2004) (affirming summary judgment on a race discrimination claim despite evidence that reasons given for termination were pretextual and that the plaintiff was retaliated against for complaining about discrimination against other minorities); Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 291-97 (4th Cir. 2004) (en banc) (affirming summary judgment despite derogatory comments about plaintiff's age and sex and evidence that decisionmakers relied on tainted information from biased supervisor); id. at 300, 304-05 (Michael, J., dissenting) (detailing derogatory comments and explaining evidence relating to decisionmakers' reliance); Filipovich v. K & R Express Sys., Inc.,
391 F.3d 859, 864 (7th Cir. 2004) (affirming judgment as a matter of law despite evidence from which the jury could have found pretext); Sartor v. Spherion Corp., 388 F.3d 275, 279-80 (7th Cir. 2004) (affirming summary judgment and drawing inferences against plaintiff as to whether retained white employees were similarly situated); see also Zimmer, supra note 113, at 592 ("The courts still are slicing and dicing away plaintiff's evidence before reviewing the record for purposes of deciding motions for summary judgment and judgment as a matter of law."); James v. N.Y. Racing Ass'n, 233 F.3d 149, 155-57 (2d Cir. 2000) (explaining why Reeves is consistent with the Second Circuit's pre-Reeves precedent).

[FN160]. The fact that the grant rates for summary judgment motions in employment cases remained about the same after Reeves does not necessarily mean that judges were treating those cases as if Reeves had never been decided. In fact, in the six months immediately following Reeves, the grant rate in the Northern District of Illinois dropped to 57%--about ten percentage points lower than in any previous six month period since January 1997, suggesting that, at least initially, there was some change in treatment. See N.D. ILL. STATISTICS, supra note 96 (noting a decrease in grants of summary judgment from 77% in the first half of 2000 to 57% in the second half). The rate returned to the 70% range in the next period. See id. (noting an increase in grants of summary judgment to 76% in the first half of 2001). It is possible that some judges reverted to pre-Reeves ways after the first reaction to the case. It is also possible that lawyers' and litigants' strategies shifted in response to Reeves, with defendants settling plaintiffs' stronger cases without filing for summary judgment where previously they would have filed, and plaintiffs who might have accepted a relatively small settlement prior to a summary judgment ruling being more willing to see the motion through. Further empirical research is needed to determine if that is in fact occurring.

[FN161]. See, e.g., FORMAN ET AL., supra note 99, at 3 ("Notwithstanding the explicit statutory grant of a trial by jury and the expressed legislative intent that these cases were to be decided by juries, courts have increasingly usurped the role of the jury in employment cases."); Zimmer, supra note 113, at 592-600 ("The early returns of decisions by the lower courts suggest that the lower courts have not changed their practices significantly despite the new approach ordered by the Court in Reeves."); Selmi, supra note 101, at 574 (concluding "that employment discrimination cases are unusually difficult to win"); Lancot, supra note 113, at 546 ("[T]he lower courts thus far have not appreciably changed their basic approach to employment discrimination cases.").

[FN162]. See Georgene M. Vairo, Through the Prism: Summary Judgment After the Trilogies, SH063 ALI-ABA 577, 636 (2003) (stating that "case law applying Reeves is all over the map"); William D. Evans, Jr., Summary Judgment Considerations After Reeves v. Sanderson Plumbing, 70 U.S.L.W. 2139, 2141 (Sept. 11, 2001) ("The case authorities are 'a work in progress.' It would be unwise to claim that all the circuit courts have established a firm position ....").

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[FN164]. In Ash, discussed supra note 112, the Court reversed a lower court's grant of judgment as a matter of law to a defendant for the first time since it decided Reeves. The Court did not, however, actually apply the standards itself as it did in Reeves. Instead, it criticized the lower court's holding that the word "boy" without a racial term like "black" can never be evidence of discriminatory intent,
and it objected to the Eleventh Circuit's description of the standard to be used when determining whether a plaintiff's qualifications were so superior to the candidate actually selected that the comparison is evidence of pretext. The Court declined to consider whether the evidence in the case at hand suggested that the defendant's use of "boy" could be seen as evidence of discriminatory intent. It expressly declined to "define more precisely what standard should govern pretext claims based on superior qualifications." And it refused to say whether the petitioners' evidence in fact was sufficient to demonstrate pretext. Instead, it remanded for the Court of Appeals to "determine in the first instance whether the two aspects of its decision here determined to have been mistaken were essential to its holding." In other words, the Court did not even decide whether these particular jury verdicts should be upheld. Furthermore, the Court said nothing about why it had chosen to issue an opinion in this case nor anything else to indicate that it thought the Eleventh Circuit's opinion exemplified a more widespread problem with the way courts address employment discrimination cases. It remains to be seen, of course, what, if any, effect Ash will have on lower court decisionmaking or whether the Roberts Court will decide more cases in this area of law, perhaps making use of the very mechanisms discussed infra, Part V.