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Employment Discrimination

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EMPLOYMENT DISCRIMINATION

LOWE v. CITY OF MONROVIA: NINTH CIRCUIT ADOPTS A FLEXIBLE INTERPRETAION OF THE *McDONNELL DOUGLAS* TEST

I. INTRODUCTION

In *Lowe v. City of Monrovia*,[1] the Ninth Circuit held that an unsuccessful Black woman applicant for a job as a city police officer established a prima facie case of racial discrimination under Title VII[2] by showing that the city's hiring practices were suspect.[3] The city's use of delayed effective dates for eligibility and its use of eligibility lists that expire, as well as comments made by the Personnel Manager that suggested an attempt to discourage Black and female applicants, raised triable issues of discriminatory motive.[4]

The Ninth Circuit reversed and remanded the district court's decision granting summary judgment to the City of Monrovia with respect to the race discrimination claims brought under Title VII and 42 U.S.C. section 1981[5] and section 1983[6]

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1. 775 F.2d 998 (9th Cir. 1985), *amended*, 784 F.2d 1407 (9th Cir. 1986) (per Reinhardt, J.; the other panel members were Pregerson, J., and Schwarzer, D.J., United States District Judge for the Northern District of California, sitting by designation, dissenting in part).

2. Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e - 2000e-17 (1982). Title VII prohibits discrimination in employment on the basis of race, color, religion, sex or national origin. *See infra* notes 24 to 28 and accompanying text for a discussion of Title VII.

3. *Lowe*, 775 F.2d at 1009.

4. *Id.*

5. 42 U.S.C. § 1981 (1982) (prohibits racial discrimination in the making and enforcing of contracts). *See infra* notes 44 to 50 and accompanying text for a discussion of § 1981.

6. 42 U.S.C. § 1983 (1982) (prohibits interference with an individual's constitutional

and the sex discrimination claim brought under 42 U.S.C. section 1983.[7] The court approved the district court's dismissal of the Title VII and section 1981 sex discrimination claims.[8]

II. FACTS

Kathryn Lowe, a Black woman graduate of a police officer training program, applied for an entry level position on the Monrovia police force in January of 1982.[9] At the time she applied, there was an opening for an entry level police officer and there were no Blacks or women on the force.[10]

While the City of Monrovia ("City") accepted police officer applications at all times, applicants who passed a written and oral examination were placed on a ranked eligibility list which became effective at a later date.[11] The eligibility list automatically expired six months after its effective date.[12] The City also maintained a separate list of lateral entry candidates.[13]

Lowe passed the required examinations by May 28, 1982, and was notified on June 3, 1982, that she was accepted for the eligibility list which took effect on August 1, 1982.[14] Lowe claimed that during her oral examination the Personnel Division Manager, Betty Logans, informed her that the City's police force had no Blacks, no women, and "no facilities."[15] She then suggested that Lowe apply for a position in Los Angeles where the department was "literally begging for minorities and especially

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rights by state and local governments). *See infra* notes 51 to 52 and accompanying text for a discussion of § 1983.

7. *Lowe*, 775 F.2d at 1011.

8. *Id.*

9. *Id.* at 1002.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* It is unclear how the list of lateral entry candidates is compiled. It is also unclear when the City hires laterally for an entry level position instead of hiring from the list of entry level recruits. However, most entry level positions are filled by recruits rather than by experienced officers. *Id.*

14. *Id.* The candidates were ranked according to their test scores. Lowe ranked number eleven on the list. She offered evidence purporting to show that she should have been ranked second on the list. The court did not specify what evidence Lowe produced. *Id.* at 1002, 1007 n.7.

15. *Id.* at 1002.

females."[16]

On June 7, 1982, four days after Lowe was notified that she had qualified for the eligibility list but before that list went into effect, Louis Razo was hired laterally for the entry level opening.[17] The eligibility list that included Lowe automatically expired on February 1, 1983, and there were no further openings for entry level police officers during the time in which Lowe's name appeared on the eligibility list.[18]

Lowe filed a complaint against the City with the Equal Employment Opportunity Commission (EEOC) on June 18, 1982.[19] The complaint subsequently was amended on June 24, 1982.[20] After receiving a right to sue letter from the EEOC, Lowe brought an action in the district court for discrimination based on race and sex.[21]

The district court dismissed Lowe's Title VII sex discrimination action.[22] The court then granted the City's motion for summary judgment with respect to Lowe's Title VII race discrimination claim and her race and sex discrimination claims under sections 1981 and 1983.[23]

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16. *Id.* at 1002-03. The court accepted Lowe's version of her conversation with Logans, and it pointed out that when reviewing an order granting summary judgment to the defendant, it is required to view the facts in the light most favorable to the plaintiff. *Id.* at 1003 n.1.

17. *Id.* at 1003.

18. *Id.* at 1002. The Equal Employment Opportunity Commission (EEOC) is empowered to investigate and eliminate through voluntary agreement any employment practice prohibited by Title VII. *See* 42 U.S.C. § 2000e-5.

19. *Lowe*, 775 F.2d at 1003. The first complaint included Logans' statement encouraging Lowe to apply to the Los Angeles police department instead. The amended complaint included the information the Louis Razo was hired laterally for the position. *Id.*

20. *Id.*

21. *Id.* If the EEOC has not been able to obtain voluntary compliance with the party charged with unlawful discrimination, it must notify the charging party that a civil action can be brought by the party. Typically, notification is achieved by issuing a right to sue letter to the charging party. *See* 42 U.S.C. § 2000e-5.

22. *Lowe*, 775 F.2d at 1003. The district court dismissed the Title VII sex discrimination claim because Lowe failed to file a complaint for sex discrimination with the EEOC. *Id.*

23. *Id.*

III. BACKGROUND

A. TITLE VII

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex or national origin.[24] The 1972 amendment extends coverage under the act to include state and local government employees.[25] The objective of Congress in enacting Title VII was to achieve equality of employment opportunities and to declare, as a national policy, the protection of the rights of individuals to be free from such discrimination.[26]

The Act established the Equal Employment Opportunity Commission which is empowered to investigate unlawful employment discrimination charges.[27] If the EEOC is unable to obtain voluntary compliance with Title VII through conference, conciliation and persuasion, a civil action may be brought by the party bringing the complaint.[28]

The Supreme Court first articulated the "disparate impact" theory of employment discrimination in *Griggs v. Duke Power Co.*[29] In *Griggs*, the court held that Title VII prohibited not only

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24. Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e - 2000e-17 (1982)). § 2000e-2 reads in part:

> (a) It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Id.

25. Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e (1982)).

26. H.R. REP. No. 914, 88th Cong. 2nd Sess. (1964) *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2355, 2401.

27. 42 U.S.C. § 2000e-5 (1982).

28. *Id.* The EEOC must first attempt to obtain voluntary compliance with Title VII from the party charged with unlawful discrimination by engaging in informal methods of conference and negotiation. If this is unsucessful, civil action may be brought against the party by either the EEOC or the party bringing the complaint. *See* 42 U.S.C. § 2000e-5.

29. 401 U.S. 424 (1971). Black employees at a generating plant challenged their employer's alternative requirement of a high school diploma or the passing of an intelligence test as a condition of employment. *Id.* at 427-28. The Supreme Court held that

overt discrimination, but also practices which are neutral on their face, but have a discriminatory impact upon individuals and groups protected under Title VII.[30] In a disparate impact case, an employee must show that a facially neutral employment practice has a significant discriminatory impact upon individuals and groups protected by Title VII.[31] Once an employee demonstrates that an employment practice has a disparate impact upon a protected person, the employer has the burden of showing that the practice is justified by business necessity.[32] In order to prove a disparate impact case, the plaintiff usually must produce statistical evidence that shows that an employer has hired members of a protected class in a smaller proportion than their representation in a pool of eligible candidates.[33]

Another theory used to bring employment discrimination cases is the "disparate treatment" theory. Employment discrimination claims based on disparate treatment can be distinguished from claims based on disparate impact. In disparate treatment cases, the employer simply treats some individuals less favorably than others because of their race, color, religion, sex or national origin.[34] In disparate impact cases, the employer's practice is

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Title VII prohibited an employer from requiring specific testing or education requirements which operate to exclude Blacks unless the requirements are shown to be related to job performance. *Id.* at 436.

30. *Id.* at 431. Title VII protects individuals and groups from discrimination based on race, color, religion, sex or national origin. *See supra* note 24 and accompanying text.

31. Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 481 (9th Cir. 1983) (citing Connecticut v. Teal, 457 U.S. 440, 446, (1982)). In *Moore*, a Black female aerospace employee brought a class action suit for race and sex discrimination based on disparate impact. The court held that the employee's disparate impact claim failed because she did not produce statistical evidence demonstrating that the percentage of Black females hired was disproportionate to the pool of eligible applicants. *Id.* at 484-86.

32. Gay v. Waiters' and Dairy Lunchmen's Union, 694 F.2d 531, 537 (9th Cir. 1982) (citing Contreras v. City of Los Angeles, 656 F.2d 1267, 1275-80 (9th Cir. 1981)). In *Contreras*, although statistics proved that a city auditor examination had a disparate impact on Spanish surnamed persons, the court found that the examination was justified by business necessity. 656 F.2d at 1267, 1275-80. For a discussion of *Gay*, *see infra* text accompanying notes 123-24.

33. 708 F.2d at 482. "Disparate impact should always be measured against the actual pool of applicants or eligible employees unless there is a characteristic of the challenged selection device that makes use of the actual pool of applicants or eligible employees inappropriate." *Id.*

34. International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 335-36 n.15 (1977) (a common carrier and a union discriminated against Blacks and Spanish surnamed truck drivers). In disparate treatment cases, proof of discriminatory motive is critical, although it can often be inferred from differences in treatment. Either theory may be applied to a particular set of facts. *Id. See generally*, B. SCHLEI AND P. GROSSMAN, EMPLOY-

facially neutral but falls more harshly on members of a protected class.[35]

In *McDonnell Douglas v. Green*,[36] the Supreme Court set forth the elements and the allocation of proof required to prove employment discrimination based on disparate treatment.[37] The first step requires the plaintiff to establish a prima facie case of disparate treatment by proving the following four elements: (1) that the plaintiff belonged to a class protected by Title VII; (2) that the plaintiff applied and was qualified for the job for which the employer was seeking applicants; (3) that despite being qualified, the plaintiff was rejected; (4) that after the plaintiff's rejection, the position remained open and the employer continued to seek applicants from persons of comparable qualifications.[38]

Once these elements are met, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for the employee's rejection.[39] In the final step, the burden shifts back to the plaintiff to show that the employer's stated nondiscriminatory reason is actually a pretext for unlawful discrimination.[40]

A prima facie case of disparate treatment can also be made without satisfying the *McDonnell Douglas* elements.[41] The legal standard to be applied is simply whether the facts are sufficient

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MENT DISCRIMINATION LAW (2nd ed. 1983).

35. *Teamsters*, 431 U.S. at 335-36 n.15.

36. 411 U.S. 792 (1973). The plaintiff, a Black mechanic, alleged that he was refused employment as a rehire because of his race and his involvement in civil rights activities. The Court held that the plaintiff established a prima facie case of racial discrimination by satisfying the four elements outlined by the court. *Id.* at 802. The case was remanded in order to give the plaintiff the chance to show that the reason for his rejection was pretext. *Id.* at 804. *See infra* text accompanying notes 37-40 for a discussion of the test outlined in *McDonnell Douglas*.

37. *Id.* at 802.

38. *Id.* The facts will vary in Title VII cases and the four elements of prima facie proof are not necessarily applicable in every respect to differing factual situations. *Id.* at 802 n.13.

39. *Id.* at 802.

40. *Id.* at 804. Evidence relevant to showing pretext includes evidence of the employer's prior treatment of the employee and the employer's policy and practice regarding minority employment. Statistical evidence is also helpful in demonstrating pretext. *Id.* at 804-05.

41. Gay v. Waiters' and Dairy Lunchmen's Union, 694 F.2d at 550. "We have repeatedly emphasized that proof of the four *McDonnell Douglas* criteria is not the only way to establish a prima facie case of disparate treatment . . . ." *Id.*

for the court to infer that the employment decision was more likely than not the product of intentional discrimination.[42] All evidence, both direct and circumstantial, statistical and non-statistical, relevant to the question of discrimination can be used to establish a prima facie case.[43]

B. 42 United States Code Sections 1981 and 1983

Title 42 of the United States Code, section 1981, which prohibits racial discrimination in the making and enforcing of contracts, originated with the 1870 Civil Rights Act.[44] The Supreme Court in *Johnson v. Railway Express Agency, Inc.*[45] established that section 1981 affords a federal remedy for employment discrimination on the basis of race.[46] The *Johnson* court further stated that Title VII and section 1981 afford overlapping and independent remedies for racial discrimination.[47] The Ninth Circuit in *Gay v. Waiters' and Dairy Lunchmen's Union*[48] stated that a section 1981 claimant must show discriminatory intent,[49] and that the same standards used to prove a Title VII disparate treatment claim may be used to prove a section 1981 claim.[50]

Section 1983, which protects an individual's constitutional

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42. *Id.*

43. *Id. See also* Diaz v. American Telephone and Telegraph, 752 F.2d 1356, 1361 (9th Cir. 1985) (circumstantial and statistical evidence); O'Brien v. Sky Chefs, Inc., 670 F.2d 864, 866 (9th Cir. 1982) (statistical evidence); Lynn v. Regents of the University of California, 656 F.2d 1337, 1342-43 (9th Cir. 1981) (statistical evidence).

44. 42 U.S.C. § 1981 reads:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

Id.

45. 421 U.S. 454 (1975). In *Johnson*, a Black railroad worker alleged that he was discharged because of his race. *Id.* at 457. The court held that § 1981 affords a separate federal remedy against employment discrimination based on race and that the filing of an EEOC complaint did not toll the statute of limitations on the plaintiff's section 1981 claim. *Id.* at 460, 466.

46. *Id.* at 459-60.

47. *Id.* at 461.

48. 694 F.2d. 531.

49. *Id.* at 537.

50. *Id.* at 538.

rights by providing a cause of action against state and local governments, is a codification of the 1871 Civil Rights Act.[51] The same inquiry used in a Title VII disparate treatment claim may also be used in a section 1983 claim involving employment discrimination.[52]

IV. THE COURT'S ANALYSIS

A. THE MAJORITY

The Ninth Circuit affirmed the district court's dismissal of Lowe's Title VII sex discrimination claim.[53] The court relied on *Shah v. Mt. Zion Hospital & Medical Center*,[54] which held that when a plaintiff fails to raise a Title VII claim before the EEOC, the district court lacks subject matter jurisdiction to hear it.[55] Because the plaintiff's amended EEOC complaint did not allege discrimination on the basis of sex, the court concluded that the district court correctly dismissed this cause of action.[56]

In its analysis of Lowe's Title VII race discrimination claim, the court first examined Lowe's claim that the City's hiring

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51. 42 U.S.C. § 1983 reads in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

52. *See* Tagupa v. Board of Directors, 633 F.2d 1309, 1312 (9th Cir. 1980). Plaintiff responded to an advertisement for a Pacific Area Specialist but never completed the application process and was later rejected. The court applied the four *McDonnell Douglas* elements to the plaintiff's sections 1981 and 1983 claims and concluded that since he did not complete the application process, he failed to establish a prima facie case of employment discrimination. *Id.*

53. *Lowe*, 775 F.2d at 1004.

54. 642 F.2d 268 (9th Cir. 1981). An East Indian male who was terminated as a payroll clerk filed an EEOC complaint alleging sex and national origin discrimination. At trial, the plaintiff expanded his Title VII action to include race, color and religious discrimination, and the court held that since these claims were not brought before the EEOC, they were properly dismissed. *Id.* at 270-72.

55. *Id.*

56. *Lowe*, 775 F.2d at 1004. Lowe's amended EEOC complaint explicitly stated: "I feel the sole reason for my denial of the job is because I am Black." The amended complaint did not allege discrimination on the basis of sex. *Id.*

practices had a disparate impact on Blacks.[57] The court relied on *Moore v. Hughes Helicopters, Inc.*[58] to assert that a proper statistical record must be shown in order to prevail under a disparate impact theory.[59] Since Lowe did not offer statistical evidence to show that the City's use of eligibility lists with delayed effective dates had a disparate impact on Blacks, the court concluded that Lowe failed to establish a prima facie case of disparate impact.[60]

The court then applied the *McDonnell Douglas* test to determine whether Lowe established a prima facie case of racial discrimination based on disparate treatment.[61] In applying the four elements of *McDonnell Douglas* to the facts of this case, the court found that the first element, that plaintiff belonged to a protected class, was met since Lowe, a Black woman, was a member of a minority protected by Title VII.[62] The third element, that plaintiff was rejected despite being qualified, was also met because Lowe passed the oral and written examination which qualified her for the position, and she was rejected by the City.[63] The court then addressed the issue of whether Lowe met the second element, that the plaintiff applied and was qualified for the job for which the employer was seeking applicants.[64] Since there was a job opening on the police force when Lowe first submitted her application, the court reasoned that this re-

57. *Id.* Lowe alleged that the City's policy of using eligibility lists with delayed effective dates and that automatically expire, along with the practice of using lateral hires to fill entry level positions, had a disparate impact on Blacks. She contended that these practices resulted in a disproportionately low number of job offers to Blacks, regardless of the City's motivation. *Id.*

58. 708 F.2d 475. The *Moore* court explained: "The best evidence of discriminatory impact is proof that an employment practice selects members of a protected class in a proportion smaller than their percentage in the pool of actual applicants." *Id.* at 482. The court also noted that in some respects the requirements the plaintiff must meet are more exacting than those of a disparate impact plaintiff. *Id.*

59. *Lowe*, 775 F.2d at 1004.

60. *Id.* at 1004 & n.3. Lowe did not offer affidavits or documentary evidence to support her claim. Her assertions were made by memoranda of law and not by way of proffered facts. *Id.* at 1004. The only racial breakdown of applicants offered by Lowe was for the year 1982. The court found that this was not a proper statistical record. *Id.* at 1004 n.3.

61. *Id.* at 1005.

62. *Id.*

63. *Id.* Both Lowe and the City agreed that Lowe met the first and third elements of the *McDonnell Douglas* test. *Id.* The City argued that Lowe failed to meet the second and fourth elements. *Id.*

64. *Id.*

quirement was met.[65] At this point, the court refused to consider the City's contention that Lowe did not "apply, for the purposes of the *McDonnell Douglas* criteria," until her name was placed on an active eligibility list, and that there were no job openings during the time that her name was on the list.[66] The court reasoned that this evidence should be saved for the rebuttal stage.[67] The final element, that after plaintiff's rejection the position remained open and the employer continued to accept applications, was satisfied because the City essentially rejected Lowe when the eligibility list on which her name appeared expired on February 1, 1983, and continued to accept applications from other qualified candidates after this date.[68] The court concluded that Lowe satisfied the four elements of the *McDonnell Douglas* test, thereby establishing a prima facie case of racial discrimination based on disparate treatment.[69]

Under the *McDonnell Douglas* analysis, once Lowe established a prima facie case of employment discrimination, the burden shifted to the City to articulate a legitimate nondiscriminatory reason for not hiring her.[70] To meet its burden, the City was only required to set forth a legally sufficient explanation for rejecting Lowe's application.[71] The court found that the City met its burden by explaining that its practice of maintaining eligibility lists with delayed effective dates was a long-standing nondiscriminatory practice.[72]

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65. *Id.* at 1006. The court noted that the second element related only to whether there was an opening either when the plaintiff applied or at any time her application was pending. *Id.*

66. *Id.* at 1005.

67. *Id.* at 1006. "[T]he order of proof set forth in *McDonnell Douglas* does not permit us to consider rebuttal evidence at the *prima facie* case stage." *Id.*

68. *Id.* The court rejected the City's contention that the automatic expiration of the eligibility list on February 1, 1983, did not constitute a rejection. *Id.*

69. *Id.* The court used the term "prima facie case" to denote the rebuttable presumption that a plaintiff must establish as the first step in a Title VII case, and not to denote the plaintiff's burden in putting on a case-in-chief. *Id.* at 1006 n.5. *See* Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981) (defining "prima facie case" for the purposes of the *McDonnell Douglas* test).

70. *Lowe*, 775 F.2d at 1007.

71. *Id. See Burdine*, 450 U.S. at 254-55.

72. *Lowe*, 775 F.2d at 1007. The court acknowledged that there may be administrative constraints which justify the City's use of eligibility lists with delayed effective dates and automatic expiration dates, and it assumed arguendo, that the City met its burden. *Id.* However, the court rejected the City's argument that it was justified in not hiring Lowe because she was only number eleven on the eligibility list. It noted that regardless of where Lowe ranked on the list, she eventually would have been offered a job if the

Under the final step of the *McDonnell Douglas* analysis, the burden shifted back to Lowe to show that the City's nondiscriminatory reasons were pretextual.[73] To prove pretext, Lowe contended that the City's rules that permit the manipulation of job openings and hiring lists are themselves suspect and raise the issue of discriminatory motive,[74] and she attempted to support this contention by introducing statistical data.[75] Although the court rejected Lowe's statistical data as inadequate,[76] it noted that the same evidence used to establish a prima facie case may be used to show that the defendant's explanation was pretextual[77] and it concluded that she sufficiently raised a factual issue as to the City's motive in refusing to hire her.[78]

The court next considered whether Lowe established a prima facie case of disparate treatment by providing direct and circumstantial evidence of the City's discriminatory motive. The court relied upon *International Brotherhood of Teamsters v. U.S.*,[79] which stated that a prima facie case of disparate treatment can be made independent of the *McDonnell Douglas* elements by the production of evidence which is adequate to infer that an employment decision was based on unlawful discrimination.[80] The court added that very little direct evidence is needed in order to raise a factual issue as to the employer's motive.[81] The Personnel Manager's statements to Lowe that there were no Blacks or women on the Monrovia police force and her encouraging Lowe to apply for a position in Los Angeles instead of Monrovia, when viewed with the fact that no Blacks were em-

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City did not use eligibility lists that expire after six months and did not occasionally hire laterally. *Id.* at 1007 n.7.

73. *Id.* at 1008. *See Burdine*, 450 U.S. at 255-56.

74. *Lowe*, 775 F.2d at 1008.

75. *Id.* Lowe claimed that six Blacks qualified on the eligibility list between 1979 and 1982 but none were hired. She also claimed that the City "held over" non-Blacks from entry level eligibility lists and hired them later. *Id. See supra* note 57.

76. *Lowe*, 775 F.2d at 1008.

77. *Id.*

78. *Id. See Burdine*, 450 U.S. at 255 n.10; *Diaz*, 752 F.2d at 1363 n.8. The court emphasized that an employer's true motive in an employment situation is not easy to discern and that the question of an employer's intent to discriminate should be left to the trier of fact. *Lowe*, 775 F.2d at 1008-09.

79. 431 U.S. 324.

80. *Id.* at 358. "[A]ny Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the [Civil Rights] Act." *Id.*

81. *Lowe*, 775 F.2d at 1009.

ployed by the Monrovia Police Department at the time Lowe applied, were found by the court to be sufficient evidence of discriminatory motive to establish a prima facie case.[82]

Finally, the court concluded that Lowe established a prima facie case of disparate treatment both by satisfying the *McDonnell Douglas* test and by introducing actual evidence of the Personnel Manager's statements, which inferred a discriminatory motive on the part of the City.[83] Therefore, the court held that a genuine issue of material fact had been raised and summary judgment was the incorrect remedy.[84]

In its analysis of Lowe's section 1981 and 1983 claims, the court found that because section 1981 redresses only discrimination based upon race, Lowe's section 1981 sex discrimination claim was properly dismissed by the district court.[85] In addressing Lowe's section 1981 race discrimination claim, the court relied upon *Gay v. Waiters' and Dairy Lunchmen's Union*,[86] which stated that the same standards are used to prove racial discrimination under both Title VII and section 1981.[87] The court concluded that the evidence presented by Lowe in her Title VII action was sufficient to allow her to bring an action for race discrimination under section 1981.[88]

In addressing Lowe's section 1983 sex discrimination claim, the court relied upon *Patsy v. Board of Regents*,[89] which held

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82. *Id.* at 1007. "One clear inference that could reasonably be drawn from [the Personnel Manager's] . . . statement is that the Monrovia police force was not begging for—or even interested in—such applicants." *Id.* at 1009.

83. *Id.* at 1009.

84. *Id.* at 1009-10.

> Once a *prima facie* case is established either by the introduction of actual evidence or reliance on the *McDonnell Douglas* presumption, summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits because the crux of a Title VII dispute is the 'elusive factual question of intentional discrimination.'

Id. at 1009 (quoting *Burdine*, 450 U.S. at 255 n.8).

85. *Lowe*, 775 F.2d at 1010.

86. 694 F.2d 531.

87. *Id.* at 538.

88. *Lowe*, 775 F.2d at 1010.

89. 457 U.S. 496 (1982). A female employee who was rejected from thirteen positions at a university filed an action under § 1983 alleging employment discrimination based on race and sex. The Fifth Circuit found that the employee was required to exhaust admin-

that a plaintiff does not have to exhaust state administrative remedies before bringing an action under section 1983.[90] The court then determined that Lowe's failure to file an EEOC sex discrimination complaint did not bar her section 1983 sex discrimination claim.[91] The court concluded that the evidence used by Lowe to establish her Title VII action was sufficient for her to also bring an action for race and sex discrimination under section 1983.[92]

B. The Dissent

Judge Schwarzer, dissenting in part, argued that Lowe did not make out a prima facie case of dispara treatment under *McDonnell Douglas*.[93] Judge Schwarzer maintained that the second *McDonnell Douglas* element, that Lowe applied and was qualified for the job for which the City was seeking applicants, was not met since the job opening was filled before Lowe became eligible and there were no job openings during the time Lowe's name was on the eligibility list.[94] He further argued that since Lowe was only number eleven on the eligibility list, this precluded the inference that the City's failure to hire her was based on discriminatory motivation.[95]

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istrative remedies. *Id.* at 498. The Supreme Court reversed this decision. *Id.*

90. *Id.* at 516.

91. *Lowe*, 775 F.2d at 1011. The court reasoned that since it was not necessary to exhaust administrative remedies before bringing an action under section 1983, Lowe's failure to file an EEOC sex discrimination complaint did not bar her section 1983 claim. *Id.*

92. *Id.*

93. *Id.* at 1012.

94. *Id.* Judge Schwarzer relied on Gay v. Waiters' and Dairy Lunchmen's Union, 694 F.2d 531 (black waiters who failed to show that they applied for positions prior to the filling of a known vacancy were not qualified applicants); Chavez v. Tempe U. High School District #213, 565 F.2d 1087 (9th Cir. 1977) (a school teacher who applied for a chairperson position after it was filled was not a qualified applicant); and Morita v. Southern Cal. Permanente Medical Group, 541 F.2d 217 (9th Cir. 1976) (an x-ray technician was not qualified to fill an open position due to lack of training) for the proposition that the plaintiff must be a qualified applicant when the job opening existed. *Lowe*, 775 F.2d at 1013.

95. *Lowe*, 775 F.2d at 1013. At oral argument, the City's counsel stated that the City was obligated to hire from the first three names on the list only. Since the only issue raised was the filling of the vacancy in June of 1982, the dissent rejected the majority argument that if the lists didn't automatically expire, the City would have had to hire Lowe eventually, regardless of her rank. *Id.* at 1013 n.2. *See supra* note 72.

Contrary to the majority's position, Judge Schwarzer accepted the City's hiring rules as racially neutral.[96] He then questioned the majority's logic in finding the City's hiring rules to be racially neutral under the disparate impact analysis and racially suspect under the disparate treatment analysis.[97] Since there was no showing that the City acted other than in accordance with its own rules and practices, Judge Schwarzer argued that Lowe produced no evidence of disparate treatment.[98] Thus, even though the comments of the Personnel Manager encouraging Lowe to apply in Los Angeles may have been perceived as evidence of discriminatory motive, Judge Schwarzer maintained that this was insufficient to establish a prima facie case in the absence of evidence of disparate treatment.[99]

Finally, the dissent noted that the system of ranking applicants on eligibility lists which have a limited life is a common practice for public agencies and that this case may create a precedent that could threaten the integrity of the civil service hiring system.[100]

V. CRITIQUE

The *Lowe* court correctly held that the plaintiff failed to prove a prima facie case of disparate impact because her statistical data was inadequate. In order to prove a prima facie case of disparate impact, the plaintiff usually must offer statistical proof that an employer hired members of a protected class in a smaller proportion than is represented in a statistical pool of qualified candidates.[101] Statistical evidence from an extremely small pool has little predictive value and should be disregarded.[102] The only

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96. *Id.* at 1013. Judge Schwarzer contended that since the majority found the City's hiring practices racially neutral under the disparate impact analysis, the practices must be accepted as racially neutral under the disparate treatment analysis unless there was strong evidence that the City acted other than in accordance with its rules and practices. *Id.*

97. *Id.* at 1013 n.4. "It is difficult to follow the majority's logic under which these same practices, held to be neutral under the impact analysis, are held to raise an inference of disparate treatment." *Id.* The dissent cited no authority to show that the majority's holding was legally impermissible.

98. *Id.* at 1014 n.5.

99. *Id.* at 1014.

100. *Id.* at 1012, 1014. *See* Cal. Govt. Code §§ 18900-18954, 19050-19062.

101. Moore v. Hughes Helicopters, Inc., 708 F.2d at 482.

102. Morita v. Southern Cal. Permanente Medical Group, 541 F.2d 217, 220 (9th

statistical evidence provided by Lowe was evidence showing that between 1979 and 1982, six Blacks applied and were rejected.[103] Since her sample was extremely small and she failed to produce statistics showing the number of qualified Blacks in the area, the court properly found that Lowe's statistical record failed to establish a prima facie case of disparate impact.

Judge Schwarzer, in his dissent, questioned how the majority could find that the City's hiring procedures were neutral under a disparate impact analysis but suspect under a disparate treatment analysis.[104] However, an examination of several Supreme Court cases reveals that a finding of disparate treatment does not depend on a prior finding of disparate impact. In *International Brotherhood of Teamsters*,[105] the Supreme Court stated that a company's system wide practices and procedures can be reviewed under either analysis.[106] Furthermore, the Supreme Court in *Furnco Construction Corp. v. Waters*[107] held that although the plaintiffs failed to establish a prima facie case of disparate impact, they did establish a prima facie case of disparate treatment under *McDonnell Douglas*.[108] In *Furnco*, the court found that the superintendent's practice of hiring only bricklayers known to him was evidence of discriminatory treatment, despite the fact that this was a long-standing industry practice which was considered "racially neutral" under the impact analysis.[109] Accordingly, the Ninth Circuit was correct in asserting that Lowe's ability to show that the City's hiring practices were discriminatory under a disparate treatment analysis was not dependent on her proving disparate impact.

Cir. 1976). In an action brought by an oriental x-ray technician alleging denial of a promotion on the basis of race, the Ninth Circuit affirmed the district court's dismissal of the plaintiff's claim. *Id.* at 219. The courat found that the plaintiff's use of only eight persons in his statistical analysis is much too small to have any predictive value and should be disregarded. *Id.* at 220.

103. *Lowe*, 775 F.2d at 1008.

104. *Id.* at 1013 n.4.

105. 431 U.S. 324.

106. *Id.* at 335 n.15.

107. 438 U.S. 567 (1978).

108. *Id.* at 575. The Supreme Court stated that the proper approach in this case is the disparate treatment analysis contained in *McDonnell Douglas*. *Id.* The Court appeared to foreclose on remand the Court of Appeals' finding of no disparate impact. *Id.* at 583. The implication is that the Supreme Court affirmed the Court of Appeal's finding of no disparate impact.

109. *Id.* at 572.

The dissent also challenged the court's finding that Lowe satisfied the second *McDonnell Douglas* element.[110] In order to meet the second element, Lowe had to show that she applied and was qualified for a current open position on the City's police force. The dissent maintained that Lowe failed to meet this element because at the time the position was filled, Lowe was not yet eligible to be hired because her name did not appear on an effective eligibility list.[111]

In order to evaluate both the majority's and the dissent's positions, it is helpful to consider the rationale behind the *McDonnell Douglas* elements and to examine several Ninth Circuit cases which specifically address the second element. The rationale of the *McDonnell Douglas* four part test is that it requires the applicant to demonstrate that his or her rejection was not due to the most common, legitimate reasons an employer may use to reject an applicant: the lack of qualifications or the absence of an opening in the job sought.[112] The elimination of these reasons is generally sufficient, absent a valid explanation, to create an inference that the hiring decision was discriminatory.[113] The *McDonnell Douglas* test is not intended to be an inflexible formula[114] and the prima facie proof required will vary in different factual situations.[115] However, it is evident from the cases that the existence of a job opening is critical to show a prima facie case.[116]

The Ninth Circuit has articulated guidelines for meeting the second *McDonnell Douglas* element, or the "job opening" requirement, in several recent cases. In *Chavez v. Tempe Union High School*,[117] the court held that an English teacher who was denied a position as department chairperson failed to satisfy the job opening requirement because the position was already filled at the time she applied.[118] The *Chavez* court formulated a clear standard which requires the existence of a job opening at the

110. *Lowe*, 775 F.2d at 1013.
111. *Id.* at 1012.
112. *Teamsters*, 431 U.S. at 358 n.44.
113. *Id.*
114. *Teamsters*, 431 U.S. at 358.
115. *McDonnell Douglas*, 411 U.S. at 802 n.13.
116. *See McDonnell Douglas*, 411 U.S. at 802; *Teamsters*, 431 U.S. at 358 n.44.
117. 565 F.2d 1087 (9th Cir. 1977).
118. *Id.* at 1092.

time that the application is submitted.[119]

The court in *McLean v. Phillips-Ramsey*,[120] however, adopted a more flexible standard for meeting this requirement. In *McLean*, the court found that a Black artist who was denied an advertising position satisfied the job opening requirement even though the opening did not occur until one month after he completed the application.[121] Under the *McLean* job opening test, there must be a job opening within a reasonable time after the application is made.[122]

The court's interpretation of the job opening requirement in *Gay v. Waiters' and Dairy Lunchmen's Union*[123] is more stringent than the *Chavez* and *McLean* interpretations. In *Gay*, the court found that four Black waiters who were denied hotel waiter positions failed to satisfy the job opening requirement because they could not establish that they applied for positions immediately before specific job openings were filled.[124] In *Gay*, the court added a new requirement to the job opening test. Not only must there be a job opening at the time the application is made, but the applicant must be "eligible" to fill the opening by meeting the employer's time-line for eligibility.[125]

The dissent in *Lowe* applied the more stringent *Gay* interpretation of the job opening requirement. It argued that Lowe did not satisfy this requirement because she was not eligible to fill the position since her name was not on the City's eligibility list.[126] However, the majority applied the more flexible *Chavez* and *McLean* interpretation and concluded that Lowe met this requirement regardless of her eligibility since there was an opening at the time she applied.[127]

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119. *Id.* at 1092.
120. 624 F.2d 70 (9th Cir. 1980).
121. *Id.* at 72.
122. *Id.* at 72.
123. 694 F.2d 531.
124. *Id.* at 548. Although there were numerous openings during the years that the waiters applied, the employer's standard hiring practice was to hire only waiters who applied within a few days of an opening, and the openings were often unadvertised. *Id.* at 535.
125. *Id.* at 547-48.
126. *Lowe*, 775 F.2d at 1012-13.
127. *Id.* at 1006.

The majority's flexible interpretation of the job opening requirement is a more appropriate approach than the stringent requirement articulated in *Gay*. The Supreme Court has emphasized that the *McDonnell Douglas* requirements were not intended to create an inflexible rule that is applied in a rigid manner.[128] Furthermore, under the more stringent *Gay* interpretation, an employer could manipulate the timing of eligibility for particular job openings to prevent minority applicants from being hired. This type of discriminatory treatment is the very practice that Title VII legislation was designed to eradicate.[129] Therefore, the *Lowe* court was correct in applying the more flexible interpretation of the job opening requirement.

The dissent expressed concern that the holding in *Lowe* would threaten the established civil service hiring system. The majority did not seriously examine this contention. However, it did suggest that adherence to a civil service hiring system alone would not afford a basis for finding disparate treatment, but that the manner in which the hiring system was applied in a given case might raise the issue of discriminatory intent.[130] The *Lowe* court thus demonstrated the importance of scrutinizing each employment decision on an individual basis regardless of the particular hiring practice used. The court also recognized that the need to eliminate employment discrimination may supercede the need to protect established hiring practices.

VI. CONCLUSION

The Ninth Circuit properly found that *Lowe* established a prima facie case of employment discrimination by satisfying the *McDonnell Douglas* test and by introducing statements of the Personnel Manager which indicates evidence of a discriminatory motive by the City. By using a flexible approach to the *McDon-*

128. *Furnco*, 438 U.S. at 575-77 (the formula suggested in *McDonnell Douglas* was never intended to be rigid, mechanized or ritualistic); *Teamsters*, 431 U.S. at 358 (the *McDonnell Douglas* elements did not purport to create an inflexible formulation); *McDonnell Douglas*, 411 U.S. at 802 n.13 (the prima facie proof required may differ with differing factual situations).

129. Griggs v. Duke Power Co., 401 U.S. at 431. "What is required by Congress [in enacting Title VII] is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.*

130. *Lowe*, 775 F.2d at 1009 n.9.

nell Douglas job opening requirement and by scrutinizing both the employment decision and the hiring system underlying the decision, the Ninth Circuit faithfully upheld the purpose of Title VII: the elimination of employment practices which operate to classify employees on impermissible grounds.

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EMPLOYMENT DISCRIMINATION

SUMMARY

PROCTOR V. CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE: AN EMPLOYER'S OBLIGATION TO MAKE A GOOD FAITH EFFORT TO ACCOMMODATE AN EMPLOYEE'S RELIGIOUS BELIEFS

I. INTRODUCTION

In *Proctor v. Consolidated Freightways Corporation of Delaware*,[1] the Ninth Circuit held that an employee who was dismissed for failing to report for work on the Sabbath established a triable issue of fact as to whether her employer's actions constituted religious discrimination under Title VII.[2] The court found that statements made by Proctor's supervisors, that they did not have to accommodate her at her new position, raised the issue of whether her employer made a good faith effort to accommodate her religious beliefs prior to terminating her.[3]

As an employee of Consolidated Freightways Corporation, plaintiff Corine Proctor held several clerical positions from 1968

1. 795 F.2d 1472 (9th Cir. 1986) (per Alarcon, J.; the other panel members were Reinhardt, J., and Thompson, J.)

2. *Id.* at 1473. Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against an employee on the basis of religion. 42 U.S.C. §§ 2000e - 2000e-17 (1982)

3. *Proctor*, 795 F.2d at 1473

until her termination in 1981.[4] In 1977, Proctor became a member of the Seventh-Day Adventist Church. The church teaches its members to observe the Sabbath from sundown Friday to sundown Saturday and prohibits its members from working on the Sabbath. In her position as a data input clerk, Proctor was required to work overtime occasionally on Saturdays. On December 12, 1977, Proctor was notified that she was required to work the following Saturday and she responded by sending Consolidated a letter stating that her religious beliefs precluded her from working on Saturdays.[5] When she failed to report to work that Saturday, she was placed on a five day suspension. After Proctor filed a grievance with the company's Grievance Committee, the Manager of Labor Relations for Consolidated instructed Proctor's supervisor to accommodate her religious beliefs by not requiring her to work on Saturdays.[6] Consolidated successfully accommodated Proctor for the next three years by substituting other data input clerks when Saturday work was required.[7]

On May 7, 1981, Proctor bid for a balancing clerk position at Consolidated. Although she refused to sign a statement acknowledging that she might be required to work on Saturdays if she accepted the position, Consolidated nevertheless awarded her the position.[8] Proctor began working as a balancing clerk on May 18, 1981. On May 28, Proctor's supervisor informed her that she was required to work overtime on Saturday, May 30, and Proctor indicated that she was unable to do so because of her religious beliefs.[9] Consolidated obtained volunteers to work overtime during the week and was successful in avoiding Saturday overtime for all the balancing clerks. The same sequence of events occurred the week of September 12, 1981, and Consolidated again avoided Saturday overtime for the balancing clerks by having volunteers work overtime during the week. The same sequence of events occurred the following week, and when Proctor failed to show up for work on September 19, she was suspended without pay for three days. Proctor was then scheduled to work on Saturday, September 26, and she again notified her

4. *Id*
5. *Id*
6. *Id.* at 1474
7. *Id*
8. *Id*
9. *Id*

supervisor that she was unable to do so. When she failed to report to work on the 26th, Consolidated terminated her employment.[10]

Proctor filed grievances with the company and the arbitrator ruled against her.[11] The arbitrator found that Proctor caused her own problem by bidding for a job which required Saturday overtime work and that Consolidated had no additional duty to accommodate her in her new position.[12] Proctor then filed a complaint in the district court for violation of Title VII.[13] The district court relied on the magistrate's findings and granted summary judgment for Consolidated.[14] The magistrate found that Consolidated had a duty to reasonably accommodate Proctor's religious beliefs after she became a balancing clerk, but that Consolidated had adequately shown that accommodation could not be made without undue hardship and that there were no triable issues of material fact remaining.[15] Proctor appealed to the Ninth Circuit.[16]

II. THE COURT'S ANALYSIS

A. Background

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against an employee or prospective employee on the basis of his or her religion.[17] The statute defines "religion" as including "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates

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10. *Id*
11. *Id*
12. *Id.* Proctor subsequently filed an employment discrimination complaint with the Equal Employment Opportunity Commission (EEOC). When conciliation efforts failed, the EEOC issued a notice of right to sue. *Id*
13. *Id*
14. *Id*
15. *Id.* at 1474-75
16. *Id.* at 1473
17. 42 U.S.C. §§2000e - 2000e-17 (1982). §2000e-2(a) reads in relevant part:

> It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[18]

In *Anderson v. General Dynamics Convair Aerospace Division*,[19] the Ninth Circuit articulated guidelines for establishing a prima facie case of religious discrimination under Title VII.[20] To establish a prima facie case, the plaintiff has the burden of pleading and proving that (1) she had a bona fide religious belief; (2) she informed her employer of her religious views and that they were in conflict with her responsibilities as an employee; and (3) she was discharged because of her observance of that belief.[21] Once the employee has established a prima facie case, the burden shifts to the employer to prove that it made good faith efforts to accommodate the employee's religious beliefs.[22] The employer must also demonstrate that it was unable to accommodate the employee's beliefs without undue hardship.[23] The burden to take the initial steps towards accommodation is on the employer.[24]

B. Discussion

The Ninth Circuit first found that Proctor established a prima facie case of discrimination under *Anderson* by showing that (1) she had a bona fide belief that working on Saturday was contrary to her religious faith; (2) she informed Consolidated of her religious views and that they were in conflict with working

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18. 42 U.S.C. § 2000e(j)

19. 589 F.2d 397 (9th Cir. 1978). In *Anderson*, an employee whose religious beliefs prevented him from joining a union and paying union dues was terminated by his employer. The court held that the employer and the union failed to prove that they were unable to reasonably accommodate the employee's religious beliefs without undue hardship. *Id.* at 399

20. *Id.* at 401

21. Proctor v. Consolidated Freightways Corp. of Del., 795 F.2d at 1475 (citing Anderson v. General Dynamics Convair, 589 F.2d at 401)

22. *Anderson*, 589 F.2d at 401

23. Burns v. Southern Pacific Transportation Co., 589 F.2d 403, 406 (9th Cir. 1978). *Burns* also involved an employee whose religious beliefs prevented him from belonging to a union and paying union dues. The court held that the employer and the union failed to prove that good faith efforts to accommodate the employee's religious beliefs were made and that no accommodation could be made without undue hardship. *Id.* at 404-05

24. *Anderson*, 589 F.2d at 401

overtime on Saturdays; and (3) she was discharged for her failure to report for work on a Saturday.[25]

The court next examined whether Consolidated made a good faith effort to accommodate Proctor's religious beliefs.[26] As a threshold matter, the court found that Consolidated had a duty under Title VII to make good faith efforts to accommodate Proctor in her new position as a balancing clerk, and the fact that Proctor applied for a position requiring Saturday work did not exempt Consolidated from its statutory duty.[27] The court also stated that the issue of whether an employer met its burden to initiate good faith efforts to accommodate an employee's beliefs is a question of fact.[28]

Turning to each party's arguments, the court noted that Consolidated maintained that it made successful good faith efforts to accommodate Proctor's religious beliefs during the week of May 30 and September 12, when it avoided Saturday overtime for all the balancing clerks.[29] Consolidated also asserted that it made similar efforts to accommodate Proctor on September 19 and September 26 which proved unsuccessful.[30] Finally, Consolidated maintained that its efforts to accommodate Proctor at her previous position were relevant in establishing that it made a good faith effort to accommodate her in her new position.[31] Proctor acknowledged that on four occasions, Consolidated made attempts to secure volunteer overtime workers to avoid Saturday overtime for the balancing clerks.[32] However, she disputed Consolidated's motives in doing so, and she argued that those actions did not amount to good faith efforts to accommodate her beliefs.[33] To support her allegation, she submitted an affidavit which stated that at the arbitration hearing, her supervisor and the Manager of Labor Relations for Consolidated both testified that the company did not have to accommodate her at grade 3 (her balancing clerk position) because they were

25. *Proctor*, 795 F.2d at 1475
26. *Id*
27. *Id.* at 1476
28. *Id*
29. *Id*
30. *Id*
31. *Id.* at 1477
32. *Id.* at 1476
33. *Id*

accommodating her at grade 2 (her data input clerk position).[34] Her affidavit also stated that Mr. Kowalski of Consolidated told her that the company would not make any effort to accommodate her at grade 3 because they were accommodating her at grade 2.[35]

After examining both party's arguments, the Ninth Circuit held that Proctor's allegations of discriminatory motive, supported by her testimony of her superiors' statements, raised a triable issue of fact as to Consolidated's motive in attempting to avoid Saturday overtime and whether its actions constituted good faith efforts to accommodate Proctor's religious beliefs.[36] The court also found that Consolidated's efforts to accommodate Proctor in her previous position might constitute admissible evidence with respect to Consolidated's motives, but that these prior efforts did not constitute compliance with its duty to accommodate Proctor in her present position.[37] Since there was a triable issue of fact concerning whether Consolidated undertook good faith efforts in accommodating Proctor in her new position, the court found it unnecessary to reach the question of whether Consolidated was unable to accommodate Proctor's beliefs without undue hardship.[38]

Proctor had requested attorney's fees in the event that she succeeded on appeal.[39] The Ninth Circuit relied on *Hanrahan v. Hampton*[40] in denying her fee request without prejudice because Proctor had not prevailed on the merits of her claim and had established only that she was entitled to a trial.[41]

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34. *Id*

35. *Id.* Mr. Kowalski's position at Consolidated is not explained by the court

36. *Id.* at 1477. The court relied on Proctor's testimony that (1) her supervisors at Consolidated believed that they were under no obligation to accommodate her in her new position as a balancing clerk, and (2) Kowalski's statement that Consolidated would not make any effort to accommodate her in her new position. *Id*

37. *Id*

38. *Id.* at 1475 n.1

39. *Id.* at 1478. Proctor's request for attorney's fees was pursuant to 42 U.S.C. § 2000e-5(k), which states: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs . . . ."

40. 446 U.S. 754, 758-59 (1980). In *Hanrahan*, the Supreme Court reversed a fee award because plaintiffs had not prevailed on the merits of any of their claims and had established only that they were entitled to a trial. *Id.* at 758-59

41. Proctor v. Consolidated Freightways Corp. of Del., 795 F.2d at 1478-79

III. CONCLUSION

In *Proctor*, the Ninth Circuit held that the plaintiff raised a material issue of fact as to whether her employer made a good faith effort to accommodate her religious beliefs.[42] This case demonstrates the court's reluctance to dismiss by summary judgment Title VII discrimination suits in which motive and intent are crucial elements.[43] This ruling signifies that if there is any disputed evidence concerning whether an employer's motives constitute a good faith effort to accommodate an employee's religious beliefs, this issue will be reserved for a trier of fact.

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42. *Id.* at 1473
43. *Id.* at 1477

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