

The Burger Court Opinion Writing Database

Texas Department of Community Affairs v. Burdine

450 U.S. 248 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 27, 1981

RE: No. 79-1764, Texas Department of Community Affairs
v. Burdine

Dear Lewis:

I can join, but I do have one suggestion.

John has been concerned that language in the present draft indicates an unrebutted prima facie case calls for a judgment for the plaintiff. I am concerned with the opposite problem: that footnote 8 in its present form could be read to suggest that, despite the defendant's rebuttal, discriminatory intent may be inferred even if the plaintiff does not persuade the trier of fact that the explanation advanced by the defendant is a pretext. In context this reading is unpersuasive, but I wish you would consider a clarification along the following lines, to be added after the cite to Thayer. I advance the language only to make clear what I have in mind:

"In saying that the presumption drops from the case, we do not mean to imply that the trier of fact must reject as untrustworthy evidence previously introduced by the plaintiff to make a prima facie case or that the trier may not take that evidence into account in deciding whether the explanation the defendant advances is a pretext. We say only that once the defendant has rebutted the plaintiff's prima facie case by coming forward with evidence of legitimate reasons, discrimination is not to be inferred unless the plaintiff persuades the trier that those reasons are a pretext. The plaintiff nonetheless may argue pretext based in whole or in part on the same evidence introduced to demonstrate a prima facie case should that evidence be probative."

Regards,



Mr. Justice Powell

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 20, 1981

RE: 79-1764 - Texas Dept. of Community
Affairs v. Burdine

Dear Lewis:

I join.

Regards,

A handwritten signature in black ink, appearing to be 'W. Powell', written in a cursive style.

Justice Powell

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 2, 1981

RE: 79-1764 - Texas Department of Community
Affairs v. Burdine

MEMORANDUM TO THE CONFERENCE:

Lewis advises me that Thurgood's vote has come in and that this case can now come down. Absent objection, it will be announced on Wednesday.

Regards,

WEB/*Werner*

cc: Mr. Cornio

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

January 29, 1981

RE: No. 79-1764 Texas Department of Community Affairs v. Burdine

Dear Lewis:

I believe that a part of the confusion concerning the effect of the plaintiff's establishment of a prima facie case in the Title VII context is that the phrase "prima facie case" ordinarily means that the plaintiff has made out a case sufficient to go to the jury, i.e., sufficient to permit the fact-finder to draw the desired inference. See C. McCormick, Handbook of the Law of Evidence, at 640 (1954). In the Title VII context, as your proposed opinion indicates, when the plaintiff has proven her "prima facie case" by a preponderance of the evidence, the fact-finder is required to draw the desired inference of discriminatory intent, unless the defendant bears his burden of articulating a legitimate, nondiscriminatory reason for the challenged action. The use of the phrase "prima facie case" in McDonnell Douglas is therefore somewhat misleading. Recognizing that my suggestions differ to some extent from those offered by John, I nevertheless suggest that the following alterations would serve to clarify the matter:

(1) In the first paragraph, second sentence, to change "after the plaintiff has made out a prima facie case," which might merely imply that she has alleged facts sufficient to establish a case, to "after the plaintiff has proven a prima facie case. . . ."

(2) After the second sentence of Part II, on page 4, to add a footnote along these lines:

In the Title VII context, the phrase "prima facie case" does not merely denote the plaintiff's burden of producing enough evidence to permit the fact-finder to infer discriminatory intent; rather, the prima facie case, if proved, requires such inference, unless the defendant articulates a legitimate, nondiscriminatory reason for the employment action.

- 2 -

(3) On page 5, to insert the phrase, "a preponderance of the" between the words "by" and "evidence" in the second sentence, and to insert the word "mandatory" before the word "presumption" in the penultimate sentence.

(4) On page 8, to delete the phrase "in the absence of any evidence of pretext" from the third sentence of the first paragraph.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 10, 1981

Re: Texas Dep't of Community Affairs v. Burdine, No. 79-1764

Dear Lewis:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill", written in dark ink.

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 15, 1981

Re: No. 79-1764, Texas Dept. of
Community Affairs v. Burdine

Dear Lewis,

I am glad to join your opinion
for the Court.

Sincerely yours,

P.S.
/

Justice Powell

Copies to the Conference

✓

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 15, 1981

Re: 79-1764 - Texas Department of
Community Affairs v. Burdine

Dear Lewis,

I agree.

Sincerely yours,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 27, 1981

Re: No. 79-1764 - Texas Dept. of Community
Affairs v. Burdine

Dear Lewis:

Please join me.

Sincerely,

J.M.

T.M.

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 19, 1981

Re: No. 79-1764 - Texas Department of Community Affairs
v. Burdine

Dear Lewis:

You have written a very persuasive opinion, and I am glad to join it.

Sincerely,



Mr. Justice Powell

cc: The Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Rehnquist
 Mr. Justice Stevens

1-14-81

From: Mr. Justice Powell

Circulated: JAN 14 1981

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 79-1764

Texas Department of Community Affairs, Petitioner, v. Joyce Ann Burdine.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[January —, 1981]

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to address again the nature of the evidentiary burden placed upon the defendant in an employment discrimination suit brought under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* The narrow question presented is whether, after the plaintiff has made out a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed.

I

Petitioner, the Texas Department of Community Affairs (TDCA), hired respondent, a female, in January 1972, for the position of accounting clerk in the Public Service Careers Division (PSC). PSC provided training and employment opportunities in the public sector for unskilled workers. When hired, respondent possessed several years' experience in employment training. She was promoted to Field Services Coordinator in July 1972. Her supervisor resigned in November of that year, and respondent was assigned additional duties. Although she applied for the supervisor's position of Project Director, the position remained vacant for six months.

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January 21, 1981

79-1764 Texas Department of Community Affairs v. Burdine

Dear John:

Thank you for your comments on my opinion. I do not think we are far apart on any one of your points.

Points 1 and 2: I do not intend to lessen the plaintiff's burden of making a prima facie case. To make this clearer, I am changing the language in the second sentence of the first full paragraph on page 5 to read as follows:

"In the instant case, respondent had to persuade the Court by evidence that she was a qualified woman who sought an available position, but was rejected in favor of a man."

As noted, proof that the complainant was qualified for the position is likely to eliminate the most common nondiscriminatory reasons for failing to hire or promote. We are talking only about an "inference of discrimination" that requires the defendant to come forward with a neutral explanation. Part III B makes clear that the plaintiff does not win merely by showing he or she was equally qualified.

Point 3: I certainly wish to make clear that a defendant must discharge his burden by introducing evidence. Indeed, the word evidence is used four time on pages 5 and 6 in describing the defendant's burden. In view of your concern, I am glad to add a footnote along the following lines:

"An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or an argument by counsel."

Point 4: As I think your point is well taken, I am adding a sentence at the end of footnote 7 on page 6 as follows:

"Thus, there may be cases where the plaintiff's initial evidence, perhaps combined with effective cross examination of the defendant, will establish pretext without the plaintiff presenting a formal rebuttal of the defendant's explanation."

Point 5: I join you in disagreeing with the Court's recent decision in Associated Dry Goods Corp., but I suppose this is now the law.

I have sent these changes to the printer and will recirculate a second draft. As four Justices have joined me, I will - of course - have to respect their views. As I consider my changes to be clarifications rather than substantive. I would not expect objections.

Sincerely,

Mr. Justice Stevens

LFP/lab

5, 6, 7, 8, 9

To: The Chief Justice
Mr. Justice Brennan ✓
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

~~Cross~~ Mr. Justice Powell

1-22-81

circulated: _____
re-circulated: _____ JAN 23 1981

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1764

Texas Department of Community Affairs, Petitioner,
v.
Joyce Ann Burdine. } On Writ of Certiorari to
the United States Court
of Appeals for the Fifth
Circuit.

[January —, 1981]

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to address again the nature of the evidentiary burden placed upon the defendant in an employment discrimination suit brought under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* The narrow question presented is whether, after the plaintiff has made out a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed.

I

Petitioner, the Texas Department of Community Affairs (TDCA), hired respondent, a female, in January 1972, for the position of accounting clerk in the Public Service Careers Division (PSC). PSC provided training and employment opportunities in the public sector for unskilled workers. When hired, respondent possessed several years' experience in employment training. She was promoted to Field Services Coordinator in July 1972. Her supervisor resigned in November of that year, and respondent was assigned additional duties. Although she applied for the supervisor's position of Project Director, the position remained vacant for six months.

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Handwritten notes:
NO
JAN 23 1981
[Illegible signature]

February 5, 1981

No. 79-1764 Texas Department of Community Affairs v.
Burdine

Dear John:

Here is a third draft of my opinion, that I had sent to the printer before receiving your draft of a concurring opinion.

I believe this meets many if not most of your concerns. I will certainly add a reference to Rule 301. Let me know if you wish me to consider further changes.

Sincerely,

Mr. Justice Stevens

LFP/lab

Enclosure

1, 5, 6, 7, 4

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall ✓
 Mr. Justice Blackmun
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Powell

2-5-81

Circulated: _____

Recirculated: **FEB 5** 1981

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1764

Texas Department of Community Affairs, Petitioner, <i>v.</i> Joyce Ann Burdine.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[January —, 1981]

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to address again the nature of the evidentiary burden placed upon the defendant in an employment discrimination suit brought under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* The narrow question presented is whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed.

I

Petitioner, the Texas Department of Community Affairs (TDCA), hired respondent, a female, in January 1972, for the position of accounting clerk in the Public Service Careers Division (PSC). PSC provided training and employment opportunities in the public sector for unskilled workers. When hired, respondent possessed several years' experience in employment training. She was promoted to Field Services Coordinator in July 1972. Her supervisor resigned in November of that year, and respondent was assigned additional duties. Although she applied for the supervisor's position of Project Director, the position remained vacant for six months.

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pg 6

By: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

2-17-81

From: Mr. Justice Powell

Circulated: _____

Revised: FEB 17 1981

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1764

Texas Department of Community Affairs, Petitioner,
v.
Joyce Ann Burdine. } On Writ of Certiorari to
the United States Court
of Appeals for the Fifth
Circuit.

[January —, 1981]

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to address again the nature of the evidentiary burden placed upon the defendant in an employment discrimination suit brought under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* The narrow question presented is whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed.

I

Petitioner, the Texas Department of Community Affairs (TDCA), hired respondent, a female, in January 1972, for the position of accounting clerk in the Public Service Careers Division (PSC). PSC provided training and employment opportunities in the public sector for unskilled workers. When hired, respondent possessed several years' experience in employment training. She was promoted to Field Services Coordinator in July 1972. Her supervisor resigned in November of that year, and respondent was assigned additional duties. Although she applied for the supervisor's position of Project Director, the position remained vacant for six months.

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March 4, 1981

LFP

MEMORANDUM TO CONFERENCE

Cases held for No. 79-1764, Texas Department of Community Affairs v. Burdine

No. 80-276, Westinghouse Electric Corp. v. Vaughn

The issue in this case is whether CA8 erred in requiring an employer, in order to rebut a prima facie case of discrimination, to prove by a preponderance of the evidence that a legitimate reason for the rejection of the plaintiff existed.

Petr, a black female, was disqualified from being a sealtex operator at resp's plant. It is uncontested that she established a prima facie case of discrimination. Petr's supervisor testified that he disqualified petr because of her low productivity and poor work. The DC held this explanation insufficient to rebut the prima facie case because resp had no objective standards by which to evaluate productivity or quality of work.

CA8 (Stephenson, Heaney; Gibson, dissented) affirmed. Examining the relevent precedents the court stated that the employer need only articulate a legitimate, non-discriminatory reason for the employment action and need not prove absence of discriminatory intent. The court stated:

"Therefore, while the burden of persuasion for demonstrating discrimination remains with the employee, the burden of producing evidence of a legitimate reason for the employment practice shifts to the employer. The employer bears the burden of proving by a preponderance of the evidence that the legitimate reason exists factually."
(emphasis added).

In support of this principle, the court cited Turner v. Texas Instruments, Inc., 555 F.2d 1251 (5th Cir. 1977), the case relied on by CA5 in Burdine.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 15, 1981

Re: No. 79-1764 Texas Dept. of Community Affairs v.
Burdine

Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST



January 15, 1981

Re: No. 79-1764 Texas Dept. of Community Affairs v.
Burdine

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

Copies to the Conference

P.S. (For your eyes only) -- I think that on page 7 in the third line from the bottom the word "it", or some synonym, has been inadvertently omitted. If I didn't tell you, HAB would.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 19, 1981

Re: 79-1764 - Texas Department of Community
Affairs v. Burdine

Dear Lewis:

There are several aspects of your opinion describing the three-stage procedure in a Title VII case that concern me. Let me raise the points separately:

1. Do you intend to lessen the plaintiff's burden of making a prima facie case? As I had understood McDonell Douglas, it required evidence on behalf of the plaintiff that gave rise to an inference that an employment decision had been made for a discriminatory reason. The second full sentence on page 5 of your opinion, however, implies that every time two qualified applicants for a vacancy are of a different race or sex, the one who does not get the job automatically has a prima facie case. It would seem to me that there might be two qualified applicants who sought employment at the same time and the employer simply took one rather than the other. In that situation, I would not think a prima facie case would have been made out because there would be no basis for an inference that the gender of the applicant had anything to do with the employment decision. In the McDonell Douglas hypothesis, on the contrary, the fact that a qualified applicant was rejected and thereafter the employer continued to interview other persons and ultimately hired one of the opposite sex would give rise to such an inference. In other words, I think an element of the plaintiff's prima facie case is some fact giving rise to an inference

that the employment decision was not made on neutral criteria.

2. I question whether you are correct in stating on page 5 that if the employer fails to put on any evidence at all, "the Court must enter judgment for the plaintiff because no issue of fact remains in the case." It seems to me that there may well be cases in which the plaintiff's testimony may not be considered credible by the judge. For example, one could suppose a ninety-five pound person testifying that he was qualified for a position as a heavy-weight boxer and nothing in the written record would dispute what he had to say but the judge might simply disbelieve him. I would think that a defendant would have no obligation to put on any evidence and counsel could simply argue that even though a prima facie case had been made which required that the issue of fact be submitted to the trier-of-fact, nevertheless, the inference of discriminatory motive was so obviously unworthy of belief that judgment should be entered for the defendant. In other words, I believe there is a distinction between the requirement that a prima facie case be submitted to the trier-of-fact and one requiring that judgment be entered in favor of the plaintiff.
3. Because the word "articulated" has given rise to some misunderstanding, I wonder if it would not be wise to make it clear that the word is intended to have reference to evidence admitted at the trial and definitely would not include a mere articulation by counsel or by an answer to a discovery request. Perhaps this is already obvious, but I would be happier if you could see fit to make the point expressly.
4. I am not sure I entirely understand the so-called third stage of the case, in which the plaintiff is permitted to demonstrate that

- 3 -

the defendant's explanation for the employment decision was pretextual. As I read the opinion, it seems to require the plaintiff to put on some additional rebuttal evidence in every case in which the defendant has put on some evidence explaining its action. Does this mean that if the plaintiff puts on all the evidence that is available in his prima facie case in order to make sure that an inference of discrimination has been established and then the defendant comes forward with an explanation of neutral reasons which conflicts in some respects with the plaintiff's evidence, that the defendant must prevail unless the plaintiff puts on further evidence? It would seem to me that there could well be situations in which a combination of plaintiff's original case and effective cross-examination of the defendant's witnesses is adequate to establish pretext, and that plaintiff would have nothing further to say in rebuttal. Even without any rebuttal, the trial judge might be convinced that the plaintiff was telling the truth and that the defendant's testimony was entirely unworthy of belief. In that situation the plaintiff should prevail but, as I read your opinion, it seems to imply the contrary.

5. Finally, and perhaps because I disagree with the decision in EEOC v. Associated Dry Goods Corp., I am not entirely happy about relying on any special liberal discovery rule in a Title VII case as a justification for a procedure that would be different from that which should prevail in any other lawsuit.

Respectfully,



Justice Powell

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 22, 1981

Re: 79-1764 - Texas Department of Community
Affairs v. Burdine

Dear Lewis:

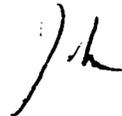
Thank you for your response to my letter of January 19, 1981. All of your changes are improvements and you surely have satisfied my points 3 and 4 and I will withdraw my point 5. I regret to say, however, that I am still concerned about points 1 and 2.

First, the facts (1) that an applicant is qualified and (2) that a person of the opposite sex was hired, do not in my judgment give rise to an inference of discrimination. Two years ago I rejected a qualified male applicant and hired a female as a law clerk; this year I rejected two qualified females and hired two qualified males. I do not believe that those facts as applied to either year viewed separately were sufficient to establish a prima facie case of discrimination, yet under your opinion they are sufficient.

Second, I am still not persuaded that an un rebutted prima facie case always requires that judgment be entered in favor of the plaintiff. I would agree with the last sentence of the full paragraph on page 5 if it were modified as follows:

"If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the fact of this presumption, the Court must enter judgment for the plaintiff because no issue of fact remains in the case."

Respectfully,



Mr. Justice Powell

cc: The Conference

W 110 117

File

Received from
JPS's office
2/4/81. This
has not been
circulated.

JPS has reviewed
& will not circulate this.

79-1764 - Texas Department of Community Affairs v. Burdine

hfp
2/12

JUSTICE STEVENS, concurring.

As I understand the Court's opinion, it holds, in essence, that the ordinary Rules of Procedure and Rules of Evidence applicable in all federal litigation also apply in Title VII cases. I agree, and I add these comments merely to explain my understanding of certain aspects of that holding.

1. The Burden of Persuasion

The plaintiff must allege that the defendant discriminated against her because of her sex, must offer evidence that raises an inference of discrimination, and must persuade the trier of fact that the defendant's employment decision was actually motivated by the fact that she was a woman. She bears the burden of persuasion throughout the litigation. The contrary holding of the Court of Appeals was erroneous and must be reversed.

2. The Prima Facie Case

To establish a prima facie case, plaintiff must introduce

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 11, 1981

Re: 79-1764 - Texas Department of Community
Affairs v. Burdine

Dear Lewis:

Thanks for accommodating me. In view of the changes in your opinion, there is no need for my separate concurrence and I will simply withdraw it.

Respectfully,

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 11, 1981

Re: 79-1764 - Texas Department of Community
Affairs v. Burdine

Dear Lewis:

Please join me.

Respectfully,



Justice Powell

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