

The Burger Court Opinion Writing Database

Postal Service Board of Governors v. Aikens

460 U.S. 711 (1983)

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

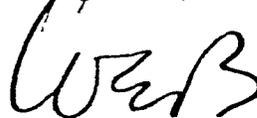
December 28, 1982

Re: No. 81-1044, U.S. Postal Service v. Aikens

Dear Bill:

I join.

Regards,



Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

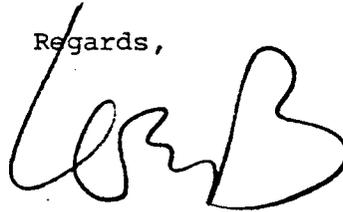
March 14, 1983

Re: 81-1044 - U.S. Postal Service Board of Governors v. Aikens

Dear Bill:

I join your revised opinion.

Regards,

A handwritten signature in black ink, appearing to be "LFB", written in a cursive style.

Justice Rehnquist

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

November 18, 1982

RE: No. 81-1044 Board of Governors, U.S. Postal Service
v. Aikens

Dear Thurgood:

You, Harry and I are in dissent in the above. Would
you be willing to undertake the dissent?

Sincerely,

Bill

Justice Marshall

Copy to:

Justice Blackmun

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 12, 1983

RE: No. 81-1044 U.S. Postal Service v. Aikens

Dear Thurgood:

Please join me in your dissent in the above.

Sincerely,



Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 28, 1983

Re: No. 81-1044, United States
Postal Service Board of Governors
v. Louis H. Aikens

Dear Bill,

I agree.

Sincerely,



Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 15, 1982

Re: 81-1044 - United States Postal
Service Board of Governors v. Aikens

Dear Bill,

I agree.

Sincerely yours,



Justice Rehnquist

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 16, 1983

Re: 81-1044 - United States Postal
Service Board of Governors v. Aikens

Dear Bill,

I am content to join the 1st draft of
your second edition.

Sincerely yours,



Justice Rehnquist

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 9, 1982

Re: No. 81-1044 - United States Postal Service Board of
Governors v. Aikens

Dear Bill:

In due course I hope to circulate a dissent.

Sincerely,



T.M.

Justice Rehnquist

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: JAN 11 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER *v.* LOUIS H. AIKENS

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

[January —, 1983]

JUSTICE MARSHALL, dissenting.

In *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973), a unanimous Court established the framework for proving employment discrimination under Title VII. The structure of proof set out in *McDonnell Douglas* and succeeding cases fairly takes into account both the difficulty of proving discriminatory motive and the importance of discouraging nonmeritorious suits. The Court today holds that the "principles established" in "the *McDonnell-Douglas* line of cases" were never "meant to apply to" claims of discrimination against applicants for "higher managerial" positions. *Ante*, at 2-3, 7. This conclusion surely comes as a surprise, for the *McDonnell Douglas* principles have been applied in the managerial context not only by the lower courts, but also by this Court in *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981). In my view, the distinction now drawn between managerial and nonmanagerial cases is untenable.¹ Moreover, even if it were proper to apply a dif-

¹The distinction is also unwieldy. The majority opinion indicates at various points that its new analytical framework applies to "higher managerial" or "managerial" positions, *ante* at 1, 7, but the majority does not even attempt to define these terms. Future courts will initially have to determine whether the *McDonnell Douglas* structure of proof applies to the position to which a plaintiff applied, and this will inevitably prompt ad-

Stylistic changes throughout
P#1,2. 5-7, 10-11

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: _____

Recirculated: JAN 25 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER v. LOUIS H. AIKENS

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

[January —, 1983]

JUSTICE MARSHALL, with whom JUSTICES BRENNAN and BLACKMUN join, dissenting.

In *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973), a unanimous Court established the framework for proving employment discrimination under Title VII. The structure of proof set out in *McDonnell Douglas* and succeeding cases fairly takes into account both the difficulty of proving discriminatory motive and the importance of discouraging nonmeritorious suits. The Court today holds that the "principles established" in "the *McDonnell-Douglas* line of cases" were never "meant to apply to" claims of discrimination against applicants for "higher managerial" positions. *Ante*, at 2-3, 7. This conclusion surely comes as a surprise, for the *McDonnell Douglas* principles have been applied in the managerial context not only by the lower courts, but also by this Court in *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981). In my view, the distinction now drawn between managerial and nonmanagerial cases is untenable.¹ Moreover, even if it were proper to apply a dif-

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 28, 1983

Re: No. 81-1044-United States Postal Service Board
of Governors v. Louis H. Aikens

Dear Bill:

Please record me at the end of your opinion as
"joining in the judgment".

Sincerely,


T.M.

Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 22, 1982

Re: No. 81-1044 - U. S. Postal Service v. Aikens

Dear Bill:

I shall await the dissent.

Sincerely,



Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 13, 1983

Re: No. 81-1044 - U.S. Postal Service v. Aikens

Dear Thurgood:

Please join me in your dissent in this case.

Sincerely,



Justice Marshall

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: MAR 29 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER v. LOUIS H. AIKENS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1983]

JUSTICE BLACKMUN, concurring.

I join the Court's opinion. I write to stress the fact, however, that, as I read its opinion, the Court today reaffirms the framework established by *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973), for Title VII cases. Under that framework, once a Title VII plaintiff has made out a prima facie case and the defendant-employer has articulated a legitimate, nondiscriminatory reason for the employment decision, the plaintiff bears the burden of demonstrating that the reason is pretextual, that is, it is "not the true reason for the employment decision." *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, 256 (1981). As the Court's opinion today implies, *ante*, at 3, this burden "merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." 450 U. S., at 256.

This ultimate burden may be met in one of two ways. First, as the Court notes, a plaintiff may persuade the court that the employment decision more likely than not was motivated by a discriminatory reason. *Ante*, at 3 and 5. In addition, however, this burden is also carried if the plaintiff shows "that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U. S., at 256, citing *McDon-*

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 29, 1983

Re: No. 81-1044 - U. S. Postal Service v. Aikens

Dear Bill:

Please join me in your circulation of today.



Justice Rehnquist

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: APR 1 1983

2nd Draft

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER v. LOUIS H. AIKENS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April —, 1983]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, concurring.

I join the Court's opinion. I write to stress the fact, however, that, as I read its opinion, the Court today reaffirms the framework established by *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973), for Title VII cases. Under that framework, once a Title VII plaintiff has made out a prima facie case and the defendant-employer has articulated a legitimate, nondiscriminatory reason for the employment decision, the plaintiff bears the burden of demonstrating that the reason is pretextual, that is, it is "not the true reason for the employment decision." *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, 256 (1981). As the Court's opinion today implies; *ante*, at 3, this burden "merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." 450 U. S., at 256.

This ultimate burden may be met in one of two ways. First, as the Court notes, a plaintiff may persuade the court that the employment decision more likely than not was motivated by a discriminatory reason. *Ante*, at 3 and 5. In addition, however, this burden is also carried if the plaintiff shows "that the employer's proffered explanation is unwor-

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4.1

December 15, 1982

81-1044 U.S. Postal Service v. Aikens

Dear Bill:

I agree that the McDonnell-Douglas prima facie test does not apply to the situation presented in this case. The fourth element (the position remains open) is absent in every case where only a single position is being filled.

The McDonnell-Douglas second element (the applicant was qualified) also should not apply literally where only a single position is at issue. As you state, in a case such as the present one, there may be a number of applicants who fairly can be viewed as "qualified". It is essential, from management's viewpoint, that the best qualified person be selected. The initial burden on a Title VII claimant should be to show that he was at least as "well qualified" as any other applicant. Your opinion generally is consistent with the foregoing, although I think we should retain McDonnell-Douglas as the starting point in these cases.

I am troubled primarily by your reading of Burdine. My opinion in that case stated that when the McDonnell test is met, it creates an inference of discrimination. When the facts proved by a plaintiff are sufficient to support such an inference, Burdine said this would result in a rebuttable presumption. Your opinion, as I understand it, suggests some tension between the inference analysis and a presumption. In my view, the facts must be adequate to justify an inference of discrimination. In that event, a rebuttable presumption exists and the burden of going forward shifts to the employer. The ultimate burden of persuasion remains, of course, on the plaintiff.

Perhaps I didn't make this clear in Burdine, although this was my understanding of it at the time. I would hesitate to join a different understanding now, as it seems to me this would create more than a little confusion.

Sincerely,

Justice Rehnquist

lfp/ss

lfp/ss 12/30/82

Full

MEMORANDUM

TO: Justice Rehnquist DATE: Dec. 29, 1982
FROM: Lewis F. Powell, Jr.

81-1044 U.S. Postal Service v. Aikens

You suggested that I indicate specifically why I am hesitant to join your opinion. I am with you, of course, through the first four pages.

My difficulty commences with the second full paragraph on page 5. There, you emphasize primarily a part of what was said in Burdine about a presumption being created by a prima facie case. I agree that a "presumption" and "inference" do not necessarily have the same consequences. But Burdine defines the consequences in cases of this kind. The two are used in conjunction: once a prima facie case is established, a rebuttable presumption arises. You mention only footnote 7. Actually, the text of Burdine repeatedly refers to the presumption. See, e.g., pp. 254, 255. Its role is described more fully in fn. 8 and 10. In the former, we state the relationship between the presumption and the prima facie case, and also expressly state that the term "presumption" properly used "refers only to a device for allocation of the production burden". Also, you used the word "presume" in Furnco in substantially the same sense: a result from the establishment of a prima facie case.

I am afraid substantial confusion will result from the way this paragraph is now written. And, certainly, I

would not describe our precedents as creating a "seemingly drastic rule".

If you revise page 5 substantially along the above lines, possibly some conforming changes would have to be made in the first two sentences (beginning "More succinctly phrased . . .") of your text on page 6.

I have no difficulty with the two full paragraphs on page 6, but again become uneasy with what you seem to say primarily on pages 7 and 8. As I read your opinion, you reject the principles of the prior cases as being wholly inapplicable to a promotion case. This seems unnecessary.

This case could be written in a straightforward manner by starting, as you do (p. 3,4), with the statement in McDonnell-Douglas that the facts necessarily will vary in Title VII cases and "the specifications [set forth in McDonnell-Douglas for] the prima facie proof required from respondent are not necessarily applicable in every respect to differing factual situations". Then, as your opinion does, point out the factual distinction between a promotion case and the employment situations involved in McDonnell-Douglas and Burdine. In a case such as this, where only a single executive position is to be filled, the elements of a prima facie case - in addition to the applicable ones of McDonnell-Douglas - include a showing that the plaintiff is at least as well qualified as the person who was given the promotion.

I would agree also that, in a promotion case, establishing that the plaintiff is at least as well qualified may not be sufficient to create a prima facie case. Prior decisions, particularly Burdine, have emphasized that an inference of discrimination must be shown to make out a prima facie case. Where only a single executive position is to be filled, a showing of "at least as well qualified" does not necessarily create this inference. You state good reasons for this view.

In making judgments to fill executive positions, subjective considerations customarily enter into the decisions. There may be two exceptionally well qualified candidates whose education and experience appear to qualify them both equally well. A choice between them must be made, and this may be done with no intent whatever to discriminate against the other. If there is a discriminatory intent, there usually will be some evidence of it. As your opinion notes, there was abundant evidence here to create a strong inference of discrimination, and therefore a rebuttable presumption that shifts the burden of going forward to the defendant.

On pages 8 and 9 you refer unnessarily, as I view it, several times to the "presumption", characterizing it as "the Burdine presumption". I doubt that I can go along with changing the emphasis in these cases, and treating the result of a prima facie case here as different from that in McDonnell-Douglas and Burdine.

As we said in McDonnell-Douglas: "The critical issue before us concerns the order and allocation of proof" in a Title VII case. The terms prima facie and presumption have been used only for this purpose. The plaintiff must make a prima facie case. This requires a sufficient showing to create an inference of discrimination. If this is done there is a presumption which if unrebutted would justify judgment for the plaintiff. But its effect merely is to shift to the defendant the burden of going forward with rebutting evidence. The burden of ultimate persuasion, of course, remains on the plaintiff.

L.F.P., Jr.

SS

December 30, 1982

81-1044 Postal Service v. Aikens

Dear Bill:

I have reread your opinion, as well as McDonnell-Douglas and Burdine. I am afraid we are farther apart than I had supposed.

The enclosed memorandum, responding to your suggestion prior to Christmas, makes specific suggestions.

I will, of course, understand if you find these unacceptable. In that event, I will join your judgment but write separately.

Sincerely,

Justice Rehnquist

lfp/ss
Enc.

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

RECEIVED
SUPREME COURT U.S.
JUSTICE MARSHALL

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

'82 DEC 35 P1:33

January 3, 1983

81-1044 Postal Service v. Aikens

Dear Bill:

Sorry we cannot be together. In due time I
will try my hand at an opinion concurring at least in the
judgment.

Sincerely,



Justice Rehnquist

lfp/ss

cc: The Conference

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FEB 17 1983

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: FEB 17 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER *v.* LOUIS H. AIKENS

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

[February —, 1983]

JUSTICE POWELL, concurring in the judgment.

I concur only in the judgment of the Court, as its reasoning departs from the consistent approach to Title VII cases that our precedents have developed. The Court apparently perceives a distinction between evidence that establishes a prima facie case under *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973), and evidence that establishes an inference of discrimination. See *ante*, 9-11. If a plaintiff is able to make out a prima facie case, he is entitled to a "presumption of discrimination" that shifts the burden of production in accordance with the analytical framework established in *McDonnell Douglas*. See *id.*, at 9-10. If, however, a plaintiff can prove only an "inference of discrimination," the Court apparently would find the *McDonnell Douglas* framework inapplicable. See *id.*, at 10. In my view, the Court's distinction finds no support in our precedents. Instead, our cases make clear that evidence that gives rise to an inference of discrimination is sufficient to establish a prima facie case. They do not indicate, as the Court suggests, that the *McDonnell Douglas* framework is inapplicable to the type of employment decision presented here.

I

In *Texas Department of Community Affairs v. Burdine*,

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February 24, 1983

81-1044 U.S. Postal Service v. Aikens

Dear John:

I am glad that you are talking to Bill Rehnquist with some hope of making changes in his opinion that would attract a Court. This would be constructive.

My efforts in this respect, both verbally and by the enclosed memo of December 29, were not fruitful. But these occurred before it was clear that Bill's views would not be acceptable to four other Justices.

My memo, of course, is not as detailed or carefully thought out as the opinion I have circulated. It does identify the concerns that I brought to Bill's attention some time ago - verbally as well as in the memo.

I should add that Sandra showed me her opinion before she circulated it. She views it as consistent with mine, and thinks it would be helpful to trial courts to have a brief summary of the appropriate analysis.

Sincerely,

Justice Stevens

lfp/ss

February 28, 1983

81-1044 U.S. Postal Service v. Aikens

Dear John:

As busy as we all are with our own cases (in addition to the general work of the Court), I particularly appreciate your undertaking the role of "mediator" between Bill and me. Yet, in candor, I do not think we can get together on the basis of the outline in your letter.

I see no reason why the Court should depart at this late date from the basic framework of McDonnell Douglas/Burdine. I understand and respect Bill's differing views, but I do not agree with them. I am distressed also that three Justices apparently would severely undercut existing precedents, as would be the result of Thurgood's opinion. Once the Court starts chipping away at the rationale of precedents, each of us is invited to join in the process.

So much for generalities, and I turn now to specifics.

As I read Bill's opinion, it holds that a Title VII plaintiff may prove his case in two ways. He may seek to establish a prima facie case by proving the four factors noted in McDonnell Douglas. Proof of these factors entitles him to a "presumption of discrimination" and shifts the burden of production to the employer. Where, however, "no standardized prima facie case can be made out," a plaintiff may seek to establish an "inference of discrimination." p. 9-10. In such cases, a court would depart from the allocation of burdens and order of proof established in McDonnell Douglas.

The distinction Bill draws between presumptions and inferences is, at least to me, unclear. The latest draft of his opinion states that in this case "there may well be additional evidence in the record" that would establish a presumption, see p. 9, but does not indicate how one determines when a presumption has been established and when it has not. This distinction could well confuse lower

courts as they try to decide which method of proof is applicable to the case before them.

I agree that a plaintiff should show more than a "weak inference of discrimination" to establish a prima facie case. But, it is not clear to me that Bill's and my opinions differ significantly on this point. Neither of us distinguishes between weak and strong inferences. Each refers only to establishing an "inference of discrimination," and each entrusts this determination to the trier of fact. It may be true, as you observe, that Bill's opinion would leave more room for judges to dismiss a plaintiff's case. But it provides no framework for determining whether the employer has acted for discriminatory reasons. In this respect, it leaves the trier of fact free to find a prima facie case when there has been proof of only a weak inference of discrimination. I suppose it also would leave a court free to reject proof as strong as that made out by Aikens.

My opinion does give triers of fact some latitude in judging the strength of the inference of discrimination to be drawn from the evidence. At the same time, it notes that the McDonnell Douglas factors continue to provide a rough guide for making this determination. As the McDonnell Douglas framework provides the trial court with both flexibility and guidance in assessing the strength of a plaintiff's evidence, I see no reason for us to depart from it by distinguishing between inferences and presumptions of discrimination.

I certainly am not unmindful of the desirability of having a Court. Yet, I am unwilling to join an opinion that seems to me to cast doubt as to what the Court has said and intended in our prior decisions.

I have no objection, of course, to your showing this letter to Bill. He and I have had quite an exchange on this case already.

Sincerely,

Justice Stevens

lfp/ss

March 9, 1983

81-1044 U.S. Postal Service v. Aikens

Dear Bill:

I called your Chambers this afternoon, just after you had departed, to say that I will be happy to join your "new" Aikens opinion.

It may not make the casebooks, and yet I think it adequately disposes of this case. I note that you have included bits and pieces from several of our opinions, and this may help bring about a consensus.

I appreciate your undertaking a Solomonic revision, and I think you have done it very well.

Sincerely,

Justice Rehnquist

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 14, 1983

88-1044 United States Postal Service v. Aikens

Dear Bill:

Please join me in your circulation of March 13.

Sincerely,

Lewis

Justice Rehnquist

lfp/ss

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: DEC 9 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER v. LOUIS H. AIKENS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[December —, 1982]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Louis Aikens filed suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e *et seq.*, claiming that petitioner, the United States Postal Service, discriminated against him on account of his race. Aikens, who is black, claimed that the Postal Service had discriminatorily refused to promote him to higher positions in the Washington, D.C. Post Office where he had been employed since 1937. After a bench trial, the District Court entered judgment in favor of the Postal Service, but this judgment was reversed by the Court of Appeals. 642 F. 2d 514 (CA DC 1980). We vacated the judgment of the Court of Appeals and remanded for reconsideration in the light of *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981). 453 U. S. 902 (1981). On remand, the Court of Appeals reaffirmed its earlier holding that the District Court had erred in requiring Aikens to offer direct proof of discriminatory intent. 665 F. 2d 1057, 1058 (CA DC 1981) (*Per Curiam*). We granted certiorari to consider the assessment of proof of racial discrimination when an employer has selected among applicants for a higher managerial position¹.
— U. S. — (1982).

¹We have consistently distinguished disparate treatment cases from cases involving facially neutral employment standards that have disparate impact on minority applicants. See, e. g., *Texas Department of Commu-*

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 15, 1982

Re: No. 81-1044 U.S. Postal Service v. Aikens

Dear Lewis:

After reading your letter of today's date, and then talking to you on the phone about it, I have a feeling that little, if anything, separates us in our view of this case.

You said in your letter, and also on the phone, that you are primarily troubled by my reading of Burdine. When I joined your opinion in McDonnell-Douglas I had no idea that the Court was talking about anything other than the normal "inference" of one fact that a trier of fact draws from other facts which will support the inference. And, as you said on the phone, I am not sure that I knew of any very precise distinction between an "inference" and a "presumption." To the extent that there is any of the kind of tension you refer to in your letter between the "inference analysis" and the "presumption analysis," I think it comes from your footnote 7 in Burdine, 450 U.S. at 254. There the Court clearly states that it is not merely an inference, but a "legally mandatory, rebuttable presumption" which arises from the plaintiff's proving his prima facie case under McDonnell-Douglas. I confess I paid no attention to the footnote when I joined your opinion, and I also confess that I wish the footnote weren't there. But it is, and as we agreed on the phone I don't think the difference between a "legally mandatory, rebuttable presumption," and an "inference" makes much difference in the great majority of garden variety employment discrimination cases in which a plaintiff will try to establish the four elements described in McDonnell-Douglas.

Where it would make a difference is in a case like this, where at least one and probably two of the McDonnell-Douglas elements are not present. In this sort of a case,

*I don't
say this*

if we were to bob-tail McDonnell-Douglas, and say that even though only two of the four McDonnell-Douglas elements are present, nonetheless a "legally mandatory, rebuttable presumption" arises, I think the point the government makes in their brief is well taken: for a member of a minority group to simply show that he was one of several considered for a promotion to a managerial job, and that a non-minority applicant was chosen in preference to him, should not without more give rise to a presumption of discrimination.

This conviction is what led me to write the opinion the way I hope I did; to leave the four element test of McDonnell-Douglas absolutely intact, and doubtless governing 95% of the employment discrimination litigation in this country. But when the plaintiff is unable to prove two of the elements of McDonnell-Douglas, as this plaintiff was, I think it would be a great mistake to try to "bob-tail" McDonnell-Douglas and create a new type of "legally mandatory rebuttable presumption" into which his case might fit. I think it much better to say that where the four elements of the McDonnell-Douglas prima facie case can't be made out, the plaintiff is simply remitted to proving discrimination the way one proves any other factual element in a disputed lawsuit. Triers of fact are still permitted to draw reasonable inference from the facts adduced by the parties, and the decision of the trier of fact will be affirmed unless a Court of Appeals thinks it is clearly erroneous.

This is by no means to say that McDonnell-Douglas "doesn't apply" or isn't a "starting point"; it is simply to say that when one begins with McDonnell-Douglas and finds that one or more of the four elements required by that decision for the plaintiff's prima facie case is lacking, one may not have the benefit of the rebuttable presumption flowing from the prima facie case. This is not a rejection of McDonnell-Douglas, but an application of it.

I realize from your letter and our telephone conversation that the opinion does not say all this quite as clearly as I would like it to.

If it would accommodate the concern which you expressed in your letter, I would like to insert the following separate paragraph before the first full paragraph beginning on page 10 of the first draft: "McDonnell-Douglas thus remains the starting point for all Title VII employment discrimination case trials. In the great majority of Title VII cases, either the plaintiff will be able to make out the

four elements of the prima facie case described in McDonnell-Douglas, or will have no alternative method of proving the necessary factual allegations to support a recovery. Where, as in this case, the plaintiff does not make out a McDonnell-Douglas prima facie case, but can present 'enough evidence to permit the trier of fact to infer' that the defendant has engaged in illegal discrimination, Burdine, supra, at 255, n. 7, the trier of fact should permit the plaintiff to proceed as with all other contested factual issues, and of course without the benefit of the presumption described in Burdine."

Sincerely,



Justice Powell

STYLISTIC CHANGES THROUGHOUT

Pp 5, 7-11

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: _____

Recirculated: JAN 14 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER *v.* LOUIS H. AIKENS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Louis Aikens filed suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e *et seq.*, claiming that petitioner, the United States Postal Service, discriminated against him on account of his race. Aikens, who is black, claimed that the Postal Service had discriminatorily refused to promote him to higher positions in the Washington, D.C. Post Office where he had been employed since 1937. After a bench trial, the District Court entered judgment in favor of the Postal Service, but this judgment was reversed by the Court of Appeals. 642 F. 2d 514 (CA DC 1980). We vacated the judgment of the Court of Appeals and remanded for reconsideration in the light of *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981). 453 U. S. 902 (1981). On remand, the Court of Appeals reaffirmed its earlier holding that the District Court had erred in requiring Aikens to offer direct proof of discriminatory intent. 665 F. 2d 1057, 1058 (CA DC 1981) (*Per Curiam*). We granted certiorari to consider the assessment of proof of racial discrimination when an employer has selected among applicants for a higher managerial position¹.
— U. S. — (1982).

¹We have consistently distinguished disparate treatment cases from cases involving facially neutral employment standards that have disparate impact on minority applicants. See, *e. g.*, *Texas Department of Commu-*

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STYLISTIC CHANGES THROUGHOUT

9, 10, 11

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: _____

FEB 28 1983

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER *v.* LOUIS H. AIKENS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[February —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Louis Aikens filed suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e *et seq.*, claiming that petitioner, the United States Postal Service, discriminated against him on account of his race. Aikens, who is black, claimed that the Postal Service had discriminatorily refused to promote him to higher positions in the Washington, D. C. Post Office where he had been employed since 1937. After a bench trial, the District Court entered judgment in favor of the Postal Service, but this judgment was reversed by the Court of Appeals. 642 F. 2d 514 (CADC 1980). We vacated the judgment of the Court of Appeals and remanded for reconsideration in the light of *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981). 453 U. S. 902 (1981). On remand, the Court of Appeals reaffirmed its earlier holding that the District Court had erred in requiring Aikens to offer direct proof of discriminatory intent. 665 F. 2d 1057, 1058 (CADC 1981) (*Per Curiam*). We granted certiorari to consider the assessment of proof of racial discrimination when an employer has selected among applicants for a higher managerial position¹. — U. S. — (1982).

¹We have consistently distinguished disparate treatment cases from cases involving facially neutral employment standards that have disparate impact on minority applicants. See, *e. g.*, *Texas Department of Commu-*

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

*Talked to
WHR. He will
try writing a stripped
down draft, and
we have debated*

March 3, 1983

Re: No. 81-1044 U.S. Postal Service v. Aikens

Dear John:

First let me say that I am most appreciative of your willingness to act as a "mediator" between Lewis and me in this case. I think Lewis and I had concluded after earlier exchanges that we were like "east is east, and west is west, and never the twain shall meet."

Respecting the revisions in my circulating draft which are contained in the substitute which you enclose with your letter of March 2nd, I can give you a general response. The changes appearing on pages 3, 6, 7, 9, 10, and most of 11 are satisfactory to me, and I think in many instances represent improvements on my most recent circulating draft. Subject to the approval of the Chief and Byron, I would accept them.

With respect to some of the changes on page 11, and the changes on pages 12, 13, 14, 15, and parts of 16 and 17, I don't doubt that they represent as good an attempt as can be made to "harmonize" the approach I have taken and the approach Lewis has taken. But I fear that the result of accepting them would be to produce internal inconsistencies in the opinion as a whole that would prove more confusing to lower courts than if my present circulation came down as a plurality opinion. Regrettable as that would be, it would get it off of all our minds for a while, and give us a chance to take another look at the question when it comes back, as it inevitably will if this case is decided in that manner.

At this late date, it occurs to me that it might have been possible to write the opinion more narrowly than is required to respond to the issues framed by the parties, and simply point out the undesirability of dealing with arguments about inferences and presumptions when the

District Court had conducted a full bench trial and made findings of fact and conclusions of law. I fear, however, that I may lack the necessary energy and dedication to go back to the drawing boards at this stage of the case.

Sincerely,

A handwritten signature in dark ink, appearing to be the initials 'WM' or similar, written in a cursive style.

Justice Stevens

cc: Justice Powell
Justice O'Connor

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 9, 1983

Re: No. 81-1044 U.S. Postal Service v. Aikens

Dear Lewis:

I enclose a copy of the "new" Aikens opinion. You will find it at least slimmer, if not better, than before. I have tried to pretermit any discussion about whether the McDonnell Douglas presumption should have been applied in this case, and simply dwelled on the fact that an appeals court reviewing a judgment of the trial court after a full trial should not get tangled up in questions about presumptions.

If you think you could join this, I am hopeful that the Chief, Byron, and John, and perhaps Sandra, might also join. If you don't think it is "joinable," I think it better to have the case come down in its present form, and I will not bother to circulate my revision to the Conference.

Sincerely



Justice Powell

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: MAR 13 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER v. LOUIS H. AIKENS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Louis Aikens filed suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e *et seq.*, claiming that petitioner, the United States Postal Service, discriminated against him on account of his race. Aikens, who is black, claimed that the Postal Service had discriminatorily refused to promote him to higher positions in the Washington, D. C. Post Office where he had been employed since 1937. After a bench trial, the District Court entered judgment in favor of the Postal Service, but the Court of Appeals reversed. 642 F. 2d 514 (CADC 1980). We vacated the Court of Appeals' judgment and remanded for reconsideration in light of *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981). 453 U. S. 902 (1981).

On remand, the Court of Appeals reaffirmed its earlier holding that the District Court had erred in requiring Aikens to offer direct proof of discriminatory intent. It also held that the District Court erred in requiring Aikens to show, as part of his *prima facie* case, that he was "as qualified or more qualified" than the people who were promoted. 665 F. 2d 1057, 1058, 1059 (CADC 1981) (*Per Curiam*). We granted certiorari.¹ — U. S. — (1982).

¹We have consistently distinguished disparate treatment cases from cases involving facially neutral employment standards that have disparate

Alternate Draft

Wt

Please

entirely
forwarded

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 14, 1983

81-1044

Re: U.S. Postal Service v. Aikens

Dear Chief, Byron, and John:

When we discussed what cases were "ready" at a recent Friday Conference, I mentioned that I was going to try to rewrite the circulating draft in this case to get a Court. As matters stood then, the Court seemed to be irrevocably divided three ways: the three of you had joined my circulating draft, Lewis had written separately and was joined by Sandra, and Thurgood had written separately and was joined by Bill and Harry. Since the question is one of statutory construction, it seems unfortunate to let it come down that way, and hence the enclosed and substantially revised draft.

The revised draft pretermits any attempt to answer the question of whether the McDonnell Douglas-Burdine "prima facie case" was applicable to the situation here, where respondent was passed over for promotion to a single vacancy. It instead attempts only the more modest task of discussing the usefulness of such "prima facie case" analysis after the case has been fully tried and is on appeal. I think what we say is still worth saying, and I think it better to say this (if it is possible to get a Court for it) than to splinter on the more far-reaching issue.

I have shown the revised draft to Lewis, and he says he can join it. I did this because if there were no possibility of picking up additional votes, I did not want to go through the trouble of recirculating. If I can get a "Court" from among the three of you, Lewis, and Sandra, I would prefer to go with the "revised" draft. If I cannot get a Court for either version, I think it probably best to stick with the previous circulation which the three of you have joined.

Sincerely,



The Chief Justice
Justice White
Justice Stevens

cc: Justice Powell
Justice O'Connor

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: _____

Recirculated: MAR 29 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER v. LOUIS H. AIKENS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Louis Aikens filed suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. §2000e *et seq.*, claiming that petitioner, the United States Postal Service, discriminated against him on account of his race. Aikens, who is black, claimed that the Postal Service had discriminatorily refused to promote him to higher positions in the Washington, D. C. Post Office where he had been employed since 1937. After a bench trial, the District Court entered judgment in favor of the Postal Service, but the Court of Appeals reversed. 642 F. 2d 514 (CADC 1980). We vacated the Court of Appeals' judgment and remanded for reconsideration in light of *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981). 453 U. S. 902 (1981).

On remand, the Court of Appeals reaffirmed its earlier holding that the District Court had erred in requiring Aikens to offer direct proof of discriminatory intent. It also held that the District Court erred in requiring Aikens to show, as part of his *prima facie* case, that he was "as qualified or more qualified" than the people who were promoted. 665 F. 2d 1057, 1058, 1059 (CADC 1981) (*Per Curiam*). We granted certiorari.¹ — U. S. — (1982).

¹We have consistently distinguished disparate treatment cases from cases involving facially neutral employment standards that have disparate

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B.S.

71A

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 14, 1983

MEMORANDUM TO THE CONFERENCE

Case Held For No. 81-1044, U.S. Postal Service v. Aikens

No. 81-2202, Westinghouse Electric Corp. v. Tribble

This is an Age Discrimination in Employment Act action filed by respondent. At trial, petitioner presented evidence to rebut respondent's prima facie case. Respondent did not seek to establish that the reason advanced by petitioner was pretextual. The jury apparently did not credit petitioner's evidence, because it found for respondent. The Court of Appeals affirmed the District Court's denial of a directed verdict for petitioner. It held that there was sufficient evidence to support a finding that the discharge happened in the manner established by respondent. It also held that respondent was not required to present direct evidence of discrimination.

I recommend denial. It appears that the jury found that respondent met his burden of persuasion "directly by persuading the [jury] that a discriminatory reason more likely motivated the employer." Aikens, slip op. at 4, quoting Burdine, 450 U.S. at 256. The holding on direct evidence is correct. Aikens, slip op. at 2 n.3.

Sincerely,



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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 9, 1982

Re: 81-1044 - United States Postal Service
v. Aikens

Dear Bill:

Please join me.

Respectfully,



Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 25, 1983

✓
See memo
reply
of 2/28

Re: 81-1044 - United States Postal Service
v. Aikens

Dear Lewis:

This morning I spent a good deal of time reviewing the Burdine opinion and the various circulations in this case. I gather that all of us in the majority agree that when the four factors specifically outlined in the McDonnell Douglas opinion are present, these consequences result:

- (1) Plaintiff's evidence raises an inference of discrimination;
- (2) That evidence establishes a prima facie case; and
- (3) If that evidence is un rebutted, judgment must be entered for plaintiff.

We also all agree that this case does not fit precisely into the McDonnell Douglas four-factor formula because the job did not remain open after plaintiff's application was rejected. We apparently also all agree that there is enough evidence in the record to support a judgment for the plaintiff if the District Court makes the proper findings, and we also agree that as appellate judges we cannot resolve the factual questions ourselves. In other words, none of us is prepared to say that judgment should be entered in plaintiff's favor as a matter of law. It seems to me that our area of agreement is broad enough to enable us to fashion a consensus on an opinion.

Where we part company, as I understand the writing, is on the question whether in Title VII litigation there is any difference between an

"inference of discrimination" and a "presumption" that requires that judgment be entered in favor of the plaintiff if the presumption is un rebutted. You emphasize the function of the presumption as a procedural, burden-shifting device. Bill, on the other hand, focuses on the substantive character of the presumption if the plaintiff's evidence is not rebutted. I am persuaded that there is not any necessary conflict between your two positions, although you may use the word "inference" differently.

If a case fits precisely into the McDonnell Douglas four-factor formula, I think Bill agrees with you that the burden shifts to the employer. I think, however, that you agree with him that if the McDonnell Douglas "presumption" (or "inference") is un rebutted, judgment must be entered for the plaintiff.

If a case does not satisfy all four McDonnell Douglas factors, Bill says--as I understand him--that the question whether plaintiff has made out a prima facie case depends on the strength of the inferences to be drawn from the plaintiff's evidence, and that the job of drawing those inferences is one that should initially be performed by the trial judge. You seem to say--and please correct me if I am wrong--that whenever the plaintiff's evidence raises an "inference of discrimination", he has made out a prima facie case which entitles him to judgment if that inference is not rebutted. In other words, any "inference of discrimination" no matter how slight has the same legal consequences as the McDonnell Douglas presumption.

Let me suggest a hypothetical case that may identify the linguistic problem that seems to be present. Assume that a Title VII plaintiff has sued the estate of a deceased employer and therefore the defense counsel was simply unable to adduce any evidence to rebut the plaintiff's case. The plaintiff's case consists of proof: (1) that she is a woman; (2) that she is a lawyer well qualified to work as a law clerk; (3) that a judge each year hires three applicants; (4) that in the year in question two male and two female lawyers applied and the employer hired two males and one female and rejected the plaintiff.

4
The
please
call
2/10
Subcommittee
Jan 15

Facts of this kind might establish a case that could be described in at least three different ways: (1) they do not raise any inference of discrimination because they are equally consistent with guilt or innocence; (2) they raise an inference of discrimination against female applicants but the inference is so weak that judgment should be entered in favor of the defendant even though the inference is unrebutted; or (3) the inference of discrimination is so strong that judgment must be entered in favor of the plaintiff if no rebuttal evidence is offered.

It seems to me that Bill uses the term "inference of discrimination" in a way that leaves room for weak inferences that do not require the entry of judgment in favor of the plaintiff, whereas you seem to use the term as one that compels the entry of judgment in favor of the plaintiff whenever the inference is unrebutted.

If I am correct in identifying the point that separates the two of you, I feel sure we can work out language that will resolve the difference. (Perhaps, for example, Bill might be willing to substitute a phrase such as "evidence of discrimination" for "inference"--at least when he is talking about weak inferences.) If I do not fairly understand your position, I hope you will further enlighten me.

Respectfully,

A handwritten signature in dark ink, appearing to be the initials 'JP' with a stylized flourish.

Justice Powell

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 2, 1983

Re: 81-1044 - U.S. Postal Svs. v. Aikens

Dear Lewis, Bill, & Sandra:

The more I have studied what has been written in this case the more firmly I have become convinced that an opinion to which we could all subscribe should be draftable. I have therefore thought it worthwhile to try to redraft the portions of Bill's opinion that Lewis finds most difficult to accept but yet to retain the central analysis with which I agree. I am enclosing the results of that attempt to see if you think there is any possibility that it might at least provide the basis for a draft that we could all accept. (Lewis and Sandra will both recognize a good deal of plagiarism in the paragraphs that are new).

The reasons why we should make every effort to obtain a Court opinion in this case are too obvious to restate. I would only add that if I have been unfaithful either to Bill's analysis or to Lewis' concerns, the error is purely unintentional.

Respectfully,



Justice Powell
Justice Rehnquist
Justice O'Connor

Enclosure

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 14, 1983



Re: 81-1044 - U.S. Postal Service
v. Aikens

Dear Bill:

Please join me in the revised draft. I think it would be most helpful to get a Court opinion if at all possible.

Respectfully,

A handwritten signature, likely of Justice Rehnquist, is written below the word "Respectfully,".

Justice Rehnquist

cc: The Chief Justice
Justice White
Justice Powell
Justice O'Connor

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 16, 1983

Re: 81-1044 - U.S. Postal Service Board
of Governors v. Aikens

Dear Bill:

Please join me in your latest circulation.

Respectfully,



Justice Rehnquist
Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 4, 1983

No. 81-1044 United States Postal Service Bd. of
Governors v. Aikens

Dear Bill,

I will wait to see what Lewis writes before
deciding which to join.

Sincerely,



Justice Rehnquist

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

FEB 22 1983

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER, *v.* LOUIS H. AIKENS

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

[February —, 1983]

JUSTICE O'CONNOR, concurring in the judgment.

I join the opinion of JUSTICE POWELL, adding only a comment on my understanding of the proof necessary to establish a prima facie case of racial discrimination in hiring or promotion under Title VII. As I understand the reach of *McDonnell Douglas v. Green*, 411 U. S. 792 (1973), it provides a rough, flexible guide for all Title VII cases of the amount and type of proof that an individual plaintiff must show to establish a prima facie case of disparate treatment. As a general reformulation of the *McDonnell Douglas* factors, applicable to all plaintiffs alleging discrimination in hiring or promotion, one could say that the plaintiff in a Title VII action would establish a prima facie case upon proof (i) "that he belongs to a racial minority," 411 U. S., at 802; (ii) that he applied for a job and possessed objective qualifications fairly comparable to other applicants that merited the employer's serious consideration; (iii) that, despite his qualifications, he was rejected (iv) under circumstances that, absent other explanation, eliminate the most common legitimate reasons for his rejection. See *Teamsters v. United States*, 431 U. S. 324, 358, n. 44 (1977). This fourth factor is flexible, and the showing it requires depends on the circumstances of the particular case. In *McDonnell Douglas* itself, a showing that the job remained open was sufficient, in combination with the

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 23, 1983

No. 81-1044 U. S. Postal Service Bd. of Gov.
v. Aikens

Dear Lewis,

I plan to join your separate opinion in this case. Do you have any objection to my supplemental explanation as set forth in the attached draft? I do not want to take liberties with what I understand to be your view.

Sincerely,

Sandra

*I agree & have
advised Sandra*

Justice Powell

Enclosure