

STATE v. WHITINGHAM SCHOOL BOARD: A UNIQUE EMPLOYMENT DISCRIMINATION LOOPHOLE FOR VERMONT EMPLOYERS

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INTRODUCTION

The Vermont Supreme Court recently decided its first case in the employment discrimination area, *State v. Whitingham School Board*.¹ The court reversed a superior court holding that the school board had discriminated against a female applicant for a teaching position when it reopened the application process and ultimately hired a male who applied after applications were reopened. The complaining female applicant, with good qualifications and superior recommendations for the position, had been a close second to the board's original choice, a male who rejected the board's offer.²

The Vermont statute prohibiting discrimination³ is largely patterned after Title VII of the Civil Rights Act of 1964.⁴ The Vermont court, therefore, properly looked to the leading United States Supreme Court case concerning individual plaintiff employment discrimination, *McDonnell Douglas Corp. v. Green*,⁵ to ascertain the appropriate legal standards.⁶ The court misapplied *McDonnell Douglas*, however, and departed significantly from the mainstream of fair employment law in holding, in effect, that a discriminatory

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1. 138 Vt. 15, 410 A.2d 996 (1979).

2. *Id.* at 17-18, 410 A.2d at 998. *State v. Whitingham School Bd.*, No. S34-76 WmM at 4 (Vt. Super. Ct. Sept. 21, 1977) [hereinafter cited as Findings and Conclusions].

3. VT. STAT. ANN. tit. 21, § 495-495e (1978).

4. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979). Fair Employment Law is the generic term which will be used in this article to refer to all employment discrimination statutes.

5. 411 U.S. 792 (1973). *McDonnell Douglas Corp. v. Green* is a race discrimination case, but as the Vermont Supreme Court noted in *Whitingham*, the proof analysis set out in *McDonnell* has been applied to sex cases as well as other types of cases. 138 Vt. 15, 19, 410 A.2d 996, 998 (1979). The *McDonnell Douglas* case is discussed at notes 23-37 and accompanying text *infra*.

6. 138 Vt. at 18, 410 A.2d at 998.

act could not take place prior to the applicant's final rejection.⁷

This comment will demonstrate that *McDonnell Douglas* and its progeny establish that the ultimate issue in individual plaintiff actions is a determination of whether discriminatory intent motivated the adverse action. Since the facts of a case are determinative of discriminatory motive, the analysis draws heavily on the findings of the lower court, which were not effectively attacked on appeal. The findings are evaluated according to the types of evidence considered by other courts as probative of discriminatory motive. The comment then questions whether reversal was proper in light of usual standards of appellate review.

The analysis⁸ then demonstrates that the United States Supreme Court intended by its procedure for analyzing the evidence in *McDonnell Douglas* to assist the plaintiff in making out a prima facie case of discriminatory intent.⁹ Cases subsequent to *McDonnell Douglas* make it clear that actionable discrimination can occur prior to final rejection of the applicant.¹⁰ Further, evidence of a later applicant's qualifications does not rebut a prima facie showing of discrimination where the plaintiff was rejected before the employer had knowledge of the qualifications of the subsequent applicant.¹¹ Requiring the trial court to treat evidence of comparative qualifications as the most probative evidence,¹² as the supreme court did, encourages the potential discriminator to avoid liability by reopening applications ultimately to find a male with better qualifications. The comment suggests that the supreme court's superficial analysis of statistical data also frustrates the federal and

7. *Id.* at 20, 410 A.2d at 999.

8. The analysis presented has been confirmed by a United States Supreme Court case decided subsequent to *Whitingham, Texas Department of Community Affairs v. Burdine*, 101 S. Ct. 1089, 1094 (1981). That case is, of course, based on the same authorities available to the Vermont Supreme Court in *Whitingham*. See notes 251-53 and accompanying text *infra*.

9. See notes 206-10 and accompanying text *infra*.

10. See notes 211-37 and accompanying text *infra*.

11. See notes 238-48 and accompanying text *infra*.

12. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1153-54 (1976) [hereinafter cited as SCHLEI & GROSSMAN].

state policies of broad protection against employment discrimination.

I. BACKGROUND

A. *The Legal Framework*

The Vermont Fair Employment Practices Act of 1963¹³ was amended in 1971¹⁴ to prohibit discrimination "against any individual because of his . . . sex"¹⁵ The statute is aimed at discriminatory acts "against any individual with respect to any matter directly or indirectly related to his employment."¹⁶ In 1975, amendments drafted by the Vermont Attorney General's office were proposed to make the statute more effective¹⁷ and to bring the Vermont statute more closely in line with Title VII, the federal fair employment statute.¹⁸ The resulting legislation included the current language¹⁹ which is similar to that of section 703 of Title

13. 1963 Vt. Acts No. 196. The original Vermont provision was apparently relatively unique. See Bonfield, *The Substance of American Fair Employment Practices Legislation I: Employers*, 61 Nw. L. Rev. 907, 909-10 (1967); Hill, *Twenty Years of State Fair Employment Practices Commissions: A Critical Analysis With Recommendations*, 14 BUFFALO L. Rev. 22, 32-33 (1964). The statute originally provided for only a \$500 penalty and no other relief. The statute failed to indicate who could enforce the statute, whether the section was civil or criminal, or which court had jurisdiction.

14. 1971 Vt. Acts No. 9.

15. VT. STAT. ANN. tit. 21, § 495(1) (1978).

16. *Id.*

17. S. 94 (Biennial Sess. 1975). *Proposed Amendments to the Fair Employment Practices Act: Hearings on Proposed S. 94 Before the Senate Judiciary Committee*, (March 13, 1975) (Attachment "A" dated April 7, 1975). Ms. Morse's remarks at the hearing reflect this purpose. *Id.* at 2-46 (responses of Morse to the Committee's questions). The memo was apparently submitted with S. 94 by Senators Alden, Daniels, Hewitt, and Sorrell. See Attachment A. to S. 94 (Adj. Sess. 1975). Additional discussions by the Committee on April 8, 1975 and March 5, 1976, confirm the purposes suggested.

18. Title VII provides for deferral of discrimination complaints to state fair employment practices (F.E.P.) agencies, the so-called "section 706 agencies," where a state has a statute which provides protection and enforcement comparable to federal requirements. See 42 U.S.C. §§ 2000e(5)(b)-(c) (Supp. III 1979) and 29 C.F.R. § 1601.13 (1980). Although the Equal Employment Opportunity Commission (E.E.O.C.) must defer to the state agency for sixty days, the victim of discrimination can, after the expiration of the deferral period, pursue remedies under Title VII. 42 U.S.C. §§ 2000(e)(5)(c)-(e) (1976). States like Vermont which have such conforming laws receive substantial federal assistance for the administration of the state F.E.P. program.

19. See 1976 Vt. Acts No. 198 (1975 Adj. Sess.).

VII.²⁰ From a study of the legislative history of the 1975 amendments, one can reasonably conclude that the Vermont Legislature intended to provide protection at least comparable to that under the federal statute.²¹ In *Whitingham* the Vermont Supreme Court explicitly noted that the Vermont statute is patterned after Title VII,²² and further stated that "[t]he legal pattern to be followed [in interpreting the Vermont statute] derives from *McDonnell Douglas Corp. v. Green*."²³

In *McDonnell, Green* asserted that McDonnell Douglas discriminated in failing to rehire him after he had been laid off. The United States Supreme Court reiterated its language from the landmark *Griggs v. Duke Power Co.*²⁴ case in which it first interpreted Title VII. "Discriminatory preference for any group, minority or majority is precisely and only what Congress has proscribed. What is required by Congress 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 imper-

20. 42 U.S.C. § 2000e (1976 & Supp. III 1979).

21. Title VII coverage is indeed broad. Numerous examples of the expansiveness of Title VII could be cited, but an early and a relatively recent development will suffice to illustrate the breadth of coverage. The United States Supreme Court, in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), held that Title VII reaches not only intentional discrimination, but also practices which have not been demonstrated by the employer to be justified by business necessity. *Id.* at 429-33. This type of discrimination, caused by a practice which discriminates in effect, is proven primarily or solely by statistical comparisons between the effect on protected and nonprotected persons and is called the disparate impact theory. See, e.g., SCHLEI & GROSSMAN, *supra* note 12, at 65-131; C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION § 1.5 (1980) [hereinafter cited as C. SULLIVAN]. Recently the courts have held that an employer is liable for a supervisory employee putting pressure on an employee to grant sexual favors. See, e.g., *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977). The amended E.E.O.C. Guidelines on Discrimination Because of Sex would make an employer liable for sexual harassment by any employee if "the employer, or its agents or supervisory employees, knows or should have known of the conduct." 29 C.F.R. § 1604.11(d) (1980).

22. 138 Vt. at 17, 410 A.2d at 997.

23. *Id.* at 18, 410 A.2d at 998 (citation omitted). The superior court explicitly discussed the similarity between the Vermont provision and Title VII and referred to the typical practice of state courts in looking to federal precedent. Findings and Conclusions, *supra* note 2, at 11-12.

24. 401 U.S. 424 (1971). See note 21 *supra*.

missible classification."²⁵ The *McDonnell* Court elaborated:

There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.²⁶

The Court went on in *McDonnell Douglas* to set forth the procedure for analyzing evidence in a situation where the employer refuses to hire an applicant. The plaintiff can establish a prima facie case by showing:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.²⁷

After the plaintiff has established a prima facie case, "the burden then must shift to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection."²⁸ Although defendant can rebut the prima facie case in this way, the plaintiff can nevertheless prevail if he demonstrates that the stated reason for rejection was in fact a pretext for discrimination.²⁹ Establishing a prima facie case and articulating a nondiscriminatory reason for the adverse action are relatively easy tasks.³⁰ Therefore, the pivotal

25. *Id.* at 430-31.

26. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

27. *Id.* at 802.

28. *Id.*

29. *Id.* at 804.

30. Subsequent Supreme Court cases have demonstrated that the burden on the employer is not great and that the ultimate burden of proving discrimination still lies with the plaintiff although she has made out her prima facie case. *See, e.g.*, *Texas Dep't of Community Affairs v. Burdine*, 101 S. Ct. 1089, 1094-96 (1981); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1979); *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 576-78 (1978). For a discussion of *Furnco*, see text accompanying notes 203-04, 211-14 *infra*. *See also* C. SULLIVAN, *supra* note 21, at § 1.6 (1980 & Supp. 1980); SCHLEI & GROSSMAN, *supra* note 12, at 1155-56.

issue under the *McDonnell Douglas* analysis is whether the plaintiff has proven that the employer's proffered reason is pretextual.³¹ The Supreme Court was concerned with setting out a sensible way to evaluate the evidence "as it bears on the critical question of discrimination."³² The three-step analysis does not require a trifurcated trial: the plaintiff must introduce evidence bearing on motive in the case in chief.³³

With respect to the ultimate issue of whether the treatment was discriminatory, proof of discriminatory motive is critical in disparate treatment cases.³⁴ Intent is impossible to prove, however, unless the discriminator carelessly fails to mask the motive for his act.³⁵ Consequently, the Supreme Court has indicated that circumstantial evidence may suffice to prove discriminatory intent.³⁶ In fact, *McDonnell Douglas* suggests that a broad range of evidence will likely be probative in disparate treatment cases,³⁷ because, like any case involving intent or state of mind, they are necessarily fact-heavy. Once the employer produces evidence of a nondiscriminatory reason for his failure to hire the applicant, the court must

31. SCHLEI & GROSSMAN, *supra* note 12, at 1155-56. Of course, pretextuality is just a stage in the proof analysis, an aid in determining whether or not the adverse action was improperly motivated. See text accompanying note 34 *infra*.

32. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

33. C. SULLIVAN, *supra* note 21, § 1.6 at 65; SCHLEI & GROSSMAN, *supra* note 12, at 1161.

34. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); SCHLEI & GROSSMAN, *supra* note 12, at 1154. "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1976). The term is used to distinguish discrimination caused by practices which, although not intended to discriminate, result in less favorable treatment of protected classes. See note 21 *supra*, for a brief description of the disparate impact theory.

35. See note 205 and accompanying text *infra*.

36. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973). See also SCHLEI & GROSSMAN, *supra* note 12, at 1154.

37. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973). See SCHLEI & GROSSMAN, *supra* note 12, at 15-25, 1147-96. The *McDonnell* Court mentioned prior treatment of plaintiff, comparative treatment of majority members, and the employer's general policy and practice with respect to minority employment. "On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks." 411 U.S. at 804-05.

sift this broad range of evidence.

Besides the difficulty of proving discriminatory intent, *McDonnell Douglas* suggests a comprehensive view of the evidence is necessary for another reason. The rebuttable presumption of discrimination only gets the plaintiff past a directed verdict because the defendant can always articulate some colorably legitimate reason for the adverse hiring decision. Once the employer produces some evidence, the court must look to the entire record to determine whether the defendant's proffered justification was indeed legitimate.

No one decision has attempted to catalogue the kinds of evidence probative of discrimination where proof of discriminatory purpose is required. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,³⁸ an equal protection challenge to an allegedly discriminatory zoning scheme, Justice Powell noted that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."³⁹ Justice Powell went on to identify some of the "subjects of proper inquiry in determining whether racially discriminatory intent existed."⁴⁰ The factors enumerated were (1) whether the impact of the action bears more heavily on one group than another; (2) the historical background of the decision, particularly if it reveals a series of official discriminatory acts; (3) departures from the normal procedural sequences; (4) departures from the factors usually considered important by the decisionmaker when the normal factors would have strongly favored a contrary decision; and (5) the legislative or administrative history, especially where there are contemporary statements by decision makers.⁴¹ With the exception of the last indicium of discriminatory purpose, which applies primarily to legislative or regulatory actions,⁴² the indicia discussed by Justice

38. 429 U.S. 252 (1977).

39. *Id.* at 266.

40. *Id.* at 268.

41. *Id.* at 267-68.

42. The criterion was applied in *Arlington Heights* to the denial by the Village Board of the request that the plot be rezoned. *Id.* at 258-60.

Powell have been frequently cited by the courts in fair employment practice (F.E.P.) cases as important factors.⁴³ They will be used, therefore, to analyze the record in *Whitingham* to determine whether the trial court was justified in concluding the board's action was motivated by discriminatory intent.

B. *The Whitingham Facts*

The Vermont Attorney General brought an action in superior court for alleged violations of the Vermont Fair Employment Practices Act on behalf of Margaret Herbst,⁴⁴ against the Whitingham School Board and its superintendent, Clarence Truesdell.⁴⁵ Herbst had been a permanent substitute teacher in the Whitingham School during the 1975-76 school year. During that school year, the school board advised her that the position of permanent substitute would be abolished effective the following school year for budgetary reasons.⁴⁶ Vacancies in the second and sixth grades in the Whitingham School subsequently opened up and Herbst applied for both positions upon invitation of the principal.⁴⁷ She was interviewed by Superintendent Truesdell who informed her that he would submit her name to the board.⁴⁸

Herbst, a graduate of the University of Pennsylvania with a Master's Degree in elementary education from New York University,⁴⁹ obtained her first teaching job as a permanent substitute with the Whitingham School District. During that year, she spent

43. See text accompanying notes 117-76 *infra*. The Supreme Court has apparently approved the *Arlington Heights* approach in the disparate treatment context. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

44. Findings and Conclusions, *supra* note 2, at 11. See VT. STAT. ANN. tit. 21, § 495(b) (1978) which gives the Vermont Attorney General the authority to bring an action on behalf of the aggrieved applicant.

45. The superior court granted judgment for Principal Stacy because there was not sufficient evidence that he "either had the authority or attempted to exercise the authority to deny employment to Herbst." Findings and Conclusions, *supra* note 2, at 21.

46. *Id.* at 5. The Vermont Supreme Court noted this fact and some of the facts that appear following. The supreme court's recitation, however, took approximately one page and omits most of the findings of the superior court. See 138 Vt. at 17-18, 410 A.2d at 997-98.

47. Findings and Conclusions, *supra* note 2, at 5.

48. *Id.*

49. *Id.* at 4.

slightly more than one-half of her time teaching in the third through sixth grades and the remaining time teaching in the high school.⁵⁰ She apparently was well liked⁵¹ and received excellent evaluations from her high school principal, her elementary division principal, and fellow teachers.⁵² These evaluations and recommendations were submitted to the school board.⁵³

Herbst was interviewed by the board for the sixth grade position on June 24, 1976, along with two males.⁵⁴ Herbst informed the board that she was primarily interested in the sixth grade position.⁵⁵ During Herbst's interview with the board, she raised what she considered to be two weaknesses in the system—the lack of a coordinated math program and problems in the transition from sixth to seventh grade.⁵⁶ The comments were based on her first-hand experience.⁵⁷ The faculty recommended Herbst for the sixth grade position before the board went into executive session.⁵⁸

After its June meeting the board announced its selection of one of the two males, Mr. Tatro, for the sixth grade position.⁵⁹ The chairman told Herbst that they had two highly qualified candidates, that they had to choose one over the other, and that she was a close second.⁶⁰ The sixth grade position required a "multidisciplinary approach which includes reading, writing, language arts, social studies, history, and humanities as well as mathematics."⁶¹

Herbst filed an appeal from the nonrenewal of her contract as a permanent substitute, intending to convince the board to reconsider its decision on the sixth grade position.⁶² Between the June

50. *Id.*

51. *Id.* at 4.

52. *Id.* at 4-5.

53. *Id.* at 5.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 6.

61. *Id.* at 8.

62. *Id.* at 6.

meeting and the next board meeting in July, Tatro refused the job offer.⁶³ At the July 15 meeting, at which she presented her appeal, Herbst was represented by counsel and submitted further evidence of her qualifications.⁶⁴ Only after Herbst left the meeting did Truesdell announce to the board that Tatro had not accepted the offer and that the sixth grade position was again open.⁶⁵ The board had, at least once in the past, offered the position to the next qualified individual who had been interviewed.⁶⁶ Rather than offer the job to Herbst, the board reposted the position to look for new candidates.⁶⁷

After the July 15 board meeting, Principal Stacy informed Herbst that the position had been reopened and she could reapply.⁶⁸ She reapplied and was told that it would not be necessary to appear again before the board.⁶⁹ The board met again on August 5 and interviewed a *new* male applicant, Phillip Lieberman.⁷⁰ Lieberman had taught elementary grades in Vermont for three years and at the junior high level in Maryland for one year. He also had teaching experience in mathematics.⁷¹ The teacher representative expressed reservations about Lieberman and suggested that any decision be delayed because the elementary division principal and other colleagues had not met Lieberman and another candidate.⁷² Truesdell told the board they had already lost one applicant through delay and that Lieberman might also be lost if a decision on his application were postponed.⁷³ The board voted to offer Lieberman a contract for the position.⁷⁴

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 7.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* At this stage the teachers apparently favored a female who had not been interviewed by the board. The teachers were not aware, however, whether Herbst had reapplied for the job. *Id.* at 7.

73. *Id.*

74. *Id.*

C. *Superior Court Inferences From the Facts and Conclusions of Law*

The superior court held that the attorney general had established a prima facie case under the *McDonnell Douglas* formula. Herbst, a female, was a protected minority member who applied for a position for which she was qualified. Despite her qualifications she was rejected, and the defendant sought new applications by reopening the application process.⁷⁵ The defendant, in an attempt "to articulate some legitimate nondiscriminatory reason for the employee's rejection,"⁷⁶ based its rejection on a "need to bridge the academic gap between grade school and junior high school with special emphasis on improvement in mathematic skills as preparation for high school."⁷⁷ The superior court held that this reason did not constitute a legitimate reason for their failure to offer the job to Herbst rather than reopening applications:

At the moment the decision to reopen applications was made, Herbst's qualifications and highly recommended past performance in Whitingham School were known to the Board while the Board had no knowledge of Lieberman's interest or qualifications. Thus, any justification offered by the Board for the failure to offer the job to Herbst at that point could not have been based on a comparison of the relative qualifications of Herbst and Lieberman.⁷⁸

The superior court had found that Herbst had challenged the board's failure to hire her for the position long before Lieberman had applied for the job.⁷⁹

The superior court went beyond the evidence necessary to establish a minimal "prima facie case in accordance with the [four criteria] set out in *McDonnell*."⁸⁰ Since "[p]roof of a discriminatory motive is critical in establishing a claim of disparate treat-

75. *Id.* at 13.

76. *Id.* at 14. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

77. Findings and Conclusions, *supra* note 2, at 14.

78. *Id.* at 14-15.

79. *Id.* at 6.

80. *Id.* at 15.

ment"⁸¹ the court looked for "other evidence of discriminatory motive against females in the hiring policies of the Whitingham School administration."⁸² The evidence considered by the superior court will be analyzed in terms of the factors enumerated by Justice Powell in *Arlington Heights*.

First, in evaluating the impact of individual hiring decisions, the trial court examined the employment patterns at the school for the school year which had just ended and compared them with state-wide data for similar schools. The court found that Whitingham School had a ratio of male to female teachers of greater than 2:1, the highest percentage of males of any combined school in Vermont.⁸³ The defendant presented no evidence to contradict the plaintiff's statistics.⁸⁴ The court observed that "[e]ven a fine tuning of these statistics cannot obscure a glaring underrepresentation of female teachers."⁸⁵

Second, the court properly looked to the history of teacher hiring decisions. Superintendent Truesdell was chief executive officer of the defendant school board. He recommended that the board employ such persons as in his judgment were necessary.⁸⁶ The board was limited to those candidates selected for its consideration by Truesdell.⁸⁷ The trial court considered several recent incidents of sex discrimination by Truesdell in concluding that the board had discriminated against Herbst.

One incident involved a female applicant who was told by Truesdell that her chances for a position in the defendant's district were not particularly good. "He stated that he preferred to hire men as they were better disciplinarians and provided a better

81. *Id.*

82. *Id.*

83. *Id.* at 16-17. Whitingham had 43% female teachers (three of seven) as compared to 80% statewide for other combined public schools. At the secondary level, 29% of Whitingham's teachers (6 of 21) were female versus 40% statewide. *Id.* at 8, 17.

84. *Id.* at 9.

85. *Id.* at 17.

86. *Id.* at 9, 17.

87. *Id.*; VT. STAT. ANN. tit. 16, §§ 243(3), 563(12) (Supp. 1980).

model for the boys in the school to go on to college.”⁸⁸ No credible evidence was submitted to challenge evidence of Truesdell’s statement that he preferred to hire male teachers.⁸⁹

During an interview with another applicant, Superintendent Truesdell and Principal Stacy participated in a discussion concerning the inability of women to discipline students and were subsequently chastised by a female board member. Although the applicant said she was known as the “marine,” Truesdell continued to question her disciplinary abilities. He was willing to sacrifice federal money available to defray the salary of the qualified female applicant and suggested instead that untrained teachers be hired and paid from local funds.⁹⁰ Also, for two humanities positions which opened in the school system for the 1975-76 school year, there were sixty-five applications received from women and 108 from men. “Six men were seriously interviewed by the superintendent and four men were sent to the defendant school board for consideration. None of the 65 women were [sic] interviewed by any of the defendants.”⁹¹

The superior court specifically relied on this past recent history of discrimination by the man responsible for selecting candidates to be interviewed by the board and recommending who should be hired as one indicium of discrimination.

Truesdell’s attitude with respect to the capability of women is part of this evidence Such stereotypical culturally based concepts of the ability of women to perform these tasks are not permissible Where, as here, sex is not a bona fide occupational qualification for the job in question, an employer must afford every applicant a reasonable opportunity to demonstrate his or her ability to perform the task required The women applicants had the right to such an opportunity in the area of ability to maintain discipline. Encouraging high school students to continue their education in college is a worthwhile endeavor, but, as a matter of law, both male

88. Findings and Conclusions, *supra* note 2, at 9, 15-16.

89. *Id.* at 9.

90. *Id.* at 9-10.

91. *Id.* at 10.

and female students should be encouraged and the sex of the teacher who does the encouraging is not a bona fide occupational consideration.⁹²

Third, the trial court evaluated whether the normal hiring procedures were followed. In the case of Margaret Herbst, there were no procedures designed to mitigate possible discrimination. In fact, the procedure used in this case apparently deviated from the norm. In what is apparently the only attempt to set aside a finding of fact of the superior court, the defendants argued in their appellate brief "that reopening the applications rather than hiring the 'next' candidate is standard procedure with the school, not linked to the sex of the applicant."⁹³ The superior court did not make an unequivocal finding on the procedure of reopening applications generally, but it did find that

[O]n at least one previous occasion the defendant school board had hired the next qualified individual who had been interviewed for a teaching position without reopening applications. The defendant school board could have offered the job to Ms. Herbst Instead of offering the position to Ms. Herbst, which had been done at times in the past, the defendant board determined to repost and look for new candidates.⁹⁴

To rebut the court's finding the defendants cited only the testimony of Chairman Pier that the position had been offered at least once to a male runner-up. Pier stated, however, that he did not "think this was a normal thing."⁹⁵ Corrine Boyd, another board member testified that applications were reopened "[i]f we felt people weren't qualified."⁹⁶ Boyd also stated that the board would hire a second choice "occasionally" but apparently did not specify the conditions under which the runner-up would be hired or applications reopened.⁹⁷ A finding that the board ordinarily hired a highly

92. *Id.* at 15-16.

93. Brief of Defendants-Appellants at 8, *State v. Whitingham School Bd.*, 138 Vt. 15, 410 A.2d 996 (1979) [hereinafter cited as Brief].

94. Findings and Conclusions, *supra* note 2, at 6-7.

95. Brief, *supra* note 93, at 9.

96. *Id.*

97. *Id.*

qualified runner-up would have been warranted by the evidence. The superior court found that no evidence was presented to explain why the application process was reopened rather than offering the position to Herbst, since she was an admittedly highly qualified candidate.⁹⁸

Fourth, the trial court scrutinized the failure of the board to formulate clear standards for the sixth grade position and its apparent departure from normal hiring criteria, noting that "[t]he court must also take into account the relatively standardless hiring policy of the board."⁹⁹ Ordinarily the board would consider general factors, such as qualifications, experience, residence, general background, and references.¹⁰⁰ Herbst was the only candidate of all the applicants "whose information was verifiable by inquiry to other employees of the defendant" board.¹⁰¹ The board indicated that they considered Herbst qualified.¹⁰² There is no indication that the reasons¹⁰³ put forth for reopening applications were articulated to the plaintiff when she applied for the job or when she inquired why Tatro was chosen over her.¹⁰⁴ Instead, she was told by the school board chairman only that she was highly qualified for the position.¹⁰⁵

Other aspects of the Truesdell-managed hiring procedure troubled the trial court. Tatro, the board's original choice, rejected the offer between the June and July board meetings. Truesdell kept this fact from Herbst and the board until after Herbst's ap-

98. Findings and Conclusions, *supra* note 2, at 6-7.

99. *Id.* at 17.

100. *Id.* at 8.

101. *Id.*

102. *Id.* at 6.

103. *Id.* at 14. See also text accompanying note 77 *supra*.

104. There is no superior court finding in this regard. Defendants did not urge that the criteria were articulated beforehand in their brief before the supreme court. Nor did the supreme court assert from its consideration of the record that the criteria were articulated beforehand.

It is ironic that Herbst discussed the math and transition problems with the board during her interview. Despite her firsthand familiarity with the problems and her suggestions to remedy them, the board utilized the problems to justify not hiring her. Findings and Conclusions, *supra* note 2, at 5.

105. *Id.* at 5-6.

peal of the nonrenewal of her substitute teacher contract at the July 15 meeting.¹⁰⁶ At the August 5 board meeting, the teacher representative expressed reservations about Lieberman and asked the board to grant time for Lieberman's prospective colleagues to interview him and the other candidates. Truesdell, however, urged that immediate action was necessary.¹⁰⁷ This suggestion contrasts sharply with his earlier recommendation that applications be reopened despite the ready availability of a qualified female candidate. In spite of this initial delay, which Truesdell could have obviated, he opposed a thorough evaluation of comparative qualifications of the second round of candidates on the basis of dangers posed by delay.

The superior court perceived a relationship between the lack of standards, the pivotal role of Truesdell in the hiring process, and Truesdell's male bias.

Once the Board actually conducted interviews with those applicants recommended by Truesdell, it is likely that it gave great weight to his further recommendations in determining which of the interviewed applicants to hire Because of Truesdell's attitudes, the Board's hiring policy was infected with a discriminatory result

When the reopening of applications for the job sought by Herbst is considered in the light of the discriminatory attitudes on the part of Truesdell, and, absent a showing by the Defendants of any other credible justification for reopening the application process, the Court is persuaded that the Plaintiff has proved its claim that the Board discriminated against Herbst as an individual in failing to hire her.¹⁰⁸

The superior court found ample evidence to conclude that the plaintiff had established discriminatory motive in the hiring policies of the Whitingham School.

106. *Id.* at 6.

107. *Id.* at 7.

108. *Id.* at 17-18 (citations omitted).

II. THE VERMONT SUPREME COURT DECISION

The Vermont Supreme Court agreed that the plaintiff had established a prima facie case and thus turned to the question of whether the trial court erred when it found that the prima facie case had not been rebutted.¹⁰⁹ The court saw no reason, under *McDonnell Douglas*, to exclude from consideration a later applicant's comparative qualifications offered by the defendant.¹¹⁰ The court's decision apparently depends almost exclusively on its interpretation of the third of the four elements necessary to establish a prima facie case under *McDonnell Douglas*, the rejection element.

The evidence shows that after applications were reopened Superintendent Truesdell again submitted Ms. Herbst's application as a qualified candidate. Until the subsequent board meeting at which the other candidate was selected, Ms. Herbst had not been eliminated. The conclusion is inescapable that until that time she had not been rejected within the meaning of *McDonnell Douglas*.

. . . The trial court therefore erred when it excluded from consideration as irrelevant the board's explanation.¹¹¹

The court observed that the board must be involved with considerations such as math teaching and transition of students from sixth to seventh grade.¹¹² "The fact that the candidate hired possessed qualifications which were, in the board's view, superior to Ms. Herbst's qualifications is the most basic legitimate nondiscriminatory consideration for a hiring decision."¹¹³ The court stated that the trial court should have focused on whether the board's reason was merely a pretext and remanded the case for a hearing on that issue in light of its analysis of *McDonnell Douglas*.¹¹⁴

109. 138 Vt. at 19, 410 A.2d at 999.

110. *Id.* at 20, 410 A.2d at 999 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 20-21, 410 A.2d at 999. For a discussion of the soundness of the court's holding with respect to rejection and comparative qualifications, see text accompanying notes 199-265 *infra*.

The opinion reviews only a small part of the lower court's findings. Essentially the court focused on the qualifications of Herbst and Lieberman and, in two paragraphs, summarized the facts relative to filling the disputed position.¹¹⁵ Although the court did briefly discuss some statistical evidence, it paid minimal attention to the lengthy trial court record containing evidence generally considered probative by courts in F.E.P. cases.¹¹⁶ The factors enumerated in *Arlington Heights* for determining whether an action is discriminatorily motivated are an appropriate starting point for discussion of the soundness of the *Whitingham* reversal.

A. Statistics

The Vermont Supreme Court correctly agreed with the trial court that the small number of teachers in the *Whitingham* system made statistics inconclusive evidence in this individual disparate treatment case.¹¹⁷ The supreme court's one-paragraph treatment of this complicated topic is misleading, however, because it ignores the fact that the superior court looked to the data as only one evidentiary brick in the wall erected by the plaintiff.¹¹⁸

The federal judiciary has clearly recognized the importance of statistics in Title VII cases. Beginning with *McDonnell Douglas*, the Supreme Court noted that statistics may be helpful in determining whether an alleged discriminatory act against an individual is part of a general discriminatory pattern.¹¹⁹ The Court cautioned that statistics "may not be in and of themselves controlling as to an individualized hiring decision . . ."¹²⁰

115. 138 Vt. at 17-18, 410 A.2d at 1000.

116. *See id.* at 21, 410 A.2d at 1000.

117. *Id.*

118. Findings and Conclusions, *supra* note 2, at 8. The metaphor is Professor McCormick's. C. McCORMICK, *McCORMICK ON EVIDENCE* 436 (E. Cleary ed., 2d ed. 1972).

119. *See* 411 U.S. 792, 805 n.19 (1973).

120. *Id.* *See also* *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 573 (1978). Most of the authorities have agreed with Justice Powell that statistics will not of themselves make out a prima facie case in an individual disparate treatment action. *See* SCHLEI & GROSSMAN, *supra* note 12, at 315 (Supp. 1979), and the authorities cited therein. One court of appeals has held, over a vigorous dissent, that statistical evidence alone is sufficient to make out a prima facie case of sexual discrimination in a single plaintiff Title VII action. *Davis v. Califano*, 613 F.2d 957 (D.C. Cir. 1979). *See also* a thoughtful note in which the author suggests that

Justice Stewart explained why statistics are probative of discrimination in disparate treatment cases and commented on the effect of sample size in *International Brotherhood of Teamsters v. United States*:¹²¹

Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population of the community from which employees are hired. Evidence of long-lasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703(j) makes it clear that Title VII imposes no requirement that a work force mirror the general population. Considerations such as small sample size may, of course, detract from the value of such evidence, and evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants would also be relevant.¹²²

The courts' use of statistics has become increasingly sophisticated, especially in systemic cases where statistics can be the predominant, if not the sole, mode of proof. Nonetheless, Justice Rehnquist's statement above still represents an accurate summary of the probative value of statistics in disparate treatment cases.¹²³

statistics alone might make out a prima facie case under appropriate circumstances but that *Davis* is not such a case. Note, 14 GEO. L. REV. 615 (1980).

121. 431 U.S. 324 (1977).

122. *Id.* at 340 n.20 (1977) (citations omitted).

123. Probably the two most important recent cases limiting the proper role of statistics are *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979), and *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977). These limits will be discussed in the context of the adequacy of the data. See text accompanying notes 131-43 *infra*. Recent treatments of the topic which indicate the increasing sophistication are W. CONNOLLY & D. PETERSON, *USE OF STATISTICS IN EQUAL OPPORTUNITY LITIGATION* (1980) and C. SULLIVAN, *supra* note 21, at § 1.8 (*Sophisticated Statistical Techniques*). A social scientist's critique of the legal community's naivete in the use of sophisticated inferential statistical techniques is Cohn, *On the Use of Statistics in Employment Discrimination Cases*, 55 IND. L.J. 493 (1980). Compare the excellent 1976 state-of-the-art treatment in SCHLEI & GROSSMAN, *supra* note 12, at 1161-96 which deals only with descriptive statistics.

In individual disparate treatment cases¹²⁴ like *Whittingham*, however, statistics alone cannot make out a prima facie case; statistics merely help.¹²⁵ Even after the plaintiff establishes a prima facie case, only the burden of *proceeding* shifts to the employer.¹²⁶ Courts, therefore, need not inflexibly require large samples in view of the relatively small effect of the data on the case. The Vermont Supreme Court apparently failed to consider that there are very different theories of employment discrimination for which statistics may or may not be conclusive and, if admitted, have greatly different effects on the burden of persuasion.¹²⁷

The court's cryptic discussion of the data obscures the fact

124. The distinction being drawn here is important; systemic (classwide) and individual discrimination may both be challenged on the basis of either disparate impact or disparate treatment theory. Differences do exist, however, including the diminished role that statistics play in buttressing attacks by an individual. See generally C. SULLIVAN, *supra* note 21, at § 1.6 for an overview of key concepts in individual cases of discrimination and note 127 *infra*.

125. See note 120 *supra*.

126. For a recent Supreme Court case clarifying the shifting burdens, see *Texas Dep't of Community Affairs v. Burdine*, 101 S. Ct. 1089 (1981).

127. The Vermont Supreme Court would have had a stronger case for being more demanding under the other theories of discrimination where the impact of statistics is far greater. Under the other general classes of cases, proper statistical evidence actually shifts the second aspect of the burden of proof, the burden of nonpersuasion, to the defendant employer. The federal government can bring a "pattern or practice" discrimination case against an employer who makes a practice of disparate treatment of protected minorities, also called a section 707 action. See 42 U.S.C. § 2000e-6 (1976 & Supp. III 1979). Private plaintiffs can bring the functional equivalent of a pattern or practice case by bringing an action as a class action where the requirements of Rule 23 can be met. The plaintiff in these cases can apparently make out a prima facie case based solely on statistical evidence where the disparity is gross. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). Statistical proof imposes a high burden on the employer in these pattern or practice cases. Unrebutted proof requires the defendant to justify individual acts of failing to hire a minority once class discrimination is found, thus shifting the burden of proof with respect to the right of individual class members. *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976).

In disparate impact cases, statistical comparisons are the very basis for a finding of adverse impact on minorities. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); SCHLES & GROSSMAN, *supra* note 12, at 1161; Note, *The Role of Statistical Evidence in Title VII Cases*, 19 B.C. L. Rev. 881 (1978). See note 21 *supra*. Under *Griggs*, where a plaintiff demonstrates that a test or practice of the employer has an adverse impact on a protected minority, the burden shifts to the defendant to demonstrate that the practice is justified by "business necessity." 401 U.S. at 431. Particularly in this latter type of case where the statistical showing triggers such a heavy burden, the courts have tended to be more demanding in the last few years. See cases cited at notes 123 and 124 *supra*.

that other courts have considered statistical evidence where the sample was of comparable size or smaller.¹²⁸ In addition to sample size and the type of case being brought, other characteristics such as the time frame represented by the data, the degree to which the data is representative of potential applicants, and the degree of the disparity shown by the data are relevant in determining what, if any, probative value should be given to statistical evidence.¹²⁹ Quite simply, unless the sample size is very small,¹³⁰ these other characteristics should be considered before rejecting the data as having no probative value.

First, the most probative statistics are those which reflect the practice of the employer at the *time* the decision concerning the plaintiff was made. With respect to Herbst, statistics representing the practice since the F.E.P. statute was amended to cover sex discrimination in 1971 would be more dispositive on the issue of the board's discriminatory practices than data from before such practices were unlawful.¹³¹ In *Whitingham*, the Vermont Supreme Court agreed with the lower court that the evidence was insufficient to determine which teachers were hired after passage of the amendment adding sex to the list of protected classes.¹³² The fact

128. See, e.g., *Lee v. Washington County Bd. of Ed.*, 625 F.2d 1235 (5th Cir. 1980); *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 549 (4th Cir. 1975); *Chicano Police Officer's Ass'n v. Stover*, 526 F.2d 431 (10th Cir. 1975), *vacated and remanded* 426 U.S. 944 (1976); *Bridges v. North Chicago*, 402 F. Supp. 418 (N.D. Ill. 1975); *Brown v. Rollins, Inc.*, 397 F. Supp. 571 (W.D.N.C. 1974).

129. See text accompanying notes 131-43 *infra*.

130. See, e.g., *Morita v. Southern Cal. Permanente Medical Group*, 541 F.2d 217 (9th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977) (eight). Only one employee was hired in *Morita*, however, since the effective date of Title VII, a fact ignored by the Vermont Supreme Court in its discussion in *Whitingham*. Under *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977) and *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), this date would be of minimal probative value even if the sample size were larger. See also *Johnson v. Fulton Sylphon Div.*, 439 F. Supp. 658 (E.D. Tenn. 1977) (four); *Ivey v. Western Elec. Co.*, 20 Fair Empl. Prac. Cas. 618 (N.D. Ga. 1975) (three); *Rogillo v. Diamond Shamrock Chem. Co.*, 446 F. Supp. 423 (S.D. Tex. 1977); *Thrower v. Sperry & Hutchinson Co.*, 21 Fair Empl. Prac. Cas. 1664 (E.D. Ark. 1979). Larger samples have been held inadequate in disparate impact cases. See, e.g., *Dendy v. Washington Hosp. Center*, 431 F. Supp. 873 (D.D.C. 1977).

131. See *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

132. 138 Vt. at 21, 410 A.2d at 1000.

that the time frame reflected by a plaintiff's data is not ideal affects the probative value of the evidence but does not render the statistics useless. Mixed statistics, particularly in an area like teaching where turnover is high, are routinely considered by the courts.¹³³

The supreme court neglected to mention, however, that the superior court had also noted that the defendant failed to contradict the validity of these statistics.¹³⁴ The defendant could have minimized the impact of the statistics by "fine tuning." In addition, the defendant has superior access to the relevant employment data and is, therefore, properly chargeable with its production.¹³⁵

Second, although the Vermont Supreme Court did not discuss the source of data used in the statistical comparisons, the degree to which the data represents the defendant's available work force is an important criterion in determining probative value. The comparison in *Whitingham* was between the defendant's work force and the work force in similar combined public schools in the state.¹³⁶ Guidelines for labor market data, a type of data frequently used,¹³⁷ were set down by the United States Supreme Court in *Hazelwood School District v. United States*.¹³⁸ The superior court,

133. See, e.g., *Hazelwood School Dist. v. United States*, 433 U.S. 299, 309-10 (1977). In spite of *Hazelwood* and *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), even pre-act statistics may be probative in egregious situations where the policies of the employer have not changed. See *United States v. San Diego County*, 21 Fair Empl. Prac. Cas. 402, 406 n.6 (S.D. Cal. 1979).

134. See text accompanying note 84 *supra*.

135. See, e.g., *Falcon v. General Tel. Co. of the Southwest*, 626 F.2d 369 (5th Cir. 1980): "We take this to mean that once the plaintiff has offered some evidence that is probative of disparity that may be statutorily significant, it is then the defendant's burden to come up with more specific statistical evidence to rebut the plaintiff's proof." *Id.* at 380-81. This burden seems especially appropriate where, as in *Whitingham*, the statistics are but one element in a relatively easily rebuttable disparate treatment case. See text accompanying notes 124-25 *supra*. If the case is a systemic challenge based primarily on statistics and/or plaintiff's statistics are of a "gross" nature, the court should find that plaintiff's gross statistical data has not met her burden of proof. See SCHLEI & GROSSMAN, *supra* note 12, at 317 (Supp. 1979) (no clear guidelines have emerged for who has the burden to produce the fine-tuned data).

136. Findings and Conclusions, *supra* note 2, at 16.

137. SCHLEI & GROSSMAN, *supra* note 12, at 1172-75.

138. 433 U.S. 299, 307-13 (1977).

citing *Hazelwood*, stated, "[b]ecause teacher certification in Vermont is based on statewide standards . . . we hold that for purposes of statistical comparison in this case, the most relevant labor market is the State of Vermont."¹³⁹ Considering that the defendant did not go to its files to contradict this statewide data base, the trial court's holding was reasonable, based on prevailing practice and legal authority.

The third major subfactor in determining the weight to be given a statistical comparison is the degree of disparity between the sample group and the comparison group. The most relevant comparison, and the one discussed by the Vermont Supreme Court, was a comparison of the percentage of female elementary school teachers in the Whitingham district with the percentage of female elementary school average for other Vermont combined school districts. The small sample notwithstanding, Whitingham employed females at about half the state average.¹⁴⁰ The supreme court noted that "[t]he small number of teachers involved means that the employment of a male teacher in place of a female teacher, or the reverse, significantly alters the ratio."¹⁴¹ In fact, however, the defendant would have had to double its hiring of females to approximate the state average. The superior court relied on a significantly lower percentage of females in the secondary schools, where a sample three times as large existed, to buttress the small sample evidence of discrimination at the Whitingham elementary school level.¹⁴² Regardless of who had the obligation of fine-tuning the statistics, they clearly evidence a significant imbalance.¹⁴³

The supreme court could have more thoroughly analyzed the question of the proper weight to be given the statistical evidence in

139. Findings and Conclusions, *supra* note 2, at 16.

140. See note 83 and accompanying text *supra*.

141. 138 Vt. at 21, 410 A.2d at 1000. The court is certainly correct that sample size and lack of fine-tuning detract from the substantial disparity. See SCHLEI & GROSSMAN, *supra* note 12, at 328 (Supp. 1979).

142. See note 83 and accompanying text *supra*.

143. Findings and Conclusions, *supra* note 2, at 17. See note 85 and accompanying text *supra*.

Whitingham if it had recognized: (1) there was a prima facie case established under the *McDonnell Douglas* formula; (2) there was other evidence indicative of discrimination; (3) the admission of the evidence would not change the burden of persuasion or significantly alter the defendant's ability to articulate a nondiscriminatory explanation for its conduct; and (4) the defendant employer in no way controverted the accuracy of the data or demonstrated that the characteristics of the data reduced its probative value.¹⁴⁴ In terms of carefully evaluating the statistical evidence according to criteria generally applied by other courts, the superior court opinion is much more complete than that of the supreme court.¹⁴⁵

The supreme court's treatment is disturbing because it may virtually preclude the use of statistics, the preeminent method of proof in employment discrimination cases, in Vermont for two reasons. First, perfect statistical data is typically unavailable or prohibitively expensive. The most relevant data may never have been recorded or is often, for practical purposes, unavailable. Many plaintiffs simply cannot afford to generate specially prepared data which entails costs for data collection, computer and programmer time, and frequent use of experts. By insisting on a high threshold standard for statistical evidence, especially where it is the defendant who controls access to relevant data and does not seriously contest the validity of the data produced by the plaintiff, the Vermont Supreme Court raises the cost of litigation and may even preclude the ability of plaintiffs to vindicate important legal rights.¹⁴⁶

Second, the problem is especially acute in Vermont. Title VII requires a minimum of fifteen employees before subjecting an employer to coverage.¹⁴⁷ The Vermont statute has no such minimum.¹⁴⁸ In 1975-76, when Vermont was changing its statute to

144. See, e.g., the discussion of the interrelationship between statistical evidence and the use of the subjective criteria, Note, *The Role of Statistical Evidence in Title VII Cases*, 18 B.C. L. REV. 881, 894 (1978).

145. See note 127 and accompanying text *supra*.

146. See generally C. SULLIVAN, *supra* note 21, at 69-71.

147. Civil Rights Act of 1964, § 701(b), 42 U.S.C. § 2000e(b) (1976).

148. VT. STAT. ANN. tit. 21, § 495 (1978).

conform more closely with Title VII, the question arose as to the difference in coverage. The Senate Judiciary Committee was apparently aware of the high incidence of small employers in Vermont.¹⁴⁹ The committee observed that the lack of a minimum number of employees "would enable Vermont to enforce essentially the federal law on our own, under fifteen."¹⁵⁰ Given the high incidence of small employers and the unusually demanding requirements for statistical data, the typical Vermont plaintiff, even if he or she has the financial resources, will probably be unable to utilize statistical evidence. It would seem that the Vermont Supreme Court has taken a large step toward negating the expanded protection sought by the legislature. Certainly the *Whitingham* opinion will discourage trial courts from undertaking a careful analysis of this important source of evidence of discrimination.

B. Historical Background

Particularly where statistical evidence is not strong enough to prove conclusively a discriminatory purpose, courts often look to prior events which provide a background to the questionable decision.¹⁵¹ As the United States Supreme Court noted in *International Brotherhood*, "[t]he individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life."¹⁵² Earlier official actions, particularly those leading up to the challenged decision, are an important evidentiary source in attempting to "shed some light on the decisionmaker's

149. *Proposed Amendments to the Fair Employment Practices Act: Hearings on Proposed S. 94 Before the Senate Judiciary Committee* 3-5 (March 13, 1975) [hereinafter cited as *Hearings*]. A student who studied the legislative history of the Vermont statute concluded: "However, in Vermont 80% to 85% of the employers, employ under 15 employees. It was this general consideration that motivated the setting of the minimum at one." B. Brewster, *A Historical Narrative and Analysis of the Vermont Fair Employment Practices Act*, 11 (May 12, 1978) (unpublished paper available from the author).

150. *Hearings*, *supra* note 149, at 5.

151. *See, e.g.*, *Parson v. Kaiser Aluminum & Chem. Co.*, 575 F.2d 1374, 1387 (5th Cir. 1978); *Dickerson v. United States Steel Corp.*, 439 F. Supp. 55, 77 (E.D. Pa. 1977); *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973), *aff'd in part, rev'd in part sub nom.* *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975). *See also* SCHLEI & GROSSMAN, *supra* note 12, at 329 (Supp. 1979). The trial court in *Whitingham* extensively evaluated the hiring history in the school district. *See* notes 89-95 and accompanying text *supra*.

152. 431 U.S. 324, 339 (1977).

purposes.¹⁵³

The courts have long recognized that an entity must act through its employees. In *Rowe v. General Motors Corp.*¹⁵⁴ which involved a challenge to the employer's promotion and transfer policies, the court considered the role of the foreman in recommending an applicant for a promotion either by initiating the process or by commenting upon an employee-initiated application.

By whomsoever initiated the foreman is the key. In one [employer-initiated] the process never gets started, in the other it stops in its tracks unless the foreman puts his blessings on the prospect. This recommendation is based in part on the foreman's subjective evaluation of the hourly employee's 'ability, merit and capacity.'¹⁵⁵

Defendant Truesdell, as chief executive officer, performed an analogous function in the Whitingham School Board's hiring process.¹⁵⁶ The trial court considered recent incidents of clear male preference by Truesdell in concluding that the board discriminated against Herbst.¹⁵⁷ The superior court apparently realized that, apart from any invidious attempt to exclude women, males may engage in sexual stereotyping, particularly regarding a woman's ability either to discipline or to provide encouragement for a boy to go on to college.¹⁵⁸ Commentators suggest that the male may look for traits in the applicant which he sees as important in himself.¹⁵⁹ As the court in *Rowe* recognized, if the person recommending candidates lacks sympathetic involvement with the pro-

153. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

154. 457 F.2d 348 (5th Cir. 1972). *Rowe* is probably the classic case involving a grant of a large measure of discretion to employees, the subjective exercise of which results in significant disparate impact.

155. *Id.* at 353.

156. See text accompanying notes 86-87 *supra*. The supreme court recognized that "Truesdell, as superintendent, acts as the chief executive officer for each of the duly elected school boards he serves. His duties include recommending that 'the school board employ or dismiss persons as in his judgment is necessary to carry out the work of the school district.' 16 V.S.A. § 242(3)." 138 Vt. at 17, 410 A.2d at 998.

157. See text accompanying notes 88-91 *supra*.

158. Findings and Conclusions, *supra* note 2, at 16.

159. See, e.g., SCHLEI & GROSSMAN, *supra* note 12, at 172.

tected class, the applicant may well be hindered in obtaining a recommendation.¹⁶⁰

Although the superior court carefully considered other probative discriminatory incidents and attitudes, the Vermont Supreme Court neglected this important source of evidence of discrimination in its narrow interpretation of the *McDonnell Douglas* formula.

C. Job Standards

The state supreme court emphasized the fact that the board articulated legitimate concerns about math instruction and transition to secondary education. The court must, however, look to all the facts to determine whether the concern is in fact applied objectively.¹⁶¹ Courts have placed a great emphasis on the failure of an employer to articulate objective standards and for neglecting to apply existing standards to a particular situation. More simply, the court must scrutinize the use of subjective standards in hiring decisions.¹⁶²

Resort to subjective criteria poses a great danger to fair employment because this procedure "allows the person conducting the analysis to inject his own impermissible biases, whether intentionally or unintentionally, into the determination of the applicant's qualifications."¹⁶³ Because of these "[g]reater possibilities

160. 457 F.2d 348, 359 (5th Cir. 1972).

161. The trial court in *Whitingham* did fulfill this obligation. Findings and Conclusions, *supra* note 2, at 14-15.

162. I have combined Justice Powell's fourth category, departures from factors ordinarily deemed important, with what is typically referred to in the cases as failure to articulate objective standards for employment decisions. See, e.g., SCHLEI & GROSSMAN, *supra* note 12, at 166-81 (ch. 6 entitled "Subjective Criteria"). The two characterizations seem to capture the same phenomenon, but simply focus on opposite sides of the coin. See also Stacy, *Subjective Criteria in Employment Decisions Under Title VII*, 10 GEO. L. REV. 737 (1976). Although the question of subjective standards has frequently been raised in the context of disparate impact cases where the employer attempts to rebut statistical evidence by advancing subjective standards, courts also look to the lack of carefully articulated criteria in individual disparate treatment cases. See *id.*; *Parson v. Kaiser Aluminum & Chem. Corp.*, 575 F.2d 1374, 1385 (5th Cir. 1978); *Kinsey v. First Regional Sec., Inc.*, 557 F.2d 830, 837 (D.C. Cir. 1977); *Saracini v. Missouri Pac. R.R. Co.*, 431 F. Supp. 389, 393-94 (E.D. Ark. 1977).

163. *Saracini v. Missouri Pac. R.R. Co.*, 431 F. Supp. 389, 394 (E.D. Ark. 1977). Al-

for abuse, . . . it is especially important for courts to be sensitive to possible bias in the hiring and promotion process arising from such subjective definition of employment criteria."¹⁶⁴ In *Whittingham*, the board attempted to justify reopening applications and hiring Lieberman by emphasizing a need to address math deficiency and transition problems¹⁶⁵ which are certainly, as the Vermont Supreme Court indicated,¹⁶⁶ proper educational considerations. Ability to promote these goals is unquestionably a legitimate hiring consideration. Since these criteria, however, were apparently never articulated to the plaintiff,¹⁶⁷ the trial court viewed the hiring policy of the board as "relatively standardless" in light of the record.¹⁶⁸

The use of unstated hiring criteria is not per se illegal. It does, however, subject the hiring process to close scrutiny.¹⁶⁹ It has been suggested that if unstated standards are to be used, they "must be nondiscriminatory, and related to job performance, and the applicants must be made aware of them in advance."¹⁷⁰ If the standards were allowed to be articulated after a possibly discriminatory hiring decision has been made and challenged, an employer can easily fabricate a defense to a discriminatory decision. Uncritical acceptance of hiring criteria simply because they are related to job per-

though the courts are typically more concerned with utilizing subjective criteria, departure from objective criteria which adversely affects a protected minority is treated similarly. "As exhibited here, such nonuniform and unequal application of criteria by an employer constitutes an unfair employment practice." *Kinsey v. First Regional Sec., Inc.*, 557 F.2d 830, 837 (D.C. Cir. 1977) (citations omitted).

164. *Rogers v. International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir. 1975). Some courts have gone so far as to require the employer, even in a disparate treatment case, to bear the burden of showing nondiscrimination by a preponderance of the evidence where hiring or promotion is based on the hiring person's subjective evaluation of abilities. *Jenkins v. Caddo-Bossier Ass'n for Retarded Children*, 570 F.2d 1227, 1229 (5th Cir. 1978). *But see* notes 251-53 and accompanying text *infra*.

165. Findings and Conclusions, *supra* note 2, at 14. *See also* text accompanying notes 76-77 *supra*.

166. 138 Vt. at 20, 410 A.2d at 999.

167. *See* note 104 and accompanying text *supra*.

168. Findings and Conclusions, *supra* note 2, at 17.

169. *Rowe v. General Motors Corp.*, 457 F.2d 348, 354 (5th Cir. 1972).

170. *Saracini v. Missouri Pac. R.R. Co.*, 431 F. Supp. 389, 394 (E.D. Ark. 1977) (citation omitted).

formance without reference to the entire record does not allow an applicant to demonstrate that the employer's articulated reason is pretextual.

Looking at the entire record, the superior court found that the use of the standards in this case was a subsequent rationalization and was not the real reason for the applicant's rejection.¹⁷¹ The supreme court directed the trial court on remand that evidence of the later applicant's qualifications relative to the criteria revealed after the plaintiff's rejection "are the most relevant" evidence.¹⁷² Thus, the court severely restricted the trial court in making the finding of pretextuality for which it purported to remand the case.¹⁷³

D. The Procedure

The inference of discrimination arising from the factors previously discussed may be mitigated or strengthened by the presence or absence of safeguards in the procedure applied to a particular plaintiff.¹⁷⁴ A combination of lack of uniformly applied objective standards and no significant procedural safeguards to insure that decisions are focused on the relevant issues has been deemed to be a fatal flaw in many cases.¹⁷⁵ In *Whitingham*, there were no procedures designed to mitigate possible discrimination and, in fact, the procedure used apparently departed from the usual practice.¹⁷⁶

171. See text accompanying note 78 *supra*.

172. 138 Vt. at 20, 410 A.2d at 999.

173. On remand, the superior court held that "we conclude from the evidence that the Board in selecting Mr. Lieberman over Ms. Herbst, in a comparative evaluation of the two candidates, had a legitimate and nondiscriminatory reason for doing so." *State v. Whitingham School Bd.*, No. 534-76 WmM at 12 (Vt. Super. Ct. July 24, 1980). The Findings, Conclusions, and Judgment Order were based upon the proceedings at the original trial. *Id.* at 1.

174. *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972); *EEOC v. E.I. duPont deNemours and Co.*, 445 F. Supp. 223, 254-55 (D. Del. 1978); *Frink v. United States Navy*, 16 Fair Empl. Prac. Cas. 67, 70-71 (E.D. Pa. 1977). In the latter two cases, safeguards instituted in the hiring or promotion procedure to prevent discrimination were major considerations in findings of no discrimination. See generally SCHLEI & GROSSMAN, *supra* note 12, at 177-81.

175. See, e.g., *Stewart v. General Motors*, 542 F.2d 445, 450 (7th Cir. 1976), and *Saracini v. Missouri Pacific R.R.*, 431 F. Supp. 389, 393 (E.D. Ark. 1977).

176. See text accompanying notes 93-99 *supra*.

The lack of any procedures designed to protect against hiring bias, the failure to hire a highly qualified runner-up in light of the time factor, and the apparent desire of Truesdell to rush a decision in favor of a male candidate add substantial strength to the inference of discriminatory conduct. The supreme court apparently disregarded the finding of a departure from the normal procedure in its holding.

The superior court directed its attention to the indicia of discrimination normally considered important by the courts in discrimination cases. The supreme court ignored this evidence or, in the case of statistics, largely ignored the evidence and attempted to minimize it. These indicia of discrimination, of course, add to the weight which should be accorded the conclusion of the trial court that the employer discriminated against the plaintiff. The neglected evidence greatly strengthens the trial court's holding that it was improper to reopen applications and to consider after-the-fact qualifications because the whole record undercuts the legitimacy of the explanation.

E. *Appropriateness of Reversal*

The United States Supreme Court has emphasized that the courts of appeals should not confuse the *McDonnell Douglas* prima facie case with an ultimate finding by the trier of fact that the original rejection of the applicant was racially motivated.¹⁷⁷

When approaching the proof or disproof of a disparate treatment case, the ultimate focus of the inquiry, and thus the proof, is whether or not the decision or action in question was "racially premised." In other words, motivation and intent are the ultimate issue—whether "the presumptively valid reasons for [the] rejection were in fact a cover-up for a racially discriminatory decision"¹⁷⁸

The superior court focused on this "ultimate issue" and concluded plaintiff had met its burden of establishing discriminatory motive. Under the prevailing view, a finding that an act of discrim-

177. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978).

178. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973).

ination occurred should stand unless the admittedly hybrid fact-law determination is based on erroneous interpretation of the law¹⁷⁹ or there are not sufficient "subsidiary facts to undergird the ultimate facts."¹⁸⁰

The Vermont Supreme Court did not consider the issue of the standard of review to be applied to a mixed question of law and fact in an employment discrimination case. The court has, however, frequently reiterated the policy reflected in Federal Rule 52 to defer to the trial court's superior ability to judge credibility and weigh the evidence in making fact determinations.¹⁸¹ Since the judge is presumed capable of disregarding incompetent evidence and had the benefit of observing the witnesses, the appellate court ought not lightly substitute its own opinion for that of the trial court. Rather than follow its usual procedure and construe the

179. I am aware of the manipulability of the terminology of Rule 52 in trying to apply the law-fact distinction. See Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1868 (1966); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2588-2589 (1973); J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 52.05 (1980 & Supp. 1981). For an historical development of the original rules, see Clark & Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190 (1937). It is clear, however, that the ultimate conclusion is not shielded where the trial court fails to apply the correct and established standard. *United States v. General Motors Corp.*, 384 U.S. 127, 141 n.16, 142 (1966). See the most recent disparate treatment case, *Texas Dep't of Community Affairs v. Burdine*, 101 S. Ct. 1089, 1097 n.12 (1981), which seems to intimate that the clearly erroneous standard is applicable to a finding of discrimination absent application of the wrong legal standard.

180. *Parson v. Kaiser Aluminum & Chem. Corp.*, 575 F.2d 1374, 1383 (1978) (quoting *Causey v. Ford Motor Co.*, 516 F.2d 416, 420-21 (5th Cir. 1975)). This case illustrates the other possible vulnerable aspect of a mixed question of fact and law. The trial court's conclusion may not be supported by the requisite amount of subsidiary facts, even granting the deference due the determinations of subsidiary facts.

181. The Vermont Supreme Court's statement of the deference due the trial court is particularly strong:

The prescribed law of this state is that findings must stand if there is any credible evidence which fairly and reasonably supports them, and this Court must construe them so as to support the judgment, if possible, and, further, that the weight of the evidence, the credibility of the witnesses and the persuasive effect of the testimony is for the sole determination of the trier of fact.

Armstrong v. Hanover Ins. Co., 130 Vt. 182, 185, 289 A.2d 669, 671 (1972) (citations omitted). The statement has often been echoed in the Vermont cases. See, e.g., *Vermont Structural Steel Corp. v. Ireland Concrete Constr. Co.*, 137 Vt. 371, 372, 406 A.2d 392, 393 (1979); *Monti v. Town of Northfield*, 135 Vt. 97, 99-100, 369 A.2d 1373, 1376 (1977).

findings "so as to support the judgment, if possible,"¹⁸² the Vermont Supreme Court largely ignored the comprehensive findings in *Whitingham* which provided ample basis for the trial court's conclusion. Under traditional notions of appellate review, the trial court should be sustained unless the result was based upon an erroneous interpretation of the law.¹⁸³ As the next section will demonstrate, the supreme court resorted to a highly legalistic and incorrect interpretation of *McDonnell Douglas* in overturning the trial court.

In effect, the supreme court reversed the superior court (which focused on the ultimate issue of intent) for failing explicitly to focus on the issue of pretext. As subsequent discussion will make clear, the pretext issue is subsumed under the ultimate issue of intent once the defendant articulates a nondiscriminatory reason; the superior court's interpretation of *McDonnell Douglas* is hardly erroneous.¹⁸⁴

The fact-heaviness of a case where discriminatory motive is the ultimate issue should caution judicial self-restraint. Not all cases are obviously subject to a clear-cut rule as to when *the* actionable discriminatory act occurred or as to whether evidence of comparative qualifications ought be given great weight. Nor are all cases which come before the appellate court appropriate vehicles for exercise of its lawmaking function.¹⁸⁵ As one commentator has

182. *Armstrong v. Hanover Ins. Co.*, 130 Vt. 182, 185, 289 A.2d 669, 671 (1972).

183. See text accompanying notes 179-80 *supra*.

184. See 138 Vt. at 20-21, 410 A.2d at 999-1000; text accompanying note 259 *infra*. With respect to the use of legalistic reasoning to avoid difficult policy decisions, see Leflar, *Honest Judicial Opinions*, 74 NW. U.L. REV. 721, 738 (1979). The distinction between legalistic and real reasons is developed by Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common Law Justification*, 63 CORNELL L. REV. 707, 735 (1978). See also K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 30-31 (1960). See also note 258 *infra*.

185. See Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635 (1971). For an especially cynical view of the utility of appellate court review, see Wilner, *Civil Appeals: Are They Useful in the Administration of Justice?*, 56 GEO. L.J. 417 (1968). For a less cynical view, see Wright, *Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957). I use the term law-making function here because the court was not engaged in its error-correcting function. See text accompanying notes 200-65 *infra*. See also note 199 *infra*.

stated: "Many questions that arise in litigation are not amenable to regulation by rule because they involve multifarious, fleeting, special, narrow facts that utterly resist generalization—at least, for the time being."¹⁸⁶ The variations in the treatment of the applicants, the historical background of the employment decisions, the variety of procedures in hiring and reopening, the degree to which the procedure was varied in a particular case, the extent to which objective factors were articulated prior to the decision, and the statistical patterns which have emerged as a result of the practices are all factors which suggest the futility of attempting to frame adequately a single blanket rule for all hiring situations.

The novelty of the issues and the lack of focus of counsel in briefing the decisive issues suggest that appellate court self-restraint was in order. As both the trial court and supreme court recognized, the case was one of first impression in Vermont. The F.E.P. law has been developing very rapidly; it was born in the sixties and the significant case law developed in the seventies.

When the problem arises in a context so new and unsettled that the rule makers do not yet know what factors should shape the result, the case may be a good one to leave to lower court discretion [I]t permits experience to accumulate at the lowest court level before the appellate judges commit themselves to a prescribed rule [T]he appeal courts have a chance to bide their time until they see more clearly what factors are important to decision and how to take them into account.¹⁸⁷

It is difficult to enter a complex and rapidly developing area under the best of circumstances, and the cases frequently reflect this difficulty. The United States Supreme Court has, unfortunately, contributed to the problem. After three opinions, the Court had not settled the extent of the defendant's burden in meeting the plaintiff's prima facie case by articulating a legitimate, nondiscriminatory reason for rejection.¹⁸⁸ Only recently, after *Whitingham* was decided, did the United States Supreme Court make this burden

186. Rosenberg, *supra* note 185, at 662.

187. *Id.* at 662-63.

188. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Furnco Constr. Co. v.*

entirely clear.¹⁸⁹ The Vermont Supreme Court could not expect to clear up this confusion in its first employment discrimination case.

In the *Whitingham* case, the court had little help from counsels' briefs on the pivotal issues. The appellant spent less than a page arguing that "The Court Below Improperly Focused on the Act of Reopening the Applications," the pivotal issue in the eyes of the supreme court, and cited no authority.¹⁹⁰ The attorney general did not raise the timing of the discriminatory act as a specific issue. In a larger context, however, he apparently argued (in approximately one page) that *Weiner v. County of Oakland*¹⁹¹ supported the trial court's determination that reopening applications was a discriminatory act.¹⁹² Under Vermont appellate rules, the court could have chosen not to consider the timing issue for failure to brief adequately the assigned error.¹⁹³

Occasionally the court must engage in what is, in effect, *sua sponte* consideration of important issues.¹⁹⁴ It does seem appropriate, however, to question the wisdom of entering difficult and vir-

Waters, 438 U.S. 567 (1978); Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978). See text accompanying note 259 *infra*.

189. Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. 1089, 1094-95 (1981).

190. Brief, *supra* note 93, at 16.

191. 14 Fair Empl. Prac. Cas. 380 (E.D. Mich. 1976).

192. Brief of the Appellee at 13, State v. Whitingham School Bd., 138 Vt. 15, 410 A.2d 996 (1979). Appellant's reply brief does not address the issue.

193. V.R.A.P. 28(a)(4) (1974). Rule 28(a)(4) states that the argument "shall" contain the reasons for the contentions of the appellant with citations to the relevant authorities. Only three months before the *Whitingham* case, the court held that merely reiterating the point made below "without the aid of argument or supporting authorities . . . presents no question for review." Hill-Martin Corp. v. Alling, 137 Vt. 432, 434, 407 A.2d 168, 169 (1979). The court in *Alling* cited an opinion of a year earlier. The language from this case is relevant to the discussion of *Whitingham*: "Beyond a short paragraph claiming such inconsistency and a 'complete disregard of . . . uncontradicted evidence,' this argument is not briefed. This is insufficient briefing under V.R.A.P. 28(a)(4), and we do not search the record for error not adequately briefed or referenced." Quazzo v. Quazzo, 136 Vt. 107, 111, 386 A.2d 638, 641 (1978). This statement of the rule governing points raised but not supported by argument conforms to the usual practice: "[F]ailure of the complaining party to support his contentions by argument and authority in his brief is usually treated as a waiver of the alleged error." Campbell, *Extent to Which Courts of Review Will Consider Questions not Properly Raised and Preserved—Part III*, 8 WIS. L. REV. 147, 167 (1933).

194. See, e.g., Tate, *Sua Sponte Consideration on Appeal*, 9 TRIAL JUDGES J. 68 (1970); Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477 (1959).

gin terrain without benefit of full briefing and argument. The supposed virtue of appellate review depends on clear framing of issues and adequate exposure to relevant authorities. The opinion illustrates that the supreme court had only a rudimentary familiarity with the relevant authority and overlooked difficult underlying problems.¹⁹⁵ In substituting its own judgment for that of the trial court the supreme court even alluded to the thoroughness of the trial court: "An examination of the findings and conclusions of law in this case reveals that the trial court fully understood this to be a case of first impression in this state, and the record reflects the care and attention it gave it."¹⁹⁶ As one commentator points out, appellate courts are not omniscient and should curb an inherent desire to do justice.¹⁹⁷ The present case unfortunately is illustrative of those situations in which any claim of the higher court to authoritativeness is attributable solely to its preeminent position rather than the thoroughness of its analysis.¹⁹⁸ Arbitrarily overturning a careful decision can hardly serve as an incentive to trial judges and arguably encourages appeals which rest on the hope that the supreme court will second guess the trial court even if the decision below is sound. It seems to be a poor use of valuable appellate court time to reverse a careful trial court decision in a probably unique factual situation unless the court can provide

195. The court's statement of the issues is indicative of the superficiality of its approach to a complex problem. "The critical questions are whether or not the plaintiff established a prima facie case of discrimination, and, if so, was the defendant employer's evidence sufficient to establish some legitimate nondiscriminatory reason for the refusal to hire." 138 Vt. at 18, 410 A.2d at 998.

196. *Id.*

197. Wright, *supra* note 185, at 778-82.

198. Professor Rosenberg forces us to confront our preoccupation, probably inculcated early in our professional experience as law students, with the sanctity of the appellate court opinion: "After all, some court has to have the last word. Why not the trial court, the one closest to the evidence, to the witnesses and the jury? Why prefer decisions that are made by distant, upper-court judges from a cold and lifeless printed record?" Rosenberg, *supra* note 185, at 641.

We should of course welcome appellate court intervention where it does indeed correct an erroneous application of the governing law, establish sound and reasoned law for the jurisdiction, or resolve conflicts which threaten the sound administration of justice in the jurisdiction. P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 1-12 (1976). Unless the opinion indeed can accomplish one of these purposes of the appellate court, however, why expend valuable appellate court resources?

sound guidance for future consideration of similar cases by the trial courts.

III. DEPARTURES FROM SUBSTANTIVE F.E.P. LAW

As indicated earlier, the supreme court reversal is apparently based upon two aberrant views of F.E.P. law. This section will consider first whether *McDonnell Douglas* should be interpreted so that a prohibited discriminatory act can only occur after the ultimate rejection of the applicant; and second, whether evidence of comparative qualifications must always be deemed highly probative of nondiscrimination. A third and related question not discussed in the supreme court's opinion is whether, if evidence of comparative qualifications need not be determinative, there are adequate means to insure that an employer will not be required to hire or compensate marginally qualified applicants.

The supreme court held that Herbst could not have been rejected within the meaning of *McDonnell Douglas* until the decision to hire Lieberman was made, which only then totally precluded her from consideration. This holding ignores the limits on the four-step prima facie case set out by the Supreme Court in *McDonnell Douglas* and subsequent cases.¹⁹⁹ In *McDonnell Douglas*, the Court noted: The facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.²⁰⁰

In its next disparate treatment case, *McDonald v. Santa Fe Trail Transportation Co.*,²⁰¹ the Court reiterated the above language, admonishing flexibility, and added that: Requirement (i) of this sample pattern of proof was set out only to demonstrate how the racial character of the discrimination could be established in the most common sort of case, and not as an indication of any substantive limitation of Title VII's prohibition of racial discrimina-

199. See text accompanying note 27 *supra*.

200. 411 U.S. 792, 802 n.13 (1973).

201. 427 U.S. 273 (1976).

tion.²⁰² The court again expressed its concern that the *McDonnell Douglas* language might be woodenly applied in *Furnco Construction Corp. v. Waters*:²⁰³ "This, of course, was not intended to be an inflexible rule."²⁰⁴

Before looking at how other courts have applied the *McDonnell Douglas* analysis to cases with different fact patterns, it is important to understand the reasons for the prima facie case formula. The Court recognized that direct proof of discriminatory animus is generally unavailable and that it is the employer who knows the actual reason for the rejection.²⁰⁵ In essence, the Court created a rebuttable presumption in situations where it is fair to shift the burden of proceeding to the employer.²⁰⁶ The Supreme Court explained the reasoning behind *McDonnell Douglas* in *International Brotherhood of Teamsters*:

The *McDonnell Douglas* case involved an individual complainant seeking to prove one instance of unlawful discrimination. An employer's isolated decision to reject an applicant who belongs to a racial minority does not show that the rejection was racially based. Although the *McDonnell Douglas* formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the

202. *Id.* at 279 n.6.

203. 438 U.S. 567 (1978).

204. *Id.* at 575.

205. "Proof of the *McDonnell Douglas* type prima facie case assures the plaintiff his day in court despite the unavailability of direct evidence, and entitles him to an explanation from the defendant-employer for whatever action was taken." *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979). The court stated that direct evidence is likely to be unavailable. *Id.*

206. For a recent thorough discussion of this proposition, see Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129 (1980) [hereinafter cited as Mendez]. This view has been confirmed by the recent Supreme Court case, *Texas Dep't of Community Affairs v. Burdine*, 101 S. Ct. 1089, 1094 (1981).

decision was a discriminatory one.²⁰⁷

In *Furnco*, the Court reiterated that the purpose of the four-step formula was to enable the plaintiff initially to meet its burden of proceeding by "showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.'"²⁰⁸ The four-step formula was set forth to help the plaintiff establish discriminatory motive because "it can in some situations be inferred from the mere fact of differences in treatment."²⁰⁹

Two principles with respect to the four-step language of *McDonnell Douglas* have emerged from the Supreme Court cases. First, the Court has emphasized that the formula was not a rigid prescription for all allegations of employment discrimination. Rather, it was an indication of one way in which a plaintiff could initially meet the burden of proceeding. Second, the Court wanted a plaintiff to be able to meet this burden by a minimal showing of circumstances under which one could reasonably infer discrimination. Clearly, the Court was not establishing a limit on plaintiff's ability to identify a discriminatory act. The formula is concerned *only* with establishing a prima facie case by use of certain bare-bone facts which permit a reasonable inference of discrimination if unexplained. As indicated earlier in this article,²¹⁰ the typical disparate treatment case involves elements of proof other than mere reliance on the *McDonnell Douglas* inference because the plaintiff ultimately bears the burden of proving discriminatory motive.

The Supreme Court itself has stated that intermediate steps in the hiring process, short of ultimate rejection, constitute actionable discrimination. In *Furnco*, when black bricklayers applied for employment they were told that the job superintendent "hired only persons who he knew to be experienced and competent in this type of work or persons who had been recommended to him as

207. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977).

208. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978) (citation omitted).

209. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977).

210. See text accompanying notes 34-43 *supra*.

similarly skilled."²¹¹ Some of the blacks who applied, including one black plaintiff, were ultimately hired because they were known by the superintendent or were referred to him by other Furnco employees.²¹² The Supreme Court held that although plaintiffs were ultimately hired, discrimination within the meaning of *McDonnell Douglas* could occur prior to the hiring decision:

We agree with the Court of Appeals that the proper approach was the analysis contained in *McDonnell Douglas* We also think the Court of Appeals was justified in concluding that as a matter of law respondents made out a prima facie case of discrimination under *McDonnell Douglas* And here respondents carried that initial burden by proving they were members of a racial minority; *they did everything within their power to apply for employment*; Furnco has conceded that they were qualified in every respect for the jobs which were about to be open; they were not offered employment, although Smith later was; and the employer continued to seek persons of similar qualifications.²¹³

Recognizing that *McDonnell Douglas* "was not intended to be an inflexible rule,"²¹⁴ the Court did not require that other candidates be hired to fill the positions. Even though the plaintiff was or may be reconsidered at a later date, the Supreme Court held that the initial failure to hire a qualified plaintiff constitutes a prima facie case of discrimination.

With one apparent exception favorable to the applicant²¹⁵

211. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 570 (1978).

212. *Id.*

213. *Id.* at 575-76 (emphasis added).

214. *Id.* at 575.

215. In *Gates v. Georgia Pacific Corp.*, 492 F.2d 292 (9th Cir. 1974) the employer urged the court to find that the time of application controlled so that plaintiff's claim was not filed in timely fashion. Apparently to prevent plaintiff's claim from being time-barred, the court held that the "unlawful employment practice is not complete until the position is filled and no longer available to the claimant." *Id.* at 294-95. The court thereby protected plaintiff's right to bring the Title VII action. *Gates* seems to fit into a pattern of cases in which the courts have liberally interpreted the time limitation to allow plaintiffs their day in court. The legislative history of the 1972 amendments to Title VII reflects that Congress was aware of this tendency and expressly approved it.

Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit

other courts have held that prehirng acts are covered by the F.E.P. statutes. In what is probably the most analogous reported case to *Whitingham, Sabol v. Snyder*,²¹⁶ a black female was the only qualified candidate who applied before an application cutoff date. A highly qualified white male nurse applied ten days after the deadline and was offered the job. The *Sabol* trial court found, as did Judge Hayes in the Vermont Superior Court,²¹⁷ that discriminatory motive existed in the failure to hire a qualified applicant even if the person ultimately hired had better qualifications.²¹⁸ In *Sabol*, late applications were occasionally considered and given the same weight as timely applications.²¹⁹ Nonetheless, the court of appeals considered the application cutoff date crucial:

The arrival of the cutoff date becomes important on these elements. Although the testimony indicates that cutoff dates are not strictly enforced, but are often ignored when no candidates have applied for a vacancy, it is assumed that when a qualified applicant has filed on time, there is no need to extend the period. The trial court found plaintiff to be a qualified applicant. There was, then, no need to extend the period for application. The acceptance of Mr. Bridges' application after the cutoff date can only be interpreted as rejection of plaintiff's application. This rejection, coupled with the acceptance of Mr. Bridges' application indicating the position was still open satisfied the last two elements in *McDonnell*

of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection. Existing case law has determined . . . that existent but undiscovered acts of discrimination should not escape the effect of the law through a procedural oversight. Moreover, wide latitude should be given individuals in such cases to avoid any prejudice to their rights as a result of government inadvertence, delay or error.

118 CONG. REC. 7167 (1972). Thus, liberal construction of the filing requirements through such equitable doctrines as tolling and estoppel, see C. SULLIVAN, *supra* note 21, at § 3.4, is consistent with the tendency to construe Title VII and *McDonnell Douglas* liberally to include prehirng acts.

216. 524 F.2d 1009 (10th Cir. 1975). The case was brought under 28 U.S.C. §§ 1981 and 1983 because the hiring took place prior to the 1972 amendments which brought governmental agencies under Title VII.

217. Findings and Conclusions, *supra* note 2, at 15.

218. *Sabol v. Snyder*, 524 F.2d 1009, 1012 (10th Cir. 1975).

219. *Id.* at 1010.

for a prima facie case.²²⁰

Sabol's situation was very similar to Herbst's.²²¹ Both were objectively qualified for their respective positions, both applied by the application deadline, and both were refused the job. The employer in *Sabol*, the Kansas State Board of Education, also examined other applications filed after the deadline. The employer in *Sabol* unsuccessfully sought to articulate job requirements not originally known by the female plaintiff which conveniently fit the person hired. The court viewed the articulation of the job requirements as a post hoc rationalization.²²²

In *Weiner v. County of Oakland*,²²³ a case which the Vermont Supreme Court felt was inapposite, the employer rejected an eligibility list totally comprised of women. Plaintiff ranked second on the list. Even though plaintiff was then invited to submit a second application²²⁴ the *Weiner* Court found that a prima facie case had been established—a fact ignored by the Vermont Supreme Court.

In *Weiner*, as in *Whitingham*, there was evidence of discriminatory animus of the director: existence of a small percentage of women hirees, use of highly subjective hiring criteria, and rejection of the list of qualified females. The plaintiff was reinvited to apply as in *Whitingham*. Another list was prepared which consisted of five women, one of whom was hired. In *Weiner*, the person responsible for hiring had evidenced a discriminatory tendency and had hired no female planners. The *Weiner* court held that the director's rejection of the original list permitted the inference that he intended to hire a man who was no more qualified than the women on the rejected list.²²⁵

220. *Id.* at 1012.

221. See text accompanying note 60 *supra*.

222. *Sabol v. Snyder*, 524 F.2d 1009, 1011 (10th Cir. 1975).

223. 14 Fair Empl. Prac. Cas. 380 (E.D. Mich. 1976).

224. *Id.* at 382.

225. *Id.* As the Vermont Supreme Court indicates, *Weiner* did not strictly exclude evidence of comparative qualifications. The *Whitingham* court used the ratings from employment interviews "to show that a bias against women affected these subjective evaluations." *Id.* at 382. Other than using the subjective rating system to demonstrate that defendant's claim of superior male qualifications was biased, the *Weiner* court did not address the relative qualifications of the candidates. The tenuousness of the supreme court's distinction is

That the four-step method of proving a prima facie case does not limit the possible kinds of discrimination actionable under the F.E.P. is further demonstrated by a series of cases starting with *Gillin v. Federal Paper Board Co.*²²⁶ Gillin applied for a promotion to a traffic manager's position but was rejected in favor of a more qualified male. As in *Whitingham* the person in charge of hiring had displayed a discriminatory animus against females. The court found that the plaintiff had been treated differently than a male with her qualifications would have been treated.

But it does not follow that although the company violated no law in hiring Swezey, it was not guilty of sex discrimination against Gillin

. . . Gillin was entitled to be treated as any other applicant . . . without any regard whatever to sex. She was not given equal treatment and the record establishes that Federal's refusal to consider her for the position was not due simply to her lack of qualification but her sex as well.²²⁷

The Court of Appeals for the Second Circuit found that plaintiff established discrimination where, even though the employer believed Gillin was not qualified, "in deciding not to consider her, he was unquestionably also motivated by the fact that she was a female."²²⁸

In a case involving a female who was among a pool of applicants, *King v. New Hampshire Department of Natural Resources and Economic Development*,²²⁹ the employer displayed a discriminatory animus against women at the interview stage. Although he "told plaintiff she was first or second on the list"²³⁰ he "did not give plaintiff's application fair consideration, if he did, indeed, give it any consideration at all."²³¹ The court held that defendant vio-

highlighted by the similarity of the facts of *Weiner* and the inference drawn by the court from the employer's failure to hire a qualified female and then requesting more applications. See 138 Vt. at 120, 410 A.2d at 999.

226. 479 F.2d 97 (2d Cir. 1973).

227. *Id.* at 101-02.

228. *Id.* at 102.

229. 420 F. Supp. 1317 (D.N.H. 1976), *aff'd* 562 F.2d 80 (1st Cir. 1977).

230. 420 F. Supp. at 1326.

231. *Id.*

lated Title VII by "discrimination which occurred at the consideration stage."²³² The trial court held that where (1) employees are selected from a pool of applicants; (2) plaintiff demonstrates a prima facie case of discriminatory animus; and (3) the first three parts of *McDonnell Douglas* are established, "it may fairly be presumed that the employer has failed to adequately consider the plaintiff's application."²³³ Other courts have also held that failure to consider fairly an applicant because of sex constitutes actionable discrimination.²³⁴

The central focus in disparate treatment cases is "always whether the employer is treating 'some people less favorably than others because of their . . . sex.'"²³⁵ The antidiscrimination statutes typically cover a broad spectrum of practices. Cases which have considered discriminatory hiring processes have viewed *McDonnell Douglas* flexibly and focused on whether the plaintiff was treated differently than a nonprotected person would have been under the circumstances.

One district court, noting the flexibility demanded by *McDonnell Douglas* and its progeny, has observed that what is required to establish a prima facie case is unclear due to the great diversity of factual patterns.

However, drawing on general principles of *McDonnell Doug-*

232. *Id.* at 1327.

233. *Id.* at 1326.

234. See, e.g., *Scarborough v. Arnold*, 117 N.H. 803, 379 A.2d 790 (1977); *Kennedy v. Godwin*, 437 F. Supp. 447 (E.D. Va. 1977). In *Kennedy* the defendant had invited a more qualified male to apply for a job for which the plaintiff was only marginally qualified. In finding sex discrimination the court stated that

[p]laintiff need not prove that she was the most qualified applicant to make out a charge of illegal sex discrimination under Title VII. Plaintiff need only prove that, wholly or partially, because of her gender, her application was not given the full consideration it warranted.

Id. at 450 (citations omitted). Under the *Gillin* line of cases, however, plaintiff's victory may be pyrrhic because Title VII does not require that plaintiff be hired unless the discrimination was the cause of the failure to hire. Title VII has been held to preclude an award of punitive damages or other damages unrelated to back pay. See note 263 *infra* and C. SULLIVAN, *supra* note 21, §§ 9.2-9.3.

235. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (citing *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)).

las and specific rulings in several district court cases, we hold that to establish a prima facie case the plaintiff must establish three elements: (1) that he is a member of a protected class; (2) that he was the object of adverse employment action; and (3) that there was a causal relationship between his membership in the protected class and the adverse action which he suffered.²³⁶

This quotation fairly summarizes the appropriate approach to *McDonnell Douglas*.

The prevailing view under Title VII is that actions short of ultimate and final rejection may constitute actionable discrimination.²³⁷ Actions such as failure to consider seriously a qualified candidate or reopening applications after a highly qualified candidate has already applied constitute such a discriminatory act. Thus the trial court in *Whitingham* did not base its conclusion on an incorrect interpretation of law. Unless the board articulated a legitimate, nondiscriminatory reason for the apparently discriminatory act of reopening applications, the plaintiff has met her burden of proof and should prevail.

The Vermont Supreme Court stated that better qualifications constitute the "most basic legitimate nondiscriminatory consideration for a hiring decision."²³⁸ As a general proposition, this statement is undoubtedly true. In hiring a nonprotected applicant based on superior qualifications the employer does not treat the female less favorably because of her sex. Nevertheless, such a simplistic application of the comparative qualifications concept in all cases would negate F.E.P. protection in many situations. A survey of cases with facts similar to *Whitingham* demonstrates the unwillingness of courts to compare qualifications where to do so would allow the employer to mask a discriminatory act.

In *Kamberos v. GTE Automatic Electric, Inc.*²³⁹ the employer

236. *Leftwich v. United States Steel Corp.*, 470 F. Supp. 758, 764 (W.D. Pa. 1979).

237. See note 215 *supra* for the one pro-applicant exception.

238. 138 Vt. at 20, 410 A.2d at 999.

239. 20 Fair Empl. Prac. Cas. 595 (N.D. Ill. 1978), *aff'd in relevant part*, 603 F.2d 598 (7th Cir. 1979).

refused to consider a qualified female attorney allegedly because it felt that Illinois law prevented a female from working overtime. Since the male ultimately hired, who probably had superior qualifications, was not a competitor at the time Kamberos sought the position, the court refused to compare credentials. As in the *Whitingham* case, the person ultimately hired did not appear for a month or more after the employer refused to hire a highly qualified applicant. Unlike the Vermont Supreme Court, the Court of Appeals for the Seventh Circuit affirmed the trial court in *Kamberos* in its refusal to consider evidence of Johnny-come-lately's qualifications.²⁴⁰

A similar case involving sex discrimination in the hiring process is *Sharp v. Brown and Co. Funeral Home*.²⁴¹ A female applied for a position as a mortician trainee. Defendant informed her that he did not hire trainees although, in fact, he had done so in the past. An apparently more qualified male applied one month after the plaintiff's rejection and was hired within a month of his application. The court held that defendant could not use the male's relative qualifications to rebut the plaintiff's prima facie case when the two sets of qualifications were not initially considered concurrently.²⁴²

The courts have also refused to allow employers to produce information about a female applicant which was obtained after her rejection to justify their failure to hire a woman. For example, in *King* the Court of Appeals for the First Circuit held that the employer "cannot rely on information learned only in July to justify their refusal to hire plaintiff in May."²⁴³ In *Jurinko v. Edwin L.*

240. 603 F.2d at 601-02.

241. 14 Fair Empl. Prac. Cas. 1694 (E.D. Mich. 1977).

242. *Id.* at 1696. The court's brief opinion included a conclusion of law as follows: "6. Even if defendant had carried its burden in proving that Mr. Leathers' higher qualifications were related to performance in question, defendant could not use this fact to rebut plaintiff's prima facie case because defendant admitted it did not consider plaintiff or her qualifications when it hired Mr. Leathers." *Id.* The converse proposition would seem to be a more sound one. Unfortunately, the court did not discuss the above conclusion.

243. *King v. New Hampshire Dep't of Resources and Economic Dev.*, 562 F.2d 80, 83 (1st Cir. 1977).

*Wiegand Co.*²⁴⁴ the court held that the fact the rejected female plaintiffs may not have been physically qualified to perform all jobs in the factory was not relevant. The company had not made this determination while plaintiffs' applications were pending, nor had the company asserted it as a reason for not hiring the plaintiffs.²⁴⁵

Similarly, in *Butta v. Anne Arundel County*,²⁴⁶ the employer attempted to justify rejecting a qualified white male on the basis of his emotional immaturity. The court characterized the testimony as "not satisfactory, since [the employer] at the time had little or no basis for determining that Mr. Butta was immature."²⁴⁷ In each of the above cases, the evidence of comparative qualifications, as in *Whitingham*, was not before the employer when the discriminatory act occurred.

The case upon which the Vermont Supreme Court relied for the appropriateness of considering comparative qualifications, *Davis v. Weidner*,²⁴⁸ is not analogous to *Whitingham*. That case involved a claim by a female professor that she should not have been terminated as a result of school budget cuts. The defendant, however, knew and considered the qualifications of all the junior professors at the time of the layoffs. The evidence, therefore, is highly probative of a legitimate nondiscriminatory reason for terminating the plaintiff. The case certainly does not legitimize the consideration of qualifications of a candidate unknown to the employer until after a discriminatory act occurred. The trial court in *Whitingham* considered the evidence but, in light of the entire record, held that the board's explanation was not credible. The trial court's holding was well founded and based on a proper interpretation of F.E.P. law.

If only final elimination constitutes actionable discrimination

244. 477 F.2d 1038 (3rd Cir. 1973), *vacated and remanded*, 414 U.S. 970 (1973).

245. 477 F.2d at 1044. The case was reversed and remanded in light of *McDonnell Douglas*, but the remand should not affect the court's reasoning cited in the text.

246. 473 F. Supp. 83 (D. Md. 1979).

247. *Id.* at 88.

248. 596 F.2d 726 (7th Cir. 1979).

and the trial court *must* consider comparative qualifications as "the most basic legitimate nondiscriminatory consideration for a hiring decision,"²⁴⁹ the employer will be able to look until he finds a more qualified nonprotected person although the protected person was highly qualified. The employer must merely hold the woman's application in abeyance while he locates an arguably more qualified male and not eliminate her from consideration until the male is hired to be protected.

The supreme court's statement requires treating comparative qualifications as the most probative factor in a decision, even where the plaintiff would have been hired but for the discrimination. How then can the employee carry her burden of demonstrating that the reason for her ultimate rejection was pretextual? The court has in effect insulated probable acts of discrimination the legislature apparently acted to protect. The court disregarded the probable effects of its decision and provided a road map for employers searching for a liability-free discriminatory course to travel.

Perhaps the Vermont Supreme Court's difficulty in applying *McDonnell Douglas* was due at least in part to the supreme court's confusing, sometimes synonymous, use of such terms as "articulate," "prove," "explain," or "show" to describe the defendant's burden of producing a legitimate, nondiscriminatory reason to rebut plaintiff's *prima facie* case.²⁵⁰ As of the time *Whitingham* was decided, it was unclear as to what satisfied this burden of the defendant.²⁵¹ Only with the recent Supreme Court decision, *Texas*

249. 138 Vt. 15, 20, 410 A.2d 996, 999 (1979).

250. See *Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978); *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577-78 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 804 (1973).

251. C. SULLIVAN, *supra* note 21, § 1.6 at 8-9 (Supp. 1980). At least two jurisdictions had required that defendant show the legitimate reason exists factually by a preponderance of the evidence. *Vaughn v. Westinghouse Corp.*, 620 F.2d 655 (8th Cir. 1980); *Davis v. Jackson County Port Auth.*, 611 F.2d 577 (5th Cir. 1980); *Burdine v. Texas Dep't of Community Affairs*, 608 F.2d 563 (1979), *rev'd*, 101 S. Ct. 1089 (1981). One court held that this burden was inconsistent with *Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978); *Gaballah v. Johnson*, 629 F.2d 1191 (7th Cir. 1980). An intermediate position is that taken in the First Circuit in *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979). The Supreme Court adopted a middle ground position, requiring a "clear and reasonably specific" expla-

*Department of Community Affairs v. Burdine*²⁵² has it become absolutely certain that "the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions."²⁵³ "[T]hat is, to satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."²⁵⁴

The trial court in *Whitingham*, however, did not require the defendant to prove that the proffered reason for the rejection was the actual reason. The court held that "absent a showing by the Defendants of any other credible justification for reopening the application process, the court is persuaded that the Board discriminated against Herbst."²⁵⁵ The superior court in effect held that the reason must have been known to exist at the time the discriminatory action occurred for the defendant to meet his burden. This burden is less than proving the factual existence of the legitimate reason. The burden of persuasion does not shift, but the burden requires at least that a plausible reason be advanced. This view is certainly consistent with the cases dealing with post-hoc reasons for the adverse action.

The use by the Supreme Court of a "legitimate, nondiscriminatory" reason suggests that, unless the former adjective is redundant, the court should not automatically accept any reason offered by the employer.²⁵⁶ The language in *Furnco* requiring "proof of a justification which is *reasonably* related to the achievement of some legitimate goal," also suggests that scrutiny of the defendant's proffered reason should be made.²⁵⁷ Unless the trial court is allowed to evaluate the legitimacy of the reason articulated by the employer, the assistance given to plaintiff in *McDonnell Douglas*

nation. *Texas Dep't of Community Affairs v. Burdine*, 101 S. Ct. 1089 (1981). See text accompanying note 252 *infra*.

252. 101 S. Ct. 1089 (1981).

253. *Id.* at 1097.

254. *Id.* at 1096.

255. Findings and Conclusions, *supra* note 2, at 18.

256. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

257. 438 U.S. 567, 578 (1978) (emphasis added).

to establish the illusive discriminatory motive will be frustrated.²⁵⁸

Clearly, the ultimate question in an individual plaintiff action is whether the adverse treatment is based upon a discriminatory motive. A trial court may hold that the defendant failed to articulate a *legitimate*, nondiscriminatory reason or that the reason advanced was pretextual; the phraseology would be immaterial where the court also concludes that there was discriminatory motive and the findings adequately support the conclusion.²⁵⁹

The confusion generated by the Supreme Court's treatment should not obscure practical realities. In a bench trial, regardless of defendant's burden, the defendant must present sufficiently persuasive evidence so that the plaintiff is not entitled to a verdict by a preponderance of the evidence.²⁶⁰ The Vermont Supreme Court's treatment of the *McDonnell Douglas* procedure, which was intended to be "merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination,"²⁶¹ makes the tail wag, and even obscure, the dog.

It is conceivable the Vermont Supreme Court was worried that the failure to consider evidence of comparative qualifications constitutes a legitimate nondiscriminatory reason would result in foisting unsatisfactory employees on the employer.²⁶² If so, that concern was inappropriate in *Whitingham* since the employer told the applicant that she was highly qualified and a close second to

258. See text accompanying notes 216-34 *supra*.

259. This view, based on the cases through *Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978), is confirmed by the most recent Supreme Court case, *Texas Dep't of Community Affairs v. Burdine*, 101 S. Ct. 1089 (1981).

This burden [pretextuality] now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Id. at 1095. The Vermont Supreme Court reversed the former finding because the trial court did not make the latter finding. See text accompanying notes 114, 155 *supra*.

260. See *Mendez*, *supra* note 206, at 1154 n.127.

261. *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978).

262. See 138 Vt. at 20, 410 A.2d at 999.

the original male choice.²⁶³ In cases unlike *Whittingham* where the position would not have been offered to the plaintiff even without any discrimination, the applicant has suffered no loss as a result of the unlawful conduct. The courts have, therefore, not awarded back pay or injunctive relief.²⁶⁴ Essentially the courts have balanced the antidiscrimination policy of Title VII²⁶⁵ and the deter-

263. See text accompanying note 60 *supra*.

264. C. SULLIVAN, *supra* note 21, § 9.1 at 522. A related question of who bears the burden of demonstrating whether the plaintiff would or would not have received the position but for the discrimination, once an un rebutted prima facie case has been proven, is not absolutely clear. What seems to be the most thorough discussion is the treatment by the District of Columbia circuit court in *Day v. Mathews*, 530 F.2d 1083 (D.C. Cir. 1976):

The precise question on remand is whether Day would have gotten the promotion had he not been the victim of discrimination. For the court's guidance, we hold that the Secretary, as employer, bears the burden of proof on this issue . . . by clear and convincing evidence that Day's qualifications were such that he would not in any event have been selected.

We reach this holding on the strength of numerous cases in the private sector which have dealt with the issue. They established unequivocally that a *prima facie* showing of discrimination shifts the burden to the employer to prove that the employee (or applicant) would not have gotten the post in any event, even absent discrimination. . . . And those courts which have given the most careful consideration to the burden of proof questions have held that the employee must prevail unless the employer proves its case by "clear and convincing evidence."

The reason for this is straightforward. "Unquestionably, it is now impossible for an individual discriminatee to recreate the past with exactitude." Such a showing is impossible precisely because of the employer's unlawful action, it is only equitable that any resulting uncertainty be resolved against the party whose action gave rise to the problem.

Id. at 1085 (quoting *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1379 (5th Cir. 1974)) (citations omitted). See also *Marotta v. Usurey*, 629 F.2d 615, 618-19 (9th Cir. 1980); *Page v. Bolger*, 21 Fair Empl. Prac. Cas. 780 (4th Cir. 1979), *rev'd en banc*, 25 Fair Empl. Prac. Cas. 593 (4th Cir. 1981). The employer should be allowed to demonstrate that the applicant would not have been hired even in the absence of discrimination so that the applicant does not receive a windfall at the expense of the employer.

Day is consistent with the Supreme Court's treatment of "dual motive" cases in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977) (failure to renew school teacher's contract attacked as violation of protected speech). The Court ruled that the school board must be given an opportunity to establish that its decision not to renew would have been the same if the protected activity had not occurred. *Id.* at 287. The burden shifts to the employer if the employee demonstrates the conduct was a substantial or motivating factor.

265. This balance is reflected in several of the cases discussed earlier to demonstrate that acts prior to ultimate rejection constitute violation of Title VII and other F.E.P. laws. See notes 226-34 and accompanying text *supra*.

rent effect of make-whole remedies on discriminatory practices on the one hand, against the need to insure employers' legitimate need for qualified employees on the other. Only relief necessary to make the discriminatee whole is granted; the employer is not required to hire and compensate those it would not have hired absent the discrimination.²⁶⁶ Thus to allow the trial court to find that the proffered reason, comparative qualifications, was not convincing because the competing qualifications were not known at the time the applicant was rejected does not skew the delicate balance in favor of the applicant.

CONCLUSION

The Vermont Fair Employment Practices Act on its face covers any act of sex discrimination.²⁶⁷ The original broad language of section 495 and the subsequent desire to strengthen the section and make it conform to Title VII both suggest that the legislature intended broad and effective protection against sex discrimination. In *Whitingham*, the Vermont Supreme Court ignored the broad language of section 495²⁶⁸ and the legislative history of the provision, drastically reducing the potential coverage of the act.

The decision puts Vermont out of the mainstream of F.E.P.

266. The extremely broad relief available under the Vermont statute makes application of the but-for rationale of *Day v. Matthews*, 530 F.2d 1083 (D.C. Cir. 1976), based in part on the make-whole nature of the relief under Title VII, problematical. The Vermont F.E.P. legislation, in addition to providing the make-whole remedies of back-pay benefits and injunctive relief granted by Title VII, incorporates the relief provisions of the Consumer Fraud statute, VT. STAT. ANN. tit. 9, §§ 2458-2461 (1970 & Supp. 1980). VT. STAT. ANN. tit. 21, § 495b (1978). Thus, at least conceivably, the Vermont courts can grant triple damages and penalties, relief far beyond the scope of Title VII. 42 U.S.C. § 2000e-5 (1976). See SCHLEI & GROSSMAN, *supra* note 12, at 1227-76; C. SULLIVAN, *supra* note 21, at 513-84. The leading Title VII relief case is *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The 1975 amendments to the Vermont F.E.P. were intended, however, to bring the Vermont law more into conformity with Title VII, so the but-for approach certainly has appeal in framing remedies under the Vermont statute. The unusually broad nature of the relief sections under section 495 also suggests that the Vermont Supreme Court might want to take a reasoned approach such as in *Day* in defining the appropriate conditions for granting the harsher forms of relief such as civil penalties and triple damages. The statute should be amended to specify under what, if any, conditions such harsh relief is appropriate.

267. VT. STAT. ANN. tit. 21, § 495 (1978).

268. See notes 13-21 and accompanying text *supra*.

law despite the legislative intent to conform section 495 to the federal law and the explicit recognition by the Vermont Supreme Court of the propriety of looking to the federal case law to determine the proper legal pattern. The holding that there can be no rejection or actionable discrimination prior to ultimate exclusion and the requirement that the hired person's qualifications be treated as the most probative evidence are both virtually without precedent. These twin misconceptions have seemingly created a great loophole for employers who wish to avoid liability for discrimination.

The treatment of statistics also greatly reduces the effectiveness of the act. The F.E.P. plaintiff in Vermont is caught between the frying pan and the fire. The large incidence of small employers makes it very difficult or impossible to use disparate impact and class action or pattern and practice theories of discrimination. The Vermont Supreme Court has suggested an inappropriately high standard for individual actions where (1) statistics are typically only one of several items of proof in the plaintiff's case; (2) statistics do not constitute sufficient evidence of intent to establish a prima facie case; and (3) the burden of proof does not shift to the defendant, as under other theories of discrimination, once a statistical case has been proven against him.²⁶⁹ The cursory and ill-informed treatment of statistical evidence unfortunately does far more harm than good to the cause of informed use of statistical evidence in Vermont, may preclude bringing an action except in flagrant cases, and undermines the legislative attempt at broad coverage.

Finally, the supreme court's decision seemingly disregarded sound appellate procedure and overturned a careful lower court decision. The court prescribed bright-line rules for situations requiring a fact-heavy determination of whether the plaintiff was treated differently and whether the plaintiff would have been hired but for the discriminatory act.

Plaintiffs' counsel would be well-advised to pursue their cli-

269. See note 127 *supra*.

ents' cases involving similar failure-to-hire issues in the federal courts when the employer meets the Title VII fifteen-employee minimum unless the Vermont statute is amended to obviate the result in *Whitingham* or the Vermont Supreme Court greatly limits its decision.

