06-4996

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANK RICCI, *et al.*,

Plaintiffs-Appellants,

JOHN DESTAFANO, *et al.*,

Defendants-Appellees,

On Appeal from the United States District Court
for the District of Connecticut

MOTION TO FILE AMICUS BRIEF AND AMICUS BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND FOR REVERSAL OF THE JUDGMENT

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Corporate Disclosure Statement

The Center for Individual Rights is a non-profit corporation formed pursuant to Section 501(c)(3) of the Internal Revenue Code. It has no parent corporations and no publicly-held corporation owns 10% or more of its stoack.

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Motion

Amicus Curiae Center for Individual Rights hereby moves pursuant to Rule 29(b), Fed. R. App. P., for leave to file the accompanying amicus brief.

The Center for Individual Rights is a public interest law firm based in Washington, D.C. It has litigated many discrimination lawsuits, including several in the Supreme Court of the United States. It has a particular interest in, and has brought numerous cases concerning, what it views as unconstitutional racial classifications by government. *E.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003). This case involves important issues concerning the use of race in employment decisions under both Title VII and the Equal Protection Clause of the Fourteenth Amendment, and the appropriate analysis under each provision.

Because plaintiffs-appellants' brief does not fully address one issue that CIR believes should affect this Court's analysis of the relevant issues, it asks that its motion to file this brief be granted. Specifically, as discussed in greater length below, it would appear that the court below erroneously tried to squeeze this case into the *McDonnell Douglas* burden shifting paradigm, and, accordingly, failed properly to weigh direct evidence of discriminatory intent in granting summary

judgment to defendants.

Argument

This case involves a failure to hire under Section 703(a)(1) of Title VII. 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin."). Plaintiffs claim that they were on a hiring list, and would have been hired to be firefighters for the City of New Haven were it not for the fact that they were white. If this is true, the fact that the city did not hire anyone at all for these positions would be irrelevant. Refusing to hire someone because of that person's race falls within the plain and unambiguous meaning of a prohibited employment practice under Section 703(a)(1). *E.g.*, *Chappell-Johnson v. Powell*, 440 F.3d 484, 488 (D.C. Cir. 2006) (failure to hire cases "typically apply the original *McDonnell Douglas* formulation, requiring plaintiffs to show that the position remained open and that the employer continued to seek applicants from persons of complainant's qualifications. It bears noting, however, that even in failure-to-hire cases we impose no requirement that the employer filled the sought-after position with a person outside the plaintiff's protected class.").

This fact distinguishes this case from *Hayden v. County of Nassau*, 180 F.3d 42 (2d Cir. 1999). In that case, the County's concern over the disparate impact of an exam manifested itself long before there was any specific individual on any sort of a list that could (if certified) become a hiring list. The County there simply chose a test that it believed would minimize adverse impact and then chose a configuration that optimized the combined goals of high job relatedness and minimal disparate impact. No particular individual was on any hiring list that the County of Nassau refused to certify. In short, and in contrast to this case, no "adverse employment action" took place in *Hayden*. *Compare* Opinion ("Op.") 19 (defendants do not dispute that there was "an adverse employment action").

The court below analyzed the evidence under the burden-shifting structure of *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973), in which plaintiffs must first prove a *prima facie* case of discrimination, and, if they do, the burden then shifts to the defendants to identify a non-discriminatory reason for their employment decision. The court below did not mention the separate burden-shifting paradigm set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) for mixed-motive cases. We believe this failure was error and that, at the very least, this Court should remand this case for analysis under that paradigm.

In a mixed-motive case, the plaintiff must establish that a prohibited discriminatory factor played a "motivating part" in a challenged employment decision. If he does, then a defendant can avoid damages for certain kinds of liability by proving, by a preponderance of the evidence, that it would have made the same decision even in the absence of the improper factor being considered. *Raskin v. Wyatt Co.*, 125 F.3d 55, 60 (2d Cir. 1997); 42 U.S.C. § 2000e-2(m) ("an unlawful employment practice is established when the complaining party demonstrate that race . . . was a motivating factor for any employment practice, even though other factors also motivated the practice"); 42 U.S.C. § 2000e-5(g)(2)(B) (where a violation of 2000e-2(m) is shown and employer demonstrates that it would have made the same decision in the absence of the impermissible motivating factor, plaintiff may be entitled to certain kinds of relief, including attorney's fees and costs, but is not entitled to damages or an order of reinstatement).[1]

To be sure, plaintiffs' initial burden in a *Price Waterhouse* mixed motives

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[1] *Price Waterhouse* held that a defendant that met its "same decision" burden would be absolved entirely of liability under Title VII. As the cited provisions of Title VII demonstrate, that part of *Price Waterhouse* is no longer applicable to claims brought under Title VII involving employment practices taking place after the enactment of the Civil Rights Act of 1991.

case is heavier than the initial burden under *McDonnell Douglas*. *Raskin*, 125 F.3d at 60. "In order to warrant a mixed-motive burden shift, the plaintiff must be able to produce a `smoking gun' or at least a `thick cloud of smoke' to support his allegations of discriminatory treatment." *Id.* at 61. The reason for this heavier burden is fairly straightforward. Meeting the initial *McDonnell Douglas* burden only demonstrates a circumstantial case of discrimination; meeting the mixed-motives burden requires direct evidence of discrimination.

Here, the court below considered only the *McDonnell Douglas* paradigm, and concluded that the plaintiffs met their initial burden. Op. 21. Specifically, it held as follows:

> Plaintiffs' evidence -- and defendants' own arguments -- show that the City's reasons for advocating non-certification were related to the racial distribution of the results. As the transcripts show, a number of witnesses at the CSB hearings, including Kimber, mentioned "diversity" as a compelling goal of the promotional process. Ude, Marcano, and Burgett specifically urged the CSB not to certify the results because, given the number of vacancies at that time, no African-Americans would be eligible for promotion to either Lieutenant or Captain, and no Latinos would be eligible for promotion to Captain. They believed this to be an undesirable outcome that could subject the City to Title VII litigation by minority firefighters, and the City's leadership to political consequences. Had the tests not yielded what

> defendants perceived as racially disparate results, defendants would not have advocated rejecting the tests, and plaintiffs would have had an opportunity to be promoted.

Id. The court below concluded that this evidence was sufficient to meet the fourth prong of the *McDonnell Douglas* prima facie test, *viz.*, "circumstances giving rise to an inference of discrimination on the basis of membership in the protected class." Op. 19.

But this is not really "circumstantial" evidence at all. It is direct evidence that city officials were dissatisfied with the fact that the top candidates from the test were not African American (and, more specifically, were white). Under these circumstances, there is no need at all to go through the *McDonnell Douglas* analysis. *Trans World Airlines v. Thurston*, 469 U.S. 111, 121-22 (1985); *Fields v. Clark University*, 817 F.2d 931, 935 (1st Cir. 1987) and cases cited therein. On a summary judgment motion by defendants, with all evidentiary disputes, and all inferences from the undisputed facts, favoring plaintiffs, a reasonable trier of fact could conclude that city officials' preoccupation with the race of those successful on the test, created a "thick cloud of smoke" sufficient to meet plaintiffs' initial mixed-motive burden.

The summary judgment posture of the case is significant. Even if a trier of fact at trial might conclude that, weighing all the evidence, plaintiffs cannot meet their burden of showing that race was a motivating factor, that does not mean that *defendants* have met their summary judgment burden of demonstrating the absence of any genuine issue of material fact with respect to that question or demonstrating that plaintiffs had no evidence to meet their burden. *Giannullo v. City of New York*, 322 F.3d 139, 140-41 (2d Cir. 2003); *BBS Norwalk One v. Raccolta, Inc.*, 117 F.3d 674, 677 (2d Cir. 1997) ("To obtain summary judgment on collateral estoppel grounds, the defendants must make a showing so strong that no fair-minded jury could fail to find that the arbitrator necessarily denied the claim for the reason they assert . . . . This is a heavy burden, and it cannot be met with equivocal evidence.").

To be sure, defendants' attorneys and the court below also attributed another motive to defendants, *viz.*, the desire to avoid Title VII liability. But given the evidence presented and cited, and particularly the weak evidence that there was anyone actually ready to sue, it is not the only possible motive for defendants' conduct. Thus, this is a classic mixed-motives case, one in which the trier of fact must determine whether or not defendants can meet their burden under Section

706(g)(2)(B), *i.e.*, whether they would have made the same decision even in the absence of any consideration of the impermissible factor (although, again, even meeting that burden does not absolve defendants of all liability).[2]

Conclusion

For the foregoing reasons, amicus believes that this Court should reverse the judgment of the Court below and remand for further proceedings.

Respectfully submitted,

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[2] Amicus CIR also points out that this case may present the issue of whether the discriminatory animus of some city officials is attributable to the City as a whole or the decision-maker, the New Haven Civil Service Board. The Supreme Court recently granted a petition for a writ of certiorari to answer a similar question. *BCI Coca Cola Bottling Co. of Los Angeles v. EEOC*, 127 S. Ct. 852 (2007). Of course, statements made in a public forum concerning the race of the top scorers on the civil service exam might be evidence of the Board's own discriminatory animus. *United States v. City of Birmingham*, 727 F.2d 560, 564 (6th Cir. 1984) (city that knowingly appeased those with discriminatory views acted at least in part for racially discriminatory reasons).

Certificate Of Service And Filing

I hereby certify that I served the foregoing amicus brief by placing a copy in two separate envelopes, and depositing each envelope in a U.S. Post Office box on January 30, 2007 addressed as follows:

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Pursuant to Rules 25(a)(2)(B)(ii) and 25(d) of the Federal Rules of Appellate Procedure, and Local Rule 31, I also certify that, on January 30, 2007, I have dispatched ten copies of the amicus brief to the Clerk of the Court by a commercial carrier for delivery within three calendar days.

Michael E. Rosman