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Representing Workers in Harassment & Retaliation Claims: U.S. Supreme Court Takes on Retaliation Actions

by

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A. The Background: Recent Retaliation Decisions of the Supreme Court

1. *Clark County School District* and Protected Activity

Clark County School District v. Breeden, __ **U.S.** __, 121 S. Ct. 1508, 85 FEP Cases 730 (2001) (*per curiam*), rejected the plaintiff's claim of retaliation for having complained about a single remark made by a co-worker with respect to a sexually-related statement made by an applicant she and the other team members were reviewing, and her supervisor's chuckle over the remark. The Court held that, even assuming *arguendo* the correctness of the Ninth Circuit's holding that a plaintiff is protected by Title VII's retaliation clause if she reasonably believes the conduct she complained about was a violation of Title VII, no one could reasonably believe that the conduct here was in violation of Title VII:

> No reasonable person could have believed that the single incident recounted above violated Title VII's standard. The ordinary terms and conditions of respondent's job required her to review the sexually explicit statement in the course of screening job applicants. Her co-workers who participated in the hiring process were subject to the same requirement, and indeed, in the District Court respondent "conceded that it did not bother or upset her" to read the statement in the file. . . . Her supervisor's comment, made at a meeting to review the application, that he did not know what the statement meant; her co-worker's responding comment; and the chuckling of both are at worst an "isolated inciden[t]" that cannot remotely be considered "extremely serious," as our cases require . . . .

The Court also held that there was no evidence of a causal link between the defendant's learning of the plaintiff's EEOC charge and her transfer four months later. "Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their

proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality." The Court also stated:

> The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be "very close," O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (C.A.10 2001). See e.g., Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (C.A.10 1997) (3-month period insufficient); Hughes v. Derwinski, 967 F.2d 1168, 1174-1175 (C.A.7 1992) (4-month period insufficient). Action taken (as here) 20 months later suggests, by itself, no causality at all.

2. ***Burlington Northern* and Actionable Conduct**

Burlington Northern and Santa Fe Ry. Co. v. White, __ **U.S.** __, 126 S. Ct. 2405, 165 L. Ed. 2d 345, 98 FEP Cases 385 (2006), affirmed the judgment on a jury verdict for the Title VII retaliation plaintiff. The Court held that the language and purpose of § 704(a) of the Act required that it reach employer conduct not reached by § 703(a). It stated that "purpose reinforces what language already indicates, namely, that the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." *Id.* at 2412–13. The Court summarized its holding:

> We conclude that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

Id. at 2409. The Court rejected the "ultimate employment decision" line of cases, stating:

> In any event, as we have explained, differences in the purpose of the two provisions remove any perceived "anomaly," for they justify this difference of interpretation. . . . Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." . . . Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends.
>
> For these reasons, we conclude that Title VII's substantive provision and its anti-retaliation provision are not coterminous. The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. We therefore reject the standards applied in the Courts of Appeals that have treated the anti-retaliation provision as forbidding the same conduct prohibited by the anti-discrimination

provision and that have limited actionable retaliation to so-called "ultimate employment decisions."

Id. at 2414. The Court's holding is:

> The anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm. As we have explained, the Courts of Appeals have used differing language to describe the level of seriousness to which this harm must rise before it becomes actionable retaliation. We agree with the formulation set forth by the Seventh and the District of Columbia Circuits. In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"

Id. at 2414–15. The Court made clear that materiality was an important criterion:

> We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth "a general civility code for the American workplace." . . . An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. See 1 B. LINDEMANN & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 669 (3d ed.1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and "'snubbing' by supervisors and co-workers" are not actionable under § 704(a)). The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. . . . It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. . . . And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. See 2 EEOC 1998 MANUAL § 8, p. 8–13.

Id. at 2415 (emphasis in original; citations omitted). The Court expanded on the application of this standard to particular cases, making clear that there are few, if any, bright-line tests:

> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." . . . A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. . . . A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. See 2 EEOC 1998 MANUAL § 8, p. 8-14. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an "act that would be immaterial in some situations is material in

others." . . .

Id. at 1215–16 (citations omitted). Here, plaintiff was assigned to a more arduous position, and was suspended without pay for 37 days, although she ultimately received back pay for this period. The Court held that each was actionable:

> First, Burlington argues that a reassignment of duties cannot constitute retaliatory discrimination where, as here, both the former and present duties fall within the same job description. . . . We do not see why that is so. Almost every job category involves some responsibilities and duties that are less desirable than others. Common sense suggests that one good way to discourage an employee such as White from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable. That is presumably why the EEOC has consistently found "[r]etaliatory work assignments" to be a classic and "widely recognized" example of "forbidden retaliation." 2 EEOC 1991 Manual § 614.7, pp. 614-31 to 614-32; see also 1972 Reference Manual § 495.2 (noting Commission decision involving an employer's ordering an employee "to do an unpleasant work assignment in retaliation" for filing racial discrimination complaint); EEOC Dec. No. 74-77, 1974 WL 3847, *4 (Jan. 18, 1974) ("Employers have been enjoined" under Title VII "from imposing unpleasant work assignments upon an employee for filing charges").
>
> To be sure, reassignment of job duties is not automatically actionable. Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and "should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" . . . But here, the jury had before it considerable evidence that the track labor duties were "by all accounts more arduous and dirtier"; that the "forklift operator position required more qualifications, which is an indication of prestige"; and that "the forklift operator position was objectively considered a better job and the male employees resented White for occupying it." . . . Based on this record, a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee.

Id. at 2416–17 (citation omitted). Turning to the suspension, the Court stated:

> Second, Burlington argues that the 37-day suspension without pay lacked statutory significance because Burlington ultimately reinstated White with backpay. Burlington says that "it defies reason to believe that Congress would have considered a rescinded investigatory suspension with full back pay" to be unlawful, particularly because Title VII, throughout much of its history, provided no relief in an equitable action for victims in White's position. . . .
>
> We do not find Burlington's last mentioned reference to the nature of Title VII's remedies convincing. After all, throughout its history, Title VII has provided for injunctions to "bar like discrimination in the future" . . . an important form of relief. . . . And we have no reason to believe that a court could not have issued an injunction where an employer suspended an employee for retaliatory purposes, even if that employer later

provided backpay. In any event, Congress amended Title VII in 1991 to permit victims of intentional discrimination to recover compensatory (as White received here) and punitive damages, concluding that the additional remedies were necessary to "'help make victims whole.'" . . . We would undermine the significance of that congressional judgment were we to conclude that employers could avoid liability in these circumstances.

Neither do we find convincing any claim of insufficient evidence. White did receive backpay. But White and her family had to live for 37 days without income. They did not know during that time whether or when White could return to work. Many reasonable employees would find a month without a paycheck to be a serious hardship. And White described to the jury the physical and emotional hardship that 37 days of having "no income, no money" in fact caused. 1 Tr. 154 ("That was the worst Christmas I had out of my life. No income, no money, and that made all of us feel bad. . . . I got very depressed"). Indeed, she obtained medical treatment for her emotional distress. A reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former. That is to say, an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay. . . . Thus, the jury's conclusion that the 37-day suspension without pay was materially adverse was a reasonable one.

Id. at 2417–18 (citations omitted). The Court held that the eventual recovery of back pay for a 37-day unpaid suspension did not mean it was not a material injury to plaintiff. In the course of its discussion, the Court stated in *dictum*: "And we have no reason to believe that a court could not have issued an injunction where an employer suspended an employee for retaliatory purposes, even if that employer later provided backpay."

- Plaintiffs will use this statement in seeking preliminary injunctions in some EEO and retaliation cases, to rebut the common perception among lower-court judges that the availability of back pay years later makes such relief unnecessary.

Justice Alito concurred in the judgment. *Id.* at 2418–22.

3. ***CBOCS West* and § 1981**

CBOCS West, Inc. v. Humphries, __ **U.S.** __, 128 S. Ct. 1951, 170 L. Ed. 2d 864, 103 FEP Cases 481 (2008), held that § 1981 applies to retaliation claims in employment discrimination cases. The court expressly rejected defendant's argument based on the Civil Rights Act of 1991:

Second, CBOCS argues that Congress, in 1991 when it reenacted § 1981 with amendments, intended the reenacted statute not to cover retaliation. CBOCS rests this conclusion primarily upon the fact that Congress did not include an explicit antiretaliation provision or the word "retaliation" in the new statutory language-although Congress has included explicit antiretaliation language in other civil rights statutes. See, e.g., National Labor Relations Act, 29 U.S.C. § 158(a)(4); Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a); Age

> Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12203(a)-(b); Family and Medical Leave Act of 1993, 29 U.S.C. § 2615.
>
> We believe, however, that the circumstances to which CBOCS points find a far more plausible explanation in the fact that, given *Sullivan* and the new statutory language nullifying *Patterson*, there was no need for Congress to include explicit language about retaliation. After all, the 1991 amendments themselves make clear that Congress intended to supersede the result in *Patterson* and embrace pre- *Patterson* law. And pre- *Patterson* law included *Sullivan*. See Part II, *supra*. Nothing in the statute's text or in the surrounding circumstances suggests any congressional effort to supersede *Sullivan* or the interpretation that courts have subsequently given that case. To the contrary, the amendments' history indicates that Congress intended to restore that interpretation. See, *e.g.*, H.R.Rep. No. 102-40, at 92 (noting that § 1981(b) in the "context of employment discrimination . . . would include . . . claims of . . . retaliation").

Id. at 1959-60. The Court also rejected defendant's argument as to the scope of the right to be free from retaliation:

> We agree with CBOCS that the statute's language does not expressly refer to the claim of an individual (black or white) who suffers retaliation because he has tried to help a different individual, suffering direct racial discrimination, secure his § 1981 rights. But that fact alone is not sufficient to carry the day. After all, this Court has long held that the statutory text of § 1981's sister statute, § 1982, provides protection from retaliation for reasons related to the *enforcement* of the express statutory right.

Id. at 1958 (emphasis in original). Justice Thomas, joined by Justice Scalia, dissented. *Id.* at 1961-70.

4. ***Gomez-Perez* and the Federal-Sector ADEA**

Gomez-Perez v. Potter, __ **U.S.** __, 128 S. Ct. 1931, 170 L. Ed. 2d 887, 103 FEP Cases 494 (2008) (Alito, J.), stated its holding succinctly: "The question before us is whether a federal employee who is a victim of retaliation due to the filing of a complaint of age discrimination may assert a claim under the federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA), as added, 88 Stat. 74, and amended, 29 U.S.C. § 633a(a) (2000 ed., Supp. V). We hold that such a claim is authorized." The Chief Justice dissented, and as joined by Justices Scalia and Thomas except as to Part I of the dissent. *Id.* at 1943-1951. Justice Thomas, joined by Justice Scalia, dissented. *Id.* at 1951.

5. ***Engquist* and the "Class of One"**

Engquist v. Oregon Dept. of Agriculture, __ **U.S.** __, 128 S. Ct. 2146, 2148-49, 170 L. Ed. 2d 975 (2008) (Roberts, J.), stated the holding of the Court succinctly: The question in this case is whether a public employee can state a claim under the Equal Protection Clause by alleging that she was arbitrarily treated differently from other similarly situated employees, with no assertion that the different treatment was based on the employee's membership in any particular class. We hold that such a "class-of-one" theory of equal protection has no place in

the public employment context." The Court distinguished public actions affecting the general public, in which everyone is expected to be treated the same, from actions affecting single employees, in which there is an expectation of individual treatment. *Id.* at 2151-54. It explained at 2155: "State employers cannot, of course, take personnel actions that would independently violate the Constitution. . . . But recognition of a class-of-one theory of equal protection in the public employment context—that is, a claim that the State treated an employee differently from others for a bad reason, or for no reason at all—is simply contrary to the concept of at-will employment. The Constitution does not require repudiating that familiar doctrine." (Citation omitted.) The Court continued:

> In concluding that the class-of-one theory of equal protection has no application in the public employment context—and that is all we decide—we are guided, as in the past, by the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." . . . If, as Engquist suggests, plaintiffs need not claim discrimination on the basis of membership in some class or group, but rather may argue only that they were treated by their employers worse than other employees similarly situated, any personnel action in which a wronged employee can conjure up a claim of differential treatment will suddenly become the basis for a federal constitutional claim. Indeed, an allegation of arbitrary differential treatment could be made in nearly every instance of an assertedly wrongful employment action-not only hiring and firing decisions, but any personnel action, such as promotion, salary, or work assignments—on the theory that other employees were not treated wrongfully. . . . On Engquist's view, every one of these employment decisions by a government employer would become the basis for an equal protection complaint.

Id. at 2156 (citations omitted). The Court recognized that it would be difficult for employees to prevail, but emphasized the practical difficulties of requiring public employers to justify each of their decisions, and held that acceptance of the class-of-one theory in an employment context would constitutionalize employee grievances over every aspect of the employment relationship. *Id.* at 2157. Justice Stevens dissented, joined by Justices Ginsburg and Souter. *Id.* at 2157-61.

B. <u>The Foreground: Upcoming Retaliation Decision</u>

Crawford v. Metropolitan Government of Nashville and Davidson County, No. (06-1595). Plaintiff and two other women were fired after they had responded to an internal investigation by stating that they had been harassed. No action was taken against the asserted harasser, who had been the target of the investigation. No EEOC charge had previously been filed by anyone, and plaintiff had not previously decided to file one. The lower court held that plaintiff's conduct was not protected because she had not participated in a charge-related investigation or engaged in active and consistent opposition to unlawful conduct. The Sixth Circuit affirmed in an unreported decision. The question presented is:

> Whether, or to what extent, Title VII's anti-retaliation provision, Section 704(a) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a), protects an employee from being dismissed because she cooperated with her employer's internal investigation of sexual harassment.

Oral argument is set for October 8, 2008.

Predicted decision: Since the *Faragher* and *Ellerth* decisions insist, as a practical matter, that employers have adequate systems in place to remedy internal complaints of harassment, and that they have adequate systems for preventing harassment from occurring, participants in internal investigations are critical to the process and are protected by both the participation and opposition clauses.

Probability of predicted decision occurring: 70% chance of success on either prong, considered separately; 50% chance of success on both prongs, 100% chance of winning on at least one prong; chance of losing on both prongs too low to quantify.

C. Other Recent Cases Affecting Retaliation Cases

1. *Sprint v. Mendelsohn* and Other Instances of Unlawful Conduct

Sprint/United Management Co. v. Mendelsohn, __ **U.S.** __, 128 S. Ct. 1140, 102 FEP Cases 1057 (2008), reversed and remanded the decision of the Tenth Circuit, and held that the lower court erred in concluding that a two-line minute entry of the district court meant that the lower court had adopted a *per se* rule barring testimony of other instances of discrimination, and in conducting its own balancing test as to such testimony instead of remanding the case to the district court. The unanimous Court stated its views on the evidentiary issue succinctly:

> The question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. Applying Rule 403 to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry. Because Rules 401 and 403 do not make such evidence per se admissible or per se inadmissible, and because the inquiry required by those Rules is within the province of the District Court in the first instance, we vacate the judgment of the Court of Appeals and remand the case with instructions to have the District Court clarify the basis for its evidentiary ruling under the applicable Rules.

Id. at 1147.

2. *Ash v. Tyson Foods* and Barring Knee-Jerk Rules

Ash v. Tyson Foods, Inc., __ **U.S.** __, 126 S. Ct. 1195, 1197–98, 97 FEP Cases 641 (2006) (*per curiam*), summarily vacated and remanded the Eleventh Circuit's affirmance of the grant of summary judgment to the Title VII and § 1981 racial discrimination defendant. The Court rejected the lower court's holding that evidence of superior qualifications, by itself, was not probative of discrimination unless the superiority was so evident that it jumps off the page and slaps one in the face. The Court explained:

> Under this Court's decisions, qualifications evidence may suffice, at least in some circumstances, to show pretext. See *Patterson v. McLean Credit Union*, 491 **U.S.** 164, 187–188, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989) (indicating a plaintiff "might seek to demonstrate that respondent's claim to have promoted a better qualified applicant was

> pretextual by showing that she was in fact better qualified than the person chosen for the position"), superseded on other grounds by 42 U.S.C. § 1981(b); *Texas Dept. of Community Affairs v. Burdine*, 450 **U.S.** 248, 259, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) ("The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination"); *cf. Reeves v. Sanderson Plumbing Products, Inc.*, 530 **U.S.** 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) ("[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated").
>
> The visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications. Federal courts, including the Court of Appeals for the Eleventh Circuit in a decision it cited here, have articulated various other standards, *see, e.g., Cooper, supra,* at 732 (noting that "disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question" (internal quotation marks omitted)); *Raad v. Fairbanks North Star Borough School Dist.*, 323 F.3d 1185, 1194 (**C.A.9** 2003) (holding that qualifications evidence standing alone may establish pretext where the plaintiff's qualifications are " 'clearly superior' " to those of the selected job applicant); *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1294 (**C.A. D.C.** 1998) (*en banc*) (concluding the factfinder may infer pretext if "a reasonable employer would have found the plaintiff to be significantly better qualified for the job"), and in this case the Court of Appeals qualified its statement by suggesting that superior qualifications may be probative of pretext when combined with other evidence, see 129 Fed.Appx., at 533. This is not the occasion to define more precisely what standard should govern pretext claims based on superior qualifications. Today's decision, furthermore, should not be read to hold that petitioners' evidence necessarily showed pretext. The District Court concluded otherwise. It suffices to say here that some formulation other than the test the Court of Appeals articulated in this case would better ensure that trial courts reach consistent results.

Plaintiffs were African-American. The Court also rejected the lower court's holding that the decisionmaker's references to each plaintiff as "boy" were not probative of racial discrimination unless the term was modified by another term, such as a racial reference:

> Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous.

Id. at 1147.

- **Comment:** This continues what has become clear as the Court's multi-year, multi-decision campaign to root out all the artificial legal presumptions adopted by the courts to make the great summary judgment engine whittle down their civil rights dockets. The more multifaceted evidentiary showings that are possible, the greater is the likelihood that plaintiffs will get their days in court before a jury.

3. ***U.S. v. Arvizu*** **and the Holistic Approach**

United States v. Arvizu, __ **U.S.** __, 122 S. Ct. 744 (2002), a Fourth Amendment case, follows *Reeves v. Sanderson Plumbing Products, Inc.*, 530 **U.S.** 133, 82 FEP Cases 1748, 78 E.P.D. ¶ 40,045 (2000). In both cases, the Court rejected the approach of some lower courts in segmenting evidence when a determination is supposed to be made in light of all the evidence. In *Arvizu*, the Ninth Circuit considered in isolation each circumstance that led to the stop, and rejected it if the court could conceive of a possible innocent explanation. The same often occurs in appellate review of employment discrimination summary judgments. In *Arvizu*, the Court stated:

> We think that the approach taken by the Court of Appeals here departs sharply from the teachings of these cases. The court's evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the "totality of the circumstances," as our cases have understood that phrase. The court appeared to believe that each observation by Stoddard that was by itself readily susceptible to an innocent explanation was entitled to "no weight." . . . *Terry*, however, precludes this sort of divide-and-conquer analysis. The officer in *Terry* observed the petitioner and his companions repeatedly walk back and forth, look into a store window, and confer with one another. Although each of the series of acts was "perhaps innocent in itself," we held that, taken together, they "warranted further investigation."

Id. at 751 (citations omitted.) The Court recognized that the Ninth Circuit was attempting to provide more uniform guidance, but held that it went too far:

> But the Court of Appeals' approach would go considerably beyond the reasoning of *Ornelas* and seriously undercut the "totality of the circumstances" principle which governs the existence *vel non* of "reasonable suspicion." Take, for example, the court's positions that respondent's deceleration could not be considered because "slowing down after spotting a law enforcement vehicle is an entirely normal response that is in no way indicative of criminal activity" and that his failure to acknowledge Stoddard's presence provided no support because there were "no 'special circumstances' rendering 'innocent avoidance . . . improbable.' " . . . We think it quite reasonable that a driver's slowing down, stiffening of posture, and failure to acknowledge a sighted law enforcement officer might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona). Stoddard was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants. . . . To the extent that a totality of the circumstances approach may render appellate review less circumscribed by precedent than otherwise, it is the nature of the totality rule.

Id. at 752 (emphasis supplied). Bright-line tests of isolated factors, such as the "same actor" inference in some Circuits, the ten-year minimum age rule in the Seventh Circuit, the universal-and-exclusive approach to retaliation cases in the Seventh Circuit, and the like, have no place under *Arvizu*.

4. ***Miller-El* and Barring Mere Excuses**

a. The 2005 Decision

Miller-El v. Dretke, __ **U.S.** __, 125 S. Ct. 2317 (2005), reversed the denial of *habeas corpus* and held that petitioner had shown racial discrimination in the prosecutor's peremptory challenges by clear and convincing evidence. The court stated: "The rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected." *Id.* at 2324. The Court cited *Reeves v. Sanderson Plumbing Products*, *id.* at 2325, underscoring the relevance of this decision to employment law.

> As for law, the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it. . . . It is true that peremptories are often the subjects of instinct . . . and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals's and the dissent's substitution of a reason for eliminating Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.

Id. at 2331–32 (citations omitted). The Court also held that evidence of the prosecution's manipulation of procedures, through jury shuffles that re-order the venire, supported the inference of discrimination. *Id.* at 2332–33. The Court rejected the defendant's speculation that there mighthave been innocent reasons for its jury shuffles, and rejected the Fifth Circuit's "see no evil" approach:

> The State notes in its brief that there might be racially neutral reasons for shuffling the jury, Brief for Respondent 36-37, and we suppose there might be. But no racially neutral reason has ever been offered in this case, and nothing stops the suspicion of discriminatory intent from rising to an inference.[14]

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[14] The Court of Appeals declined to give much weight to the evidence of racially motivated jury shuffles because "Miller-El shuffled the jury five times and the prosecutors shuffled the jury only twice." 361 F.3d, at 855. But Miller-El's shuffles are flatly irrelevant to the question whether prosecutors' shuffles revealed a desire to exclude blacks. . . .

Id. at 2333. The Court emphasized a common-sense "best fit" approach to the determination of motivation:

> The State's attempt at a race-neutral rationalization thus simply fails to explain what the prosecutors did. But if we posit instead that the prosecutors' first object was to use the graphic script to make a case for excluding black panel members opposed to or ambivalent about the death penalty, there is a much tighter fit of fact and explanation.[29] Of the 10 nonblacks whose questionnaires expressed ambivalence or opposition, only 30% received the graphic treatment. But of the seven blacks who expressed ambivalence or opposition, 86% heard the graphic script. As between the State's ambivalence explanation and Miller-El's racial one, race is much the better, and the reasonable inference is that race was the major consideration when the prosecution chose to follow the graphic script.
>
> The same is true for another kind of disparate questioning, which might fairly be called trickery. The prosecutors asked members of the panel how low a sentence they would consider imposing for murder. Most potential jurors were first told that Texas law provided for a minimum term of five years, but some members of the panel were not, and if a panel member then insisted on a minimum above five years, the prosecutor would suppress his normal preference for tough jurors and claim cause to strike. Two Terms ago, we described how this disparate questioning was correlated with race . . . .
>
> The State concedes that the manipulative minimum punishment questioning was used to create cause to strike . . . but now it offers the extenuation that prosecutors omitted the 5-year information not on the basis of race, but on stated opposition to the death penalty, or ambivalence about it, on the questionnaires and in the *voir dire* testimony. *Id.*, at 34–35. On the State's identification of black panel members opposed or ambivalent, all were asked the trick question. But the State's rationale flatly fails to explain why most white panel members who expressed similar opposition or ambivalence were not subjected to it. It is entirely true, as the State argues, *id.*, at 35, that prosecutors struck a number of nonblack members of the panel (as well as black members) for cause or by agreement before they reached the point in the standard *voir dire* sequence to question about minimum punishment. But this is no answer; 8 of the 11 nonblack individuals who voiced opposition or ambivalence were asked about the acceptable minimum only after being told what state law required. Hence, only 27% of nonblacks questioned on the subject who expressed these views were subjected to the trick question, as against 100% of black members. Once again, the implication of race in the prosecutors' choice of questioning cannot be explained away.

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[29] The dissent posits that prosecutors did not use the graphic script with panel members opposed to the death penalty because it would only have antagonized them. See *post*, at 2359. No answer is offered to the question why a prosecutor would take care with the feelings of a panel member he would excuse for cause or strike yet would antagonize an ambivalent member whose feelings he wanted to smoke out, but who might turn out to be an acceptable juror.

Id. at 2336–38 (footnotes omitted). There was a great deal of evidence of discrimination. See the discussion of this case below. The Court sharply criticized the Fifth Circuit's unwillingness to see the discrimination so plainly laid before it:

> The Court of Appeals concluded that Miller-El failed to show by clear and convincing evidence that the state court's finding of no discrimination was wrong, whether his evidence was viewed collectively or separately. . . . We find this conclusion as unsupportable as the "dismissive and strained interpretation" of his evidence that we disapproved when we decided Miller-El was entitled to a certificate of appealability. . . . It is true, of course, that at some points the significance of Miller-El's evidence is open to judgment calls, but when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination.
>
> In the course of drawing a jury to try a black defendant, 10 of the 11 qualified black venire panel members were peremptorily struck. At least two of them, Fields and Warren, were ostensibly acceptable to prosecutors seeking a death verdict, and Fields was ideal. The prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny.
>
> The strikes that drew these incredible explanations occurred in a selection process replete with evidence that the prosecutors were selecting and rejecting potential jurors because of race. At least two of the jury shuffles conducted by the State make no sense except as efforts to delay consideration of black jury panelists to the end of the week, when they might not even be reached. The State has in fact never offered any other explanation. Nor has the State denied that disparate lines of questioning were pursued: 53% of black panelists but only 3% of nonblacks were questioned with a graphic script meant to induce qualms about applying the death penalty (and thus explain a strike), and 100% of blacks but only 27% of nonblacks were subjected to a trick question about the minimum acceptable penalty for murder, meant to induce a disqualifying answer. The State's attempts to explain the prosecutors' questioning of particular witnesses on nonracial grounds fit the evidence less well than the racially discriminatory hypothesis.
>
> If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year old manual of tips on jury selection, as shown by their notes of the race of each potential juror. By the time a jury was chosen, the State had peremptorily challenged 12% of qualified nonblack panel members, but eliminated 91% of the black ones.
>
> It blinks reality to deny that the State struck Fields and Warren, included in that 91%, because they were black. The strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State. The State's pretextual positions confirm Miller-El's claim, and the prosecutors' own notes proclaim that the Sparling Manual's emphasis on race was on their minds when they considered every potential juror.

> The state court's conclusion that the prosecutors' strikes of Fields and Warren were not racially determined is shown up as wrong to a clear and convincing degree; the state court's conclusion was unreasonable as well as erroneous.

Id. at 2339–40. The Court also drew the inference of racial discrimination from prosecutor James Nelson's offering of a pretextual reason:

> The unlikelihood that his position on rehabilitation had anything to do with the peremptory strike of Fields is underscored by the prosecution's response after Miller-El's lawyer pointed out that the prosecutor had misrepresented Fields's responses on the subject. A moment earlier the prosecutor had finished his misdescription of Fields's views on potential rehabilitation with the words, "Those are our reasons for exercising our ... strike at this time." *Id.*, at 197. When defense counsel called him on his misstatement, he neither defended what he said nor withdrew the strike. *Id.*, at 198. Instead, he suddenly came up with Fields's brother's prior conviction as another reason for the strike. *Id.*, at 199.
>
> It would be difficult to credit the State's new explanation, which reeks of afterthought. While the Court of Appeals tried to bolster it with the observation that no seated juror was in Fields's position with respect to his brother . . . the court's readiness to accept the State's substitute reason ignores not only its pretextual timing but the other reasons rendering it implausible. Fields's testimony indicated he was not close to his brother, App. 190 ("I don't really know too much about it"), and the prosecution asked nothing further about the influence his brother's history might have had on Fields, as it probably would have done if the family history had actually mattered. . . . There is no good reason to doubt that the State's afterthought about Fields's brother was anything but makeweight.

Id. at 2328. The Court criticized the Fifth Circuit for its failure to appreciate the importance of the prosecutor's effort to advance an untruthful explanation:

> The Court of Appeals's judgment on the Fields strike is unsupportable for the same reason the State's first explanation is itself unsupportable. The Appeals Court's description of Fields's *voir dire* testimony mentioned only his statements that everyone could be rehabilitated, failing to note that Fields affirmed that he could give the death penalty if the law and evidence called for it, regardless of the possibility of divine grace. The Court of Appeals made no mention of the fact that the prosecution mischaracterized Fields as saying he could not give death if rehabilitation were possible.

Id. at 2329. The Court also held that evidence of the manipulation of procedures supported the inference of discrimination:

> The first clue to the prosecutors' intentions, distinct from the peremptory challenges themselves, is their resort during *voir dire* to a procedure known in Texas as the jury shuffle. In the State's criminal practice, either side may literally reshuffle the cards bearing panel members' names, thus rearranging the order in which members of a venire panel are seated and reached for questioning. Once the order is established, the

> panel members seated at the back are likely to escape *voir dire* altogether, for those not questioned by the end of the week are dismissed. As we previously explained, "the prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury. Our concerns are amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the Dallas County District Attorney's Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past."

Id. at 2332–33. The Court rejected the defendant's speculation that there mighthave been innocent reasons for its jury shuffles, and rejected the Fifth Circuit's "see no evil" approach:

> The State notes in its brief that there might be racially neutral reasons for shuffling the jury, Brief for Respondent 36-37, and we suppose there might be. But no racially neutral reason has ever been offered in this case, and nothing stops the suspicion of discriminatory intent from rising to an inference.[14]
>
> ———
>
> [14] The Court of Appeals declined to give much weight to the evidence of racially motivated jury shuffles because "Miller-El shuffled the jury five times and the prosecutors shuffled the jury only twice." 361 F.3d, at 855. But Miller-El's shuffles are flatly irrelevant to the question whether prosecutors' shuffles revealed a desire to exclude blacks. (The Appeals Court's statement was also inaccurate: the prosecution shuffled the jury three times.)

Id. at 2333. The Court also held that the State manipulated the process by the type of questions it asked different venire members about their feelings on the death penalty. 94% of white venire members were given an abstract description of the death penalty and were then asked about their feelings on it. A "graphic script" describing the death penalty—intended to motivate venire members into expressing misgivings about the death penalty and providing an occasion to strike them for cause—was given to 6% of white venire members and 53% of black venire members before they were asked about their feelings on the death penalty. *Id.* at 2333–34. The court discussed each of the State's professed reasons for disparate use of the graphic script, and found that the facts did not support the reasons. It continued:

> The State's attempt at a race-neutral rationalization thus simply fails to explain what the prosecutors did. But if we posit instead that the prosecutors' first object was to use the graphic script to make a case for excluding black panel members opposed to or ambivalent about the death penalty, there is a much tighter fit of fact and explanation. Of the 10 nonblacks whose questionnaires expressed ambivalence or opposition, only 30% received the graphic treatment. But of the seven blacks who expressed ambivalence or opposition, 86% heard the graphic script. As between the State's ambivalence explanation and Miller-El's racial one, race is much the better, and the reasonable inference is that race was the major consideration when the prosecution chose to follow the graphic script.

Id. at 2336–37 (footnotes omitted). The Court next turned to a form of manipulation it termed "trickery."

> The same is true for another kind of disparate questioning, which might fairly be called trickery. The prosecutors asked members of the panel how low a sentence they would consider imposing for murder. Most potential jurors were first told that Texas law provided for a minimum term of five years, but some members of the panel were not, and if a panel member then insisted on a minimum above five years, the prosecutor would suppress his normal preference for tough jurors and claim cause to strike.

Id. at 2337. The State informed 94% of white venire members, and only 12.5^ of blacks, about the minimum sentence for murder, allowing them to engage in the trickery questions with 87.5% of blacks, and only 6% of whites. *Id.* The Justice Breyer concurred. *Id.* at 2340–44. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, dissented. *Id.* at 2344–63.

b. <u>The 2003 Decision</u>

Miller-El v. Cockrell, __ **U.S.** __, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003), reversed the Fifth Circuit's denial of a certificate of appealability ("COA") from the denial of habeas corpus that had been sought on a *Batson* challenge to the prosecutor's striking of 10 of 11 African-American potential jurors. The standard was whether petitioner demonstrated "'that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" The Court cited *Reeves*. It relied in part on comparative evidence, buttressed by other evidence:

> A comparative analysis of the venire members demonstrates that African-Americans were excluded from petitioner's jury in a ratio significantly higher than Caucasians were. Of the 108 possible jurors reviewed by the prosecution and defense, 20 were African-American. Nine of them were excused for cause or by agreement of the parties. Of the 11 African-American jurors remaining, however, all but 1 were excluded by peremptory strikes exercised by the prosecutors. On this basis 91% of the eligible black jurors were removed by peremptory strikes. In contrast the prosecutors used their peremptory strikes against just 13% (4 out of 31) of the eligible nonblack prospective jurors qualified to serve on petitioner's jury.
>
> These numbers, while relevant, are not petitioner's whole case. During *voir dire*, the prosecution questioned venire members as to their views concerning the death penalty and their willingness to serve on a capital case. Responses that disclosed reluctance or hesitation to impose capital punishment were cited as a justification for striking a potential juror for cause or by peremptory challenge. . . . The evidence suggests, however, that the manner in which members of the venire were questioned varied by race. To the extent a divergence in responses can be attributed to the racially disparate mode of examination, it is relevant to our inquiry.
>
> Most African-Americans (53%, or 8 out of 15) were first given a detailed description of the mechanics of an execution in Texas:

> "[I]f those three [sentencing] questions are answered yes, at some point[,] Thomas Joe Miller-El will be taken to Huntsville, Texas. He will be placed on death row and at some time will be taken to the death house where he will be strapped on a gurney, an IV put into his arm and he will be injected with a substance that will cause his death … as the result of the verdict in this case if those three questions are answered yes." App. 215.

> Only then were these African-American venire members asked whether they could render a decision leading to a sentence of death. Very few prospective white jurors (6%, or 3 out of 49) were given this preface prior to being asked for their views on capital punishment. Rather, all but three were questioned in vague terms: "Would you share with us … your personal feelings, if you could, in your own words how you do feel about the death penalty and capital punishment and secondly, do you feel you could serve on this type of a jury and actually render a decision that would result in the death of the Defendant in this case based on the evidence? " *Id.*, at 506.

The Court cited *Reeves*. It relied in part on simple statistics, buttressed by other evidence:

> A comparative analysis of the venire members demonstrates that African-Americans were excluded from petitioner's jury in a ratio significantly higher than Caucasians were. Of the 108 possible jurors reviewed by the prosecution and defense, 20 were African-American. Nine of them were excused for cause or by agreement of the parties. Of the 11 African-American jurors remaining, however, all but 1 were excluded by peremptory strikes exercised by the prosecutors. On this basis 91% of the eligible black jurors were removed by peremptory strikes. In contrast the prosecutors used their peremptory strikes against just 13% (4 out of 31) of the eligible nonblack prospective jurors qualified to serve on petitioner's jury.

The court again relied on simple statistics later in its decision:

> There was an even more pronounced difference, on the apparent basis of race, in the manner the prosecutors questioned members of the venire about their willingness to impose the minimum sentence for murder. Under Texas law at the time of petitioner's trial, an unwillingness to do so warranted removal for cause. . . . This strategy normally is used by the defense to weed out pro-state members of the venire, but, ironically, the prosecution employed it here. The prosecutors first identified the statutory minimum sentence of five years' imprisonment to 34 out of 36 (94%) white venire members, and only then asked: "If you hear a case, to your way of thinking [that] calls for and warrants and justifies five years, you'll give it?" App. 509. In contrast, only 1 out of 8 (12.5%) African-American prospective jurors were informed of the statutory minimum before being asked what minimum sentence they would impose.

The Court cited *Reeves*. It held that a 1968 racially biased statement contained in an official manual was probative of racial bias in the 1986 peremptory challenges:

> Of more importance, the defense presented evidence that the District Attorney's Office had adopted a formal policy to exclude minorities from jury service. A 1963

> circular by the District Attorney's Office instructed its prosecutors to exercise peremptory strikes against minorities: "'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'" App. 710. A manual entitled "Jury Selection in a Criminal Case" was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service. Although the manual was written in 1968, it remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller-El's trial. *Id.*, at 749, 774, 783.

The court also relied on other old evidence of biased statements:

> A Dallas County district judge testified that, when he had served in the District Attorney's Office from the late-1950's to early-1960's, his superior warned him that he would be fired if he permitted any African-Americans to serve on a jury. Similarly, another Dallas County district judge and former assistant district attorney from 1976 to 1978 testified that he believed the office had a systematic policy of excluding African-Americans from juries.

D. Framing Future Cases for Success, in Light of the Past

It seems to me that the Court is sending a fairly clear message to practitioners:

- Frame theories in ways that appear self-limiting, *i.e.*, that do not open the floodgates.
- Weave the protected activity into the purposes of the statute and mechanisms that are essential for the meaning to be fulfilled.
- Weave the adverse action into the things that are important to ordinary workers. Judges with lifetime tenure are not impressed by 37 days' loss of pay, but look at how the attorney for White pictured what it is like at the sharp edge of the employer's spear.
- Resist, to the last ounce of our strength, employer efforts to unravel each thread from the tapestry to examine it in isolation; we are presenting a story and showing a tapestry, and are entitled to do it as a whole.